IN THE COURT OF APPEALS OF IOWA

No. 7-550 / 06-1883
Filed October 24, 2007

ROBERT RIVAS,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Eliza J. Ovrom, Judge.

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

Todd A. Miler, West Des Moines, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, John P. Sarcone, County Attorney, and Jim Ward, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Huitink and Vogel, JJ.

HUITINK, J.

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

I. Background Facts and Proceedings

The record includes evidence of the following: In the early morning hours of July 22, 2002, Des Moines police officers were alerted to a potentially suicidal individual at 704 Winegardner Street. Upon responding, officers observed Rivas standing on the back deck. When Rivas saw that officers had spotted him, he turned, ran into the house, and locked the door. When Officer Brian Mathis approached the house and looked through the door, he witnessed Rivas reach for a shotgun. Officer Mathis yelled "Gun," and the officers ran for cover. Officers Mathis, Brent Harris, and Terry Mitchell then heard a shotgun blast and glass breaking. The blast had broken the sliding glass door, behind which Officer Mathis had just been standing.

Officer Mitchell attempted to reach Officer Harris, who was on the other side of the house, but turned back after more shots were fired in his direction. Officer Mitchell felt one shot was so close that he could feel it go by his hair. Officer Mathis testified he heard more than twenty-five shots come from the house in the first forty-five minutes of the ordeal. The shots destroyed much of the interior of the home. Some of the ammunition fired by Rivas struck neighboring homes. One neighboring family, the Croushores, was evacuated from their home by police. Another neighbor, Dallas Bagley, was awakened, but only became aware of the true nature of the incident the following day. After an eight-hour standoff, the matter was finally resolved when Rivas surrendered to

police. Officers theorized Rivas was attempting "suicide by cop," where he would bait officers into shooting him, rather than shooting himself.

Based on this incident, the State charged Rivas with eight crimes. Rivas pled not guilty. At trial, Rivas testified about his history of depression and prior suicide attempts. After an argument with his father on July 22, Rivas wrote a suicide note; ingested his father's prescription allergy medication, cough syrup, and alcohol; found a shotgun; attempted to shoot himself; and shot his father's possessions. He claimed he was not aware officers were outside the house until he received a call from a negotiator, he did not shoot out the sliding glass door, and he had no recollection of being on the deck. Following the jury trial, Rivas was found guilty of assault with intent to inflict serious injury, in violation of Iowa Code sections 708.1 and 708.2(1) (2001); attempted murder, in violation of section 707.11; intimidation with intent, in violation of section 708.6(1); two counts of intimidation without intent, in violation of section 708.6(2); and going armed with intent, in violation of section 708.8. He was sentenced to a term of imprisonment not to exceed thirty-seven years.

Rivas appealed, asserting various instances of ineffective assistance of trial counsel. We reversed one of Rivas's convictions for intimidation without intent. *State v. Rivas*, No. 03-0511 (Iowa Ct. App. Jan. 14, 2004). The district court accordingly modified Rivas's sentence.

On January 17, 2006, Rivas filed his application for postconviction relief, claiming his trial counsel was ineffective in (1) failing to plead the affirmative defenses or request jury instructions on insanity, diminished responsibility, and intoxication and (2) failing to object to the State's improper closing argument. He

also claimed his appellate counsel was ineffective in failing to raise these issues on direct appeal.

Trial was held July 14, 2006. The evidence consisted of Rivas's trial counsel's deposition, Dr. James Gallagher's psychological evaluation, and Dr. Jennifer Ryan's psychological evaluation.

On October 31, 2006, the district court denied Rivas's application. As to Rivas's first claim, the district court found:

> Trial counsel, John Wellman, pursued a defense at trial that sought to rebut the prosecution's claim that Rivas had the intent to harm officers and neighbors. During deposition, Mr. Wellman explained his reasons for failing to pursue a defense of insanity or diminished capacity. First, Rivas told him that he was just shooting the gun to get police to leave or not come in the house. . . . Second, Wellman was told by examining physicians that "there was no defense available" based on diminished capacity. . . . Third, such defenses are typically not very successful and usually only successful when an expert supports such a defense; two experts told Wellman they could not support the defense. . . . Clearly it was a strategy decision not to pursue the affirmative defenses. It was not a case of lack of diligence. The Court concludes trial counsel was not ineffective.
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> . . . .
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> Additionally, based on the evidence presented by the State of Iowa at trial, the Court finds it unlikely that the inclusion of insanity, intoxication, or diminished responsibility instructions would have produced a different jury verdict. *See State v. Propps*, 376 N.W.2d 619 (Iowa 1985). For example, the evidence of Rivas running inside from the police and firing a shotgun through the door where they had been standing was strong evidence of specific intent.

As to Rivas's second claim, the district court determined the statements the prosecutor made in closing argument were not improper when read in context. According to the district court,

> much of the argument offered by counsel sought to discredit the version of events offered by the defense through comparison to the physical evidence in the case and contrary testimony offered by

> officers at the scene. This approach, as previously stated, is proper under *Graves* and its progeny. Even if this Court were to find some of the above statements to be misconduct that should have been objected to, the Petitioner would still be burdened with the duty of showing a resulting prejudice.
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> . . . The Court does not view the errors analyzed above as having a "pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture." *Strickland*, 466 U.S. at 695-96. For this reason, the Court concludes the Petitioner has not established a reasonable probability of a different outcome had trial counsel objected to the prosecutor's alleged misconduct.

On appeal, Rivas argues that his trial and appellate counsel were ineffective for the reasons set forth in his application for postconviction relief.

II. Standard of Review

In general, we review postconviction relief proceedings for errors at law. *DeVoss v. State*, 648 N.W.2d 56, 60 (Iowa 2002). However, when an applicant claims ineffective assistance of counsel under the Sixth Amendment, our review is de novo. *State v. Kress*, 636 N.W.2d 12, 19 (Iowa 2001).

III. Ineffective Assistance of Counsel

To prevail on ineffective assistance of counsel claims, the applicant has the burden of proving by a preponderance of the evidence that "(1) counsel failed to perform an essential duty, and (2) prejudice resulted." *Meier v. State*, 337 N.W.2d 204, 207 (Iowa 1983). With regard to the first prong, "the [applicant] must overcome the presumption that counsel was competent and show that counsel's performance was not within the range of normal competency." *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). With regard to the second prong, the applicant must show that "a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Wemark v. State*, 602 N.W.2d 810, 815 (Iowa 1999). We may dispose of

ineffective assistance of counsel claims if an applicant fails to meet either of these prongs. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997).

A. Preservation of Error

Initially, we address the State's argument that Rivas's ineffective assistance of counsel claims have not been preserved because Rivas failed to raise these claims on direct appeal. We disagree. Recently, our supreme court held Iowa Code section 814.7(1) (2007), which was enacted in 2004 and provides that ineffective assistance of counsel claims "need not be raised on direct appeal from the criminal proceedings in order to preserve the claim for postconviction relief purposes," is retroactive. *Hannan v. State*, 732 N.W.2d 45, 51 (Iowa 2007). Therefore, we find Rivas was not required to raise these claims on direct appeal to preserve them for postconviction relief.

B. Failure to Plead Defenses and Request Instructions

Rivas argues that his trial counsel was ineffective in failing to plead the cited defenses and in failing to request jury instructions on insanity, diminished responsibility, and intoxication. Generally, ineffective assistance of counsel claims do not lie for counsel's exercise of judgment and are more likely to lie for counsel's lack of diligence. *State v. Polly*, 657 N.W.2d 462, 468 (Iowa 2003). Improvident trial strategy, miscalculated tactics, and mistakes in judgment do not amount to ineffective assistance of counsel. *State v. McKettrick*, 480 N.W.2d 52, 55 (Iowa 1992). When counsel makes a reasonable tactical or strategic decision, we will not engage in second-guessing, nor will we interfere simply because it was unsuccessful. *Fryer v. State*, 325 N.W.2d 400, 413 (Iowa 1982); *State v. Johnson*, 534 N.W.2d 118, 127 (Iowa Ct. App. 1995).

"The selection of the primary theory or theories of defense is a tactical matter." *Schrier v. State*, 347 N.W.2d 657, 663 (Iowa 1984); *see also Pettes v. State*, 418 N.W.2d 53, 56-57 (Iowa 1988) (holding that trial counsel made a reasonable tactical decision in not pursuing a diminished responsibility defense); *State v. Sinclair*, 662 N.W.2d 772, 782 (Iowa Ct. App. 2000) (same). Similarly, the question of whether trial counsel was ineffective for failing to request particular instructions must be determined with regard to the theory of the defense in the case. *State v. Broughton*, 450 N.W.2d 874, 876 (Iowa 1990).

As noted earlier, trial counsel cited specific reasons for electing to pursue a factual defense rather than the defenses now advanced by postconviction relief counsel. Trial counsel's reasons included his experienced opinion concerning the limited prospects for an acquittal based on the cited defenses, as well as the negative opinion of the physicians who examined Rivas prior to trial. Under these circumstances, we are unable to find counsel's tactical decisions were unreasonable. Because Rivas has failed to prove trial counsel breached any essential duty concerning counsel's choice of a defense or related jury instructions, we affirm on this issue.

C. Prosecutorial Misconduct

Rivas claims trial counsel breached an essential duty by failing to object to the following statements made by the prosecutor during closing argument:

> (1) "Well, we know [Officer Mitchell is] telling the truth . . . ."
> (2) "[I]f you find he meant to kill him on any one of those three shots, he's guilty of attempted murder with regard to Officer Mitchell."
> (3) "[Rivas's] rendition of the events regarding the shotgun, the firing of the shotgun is absolutely absurd when you compare it to the facts that you will agree happened."

> (4) "[Rivas] said he didn't know they were there and it's all an accident. That is absurd."
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> (5) "You can believe the baloney about his personal history if you want to. . . ."
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> (6) "[Officers] said, hey, buddy, and he ran inside. Does [Rivas] say I didn't run inside? Does he not want to say that they're liars?"
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> (7) "[Y]our duty to find a verdict that ultimately will decide that the defendant got on the witness stand and lied about what happened. . . ."
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> (8) "Remember, [Rivas's] entire defense is dependent upon you believing the defendant when he said I wasn't trying to shoot outside. His whole – because otherwise it's all a lie, right?"
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> (9) "Recognize what Mr. Wellman's argument was. His argument was, generally speaking, that his client was not lying and the police officers are lying."
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> (10) "Mr. Wellman is very good at his arguments, probably better than me because I do tend to get loud. He's also very good at picking out little things and then twisting them. . . ."
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> (11) "Focus on the instructions, talk about the instructions and then focus on the defendant's testimony as it relates to the officers' testimony that we know has to be true."
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> (12) "Sure, [Rivas] had problems. I don't doubt that, but I belittle them to the extent that they are not an excuse to let you shoot at police officers."

To prevail on a due process claim of prosecutorial misconduct, the defendant must prove (1) misconduct that (2) resulted in prejudice to the extent that the defendant was denied a fair trial. *State v. Piper*, 663 N.W.2d 894, 913 (Iowa 2003). A prosecutor "is entitled to some latitude during closing argument in analyzing evidence admitted in the trial." *State v. Phillips*, 226 N.W.2d 16, 19 (Iowa 1975). It is "clearly improper," however, for a prosecutor to (1) "call the defendant a liar," "state the defendant is lying," or "make similar disparaging comments," *State v. Graves*, 668 N.W.2d 860, 876 (Iowa 2003), (2) refer to defense counsel's argument as a "smoke screen," *id.* at 879, (3) misstate the law, *id.* at 880, (4) vouch "for the credibility of a witness against the credibility of the defendant," *id.* at 879, (5) inflame or appeal to the fears, passion, and

prejudice of the jury against the defendant, *State v. Werts*, 677 N.W.2d 734, 739-40 (Iowa 2004), and *State v. Vickroy*, 205 N.W.2d 748, 749-50 (Iowa 1973), (6) assert a personal opinion or create evidence, *State v. Shanahan*, 712 N.W.2d 121, 139-40 (Iowa 2006), or (7) make other comments that are outside the record, *State v. Carey*, 709 N.W.2d 547, 556 (Iowa 2006). The concern is the possibility that a jury might convict the defendant for reasons other than those found in the evidence. *State v. Musser*, 721 N.W.2d 734, 755 (Iowa 2006). Nonetheless, the 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.'" *Graves*, 668 N.W.2d at 876 (quoting *State v. Davis*, 61 P.3d 701, 710-11 (Kan. 2003)); *see also Carey*, 709 N.W.2d at 555 (stating that this is so even if the comments are sarcastic or snide).

Like the district court, we find the prosecutor's statements, when read in their proper context, sought to discredit the version of events offered by the defense through comparison to the physical evidence in the case and contrary testimony offered by officers at the scene. Trial counsel did not breach an essential duty by failing to object to these statements. We also affirm on this issue.

D. Ineffective Assistance of Appellate Counsel

We analyze ineffective assistance of appellate counsel claims under the same two-pronged test used for ineffective assistance of trial counsel claims. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). Because Rivas cannot establish the first prong of his ineffective assistance of trial counsel claims, we

find appellate counsel was not ineffective in failing to raise these issues on direct appeal.

IV. Conclusion

Based on the foregoing, we conclude Rivas has failed to establish either prong of his ineffective assistance of counsel claims. The district court's ruling on Rivas's application for postconviction relief is affirmed.

AFFIRMED.