IN THE COURT OF APPEALS OF IOWA

No. 8-113 / 06-1254
Filed May 14, 2008

CHRISTOPHER P. BENNETT,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, D.J. Stovall, Judge.

Christopher Bennett appeals from the denial of his application for postconviction relief. **AFFIRMED.**

Frank Burnette, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor and Robert P. Ewald, Assistant Attorneys General, John P. Sarcone, County Attorney, and Nan Horvat, Assistant County Attorney, for appellee State.

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

BAKER, J.

Christopher Bennett appeals from the denial of his application for postconviction relief. Because Bennett is unable to prove both breach of duty and resulting prejudice on any of his ineffective-assistance-of-counsel claims, we affirm the district court's decision to deny Bennett's application.

I. Background and Facts

On March 20, 1995, Christopher Bennett was convicted of first-degree murder in the death of his girlfriend, Julie Wacht. At the time of her death, Wacht was sixteen and Bennett was eighteen. They lived together and were involved in a romantic, yet volatile and violent, relationship. At trial, Bennett claimed that on the night she died Wacht was upset and had been hitting and yelling at him, so he tied her up to calm her down. Bennett tied Wacht's arms and legs together and put a sock in her mouth, then tied a pillow over her face to muffle her screaming. He then left to go to a friend's house. Wacht died due to suffocation.

Bennett's conviction was affirmed on direct appeal. *State v. Bennett*, No. 95-0926 (Iowa Ct. App. Nov. 27, 1996). In 2003, he filed an application for postconviction relief, which he amended in 2005.[1] The district court dismissed the application and denied relief. Bennett appeals. Other facts will be discussed in our consideration of the legal issues presented.

II. Merits

Bennett contends he was denied due process and a fair trial due to prosecutorial misconduct. He also contends his trial counsel rendered ineffective

[1] In its post-trial brief, the State raised the issue of untimeliness. The district court denied the State's request for dismissal, noting it had waived its statute of limitations defense when it "had its opportunity to properly raise this defense and failed to do so."

assistance by failing to request an instruction on voluntary manslaughter and a limiting instruction on bad acts evidence. Bennett asserts that the alleged errors in this case were not harmless, under any standard of harmless error. Bennett also asserts "this court is not required to follow a conclusion of the United States Supreme Court with respect to" the issue of the retroactive application of *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

> Our review of postconviction relief proceedings can be for errors at law or de novo. When the action implicates constitutional issues, our consideration is in the nature of a de novo review. When no constitutional safeguards are at issue, our review is for errors at law.

Berryhill v. State, 603 N.W.2d 243, 244-45 (Iowa 1999) (citations omitted). Because a criminal defendant's right to reasonably effective assistance of trial counsel is derived from the Sixth Amendment of the United States Constitution, we review ineffective assistance claims de novo. *State v. Wills*, 696 N.W.2d 20, 22 (Iowa 2005).

A. Prosecutorial Misconduct

Bennett contends his trial counsel rendered ineffective assistance by failing to object to prosecutorial misconduct which occurred during cross-examination and closing argument. "In order to establish a due process violation based upon prosecutorial misconduct, the defendant must first establish proof of misconduct." *State v. Musser*, 721 N.W.2d 734, 754 (Iowa 2006) (citation omitted).

"A prosecutor is not an advocate in the ordinary meaning of the term." *State v. Graves*, 668 N.W.2d 860, 870 (Iowa 2003) (citation omitted). In addition to the duty owed to the public, prosecutors owe a duty to the defendant to assure a fair trial, and must therefore abide by due process requirements throughout the

trial. *Id.* Although a prosecutor is an advocate for the State, the prosecutor's primary interest is to see that justice is served, not to obtain a conviction. *Id.* While a prosecutor is allowed some latitude during closing arguments, and "may argue the reasonable inferences and conclusions to be drawn from the evidence," she must confine her arguments to the evidence and "is not 'allowed to make inflammatory or prejudicial statements regarding a defendant in a criminal action.'" *Id.* at 874 (citations omitted).

1. Sarcasm and Improper Comments

Bennett contends the prosecutor's cross-examination of him and closing argument were misconduct. The prosecutor's questions to Bennett included:

> Q. Did you love Julie when you restrained her by holding her hands down?
>
> . . . .
>
> Q. And you loved Julie Wacht when you testified that you slapped her only once, is that correct?
>
> . . . .
>
> Q. And when did that happen in relation to the day when you loved her so much you killed her?

The prosecutor's closing argument, which Bennett asserts was "laced with sarcasm and disdain" for his professed love for Wacht, included:

> And above all, remember that glorious statement, I love her, I want to spend the rest of my life with her.
>
> I love her so much that when she told me I couldn't leave, I took a rope and I tied her hands together while sitting on top of her, after throwing her on the bed.
>
> I loved her so much that I took a sock and I put it in her mouth. And I tied a rope around it to make sure it stayed. I loved her so much that I tied that same rope to her ankles.
>
> . . . .
>
> I loved her so much that . . . I went back and I cut a piece of that rope, and I loved her so much, so very much, that I tied a pillow around her face.
>
> What a loving, loving act.
>
> . . . .

> And all we're asking you now is to hold him accountable for loving Julie the way he did.

Bennett asserts that the prosecutor's use of the phrase "you loved her so much" in connection with his killing Wacht "could do no more than inflame the passions of the jury, which is exactly what it did, as it was deliberately designed to do."

Questioning and closing arguments which "attempt to appeal to the passion and prejudice of the jury," clearly "violate a prosecutor's duty to keep the record free of undue denunciations or inflammatory utterances," and are to be avoided. *State v. Werts*, 677 N.W.2d 734, 739 (Iowa 2004) (citations omitted).

> [M]isconduct 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).

In determining whether a prosecutor's arguments are improper, we consider whether the prosecutor's argument was made in a professional manner, or whether it unfairly disparaged the defendant and tended to "cause the jury to decide the case based on emotion rather than upon a dispassionate review of the evidence." *Graves*, 668 N.W.2d at 874-75. In *Wertz*, 677 N.W.2d at 739, a prosecutor asked the defendant whether she had in truth "knocked the life out of" the child victim and "robbed that little boy of his life because he didn't fit within [her] schedule." During closing arguments the prosecutor held a baby book up and described several childhood activities the victim would never experience, tearing a page out of the book for each activity. *Wertz*, 677 N.W.2d at 739. The

questioning and closing argument were found to be an improper attempt to appeal to the passions of the jury, and therefore constituted prosecutorial misconduct. *Id.* Conversely, in *Carey*, 709 N.W.2d at 555, the prosecutor's "sarcastic and snide" comments, were "based on a legitimate assessment of the evidence and . . . did not constitute misconduct, given the considerable latitude accorded to lawyers in final arguments."

Upon our de novo review, we find the prosecutor's references to Bennett's professed love for Wacht did not constitute prosecutorial misconduct. The prosecutor's "loved her so much" comments, while sarcastic, were not improper attempts to appeal to the passions of the jury.

2. Truthfulness of Other Witnesses

Bennett also asserts prosecutorial misconduct because he was asked to comment on the credibility or truthfulness of other witnesses. Asking a defendant whether another witness has lied is inconsistent "with the prosecutor's duty to the defendant to ensure a fair trial, including a verdict that rests on the evidence and not on passion or prejudice." *Graves*, 668 N.W.2d at 873 (citation omitted).

> [A] lawyer may properly examine a witness about an event by pointing out the factual differences between the witness's testimony and the testimony of other witnesses to the same event . . . . However, it is not proper to take the further step of asking one witness if another witness is untruthful, mistaken, or to otherwise ask the witness to comment on the credibility of another witness.

Nguyen v. State, 707 N.W.2d 317, 324-25 (Iowa 2005).

At trial, Michael Glodt and Victoria Padavitch, who were friends and coworkers with Wacht, testified they had observed evidence of physical abuse, such as black eyes and bruises, and that Wacht had told them that Bennett hit

her. During the prosecution's cross-examination of Bennett, these exchanges occurred:

> Q. And are you saying that Mike Glodt is exaggerating or making that up? A. I am saying that's not what happened.
> . . . .
> Q. Vicki Padavitch and Mike Glodt testified that Julie came to work with black eyes, crying, marks on her, often. Are you saying they are mistaken? A. I am saying that the black eye that they both claim to have seen is probably the same one.
> . . . .
> Q. So, then, is Vicky Padavitch mistaken about that Julie was in the house crying and you wouldn't let her in to see Julie? A. No.

Because asking a defendant "'were they lying or mistaken' questions" constitutes prosecutorial misconduct, defense counsel's failure to object to such questioning may constitute a breach of an essential duty. *Nguyen*, 707 N.W.2d at 324; *see also Bowman v. State*, 710 N.W.2d 200, 205 (Iowa 2006) (asking the defendant to comment on the credibility of witnesses was improper, and "trial counsel had a duty to make a proper objection to these questions"). We find the prosecutor's cross-examination of Bennett, in which he was asked to comment on the veracity of Padavitch and Glodt's testimony, constituted misconduct. *See Bowman*, 710 N.W.2d at 204 ("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. There are no exceptions to this rule." (citations omitted)).

To prevail on his ineffective assistance claim, however, Bennett must show both failure to perform an essential duty and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). The prosecutor's misconduct, while satisfying the breach of duty prong, does not necessarily entitle Bennett to a mistrial. *See Musser*, 721 N.W.2d at

755. We turn therefore to the prejudice prong. *See State v. Wilkins*, 693 N.W.2d 348, 352 (Iowa 2005) ("'[I]t is the prejudice resulting from misconduct, not the misconduct itself, that entitles a defendant to a new trial.'" (citation omitted)).

To prove prejudice, Bennett must prove "a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." *State v. Artzer*, 609 N.W.2d 526, 531 (Iowa 2000) (citing *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698). We consider several 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 . . . ." *Musser*, 721 N.W.2d at 755 (internal citations omitted). "The most important factor is the strength of the State's case against the defendant." *State v. Boggs*, 741 N.W.2d 492, 509 (Iowa 2007) (citing *Carey*, 709 N.W.2d at 559). "'[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.'" *Nguyen*, 707 N.W.2d at 326 (quoting *Strickland*, 466 U.S. at 696, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699).

"[M]isconduct, and resulting prejudice, does not occur by raising the issue of credibility of a witness, but by the manner in which it is done." *Id.* at 325. Where a prosecutor aggressively asked the defendant liar questions, told the jury that the defendant basically called a police officer a liar, and repeatedly called the defendant a liar, such conduct was found to be prejudicial because it improperly diverted the jury's focus to the issue of the defendant's truthfulness. *Graves*, 668 N.W.2d at 880-81. However, where the prosecutor asked the defendant to comment on whether other witnesses were mistaken, but then made no

reference to lying in closing argument and never called the defendant a liar or implied the defendant called an eyewitness a liar, the defendant was not prejudiced because the jury was focused on whether the eyewitnesses were mistaken, not whether the defendant was a bad person because he said the witnesses were mistaken. *Nguyen*, 707 N.W.2d at 325-26.

The parties agree the central issue at the time of trial was Bennett's intent at the time he tied up Wacht. We agree with the district court that the error did not affect the intent element because "Bennett's responses to the questions on cross-examination did not change the quality or nature of his abusive conduct toward the victim." Further, the prosecutor's few questions regarding the veracity of Padavitch and Glodt's testimony, in the context of a trial with numerous witnesses, was not pervasive. *See State v. Stewart*, 691 N.W.2d 747, 751 (Iowa Ct. App. 2004) (holding "only three inappropriate questions from the prosecutor" during "a trial with multiple witnesses" was neither severe nor pervasive). Further, the questions had little effect on the factual findings which supported the conviction and did not become a central issue in the case. Finally, the State's evidence against Bennett was strong. Considering the misconduct in light of the totality of the evidence, we cannot conclude that, absent the misconduct, the jury "would have had a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 695, 104 S. Ct. at 2068-69, 80 L. Ed. 2d at 698. Bennett cannot establish the prejudice prong. We therefore reject this ineffective assistance claim.

B. Voluntary Manslaughter

Bennett next contends his trial counsel rendered ineffective assistance by failing to request a jury instruction on voluntary manslaughter. He argues that,

because Wacht was upset, yelling, and hitting during the ordeal, the jury could reasonably have concluded a voluntary manslaughter verdict was appropriate.

Voluntary manslaughter is a lesser-included offense for first-degree murder. *State v. Jeffries*, 430 N.W.2d 728, 737 (Iowa 1988). Therefore, if after applying the "factual test" the trial court determines substantial evidence supports each element of voluntary manslaughter, an instruction on that offense is appropriate. *State v. Royer*, 436 N.W.2d 637, 643 (Iowa 1989).

> Voluntary manslaughter requires proof of intent and a
>
> > sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a person and there is not an interval between the provocation and the killing in which a person of ordinary reason and temperament would regain control and suppress the impulse to kill.

Iowa Code § 707.4 (1993). We agree with the district court that Bennett's admission that he bound and gagged Wacht over a period of time supports "the lack of the prerequisite interval of time." *See State v. Inger*, 292 N.W.2d 119, 122 (Iowa 1980) (noting lack of interval between provocation and killing, "in which a person of ordinary reason and temperament would regain his or her control and suppress the impulse to kill" is an objective requirement for voluntary manslaughter).

Additionally, to prove the prejudice prong of the ineffective assistance test, Bennett must prove a reasonable probability that, but for counsel's errors, the outcome would have been different. *Artzer*, 609 N.W.2d at 531. On our de novo review, we find no reasonable probability that, had Bennett's trial counsel requested a voluntary manslaughter instruction, the outcome would have changed. The jury was instructed on the lesser-included offense of second-

degree murder. Given that both first- and second-degree murder instructions were given, and the jury found Bennett guilty of first-degree murder, we are unable to conclude Bennett was prejudiced by the failure to instruct on a charge of manslaughter. *See State v. Drosos*, 253 Iowa 1152, 1164, 114 N.W.2d 526, 533 (1962) ("By rejecting the second degree or lesser offense, we fail to see how defendant was then prejudiced by a failure to submit manslaughter, a lesser offense than second degree murder.").

We recognize that the submission of a lesser-included offense is required where it is "the only way to let the jury consider [the defendant's] primary theory of defense." *State v. Mikesell*, 479 N.W.2d 591, 591-92 (Iowa 1991). That is not the case here. At the postconviction relief hearing, Bennett's trial counsel testified that he had made a strategic decision to build the defense around the premise that Bennett did not intend to kill Wacht. Therefore, he testified, because voluntary manslaughter requires proof of intent, it would be inconsistent with a lack-of-intent defense to argue manslaughter. Clearly the failure to submit a voluntary manslaughter instruction did not interfere with the jury's consideration of the primary theory of defense.

Further, the selection of a theory of defense is a tactical decision. *Schrier v. State*, 347 N.W.2d 657, 663 (Iowa 1984). Here, counsel articulated a reasonable tactical basis for his action. We will not at this time second-guess counsel's decision. Given the facts of the case and Bennett's own testimony, a decision not to request a voluntary manslaughter instruction was appropriate, and his trial counsel was not ineffective in not requesting it.

C. Bad Acts Evidence

Bennett also contends his trial counsel rendered ineffective assistance by failing to request a limiting instruction on bad acts evidence admitted over objection. While it is unclear from his brief, we assume he is referring to prior bad acts evidence offered through the testimony of Glodt and Padavitch.

Pursuant to Iowa Rule of Evidence 5.404(b), evidence of other bad acts "is not admissible to prove the character of a person in order to show that the person acted in conformity therewith" but may be admissible to prove intent. The parties agree the central issue at trial was Bennett's intent. Bennett's prior bad acts clearly went to the issue of intent and therefore were appropriately admitted. Instructing the jury to consider the evidence only for that purpose would not have changed the outcome. This ineffective assistance claim fails as well. *See Artzer*, 609 N.W.2d at 531.

D. Harmless Error

Bennett next asserts that the alleged errors in this case were not harmless, under any standard of harmless error. We have carefully reviewed Bennett's recitation of the standard of review applied by federal courts in federal habeas corpus proceedings. We agree with the State's contention that "[t]his discussion is inapposite to any issues in this appeal" and reject Bennett's request for a new trial based on this argument.

E. Retroactive Application of *Crawford*

Bennett claims his right to confrontation was violated by the trial court's admission of statements by an unavailable witness without his having the opportunity to cross-examine the witness. In *Crawford v. Washington*, 541 U.S.

at 68, 124 S. Ct. at 1374, 158 L. Ed. 2d at 203, the United States Supreme Court held the admission of out-of-court testimonial statements against a defendant is a violation of the confrontation clause of the Sixth Amendment, unless the witness is unavailable and the defendant had a prior opportunity to properly cross-examine the witness. While "federal law does not *require* state courts to apply the holding in *Crawford* to cases that were final when that case was decided," states are not prohibited from applying *Crawford* retroactively. *Danforth v. Minnesota*, ___ U.S. ___, ___, ____, 128 S. Ct. 1029, 1034, 1042, ___ L. Ed. 2d ___, ___, ____ (2008) (citing *Whorton v. Bockting*, 549 U.S. ___, 127 S. Ct. 1173, 167 L. Ed. 2d 1 (2007)). The Iowa Supreme Court, however, has held that *Crawford* cannot be applied "retroactively to support a claim for ineffective assistance of counsel." *State v. Williams*, 695 N.W.2d 23, 29 (2005). *Crawford* was decided after Bennett's underlying trial. Without deciding there was a *Crawford* violation, we conclude the holding in *Williams* precludes this court's retroactive application of *Crawford* in this case.

III. Conclusion

Bennett's trial counsel did not breach an essential duty by failing to object to the prosecutor's closing argument or failing to request a voluntary manslaughter instruction. Bennett cannot establish he was prejudiced by his trial counsel's failure to object to the prosecutor's cross-examination of him or by his counsel's failure to request a limiting instruction on bad acts evidence. We therefore reject his ineffective assistance claims. Having considered all issues raised on appeal, whether or not specifically addressed in this opinion, we affirm the district court's

decision to deny Bennett's application for postconviction relief.

AFFIRMED.