IN THE COURT OF APPEALS OF IOWA

No. 6-363 / 05-0362
Filed August 23, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JORGE PEREZ-CASTILLO,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Robert B. Hanson, Judge.

A defendant appeals following conviction and sentence for two counts of murder in the first degree and two counts of attempted murder, alleging ineffective assistance of trial counsel. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Theresa Wilson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney General, John Sarcone, County Attorney, and Jeffrey Noble, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Zimmer and Vaitheswaran, JJ.

ZIMMER, J.

Following a jury trial, Jorge Perez-Castillo was convicted of two counts of murder in the first degree, in violation of Iowa Code sections 707.1 and 707.2 (2003), and two counts of attempted murder, in violation of section 707.11. He appeals, contending his trial attorneys were ineffective in three particulars. We affirm Perez-Castillo's convictions and preserve two of his ineffective assistance of counsel claims for a possible postconviction proceeding.

I. Background Facts and Proceedings.

During the early morning hours of January 24, 2004, Jorge Perez-Castillo and his brother Fernando Sandoval were drinking with a group of friends at the Casa Vallarta bar. The group included Perez-Castillo and Sandoval's cousin, Christian Gonzales. Santos Bueso, Jr., his father (Santos Bueso, Sr.), and his uncle (Manuel Ulloa) were also at the bar with a group of friends celebrating Bueso, Jr.'s upcoming wedding. A fight erupted between the two groups, which was diffused by security guards. After managers decided to close the bar and bar patrons exited to the parking lot, another fight erupted between the two groups. During the altercation, Bueso, Jr., Bueso, Sr., and Ulloa were shot. Bueso, Sr. and Ulloa died as a result of their injuries.

Perez-Castillo and Sandoval left the scene in Perez-Castillo's pickup truck. Perez-Castillo was driving, and a gun used in the shootings was in his possession. A stop of the pickup truck initiated by Officer David Viggers evolved into a high-speed chase. During the pursuit, shots were fired from Perez-Castillo's vehicle. One bullet struck the windshield of Officer Viggers's vehicle. The pickup truck was eventually disabled. A foot chase ensued, during which

Perez-Castillo fired at officers and was shot in the leg. After Perez-Castillo ran out of ammunition, he and Sandoval surrendered.

Both men were arrested and charged with two counts of murder in the first degree based on the deaths of Bueso, Sr. and Ulloa, one count of attempted murder based on the shooting of Bueso, Jr., and one count of attempted murder based on the shots fired at Officer Viggers. The matter proceeded to a joint trial in November 2004.

The State presented evidence, including eyewitness testimony and Perez-Castillo's confession to the police, that indicated Perez-Castillo had retrieved a gun from his pickup truck, shot Bueso, Jr. while he was being restrained by Sandoval, shot Bueso, Sr., then shot Ulloa while Sandoval stopped a member of the Bueso party who was attempting to go to Ulloa's aid. Although Perez-Castillo admitted in court that he had fired at pursuing police vehicles, the State presented evidence indicating the bullet that struck Officer Viggers's windshield was fired from the passenger area of Perez-Castillo's pickup truck, where Sandoval was sitting.

Perez-Castillo and Sandoval each defended on the theory that, while they were at Casa Vallarta at the time Bueso, Jr., Bueso, Sr., and Ulloa were shot, they were not involved in the shootings. Perez-Castillo testified he was in his pickup truck when the first shots were fired, had a cell phone and not a gun in his hand when he exited the vehicle, observed that Gonzales and another man each had a gun, was able to take the gun away from Gonzales after a struggle, and threw Gonzales's gun in his pickup truck before he and Sandoval left the scene. Perez-Castillo also relied on witness testimony that partially corroborated his

version of events. He suggested contradictory testimony was provided by witnesses who had confused him with Gonzales. While Perez-Castillo admitted to firing the gun while being pursued by police, he asserted he fired the gun up into the air and did not intend to kill anyone. Sandoval did not testify, but relied on witness testimony that indicated he was still inside the bar when the shooting began and Perez-Castillo's own testimony that Sandoval was not involved. Sandoval also argued that, to the extent witnesses identified him as the man aiding Perez-Castillo, they were confusing him with Gonzales. Individuals acquainted with Perez-Castillo, Sandoval, and Gonzales testified Gonzales somewhat resembled both men.

The jury received instructions that allowed them to convict either defendant as the principal in or an aider and abettor to the two murders and two attempted murders. The jury returned verdicts finding both Perez-Castillo and Sandoval guilty on all four counts. Perez-Castillo was sentenced to two life and two twenty-five-year terms of incarceration, to run concurrently.

Perez-Castillo appeals.[1] He asserts his trial attorneys were ineffective for failing to (1) object to an incomplete jury instruction on aiding and abetting, (2) move to sever his trial from Sandoval's because their defenses conflicted to the point of being irreconcilable and mutually exclusive, and (3) object to portions of the State's closing argument and rebuttal that amounted to prosecutorial misconduct.

[1] Sandoval has filed a separate appeal.

II. Ineffective Assistance of Counsel.

We conduct a de novo review of ineffective assistance claims. *Wemark v. State*, 602 N.W.2d 810, 814 (Iowa 1999). To establish ineffective assistance of his trial counsel, Perez-Castillo must prove both that his attorneys' performance fell below "an objective standard of reasonableness" and that "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). To establish a breach of duty, he must overcome the presumption that his trial attorneys were competent and prove that their performance was not within the range of normal competency. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). To establish prejudice, he must show a reasonable probability that, but for counsels' errors, the result of the proceeding would have been different. *State v. Atwood,* 602 N.W.2d 775, 784 (Iowa 1999). If Perez-Castillo fails to prove either prong, his ineffective assistance claim cannot succeed. *State v. Query*, 594 N.W.2d 438, 445 (Iowa Ct. App. 1999).

Typically, ineffective assistance of counsel claims are preserved for a possible postconviction proceeding to allow a full development of the record regarding counsel's actions. *State v. DeCamp*, 622 N.W.2d 290, 296 (Iowa 2001). We address such a claim on direct appeal only where the record establishes that either (1) as a matter of law the defendant cannot prevail on this claim or (2) both prongs of the *Strickland* test are satisfied, and a further evidentiary hearing would not change the result. *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003). Here, we find the record insufficient to resolve Perez-

Castillo's first and second ineffective assistance claims, but conclude that, as a matter of law, he cannot prevail on the third.

Perez-Castillo first asserts his trial attorneys were ineffective in failing to object to the aiding and abetting instruction submitted to the jury because it did not contain the following paragraph of the uniform aiding and abetting instruction applicable to crimes involving specific intent:

> The crime charged requires a specific intent. Therefore, before you can find the defendant "aided and abetted" the commission of the crime, the State must prove the defendant either has such specific intent or "aided and abetted" with the knowledge the others who directly committed the crime had such specific intent. If the defendant did not have the specific intent, or knowledge the others had such specific intent, [he] [she] is not guilty.

Iowa Crim. Jury Instruction 200.8.

The foregoing is a correct statement of the law and could have been properly submitted to the jury under the facts of this case. *See State v. Salkil*, 441 N.W.2d 386, 387 (Iowa Ct. App. 1989). We note, however, that the record indicates the submitted set of instructions, approved by the State and both sets of defense counsel, was preceded by multiple drafts and arrived at only after off-the-record input by all sides. Specifically, Perez-Castillo's attorney stated: "Mr. Castillo, I have reviewed this document thoroughly and I was involved in its preparation. All the recommendations that I've made in your defense have been included in these instructions. I told you that this represents Iowa law . . . ."

The foregoing suggests the possibility that defense counsels' approval of the final aiding and abetting instruction, absent the specific intent language, was a conscious and informed decision. *See State v. Johnson*, 604 N.W.2d 669, 673 (Iowa Ct. App. 1999) (providing that generally, "[w]here counsel's decisions are

made pursuant to a reasonable trial strategy, we will not find ineffective assistance of counsel"). Accordingly, we conclude a record of the negotiations regarding jury instructions should be developed before defense counsels' decision to approve the aiding and abetting instruction can be fully and fairly assessed.

We reach the same conclusion regarding Perez-Castillo's claim that his trial counsel were ineffective because they did not move to sever his trial from Sandoval's. The record is silent regarding the reason for counsels' action. We have no indication of counsels' pretrial knowledge of Sandoval's theory of defense, or whether severance was considered by counsel or discussed with Perez-Castillo. Again, the record should be more fully developed before the attorneys' effectiveness can be fairly assessed. Accordingly, we preserve these claims for a possible postconviction proceeding.

We next turn to Perez-Castillo's third claim on appeal—that certain statements made by the prosecutors during closing argument and rebuttal were inflammatory, derogatory, and prejudicial comments that "personally vouched for the State's witnesses and commented upon the truth or falsity of various aspects of testimony," and that trial counsel were ineffective for failing to object to this prosecutorial misconduct. As with the foregoing claims, based on the current record we can only speculate why counsel did not object to the disputed portions of the State's argument. However, we need not specifically assess whether counsel breached a duty in this regard, because we conclude Perez-Castillo has not established the requisite prejudice.

The law in this area was recently set forth by our supreme court in *State v. Carey*, 709 N.W.2d 547, 554, 556 (Iowa 2006):

> We start with the principle that, "[i]n closing arguments, counsel is allowed some latitude. Counsel may draw conclusions and argue permissible inferences which reasonably flow from the evidence presented."
>
> . . . .
>
> The issue is how far a prosecutor may go in suggesting that the defendant gave untruthful testimony. On one hand, "Iowa follows the rule that it is improper for a prosecutor to call the defendant a liar, to state the defendant is lying, or to make similar disparaging comments." However, "[n]otwithstanding this prohibition, a prosecutor is still free 'to craft an argument that includes reasonable inferences based on the evidence and . . . when a case turns on which of two conflicting stories is true, [to argue that] certain testimony is not believable.'" "The key point is that counsel is precluded from using argument to vouch personally as to a defendant's guilt or a witness's credibility. . . . A defendant is entitled to have the case decided solely on the evidence."
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> . . . Thus, misconduct does not reside in the fact that the prosecution attempts to tarnish defendant's credibility or boost that of the State's witnesses; such tactics are not only proper, but part of the prosecutor's duty. Instead, misconduct occurs when the prosecutor seeks this end through unnecessary and overinflammatory means that go outside the record or threaten to improperly incite the passions of the jury.

(Citations omitted.)

Perez-Castillo first contends the prosecutor committed misconduct when he "personally vouched for" Officer Viggers. The statements complained of are (1) a comment that Officer Viggers's actions in maneuvering his vehicle behind Perez-Castillo's pickup truck and turning on his takedown lights were "good police work" and (2) a comment, regarding the contents of the dispatch tape, that "[i]t's terrible what [Officer Viggers] was going through." These comments fall far short of vouching for the credibility of Officer Viggers's testimony.

Perez-Castillo further asserts that numerous statements made by the prosecutors during closing argument and rebuttal were comments on the veracity of his own statements. These include comments that certain of Perez-Castillo's statements were "not true," "a story," "didn't happen," "amazing," "the only thing with more bullet holes than the bodies of the victims," and "an insult to your intelligence." We apply a three-part test when determining whether such statements amounted to prosecutorial misconduct:

> (1) Could one legitimately infer from the evidence that the defendant lied? (2) Were the prosecutor's statements that the defendant lied conveyed to the jury as the prosecutor's personal opinion of the defendant's credibility, or was such argument related to specific evidence that tended to show the defendant had been untruthful? and (3) Was the argument made in a professional manner, or did it unfairly disparage the defendant and tend to cause the jury to decide the case based on emotion rather than upon a dispassionate review of the evidence?

Carey, 709 N.W.2d at 556-57.

Perez-Castillo concedes the jury could have reasonably inferred that he was less than truthful at several points during this case. For instance, he admitted during his own testimony that he gave false information to the police. Further, when the prosecutors' statements are viewed in context we conclude that they were not personal opinions of Perez-Castillo's credibility, but related back to specific evidence that cast doubt on Perez-Castillo's version of events. The real question, and the apparent focus of Perez-Castillo's argument, is whether the prosecutors' comments disparaged him and tended to cause the jury to reach a verdict based on emotion rather than the evidence.

While some of the prosecutors' statements could be fairly categorized as condescending or snide,

> [t]he prosecutor's comments, when read in context, do not rise (or sink) to that level. While more professional language could, and should, have been used to convey the same message, we should not forget that prosecutors are entitled to some latitude in crafting a closing argument. Jurors, we believe, are sophisticated enough not to be inflamed or prejudiced by what would reasonably be categorized as simply being snide or sarcastic comments.

Id. at 556-57 (regarding comments defendant's testimony was "absolutely not true," "baloney," and "lies that . . . are constantly changing"; and questioning, "[W]hy on earth would you believe anything the defendant says?").

Although the prosecutors' comments in this case were somewhat derisive, they were based on a legitimate view of the evidence. While they suggested Perez-Castillo was untruthful, the prosecutors stopped short of stating Perez-Castillo "lied" or was "a liar." *See Graves*, 668 N.W.2d at 876 (noting distinction between arguing, based on reasonable inferences drawn from the evidence, that testimony is unbelievable, and inflammatory and improper use of the word "liar"). Under the circumstances, we cannot conclude the statements impugning Perez-Castillo's credibility amounted to prosecutorial misconduct.

Moreover, even if misconduct occurred, "it is the prejudice resulting from misconduct, not the misconduct itself, that entitles a defendant to a new trial." *State v. Piper*, 663 N.W.2d 894, 913 (Iowa 2003). In determining whether a defendant has shown prejudice sufficient to grant a new trial, we consider a number of factors, including the severity and pervasiveness of the misconduct, the significance of the misconduct to the central issues in the case, and the strength of the State's evidence. *Graves*, 668 N.W.2d at 877. We look to see whether the effect of the prosecutors' statements was pervasive enough to

undermine confidence in the verdict. *See Nguyen v. State*, 707 N.W.2d 317, 326 (Iowa 2005).

Although the prosecutors' statements did go to a central issue in the case, "it is not enough that the affected issue was a critical factual point." *Id.* at 324. The question is whether and how the misconduct affected the factual findings necessary to support the conviction. *Id*. Prejudice does not depend upon the fact the State raised the issue of the defendant's credibility, but upon the manner in which this was done. *Id*. at 325. "[J]ust as the line between proper and improper [statements] depends on the facts, so does the line between prejudicial and nonprejudicial misconduct." *Id*. at 326.

Contrary to Perez-Castillo's contentions, the comments made by the prosecutors in this case were not so disparaging or pervasive as to prejudice his defense, particularly when viewed in light of the substantial evidence of his guilt. Multiple eyewitnesses, forensic evidence, and Perez-Castillo's own statements to police all provide support for the jury's findings of guilt. It was the strength of the State's evidence, and the inconsistencies between that evidence and Perez-Castillo's version of events rather than disparagement of Perez-Castillo's credibility, that was the centerpiece of the prosecution. *Cf. Graves*, 668 N.W.2d at 883 (holding prosecutorial misconduct prejudicial where disparaging defendant's testimony was the centerpiece of the prosecution).

We cannot conclude the prosecutors' statements, when taken in context, swayed the jury to convict Perez-Castillo out of emotion rather than upon the evidence and instructions. Because he has not established that exclusion of the

disputed statements would lead to a reasonable probability of a different outcome, *see Atwood,* 602 N.W.2d at 784, this claim must fail.

III. Conclusion.

Perez-Castillo's convictions are affirmed. His claims that trial counsel were ineffective in approving the aiding and abetting instruction and in not moving to sever his trial from Sandoval's are preserved for a possible postconviction proceeding.

AFFIRMED.