IN THE COURT OF APPEALS OF IOWA

No. 8-908 / 07-1479
Filed December 17, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JESSE EDWARD BROWN,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Gary D. McKenrick, Judge.

Appeal from convictions for first-degree kidnapping and second-degree sexual assault. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Stephan Japuntich, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bridget Chambers, Assistant Attorney General, and Michael Walton, County Attorney, for appellee.

Considered by Sackett, C.J., and Eisenhauer and Doyle, JJ.

SACKETT, C.J.

The appellant, Jesse Brown, appeals from his convictions of first-degree kidnapping and second-degree sexual assault. He contends the trial court abused its discretion in overruling an evidentiary objection. He further contends defense counsel was ineffective in not striking two potential jurors for cause. We affirm.

I. Trial Proceedings.

The State charged the defendant with first-degree kidnapping and second-degree sexual abuse.

During jury selection, two potential jurors answered questions in ways that could be interpreted to mean they could not judge the defendant impartially. Defense counsel passed on the jury for cause. Counsel used preemptory challenges to strike both individuals, so they did not serve on the jury.

During the trial, the prosecutor started to ask a question using the term "sexual assault," leading to this interchange:

> **Pros:** During the sexual assault—
> **Def:** Objection. Counsel is pretty close to testifying here.
> **Court:** You can rephrase.
> **Pros:** Where were your children during the sexual assault?
> **Def:** Same objection as before.
> **Court:** The objection is overruled.

II. Scope and Standards of Review.

A trial court's evidentiary rulings are generally reviewed for an abuse of discretion. *State v. Rodriquez*, 636 N.W.2d 234, 239 (Iowa 2001); *but see State v. Musser*, 721 N.W.2d 734, 751 (Iowa 2006) (stating the standard of review for

admission of alleged hearsay evidence is for correction of errors at law). A court abuses its discretion when it exercises its discretion on "grounds or for reasons clearly untenable or to an extent clearly unreasonable." *State v. Helmers*, 753 N.W.2d 565, 567 (Iowa 2008) (quoting *State v. Maghee*, 573 N.W.2d 1, 5 (Iowa 1997)).

Claims defense counsel rendered ineffective assistance are reviewed de novo. *State v. Bearse*, 748 N.W.2d 211, 214 (Iowa 2008).

> Two elements must be established to show the ineffectiveness of defense counsel: (1) trial counsel failed to perform an essential duty; and (2) this omission resulted in prejudice. A defendant's inability to prove either element is fatal.

State v. Graves, 668 N.W.2d 860, 869 (Iowa 2003) (citations omitted).

III. Merits.

Overruled Objection. The appellant contends the district court abused its discretion in overruling his objection to the State's "characterization of the sexual act in question." He argues it was prosecutorial misconduct, was improper expert testimony, violated his right of confrontation, and was irrelevant and highly prejudicial. He asks, alternatively, that the claim be considered under an ineffective-assistance analysis if we determine error was not preserved. The State contends the objection, "Counsel is pretty close to testifying there," is insufficient to preserve any of the appellant's claims for our review.

We agree error was not preserved as to the prosecutorial misconduct claims raised on appeal, so consider them in our review of trial counsel's assistance. We note, however, that we conclude below the prosecutor's actions

did not constitute misconduct, so the court did not abuse its discretion in overruling defense counsel's objection.

Ineffective Assistance. The appellant contends trial counsel was ineffective in not challenging two jurors for cause and in not properly preserving the evidentiary objection for our review.

A. Jurors. The appellant contends he was prejudiced because preemptory strikes were used to excuse two jurors that "could have been used to exclude other potential jurors had counsel moved to strike the pair for cause." This argument has already been rejected in *State v. Neuendorf*, 509 N.W.2d 743, 746-47 (Iowa 1993):

> In the absence of some factual showing that this circumstance resulted in a juror being seated who was not impartial, the existence of prejudice is entirely speculative. We believe it is too speculative to justify overturning the verdict of the jury on that basis alone.
>
> . . . .
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> We now choose to follow the pattern established in this very substantial number of jurisdictions. We hold that partiality of a juror may not be made the basis for reversal in instances in which that juror has been removed through exercise of a peremptory challenge. Any claim that the jury that did serve in the case was not impartial must be based on matters that appear of record. Prejudice will no longer be presumed from the fact that the defendant has been forced to waste a peremptory challenge.
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> Based on the standard that we now adopt, the showing made by defendant is insufficient to warrant a reversal based on juror prejudice.

The appellant has not claimed or shown that any of the jurors actually seated were biased. He has not demonstrated prejudice. This claim of ineffective assistance fails.

B. Evidentiary Objection. The appellant contends counsel was ineffective in not properly preserving the claim the court abused its discretion in overruling

his objection to the State's characterization of the sexual act between the appellant and his wife. He argues the term used amounted to prosecutorial misconduct because it was expressing a personal opinion and giving a legal opinion that "the jury almost assuredly relied upon" in convicting the appellant. He contends this was "egregious misconduct" that "surely compromised defendant's right to a fair trial."

To analyze this claim we first must consider whether the prosecutor was guilty of misconduct in the particulars identified by the appellant and whether the record shows prejudice. *See Graves*, 668 N.W.2d at 669. If the record reveals either element is lacking as a matter of law, we will affirm the conviction without preserving this claim for a later postconviction relief action. *See id.* at 670.

When we consider whether the prosecutor's use of the term "sexual assault" in two questions crossed the line marking what is acceptable conduct, we are guided by a review of two cases alleging prosecutorial misconduct. In *State v. Williams*, 334 N.W.2d 742, 744-45 (Iowa 1983), the prosecutor had made a number of comments that to us seem much more problematic in a misconduct analysis,[1] yet the supreme court did not find misconduct because the

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[1] The record included statements in which the prosecutor said defendant took the victim to a secluded area "in my opinion, in an attempt to avoid detection." He also said, "I also think it is clear that she was subjected to sexual abuse." At another point he said:

> One other thing: the judge will also instruct you on some lesser included offenses that are included in the principal charges of sexual abuse in the second degree and kidnapping. It's my opinion that you don't need to worry about those lesser included offenses, because the State has, in my opinion, proved beyond a reasonable doubt all of the elements necessary to establish both sexual abuse in the second degree and kidnapping in the first degree.

prosecutor's remarks were based on the record and did not personally vouch for the credibility of a witness. In contrast, the court determined the prosecutor crossed the line in *State v. TeBockhorst*, 305 N.W.2d 705, 709 (Iowa 1981) in creating evidence by argument and in expressing a personal belief in the defendant's guilt.[2]

We cannot agree with the appellant that the prosecutor's use of the term "sexual assault" in two questions constitutes misconduct. The term is a legitimate inference from the record evidence, and the prosecutor did not personally vouch for the credibility of the alleged victim or express a personal belief in the appellant's guilty by the use of the term.

Even if we were to find the use of the term constituted misconduct, we could not find a reasonable probability the use of the term "prejudiced, inflamed

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In commenting on defendant's testimony that he reached under his car seat to hide money rather than a knife at the time he was stopped by the police, the prosecutor noted the police testified only about finding a knife there. He added: "So it seems to me that the money didn't exist. The knife existed, and that's what Mr. Williams was attempting to do when he reached under the seat; to hide the knife." At another point the prosecutor discussed defendant's testimony that his physical contact with the victim was limited to an exchange of kisses. He said:

> I find that hard to believe. I find that very hard to believe. I find it hard to believe that after that opening he didn't do anything more. He testified he was rather sexually active. I find that story just a little bit hard to believe. I find it stretches my imagination.

Williams, 334 N.W.2d at 744.

[2] During final argument, the prosecutor told the jury he worked late at night during the trial in an effort to satisfy himself that the State's theory of the case on the arson charge was true. He described conversations with his wife on those occasions. Finally, he said these efforts were productive because he became convinced defendant was guilty of the charge. He said:

> I know that's how he did it. His story is as good as mine. That's the issue: did (the van) roll? Because if it rolled, all the guilt feelings and bad feelings I felt three days ago about this trial you're telling me I should feel right now, and I will . . . . but I am right. I am right.

TeBockhorst, 305 N.W.2d at 709.

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." *Graves*, 668 N.W.2d at 877.

> 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.

Id. The conduct was neither severe nor pervasive. Although it relates to the issue of whether the sex acts between the alleged victim and the appellant were consensual, it is merely a close synonym for the language of the criminal charge. Defense counsel's objection alerted the jury to the issue it was not evidence. The court instructed the jury that "statements, arguments, questions, and comments by the lawyers" were not evidence and were not for the jury's consideration or to be used as a basis for the verdict.

Having concluded the prosecutor's use of the term was not misconduct, we can affirm on this ineffective assistance claim without analyzing defense counsel's conduct or any resulting prejudice. *See id*.

We have examined the appellant's other arguments concerning the prosecutor's actions and conclude they either are without merit or do not apply to the circumstances before us.

AFFIRMED.