IN THE COURT OF APPEALS OF IOWA

No. 7-022 / 05-1756
Filed May 23, 2007

NICHOLAS L. HANEGAN,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Daniel P. Wilson, Judge.

Nicholas Hanegan appeals following the denial of his application for postconviction relief. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Shellie Knipfer, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bridget Chambers, Assistant Attorney General, John P. Sarcone, County Attorney, and Steve Foritano, Assistant County Attorney, for appellee State.

Heard by Zimmer, P.J., and Miller and Baker, JJ.

BAKER, J.

Nicholas Hanegan appeals following the denial of his application for postconviction relief. We affirm his conviction.

I. Background Facts and Proceedings.

We filed our opinion in this case on April 25, 2007, but subsequently granted the state's petition for rehearing. Our April 25, 2007 decision is therefore vacated, and this opinion replaces it.

On December 7, 2000, Hanegan was adjudged guilty of first-degree kidnapping, attempted murder, and willful injury. The court sentenced him to imprisonment for life on the kidnapping charge, and indeterminate terms of twenty-five and ten years for attempted murder and willful injury respectively. These convictions were affirmed by this court on direct appeal. *State v. Hanegan*, No. 00-2049 (Iowa Ct. App. April 24, 2002). In that opinion we recited the factual background as follows:

> On May 5, 2000 defendant Nicholas Hanegan and the victim in this case, Carrie Ann Fleenor, as well as several of their friends and acquaintances, had spent the day injecting methamphetamine and smoking marijuana. Apparently Fleenor, who had been sexually involved with the defendant for two weeks, called him repeatedly during the day. According to testimony the two were in a disagreement, which may or may not have been related to defendant's suspicion that Fleenor had reported him to be a drug dealer. Testimony indicated that defendant also made statements that he felt he needed to "take care of his problem" with Fleenor.
>
> Fleenor testified that at some point in the evening of that day defendant called her, requesting a ride to his mother's house. Defendant then showed up at the parking lot of Fleenor's apartment complex. Defendant, Fleenor, and another man, James Rainer, got into Fleenor's car, with defendant in the driver's seat, Rainer in the passenger's seat, and Fleenor in the back seat. Fleenor testified she did not remember how she got into the car; defendant testified she did so voluntarily.

Defendant drove the three of them out of Fleenor's apartment complex and past the street which would have taken them to defendant's mother's house, where Fleenor believed they were headed. Fleenor testified that when she asked defendant why he had not turned toward his mother's house, he had responded that Fleenor was going to die. Fleenor further testified that defendant then accused her of telling police he used drugs, and as a consequence he was going to kill her. After passing the street to his mother's house, defendant stopped the car at the house of Tony Morrow. Fleenor testified defendant told Rainer to keep her in the car, and that defendant grabbed her purse and went into Morrow's house. She further testified that she was held captive in the car at Morrow's, that she yelled for help and tried to kick out one of the car windows, and that when defendant returned to the car and discovered she had tried to escape, he slapped her face. Defendant's explanation for his stop at Morrow's was that he was buying the three of them some methamphetamine, that Fleenor had handed him twenty dollars for the purchase, that she was not captive in the car, and that his contact with her after leaving Morrow's consisted of handing her drugs, not slapping her.

Defendant then drove to the pet cemetery, where Fleenor testified defendant pulled her out of the car, beat her in the head with a bottle of alcohol, and after pushing her back into the car, attempted, with Rainer's help, to light the car on fire. Due to the effects of trauma and drugs, Fleenor was unable to remember what transpired beyond this point.

Rescue workers called to the scene found a severely injured Fleenor underneath the vehicle, her lower body to her upper torso pinned between the car and the ground. Fleenor suffered, among other injuries, lacerations to her head, a partially torn eyelid, six broken ribs, spinal injury resulting in mild scoliosis, internal injuries, third-degree burns on her arm, and additional burns on her leg and foot.

Testimony at trial by acquaintances of defendant indicated that defendant had made a phone call in the early morning hours of May 6, urgently seeking someone to pick him up south of the Des Moines airport, between Des Moines and the pet cemetery; that there was screaming in the background when defendant made one of these calls; that defendant had told Terry Wells, who had come to pick him up, that he had “decapitated a female, . . . beaten her half to death, left her at the pet cemetery on County Line Road, had driven a car on top of her, and that he was sure she was dead”; that defendant appeared the next day in a change of clothes which were unusually large; that defendant had arranged for the disposal of a bag of clothes; and that defendant had made statements that next morning and day to the effect that he had “gotten rid” of his problem.

Id. In affirming, we addressed claims of sufficiency of the evidence and a variety of ineffective assistance of counsel claims. We preserved one of those claims for postconviction relief.

On May 13, 2003, Hanegan filed a postconviction relief application in which he raised a claim of prosecutorial misconduct based on the prosecutor's knowing use of false evidence and claims of ineffective assistance of trial counsel based on (1) the failure to prepare and pursue cross-examination, and (2) failure to object to improper character evidence. Finally, he claimed on direct appeal counsel was ineffective. Prior to trial, he added another claim of newly discovered evidence. Following a hearing on this application, the court denied the application.

Now on appeal from that ruling, Hanegan alleges for the first time that trial counsel was ineffective in failing to object when the prosecutor questioned Hanegan about other witnesses' credibility and failed to request that closing arguments be reported. Because these claims have not been raised previously, Hanegan alleges that postconviction counsel was ineffective in failing to claim that direct appeal counsel was ineffective in failing to raise these claims. In addition, he claims that a variety of additional failures by counsel combined to deprive him of a fundamentally fair trial. Finally, he argues that newly discovered evidence shows that Fleenor gave false testimony regarding her injuries.

II. Ineffective Assistance of Counsel.

A claim of ineffective assistance of counsel requires a de novo review because the claim is derived from the Sixth Amendment of the United States

Constitution. *State v. Wills,* 696 N.W.2d 20, 22 (Iowa 2005). In order to succeed on a claim of ineffective assistance of counsel, a defendant must prove (1) counsel failed to perform an essential duty and (2) prejudice resulted. *State v. Artzer,* 609 N.W.2d 526, 531 (Iowa 2000). When "'there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different,'" prejudice results. *State v. Hopkins,* 576 N.W.2d 374, 378 (Iowa 1998) (quoting *Strickland v. Washington,* 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984)).

III. Analysis.

A. Prosecutorial Misconduct.

On appeal, Hanegan alleges for the first time in these proceedings that trial counsel was ineffective in failing to object when the prosecutor questioned Hanegan about other witnesses' credibility. The State alleges that Hanegan failed to preserve error because this issue was not raised in either the initial appeal or at trial for postconviction relief.

An applicant for postconviction relief must not only demonstrate sufficient cause or reason for not previously raising the issue presented, but must also prove resulting actual prejudice. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001); *Polly v. State*, 355 N.W.2d 849, 856 (Iowa 1984). Ineffective assistance of appellate counsel may constitute a sufficient reason for failing to raise on direct appeal a claim of ineffective assistance of trial counsel, and to prove such defective performance of appellate counsel resulted in prejudice an applicant must prove that his ineffective assistance of trial counsel claim would have prevailed if raised on direct appeal. *Ledezma*, 626 N.W.2d at 141. "Thus, before

we can decide whether error has been preserved, we must analyze the merits of [Hanegan's] ineffective assistance of counsel claim[ ]." *Id.* at 141-42.

In his examination of the defendant, the prosecutor, without objection, asked a series of questions on whether other witnesses were telling the truth. As our supreme court has stated:

> It is well-settled law in Iowa that a bright-line rule prohibits the questioning of a witness on whether another witness is telling the truth. *State v. Carey,* 709 N.W.2d 547, 557 (Iowa 2006); *Nguyen v. State,* 707 N.W.2d 317, 323-24 (Iowa 2005); *State v. Graves,* 668 N.W.2d 860, 873 (Iowa 2003). There are no exceptions to this rule. *See Graves,* 668 N.W.2d at 873 (stating "prosecutors and trial judges will have more guidance in assuring proper examination of witnesses with a bright-line rule that bars such inquiries without exception").

Bowman v. State, 710 N.W.2d 200, 204 (Iowa 2006). The first prong of *Strickland*—breach of duty—is therefore met. The finding that counsel failed to perform an essential duty in failing to object to this line of questioning does not, however, necessarily entitle Hanegan to relief.

> The bright-line rule of *Graves* is not a bright-line rule for prejudice. Accordingly, we turn to consider whether the effect of the misconduct in this case was pervasive enough to undermine confidence in the verdict. *See Strickland,* 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698 ("A reasonable probability is a probability sufficient to undermine confidence in the outcome.").

Nguyen v. State, 707 N.W.2d 317, 325 (Iowa 2005). In making this determination, the court has set out the following considerations:

> [W]e must determine whether there is a reasonable probability the prosecutor's misconduct prejudiced, inflamed or misled the jurors so as to prompt them to convict the defendant for reasons other than the evidence introduced at trial and the law as contained in the court's instructions. In making this determination we consider the factors noted previously: (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, 877 (Iowa 2003). This case is more similar to the conduct in *Nguyen* than the conduct in *Graves*. In *Graves,* the prosecutor not only aggressively cross-examined the defendant with "liar" questions, but told the jury in closing argument that the defendant's testimony called the State's witness, a police officer, a liar and the prosecutor repeatedly and explicitly called the defendant a liar. *Id.* at 868. In contrast, the prosecutor in Hanegan's trial did not make any reference to lying in closing argument. Further, the prosecutor in *Nguyen* never called Nguyen a liar or implied that Nguyen called any eyewitness a liar. *Nguyen,* 707 N.W.2d at 326. In this case there is no evidence that any reference was made to lying in closing argument.

Finally, we must also consider the relative strength or weakness of the totality of the evidence. Like *Nguyen,* the State's evidence here was strong. "[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Strickland,* 466 U.S. at 696, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699; *Nguyen,* 707 N.W.2d at 326. In this case, evidence of Hanegan's guilt was overwhelming. We have also considered *Bowman v. State*, 710 N.W.2d 200 (Iowa 2006), but find its facts to be more similar to those in *Graves* than those in *Nguyen* and the facts herein.

> Instead of presenting the evidence for the jury to consider under the instructions of the court, the prosecutor chose to engage in an all-out, name-calling attack. The pervasiveness of the prosecutor's conduct coupled with the relative weakness of the State's case shows there is a reasonable probability that the result of this case would have been different if Bowman's trial counsel had objected to the prosecutor's questions. Therefore, our confidence in the outcome of this case is undermined. *Compare Graves,* 668

> N.W.2d at 883 (finding prejudice where the county attorney's misconduct "related to a critical issue in the case and was the centerpiece of the prosecution's trial strategy" and the evidence of the defendant's guilt was not strong), *with Carey,* 709 N.W.2d at 558 (finding no prejudice in asking a witness to comment on the credibility of another witness on a collateral issue when the State's case was strong), *and Nguyen,* 707 N.W.2d at 326-27 (finding no prejudice in asking a witness to comment on the credibility of another witness, which did not become a theme in the case and did not amount to name-calling when the State's case was strong).

*Bowman***,** 710 N.W.2d at 207-08

Considering all of the factors, we conclude Hanegan failed to meet his burden of showing a reasonable probability that the result of the trial would have been different had his attorney objected to the prosecutor's improper questions. *See Strickland.* at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698 ("The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."). Hanegan has failed to establish a claim of ineffective assistance of counsel. *See id.* at 696, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699 (stating that if the defendant makes an insufficient showing on one element, the court need not discuss the other element). Therefore, because Hanegan cannot prevail on the prejudice prong, error was not preserved on this issue. *Ledezma*, 626 N.W.2d at 141.

B. Failure to Report Final Arguments.

Closing arguments were not reported. Now, Hanegan alleges trial counsel was ineffective in his failure to request the reporting, and that his subsequent counsel were likewise ineffective in failing to raise the issue. At its root, he maintains that something improper *must* have been spoken in closing because of the alleged volume of improper questioning at trial. We must reject this claim.

Although possibly a breach of counsel's duty, there is no record from which we could determine that any prejudice resulted. Other than bare speculation, there is no way to divine what was stated in closing. Even if not in the original record, there was no testimony in this proceeding by Hanegan or anyone else that the credibility issue or other improper matters were raised in final argument. It is Hanegan's burden to establish prejudice, *id*. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693, and he also has the duty to "provide a record on appeal affirmatively disclosing the alleged error relied upon." *In re F.W.S.,* 698 N.W.2d 134, 135 (Iowa 2005). "When complaining about the adequacy of an attorney's representation, it is not enough to simply claim that counsel should have done a better job." *State v. White,* 337 N.W.2d 517, 519 (Iowa 1983). The applicant must state the specific ways in which counsel's performance was inadequate and identify how competent representation probably would have changed the outcome. *See Schertz v. State,* 380 N.W.2d 404, 412 (Iowa 1985); *State v. Kendall,* 167 N.W.2d 909, 911 (Iowa 1969). On this record we have nothing to review, and we neither address nor preserve this issue.

C. Knowing Use of False Evidence.

Hanegan further alleges ineffectiveness in trial counsel's "fail[ure] to object to the prosecutor's misconduct of using evidence he knew to be false." In particular, he claims misconduct when the prosecutor "allowed and did not correct false testimony" by the victim and a doctor regarding the extent of Fleenor's injuries.

Even if the prosecutor introduced false evidence, the issue at hand was whether the victim suffered serious injury. Upon our de novo review we find

overwhelming evidence that Fleenor suffered a "serious injury." The victim was run over by a car. Even Hanegan does not contest the existence of at least three rib fractures, some sort of deep wound to Fleenor's arm, and a possible puncture to the lungs. A jury could have found any of these injuries to have constituted a "serious injury" under both the willful injury and kidnapping charges. As such, Hanegan could not have suffered any prejudice even if we assume the prosecutor wittingly allowed questionable evidence to be introduced at trial.

D. Newly Discovered Evidence.

Hanegan claims that he should be granted a new trial because of "newly discovered evidence." In order to prevail on a claim of newly discovered evidence, a postconviction applicant must show: (1) the evidence in question could not have been discovered before judgment in the exercise of due diligence; (2) the evidence is material to the issue and not merely cumulative or impeaching; and (3) its admission would likely change the result if a new trial were granted. *Adcock v. State,* 528 N.W.2d 645, 647 (Iowa Ct. App. 1994).

We reject this contention. Specifically, Hanegan asserts newly discovered evidence shows the unreliability of Fleenor's injury claims. This evidence consists of evidence that in the course of obtaining treatment for her injuries and attendant pain, Fleenor provided somewhat bizarre medical histories to her treating physicians. This evidence (a) could have been discovered earlier, (b) was merely impeaching, and (c) would not have changed the result or resulted in a new trial.

E. Psychosis.

Finally, Hanegan claims counsel failed to adequately investigate and argue that he suffered from psychosis by virtue of his methamphetamine addiction. While Hanegan may have introduced evidence at the postconviction hearing that methamphetamine can lead to psychosis, he presented absolutely no evidence that he, in fact, suffered from such an affliction. In addition, counsel did retain a psychiatrist to evaluate Hanegan. Finding that this expert's opinion would not aid Hanegan, counsel made a strategic decision to forego a psychiatric defense. Counsel was thus not ineffective in this respect.

IV. Conclusion.

We reject Hanegan's claims of ineffective assistance of counsel in their entirety. Accordingly, we also reject his claim of cumulative error, and affirm his convictions for first-degree kidnapping, attempted murder, and willful injury.

AFFIRMED.