IN THE COURT OF APPEALS OF IOWA

No. 6-606 / 05-0816
Filed May 9, 2007

MARTIN S. MOON,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Clarke County, Gary G. Kimes, Judge.

Martin Moon appeals the district court's denial of his application for postconviction relief. **AFFIRMED.**

Scott Bandstra, Des Moines, and Todd Miler, West Des Moines, appellant.

Thomas J. Miller, Attorney General, Sheryl Soich, Assistant Attorney General, and Elisabeth S. Reynoldson, County Attorney, for appellee.

Heard by Mahan, P.J., and Miller and Vaitheswaran, JJ.

MILLER, J.

Martin Moon appeals the district court's denial of his application for postconviction relief. We affirm.

I. BACKGROUND FACTS AND PROCEEDINGS.

The defendant, Martin Moon, was charged with and convicted of murder in the first degree, in violation of Iowa Code sections 701.1 and 707.2(1) (1999). The charge stemmed from allegations that Moon lured his roommate, Kevin Dickson, to an abandoned farmhouse under the guise of engaging in a drug deal, shot Dickson, and then with the aid of two friends threw Dickson's body into a cistern, where it remained undiscovered for almost a decade.

Moon appealed his conviction, which this court affirmed in *State v. Moon*, No. 00-1128 (Iowa Ct. App. April 24, 2002). In Moon's direct appeal we also preserved two issues of ineffective assistance of counsel for a possible postconviction proceeding. We found the following facts in the direct appeal:

> In 1990, Kevin Dickson was shot and killed at an abandoned farmhouse near Winterset. Nine years later, the State charged his friends Martin Moon and Casey Brodsack with first-degree murder. Brodsack ultimately pled guilty to second-degree murder and agreed to testify at Moon's trial.
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> At trial, Brodsack testified that he, Moon, a friend named Scott Aukes, and the victim lived in the same building and regularly used drugs and alcohol together. One morning, Moon informed the other three that they would need to drive to an abandoned farmhouse to meet his drug dealer. When the four arrived at the farmhouse, Moon, Brodsack and Dickson went to the basement purportedly to look for drugs left by the dealer. While Brodsack was checking for drugs behind the water heater, he heard gunshots. He went around the heater and saw Dickson lying on the ground and Moon standing over him with a gun. According to Brodsack, Moon then demanded that Brodsack also shoot Dickson. To coerce compliance, Moon took another gun out and pointed it at

> Brodsack's head. He then handed Brodsack the original gun, which Brodsack fired at Dickson's supine body.
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> Aukes, who remained outside during this episode, testified that he heard ten gunshots. Then, Moon and Brodsack came out of the farmhouse and Moon advised the others they needed to dispose of Dickson's body. The three went home, retrieved a sledgehammer, returned to the farmhouse, and attempted to cover Dickson with bricks. When that effort failed, they dragged Dickson outside and dumped his body into a cistern.
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> To further support its case, the State introduced evidence from which a jury could have concluded the guns used in the murder were the same guns Moon and Brodsack stole from the farmstead of Madelyn Kerns several days earlier.

Id.

About six years after Dickson's still-undiscovered murder, Brodsack happened to be painting fire hydrants with a co-worker near the abandoned farmhouse property. He told the co-worker, Brett Lovely, about the murder. The men looked into the cistern and saw Dickson's skeleton. Lovely kept Brodsack's secret for three years, but eventually told authorities about the discovery.

Following our affirmance of Moon's conviction, he filed a pro se application for postconviction relief on October 31, 2002. His appointed postconviction counsel filed an amended application alleging additional claims of ineffective assistance of counsel and trial court error on August 19, 2004. The district court denied Moon's postconviction application and he appeals from that ruling. On appeal, Moon pursues eight claims upon which he asserts he is entitled to postconviction relief. More specifically, he contends the court erred in finding trial counsel were not ineffective for failing to: (1) attempt to impeach Duane McPhillips and shift the blame for the murder to him; (2) object to certain testimony of Madelyn Kerns on confrontation clause and/or hearsay grounds; (3)

obtain an independent ballistics expert; (4) request a jury instruction that a certain witness was an accomplice; (5) object to several portions of the prosecutors' closing arguments; (6) object to three jury instructions; and (7) file a motion for new trial. He also contends the postconviction court erred in determining that certain other bad acts evidence admitted at trial did not entitle him to a new trial. We will address these issues separately.

II. SCOPE AND STANDARDS OF REVIEW.

We typically review postconviction relief proceedings on claimed error. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). However, when the applicant asserts constitutional claims, our review is de novo. *Id*. Thus, we review claims of ineffective of assistance of counsel de novo. *Id.*

To prove ineffective assistance of counsel the petitioner must show that counsel failed to perform an essential duty and that prejudice resulted from counsel's error. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *Wemark v. State*, 602 N.W.2d 810, 814 (Iowa 1999). To prove breach of duty, Moon must overcome the presumption counsel was competent and prove that counsel's performance was not within the range of normal competency. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). To prove prejudice, Moon must show there is a reasonable probability that but for his counsels' unprofessional errors the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698; *Ledezma*, 626 N.W.2d at 143-44. A reviewing court may look to either prong to dispose of an ineffective assistance claim. *Ledezma*, 626 N.W.2d at 142.

III. MERITS.

A. Duane McPhillips.

On direct appeal Moon raised the issue of his trial counsels' alleged ineffectiveness for failing to "properly investigate evidence that [Duane] McPhillips was the murderer," and we preserved this claim for a possible postconviction proceeding. *State v. Moon,* No. 00-1128 (Iowa Ct. App. April 24, 2002). Error was thus preserved on this issue.

Moon claims his trial counsel were ineffective for failing to investigate the claim that McPhillips was responsible for the murder of Dickson. McPhillips, an acquaintance of Moon's, apparently told several people he bore some responsibility for the death of Dickson. Moon claims trial counsel should have conducted an independent investigation into McPhillips's "confessions" and called as witnesses the people to whom he allegedly confessed. McPhillips testified against Moon at trial.

The postconviction court concluded trial counsel were not ineffective in deciding not to call these witnesses to testify because counsel felt their testimony would also have placed Moon at the scene of the crime and been damaging to him. Thus, the decision not to call them was a tactical decision. The court further concluded that, "counsel did use the [witnesses'] statements while cross-examining Mr. McPhillips and succeeded in introducing to the jury portions of the statements that implicated Mr. McPhillips." It determined that the deposition of both of Moon's trial attorneys showed that they conducted a thorough investigation into the alleged confessions.

Moon's lead defense counsel testified in his deposition that he reviewed the McPhillips material extensively. He also pointed out that the trouble with calling the witnesses to McPhillips's alleged confessions was that they would also implicate Moon and place him at the scene of the crime. The record shows counsel cross-examined McPhillips extensively at trial and in doing so was able to use the statements implicating McPhillips without opening the door to Moon's involvement, which calling the other witnesses would likely have done. Thus, we agree with the postconviction court that Moon's trial counsel conducted an adequate investigation into the alleged confessions made by McPhillips and the decision not to call as witnesses any of the people to whom he allegedly confessed was a reasonable tactical decision. Trial counsel were not ineffective for making the tactical decision not to further investigate or present the witnesses to McPhillips's alleged confessions.

B. Independent Ballistics Expert.

On direct appeal Moon also alleged his trial counsel were ineffective for failing to "obtain an independent analysis of the ballistics tests," and we preserved this issue for a possible postconviction proceeding. *State v. Moon,* No. 00-1128 (Iowa Ct. App. April 24, 2002). Error is thus preserved on this issue.

Moon argues his trial counsel were ineffective for not hiring an independent ballistics expert for the defense to challenge the testimony of the State's expert, Victor Murillo. Murillo testified that the bullets recovered from the cistern where Dickson's body was found were too damaged to make a positive identification of them. He also stated that three .45 caliber cartridge casings

were recovered from the basement of the abandoned house where the murder occurred, and two .45 caliber casings were recovered on the Kerns' property. Murillo testified that all five of those bullets were fired from the same firearm.

Moon's trial counsel did not hire an independent ballistics expert. Moon contends this constituted ineffective assistance of counsel, pointing to the opinion of Dr. Jon Norby who was hired by postconviction counsel. However, we find that Dr. Norby's opinion in most respects was very similar to Murillo's. The only real difference between Norby's and Murillo's ballistics opinions is that Norby could only determine four of the five .45 caliber casings found during the investigation were fired from the same weapon, whereas Murillo opined that all five were fired from the same gun. It appears Dr. Norby's, or another expert's, testimony at trial would have contributed little or nothing to Moon's defense, at least with regard to the ballistics evidence. Thus, the fact that trial counsel did not call an independent ballistics expert to challenge the evidence offered by the State's expert neither constituted a breach of an essential duty nor resulted in prejudice. Moon's ineffective assistance claim on this ground must fail.

C. Other Bad Acts Evidence.

Moon claims the postconviction court erred in concluding the other bad acts evidence admitted at trial did not entitle him to a new trial. He asserts he is entitled to a new trial because the "extended" references to this evidence violated Iowa Rule of Evidence 5.404(b). In affirming his conviction on direct appeal this court found all of the challenged evidence to be both relevant and not unfairly prejudicial, or that its admission was harmless error given the strength of the

other evidence against Moon. *State v. Moon,* No. 00-1128 (Iowa Ct. App. April 24, 2002). Thus, we concluded no reversible error occurred in the admission of the evidence regarding Moon's drug use and procurement and participation in burglaries. *See id.*

Because precisely the same issue regarding the admissibility of other bad acts evidence was decided adversely to Moon on direct appeal he is now barred from relitigating this issue in a postconviction relief action. *See Osborn v. State,* 573 N.W.2d 917, 921 (Iowa 1998) (noting that postconviction relief is not a means for relitigating claims that were properly presented on direct appeal).

D. Accomplice Jury Instruction.

Moon claims his trial counsel were ineffective for failing to request an instruction informing the jurors that Brodsack was an accomplice as a matter of law. Moon also lodged this same complaint on direct appeal and this court rejected it. We determined that because the question of whether a person pleading guilty to a crime arising from the same events underlying the defendant's charge is an accomplice as a matter of law had never been decided in Iowa, Moon's trial counsel did not breach an essential duty by failing to raise the issue. *State v. Moon,* No. 00-1128 (Iowa Ct. App. April 24, 2002). Moon's complaint regarding his trial counsels' alleged ineffectiveness for failing to request an accomplice jury instruction was decided adversely to him on direct appeal and he is therefore barred from relitigating this issue in a postconviction relief action. *See Osborn,* 573 N.W.2d at 921.

E. Madelyn Kerns's Testimony.

Moon claims his trial counsel were ineffective for not objecting to Madelyn Kerns's (Kerns) testimony on confrontation clause grounds.[1] At trial Brodsack testified that in the summer of 1990 he, Moon, Dickson, and Aukes broke into a building owned by Russell Kerns and stole several guns. He further testified he recognized two of the guns they had stolen when he and Moon killed Dickson, which he stated was a week or so after the burglary. According to additional minutes of evidence filed by the State, prior to his death Mr. Kerns spoke to law enforcement personnel on the telephone about having shown the guns to Moon.

Madelyn Kerns testified at trial that her late husband had shown his gun collection to Moon and Moon's father several years earlier. She stated she stayed in the yard or house while Russell Kerns took Moon and his father to see his gun collection, and he did so because he had known Moon's father for a long time. Kerns did not testify to overhearing any telephone conversation between her husband and law enforcement regarding this issue. She only testified about events surrounding the incident when Mr. Kerns showed his gun collection to Moon. Moon's trial counsel objected to this testimony on the basis of Iowa Rules of Evidence 5.401, 5.403, and 5.404(b), but did not lodge a confrontation clause objection or challenge it as hearsay.

Moon first claims his counsel should have made a confrontation clause objection to Kerns's testimony based on *Crawford v. Washington,* 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). In *Crawford* the United States

[1] We note the State contends that this and the next three claims of ineffective assistance of counsel are not preserved because Moon did not raise them on direct appeal. However, we need not rest our determination on error preservation grounds because we find each of these claims to be without merit.

Supreme Court overruled *Ohio v. Roberts,* 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), and found that for "testimonial" hearsay to be admitted, the "Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Crawford,* 541 U.S. at 68, 124 S. Ct. at 1374, 158 L. Ed. 2d at 203. Our supreme court has held that counsel was not ineffective for failing to challenge excited utterances on *Crawford* grounds before *Crawford* was decided because "counsel is not under a duty of clairvoyance." *State v. Williams,* 695 N.W.2d 23, 29 (Iowa 2005). "Counsel need not be a crystal gazer; it is not necessary to know what the law will become in the future to provide effective assistance of counsel." *Snethen v. State,* 308 N.W.2d 11, 16 (Iowa 1981). These same principles apply here. *Crawford* was not decided until four years after Moon's criminal trial. His counsel was not under a "duty of clairvoyance" and had no duty to raise a confrontation clause objection based on *Crawford*.

In addition, Moon appears to argue counsel was also ineffective for failing to challenge Kerns's testimony as hearsay. To the extent he also raises a hearsay claim we find such claim to be without merit because Kerns's challenged testimony was admissible under Iowa Rule of Evidence 5.803(3). This rule

> provides for an exception to the hearsay rule for [a] statement of the declarant's then existing state of mind, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed . . . .

State v. Newell, 710 N.W.2d 6, 18-19 (Iowa 2006). Kerns merely testified regarding Russell Kerns's statement that it was his immediate intent to escort

Moon and his father to his office to see his gun collection. Thus, this testimony was admissible under the "state of mind" (intent) exception found in rule 5.803(3). Any objection trial counsel would have made to this testimony on hearsay grounds would have been rejected by the trial court as meritless. Counsel is not ineffective for failing to raise meritless issues or to make questionable or meritless objections. *State v. Smothers*, 590 N.W.2d 721, 724 (Iowa 1999). Moon's trial counsel were not ineffective for not objecting to Kerns's testimony on hearsay grounds.

F. Prosecutorial Misconduct in Closing Arguments.

Moon claims his trial counsel were ineffective for failing to object to several specific statements made by the prosecutor during closing arguments. It appears he has divided these claims into four general categories. We will address each category separately.

> The initial requirement for a due process claim based on prosecutorial misconduct is proof of misconduct. Evidence of the prosecutor's bad faith is not necessary, as a trial can be unfair to the defendant even when the prosecutor has acted in good faith.
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> The second required element is proof the misconduct resulted in prejudice to such an extent that the defendant was denied a fair trial. Thus, it is the prejudice resulting from misconduct, not the misconduct itself, that entitles a defendant to a new trial. In determining prejudice the court looks at several factors within the context of the entire trial. We consider (1) the severity and pervasiveness of the misconduct; (2) the significance of the misconduct to the central issues in the case; (3) the strength of the State's evidence; (4) the use of cautionary instructions or other curative measures; and (5) the extent to which the defense invited the misconduct.

State v. Graves, 668 N.W.2d 860, 869 (Iowa 2003) (internal citations and quotations omitted). "[T]he prosecutor is not 'allowed to make inflammatory or

prejudicial statements regarding a defendant in a criminal action.'" *Id.* at 874 (quoting *State v. Leiss,* 258 Iowa 787, 792, 140 N.W.2d 172, 175 (Iowa 1966)). The following questions must be answered to determine whether the prosecutor's remarks were proper:

> (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?

Id. at 874-75.

In a recent opinion regarding the *Graves* decision our supreme court stated:

> The obvious threat addressed by *Graves* and other of our cases is the possibility that a jury might convict the defendant for reasons other than those found in the evidence. 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.

State v. Carey, 709 N.W.2d 547, 556 (Iowa 2006) (citation omitted).

Moon first complains of statements made by the prosecutor that implied Moon had lied. More specifically, the prosecutor stated "I would submit to you, ladies and gentlemen, that the type of person who commits a murder is also the type of person who's going to lie about it afterwards in order to divert suspicion away from their crime." However, this statement was a direct reflection of the

evidence presented at trial. Moon had told the police that Dickson had participated in a burglary and moved to Colorado. However, Dickson could not have participated in that burglary if, as indicated by substantial evidence, Moon and Brodsack had already killed Dickson and thrown his body into a cistern before the burglary occurred. Thus, the prosecutor's comment was merely a valid comment on facts the jury could find from the evidence presented. *See State v. Lasage,* 523 N.W.2d 617, 621 (Iowa Ct. App. 1994) (finding witnesses testimony was relevant to show defendant deliberately fabricated facts to mislead investigators, showing defendant's consciousness of guilt); *State v. Cox,* 500 N.W.2d 23, 25 (Iowa 1993) ("A false story told by a defendant to explain or deny a material fact against him is by itself an indication of guilt and the false story is relevant to show that the defendant fabricated evidence to aid his defense."). Trial counsel were not ineffective for not objecting to the prosecutor's proper statements suggesting Moon's consciousness of guilt.

Moon next complains about the prosecutor's statements during closing arguments relating to Moon's involvement in drug use and burglaries. For example, the prosecutor stated that in July 1990 Moon, Brodsack, and Dickson lived together, worked together, and generally spent time together "doing drugs and alcohol to excess as they partied with beer, marijuana and LSD, or out in the community committing burglaries to support that vice." Again, however these statements were merely based on the evidence presented at trial. The evidence of drug use and committing burglaries applied to all three men, including the victim, and was relevant to explain the relationship between Moon, Brodsack,

and Dickson. The evidence of drug use was also relevant to explain the ruse Moon employed to lure Dickson to his death (i.e. that they were going to the abandoned house to procure more drugs).

Furthermore, the evidence of Moon using drugs and participating in burglaries paled in comparison to the evidence properly before the jury indicating that Moon executed his roommate. Any possible inflammatory effect of such argument was therefore blunted. *See State v. Rodriguez,* 636 N.W.2d 234, 243 (Iowa 2001) (indicating that in an evidentiary context the court should compare the nature of the challenged evidence to the brutality of the crime charged); *State v. Larsen,* 512 N.W.2d 803, 808 (Iowa Ct. App. 1993) (holding that potential prejudicial effect of other acts evidence was "neutralized by the equally reprehensible nature of the charged crime"). Accordingly, counsel had no duty to object to these proper comments on the evidence by the prosecutor and Moon was not unfairly prejudiced by the comments.

Moon next claims his counsel should have objected to statements made by the prosecutor that Brodsack was telling the truth at trial. More specifically, the prosecutor argued that what Brodsack stated at trial in 2000 was the same as what he had told Lovely in 1996 when he showed him the cistern, "That he and Marty Moon shot and killed Kevin Dickson. That was true in 1996, and it's true today." Moon argues this was an improper statement as to the prosecutor's personal belief. However, the prosecutor did not imply he had knowledge the jurors did not, nor did he personally vouch for Brodsack's veracity. He merely noted that Brodsack's story regarding what happened to Dickson had remained

consistent. Moon's trial counsel was not ineffective for failing to object to this proper argument by the prosecutor. Counsel has no duty to raise a meritless objection. *See Smothers*, 590 N.W.2d at 724 (holding trial counsel was not ineffective for failing to pursue a meritless issue); *State v. Hochmuth*, 585 N.W.2d 234, 238 (Iowa 1998) (same).

Finally, Moon complains about the prosecutor's comments regarding Aukes's testimony. Here the prosecutor stated in closing arguments that even disregarding the testimony of Brodsack entirely, the testimony of Aukes "standing alone coupled with the physical evidence proves that Moon is guilty of first degree murder along with Brodsack." Further, in its response to Moon's closing argument the State argued that Aukes was "telling the truth."

Moon contends that in making the first statement the prosecutor distorted the burden of proof. We disagree. The prosecutor was merely arguing to the jury what the evidence had shown. Furthermore, the prosecutor's comment that Aukes was "telling the truth" was also based on the evidence before the jury and was in response to defense counsel's suggestions that Aukes was untrustworthy. The credibility of a witness is a proper subject for discussion during closing arguments. *State v. Martens*, 521 N.W.2d 768, 772 (Iowa Ct. App. 1994). The prosecutor's comment was not stated as a personal endorsement of Aukes's character or veracity. The prosecutor did not commit misconduct by arguing the State's view of the evidence, and did not alter the burden of proof by doing so. Accordingly, Moon's trial counsel was not ineffective in declining to object to these comments.

In sum, none of the prosecutors' arguments challenged by Moon violated Moon's due process rights. Each was merely a fair comment on evidence admitted at trial. Prosecutors are "entitled to some latitude during closing argument in analyzing the evidence admitted in the trial." *Graves,* 668 N.W.2d at 874 (citing *State v. Phillips,* 226 N.W.2d 16, 19 (Iowa 1975)). Although a prosecutor cannot express his or her personal beliefs, he or she "may argue the reasonable inferences and conclusions to be drawn from the evidence." *Id.* Trial counsel was not ineffective for not objecting to the prosecutors' closing arguments in question because any such objections would have been without merit. *See Smothers*, 590 N.W.2d at 724; *Hochmuth*, 585 N.W.2d at 238.

G. Jury Instructions.

Moon claims his trial counsel was ineffective for failing to object to jury instructions 8, 9, and 14.[2] With regard to Instruction 8, Moon specifically contends the jury should not have been instructed to "Try to reconcile any conflicts in the evidence; but if you cannot, accept the evidence you find more believable." In Instruction 9 he challenges the language, "However, you should not disregard the testimony if other believable evidence supports it, or if for some other reason you believe it." In both instances he claims that because he did not call any witnesses of his own, the jury had no evidence but the State's to accept and thus the jurors were basically instructed to find Moon guilty.

All three instructions that Moon challenges are substantively indistinguishable from three of our comparable uniform jury instructions. *See* Iowa Criminal Jury Instructions 100.7, 200.42, and 100.10. We are reluctant to

[2] In fact, it appears that defense counsel requested Instructions 8 and 9.

disapprove those uniform instructions. *State v. Johnson*, 534 N.W.2d 118, 127 (Iowa Ct. App. 1995). More importantly however, with regard to Instructions 8 and 9 Moon's argument ignores the fact the State's witnesses were vigorously cross-examined by Moon's counsel at trial. These instructions simply note the ways in which the jury should evaluate the credibility of witnesses. Thus, even though Moon did not call any witnesses of his own, the witnesses against him were thoroughly cross-examined and these instructions in no way instructed the jurors they were required to find him guilty. Trial counsel were not ineffective by not objecting to Instructions 8 and 9.

Instruction 14 defines the concept of reasonable doubt for the jury. It states, in part,

> If, after a full and fair consideration of all the evidence, you are firmly convinced of the Defendant's guilt, then you have no reasonable doubt and you should fine the Defendant guilty.
>
> But if, after a full and fair consideration of all the evidence or lack of evidence produced by the State, you are not firmly convinced of the Defendant's guilt, then you have a reasonable doubt and you should find the Defendant not guilty.

Moon contends the jury was erroneously instructed on the definition of reasonable doubt because "not firmly convinced" does not equate to having a reasonable doubt and thus violates his right to due process of law.

Our supreme court has repeatedly stated that "no particular model or form is required in advising the jury concerning the meaning of reasonable doubt as long as a suitable standard is given." *State v. Finnegan*, 237 N.W.2d 459, 460 (Iowa 1976) (citing *State v. McGranahan,* 206 N.W.2d 88, 91-92 (Iowa 1973)); *see also State v. Ochoa,* 244 N.W.2d 773, 775 (Iowa 1976). Furthermore, a very

similar instruction was previously approved by our supreme court. *See State v. McFarland,* 287 N.W.2d 162, 163 (Iowa 1980) (approving language in instruction stating that if the jurors "are firmly and abidingly convinced of the defendant's guilt, then you may be said to have no reasonable doubt" and finding it "set out an objective standard for measuring the juror's doubts"). Trial counsel were not ineffective for declining to make a meritless objection to this instruction.

H. Motion for New Trial.

Finally, Moon claims his trial counsel was ineffective for failing to file a motion for new trial based on the weight of the evidence in addition to moving for judgment of acquittal based on the sufficiency of the evidence standard. Our supreme court made it clear in *State v. Ellis,* 578 N.W.2d 655, 658 (Iowa 1998) that the contrary to the weight of the evidence standard was not the same as the sufficiency of the evidence standard. The weight of the evidence standard used in a motion for new trial requires a determination by the court whether a greater amount of credible evidence supports one side of an issue or cause than the other. *Id.* The power of the trial court is much broader in a motion for new trial than a motion for judgment of acquittal. *Id*. The power to grant a new trial on the basis of *Ellis* should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict. *Id.* at 658-59.

We conclude the greater amount of credible evidence here supported the guilty verdict. As we noted on direct appeal, the evidence against Moon was overwhelming. *State v. Moon,* No. 00-1128 (Iowa Ct. App. April 24, 2002). This is not a case in which the testimony of a witness or witnesses which otherwise

supports conviction is so lacking in credibility that the testimony cannot support a guilty verdict. Neither is it a case in which the evidence supporting the guilty verdict is so scant, or the evidence opposed to a guilty verdict so compelling, that the verdict can be seen as contrary to the evidence. The evidence is this case does not preponderate heavily against the verdict. A motion for new trial based on the weight of the evidence standard would not have been successful. Thus, trial counsel had no duty to make such a questionable or meritless motion. *See Smothers*, 590 N.W.2d at 724; *Hochmuth*, 585 N.W.2d at 238.

IV. CONCLUSION.

Based on our de novo review of the record, and for the reasons set forth above, we conclude Moon did not receive ineffective assistance of counsel. The district court was correct in denying Moon's application for postconviction relief.

AFFIRMED.