

IN THE COURT OF APPEALS OF IOWA

No. 9-274 / 08-1156
Filed May 29, 2009

BOBBY SIMMONS,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Linn County, Mitchell E. Turner,
Judge.

Bobby Simmons appeals from the district court's denial of his application
for postconviction relief following his conviction for robbery in the first degree.

AFFIRMED.

Anne K. Wilson of Allen, Vernon & Hoskins, P.L.C., Marion, for appellant.

Mark C. Smith, State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Cristen Douglass, Assistant Attorney
General, Harold Denton, County Attorney, and Todd Tripp, Assistant County
Attorney, for appellee.

Considered by Sackett, C.J., and Vogel and Miller, JJ.

MILLER, J.

Bobby Simmons appeals from the district court's denial of his application for postconviction relief following his conviction for robbery in the first degree. We affirm.

I. BACKGROUND FACTS AND PROCEEDINGS.

From the evidence presented at trial of the underlying criminal charge against Simmons, the jury could have found the following facts. Just after 2:00 a.m. on February 28, 2002, cab driver Daniel Miller was dispatched to the parking lot of Jim's Foods in Cedar Rapids. Two male passengers got into the cab. Miller was able to get a good look at both men as they got into the cab. The man sitting directly behind him was Bobby Simmons and the man in the back passenger's seat was David Bowles.

Throughout the evening and night Simmons and Bowles had been partying heavily, including drinking beer and using crack cocaine. After Simmons gave Miller directions where to drive, he began whispering with Bowles in the back seat. Having directed the cab to an isolated area, Simmons told Miller to slow down. Miller then felt an arm come from his left side and the jab of a knife into his right jaw. Miller was able to wedge his left hand between the blade of the knife and his throat and tried to pull the knife away. The blade of the knife embedded in Miller's hand, severing muscle, nerves, and tendons, and leaving two of his fingers on that hand permanently injured. He testified that the person sitting directly behind him was the primary assailant with the knife and that

person was Simmons. Miller also saw Bowles reach over the front seat and take his wallet that was lying next to him on the seat.

Miller accelerated and swerved when he heard the back car door open, causing both Simmons and Bowles to fall out of the cab and onto the pavement. Miller saw them run into the nearby woods. Miller called his dispatcher who in turn alerted the Cedar Rapids police. Responding within several minutes, police set up a “perimeter” around the wooded area. The police found blood and footprints in the snow at the bottom of a ravine. They then spotted Simmons running near the scene of the crime about one-half hour after the incident and stopped him.

Simmons initially lied to police, claiming he had been walking to pick up a pizza and denying he had been in a cab that evening. Simmons’s hands were covered in blood and the pattern on the soles of his shoes matched the pattern found at the scene of the robbery. Through later DNA testing, Simmons’s blood and the victim’s blood were both found on the knife. In both a photo lineup shortly after the robbery and at trial Miller identified Simmons as the one who was sitting directly behind him and wielding the knife.

On March 15, 2002, the State charged Simmons and Bowles with robbery in the first degree, in violation of Iowa Code sections 711.1 and 711.2 (2001). The trial court granted Bowles’s request to sever the trials. Simmons filed a notice that he intended to rely on the defense of intoxication. Simmons elected a jury trial. At trial he relied in part on the defense of intoxication. The jury found Simmons guilty as charged.

Simmons timely appealed his conviction, raising two claims of ineffective assistance of trial counsel. This court preserved these claims for a possible postconviction proceeding. *State v. Simmons*, No. 02-1745 (Iowa Ct. App. Feb. 11, 2004).

Simmons filed a pro-se application for postconviction relief on June 10, 2004, and obtained the appointment of counsel. His appointed counsel filed an amended postconviction application on July 14, 2006, raising a claim of newly discovered evidence and three claims of ineffective assistance of counsel. A hearing on the application was held. The district court heard testimony from Simmons and Bowles, as well as from their respective trial attorneys and the assistant county attorney who prosecuted both cases. The court filed a written ruling denying Simmons's postconviction application. In denying the application the court concluded the "new evidence" upon which Simmons relied did not meet the criteria to warrant a new trial, Simmons had not shown that trial counsel was ineffective, and there was no misconduct by the prosecutor during his closing argument. Simmons appeals the district court's denial of his postconviction application.

II. SCOPE AND STANDARDS OF REVIEW.

We typically review postconviction relief proceedings on error. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). When the applicant asserts a claim of constitutional nature, such as ineffective assistance of trial counsel, we evaluate the totality of the circumstances in a de novo review. *Id.*

III. MERITS.

A. Newly Discovered Evidence.

Simmons first claims the postconviction court erred in finding the new evidence he relied upon did not warrant a new trial. The new evidence he relies upon consists of an affidavit and letter, both allegedly written by Bowles, that exonerate Simmons as a knowing participant in the robbery.

Bowles was convicted in a separate trial on the theory he aided and abetted Simmons in the robbery. At his trial, Simmons testified in his own defense and claimed that Bowles alone committed the robbery without Simmons's knowledge or participation. On April 6, 2006, Bowles signed an affidavit that included the following language:

Bobby [Simmons] and I were together on the evening of February 27, 2002 at my house. When Bobby called a cab so that he could go home and borrow some money that I needed. I went with Bobby to Jim's Foods where the cab was to pick us up.

When the cab arrived, Bobby spoke to the drive[r] and told him where to go, and he got into the cab from the driver's side and slide over to the passenger[']s side in the back seat. I got in the cab behind the driver.

We went towards Bobby's house and where his girlfriend and some people I knew lived. At some point I pulled out a knife that I had in my pocket and grabbed the driver of the cab, pulling him back. I wanted the driver to stop and give me his money. Bobby grabbed for my arm to pull me away when the drive[r] hit his brakes fast and threw us into the seat. At that point Bobby jumped from the passenger's rear door. He had no idea of what I was doing because I had not suggested I was going to do such a stupid thing.

....

Later when I was arrested and taken to the police station, I answered the officer's questions. He was presenting things as if Bobby had been the one with the knife and had grabbed the driver. I just agreed to this and went along thinking it would help me.

Bobby had no indication that I was going to do what I did.

In a letter dated May 25, 2006, Bowles wrote to Simmons's sister. Professing his intention to "get off [his] chest" something he regretted, Bowles similarly exonerated Simmons in this letter.

Pursuant to section 822.2(4) (2003) a person may seek postconviction relief from his or her conviction if the person claims "[t]here exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." We use the same analysis to resolve a postconviction relief claim based on newly discovered evidence as we do a motion for new trial on the same ground. *Grissom v. State*, 572 N.W.2d 183, 184 (Iowa Ct. App. 1997). We have interpreted section 822.2(4) to require the postconviction relief applicant to establish four elements before a new trial will be granted. *Summage v. State*, 579 N.W.2d 821, 822 (Iowa 1998). The applicant must establish all of the following: (1) the evidence was discovered after judgment; (2) the evidence could not have been discovered earlier in the exercise of due diligence; (3) it is material to the issue, not merely cumulative or impeaching; and (4) it would probably change the result if a new trial is granted. *Summage*, 579 N.W.2d at 822; *Grissom*, 572 N.W.2d at 184. It thus follows that a new trial is not warranted if the applicant fails to prove any one of these four elements.

Exculpatory evidence of one co-defendant that was known to the defendant at the time of trial may not be considered newly discovered evidence so as to warrant the grant of a new trial.¹ *Jones v. Scurr*, 316 N.W.2d 905, 910

¹ This is true even if, as suggested by the postconviction court here, the co-defendant had earlier exercised his Fifth Amendment privilege against self-incrimination at the

(Iowa 1982). “The requirement that evidence be newly discovered is intended to bring finality to litigation.” *Id.*

[I]t is not unusual for one of two convicted accomplices to assume the entire fault and thus exculpate his co-defendant by the filing of a recanting affidavit. In a case such as the present one, the already convicted codefendants have nothing to lose by making statements that exculpate defendant. We find that such statements should not automatically be allowed to interfere with the finality of the underlying trial. Otherwise, the underlying trial would always be tentative unless all codefendants and alleged accomplices testified fully at that trial. The evidence here, although unavailable, was known to defendant, and cannot be considered newly discovered.

Id. (quotation and citations omitted).

Based upon our review of the record, it cannot be said that Simmons did not know of the evidence Bowles would later provide. As set forth above, Simmons testified in his own criminal trial and related to the jury at that time the same version of the facts that Bowles much later asserted, namely that Bowles was the one with the knife and that Simmons did not know Bowles was going to commit the crime. Accordingly, even if Simmons’s version of the facts were to be believed, this evidence was known to Simmons at the time of trial and thus cannot be considered newly discovered.² See *Scurr*, 316 N.W.2d at 910.

Furthermore, the testimony of convicted co-defendants has “lessened credibility” and their exonerating evidence is regarded with suspicion because “the witnesses have nothing to lose now by shouldering the blame for the crime.” *Scurr*, 316 N.W.2d at 910. Here, Bowles testified at the postconviction hearing

defendant’s criminal trial and thus the evidence was “unavailable” to the defendant at trial. *Jones v. State*, 479 N.W.2d 265, 274 (Iowa 1991); *Scurr*, 316 N.W.2d at 910.

² We reiterate that this is the case even assuming the evidence was “unavailable” to Simmons at the time of trial due to Bowles possible exercise of his Fifth Amendment privilege. See *Jones*, 479 N.W.2d at 274.

and claimed both the affidavit and letter as his own work. However, on cross-examination the prosecutor dictated a few phrases from the letter to Bowles for him to write on a furnished pad of paper and he was unable to coherently write the dictated phrases. Bowles testified this was because he used a dictionary when he wrote the letter. The postconviction court found Bowles's testimony to be "utterly NOT credible."

In addition, the prosecutor from Bowles's criminal trial testified at Simmons's postconviction hearing that Bowles was "more limited intellectually than" is Simmons. Bowles's trial counsel testified at the hearing that Bowles was "more likely to be led" than Simmons. The court also took into account the relevant fact that prior to the postconviction hearing Bowles and Simmons were both incarcerated at Anamosa Reformatory. See *Adcock v. State*, 528 N.W.2d 645, 647 (Iowa Ct. App. 1994). ("The court noted [co-defendant] did not decide to change his testimony until he met [the postconviction applicant] in the prison system.") These facts, in combination with the fact Bowles could not successfully write the phrases from the letter, led the postconviction court to make a specific finding that Bowles's testimony was not credible. We agree with the court's determination with regard to Bowles's testimony and find it to be completely lacking in credibility.

We conclude, as did the postconviction court, that Simmons did not prove either of the first two elements necessary to warrant a new trial under section 822.2(4).

Finally, to prevail on a postconviction relief claim based upon newly discovered evidence the applicant must also show that the admission of the evidence would likely change the result if a new trial were granted. *Id.* The postconviction court has wide discretion to “view the matter in its entirety to determine if a defendant had a fair criminal trial and if a new trial would likely produce a different result.” *Id.* We will not interfere with the court’s determination unless there is a clear abuse of discretion. *Id.*

Both in the photo line-up and at trial the cab driver positively identified Simmons as the one with the knife. Simmons’s hands were covered with blood and the pattern of his shoes matched the pattern found at the scene of the robbery. DNA evidence showed that both Simmons’s blood and the victim’s blood were on the knife. Simmons admitted at his criminal trial that when apprehended he initially lied to the police about walking to pick up a pizza and not being in a taxicab that evening. See *State v. Lasage*, 523 N.W.2d 617, 621 (Iowa Ct. App. 1994) (“An intentional untruth can be an indication of consciousness of guilt.”). He later changed this story and admitted to being in the cab with Bowles but claimed Bowles attacked the driver without his knowledge or participation. See *State v. Blair*, 347 N.W.2d 416, 422 (Iowa 1984) (finding a defendant’s inconsistent statements are probative circumstantial evidence from which a jury may infer guilt). Accordingly, based on the strong evidence of Simmons’s guilt we conclude the exonerating evidence from Bowles would not probably change the result if a new trial were granted.

We conclude Simmons did not meet his burden of proof on the first, second, or fourth elements required to warrant a new trial based on newly discovered evidence. The postconviction court did not err in denying Simmons's application on this ground.

B. Ineffective Assistance of Counsel.

Simmons next claims the postconviction court erred in not finding his trial counsel provided ineffective assistance of counsel. 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). To prove the first prong, failure of an essential duty, Simmons must overcome a 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). In order to prove prejudice, Simmons must show there is a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different. *Ledezma*, 626 N.W.2d at 143. An ineffective assistance claim may be disposed of if the defendant fails to prove either of the two prongs of such a claim. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997). Therefore, we need not determine whether counsel's performance is deficient before undertaking the prejudice determination. *State v. Wissing*, 528 N.W.2d 561, 564 (Iowa 1995).

Simmons first challenges counsel's strategy of using an intoxication defense at trial.³ He claims that because counsel questioned him regarding the

³ Simmons alleges he had only minimal contact with his attorney, and thus was not able to have adequate input on that strategy or express concerns about using intoxication as

events of the evening in question and he was clearly able to recall those events, offering an intoxication defense, that by reason of intoxication he was unable to form the specific intent necessary for robbery, conflicted with his clear ability to recall the events and likely caused jury confusion, to his prejudice.

Simmons's trial counsel testified at the postconviction hearing. She testified she felt it was her duty and responsibility to present the intoxication defense because of the extensive evidence that Simmons had consumed large quantities of alcohol and crack cocaine on the night in question. She further testified that because Simmons had been charged with a specific intent crime, she felt she would have been remiss if she did not raise intoxication as a defense because if successful such defense would eliminate the specific intent element of the charged crime. Trial counsel also stated that she did not believe that in this case the intoxication defense conflicted with Simmons's denying that he knew of Bowles's intent to rob Miller or participated in the robbery. She believed the intoxication defense would allow him to admit he was at the scene of the crime while denying he had any idea what Bowles was doing.

We, like the postconviction court, conclude that the intoxication defense did not conflict with the denial of knowledge and participation. We further conclude the decision to assert an intoxication defense was a strategic decision and was well within the range of normal competency. Additionally, based on the substantial evidence of guilt set forth above we conclude Simmons has failed to show a reasonable probability that but for the use of the intoxication defense the

a defense. He does not, however, claim that counsel was ineffective by not having more contact with him, that the postconviction court erred in rejecting such a claim, or that he opposed using intoxication as a defense.

result of the proceeding would have been different and has thus not shown he was prejudiced by counsel's alleged breach. The postconviction court did not err in denying this claim of ineffective assistance of counsel.

Simmons next claims the postconviction court erred in not finding his trial counsel was ineffective for failing to object to the use of a joint criminal conduct instruction to the jury. When a defendant makes an ineffective assistance of counsel claim alleging the attorney should have objected to a specific instruction, "the instruction complained of [must be] of such a nature that the resulting conviction violate[s] due process." *State v. Maxwell*, 743 N.W.2d 185, 196 (Iowa 2008) (quoting *State v. Hill*, 449 N.W.2d 626, 629 (Iowa 1989)).

The essential elements for imposing criminal liability on the basis of joint criminal conduct are:

1. Defendant must be acting in concert with another.
2. Defendant must knowingly be participating in a public offense.
3. A "different crime" must be committed by another participant in furtherance of defendant's offense.
4. The commission of the different crime must be reasonably foreseen.

State v. Countryman, 572 N.W.2d 553, 561 (Iowa 1997). Simmons contends his trial counsel should have objected to the submission of a joint criminal conduct instruction because the State failed to establish participation in any predicate public offense, or that he and Bowles were acting in concert with each other.

Assuming without deciding that Simmons's trial counsel should have objected to the challenged instruction, we do not believe Simmons has proved he was prejudiced by such a breach.

When the submission of a superfluous jury instruction does not give rise to a reasonable probability the outcome of the proceeding would have been different had counsel not erred, in the context of an ineffective-assistance-of-counsel claim, no prejudice results.

Maxwell, 743 N.W.2d at 197 (citing *State v. Tejada*, 677 N.W.2d 744, 755 (Iowa 2004)).

As we stated above, there was sufficient evidence to support the jury's verdict finding Simmons guilty of robbery in the first degree beyond a reasonable doubt.

[T]he giving of a joint criminal conduct instruction in instances in which the alleged multiple participants are either principals or aiders and abettors in the same crime does not require reversal if there is no opportunity for the defendant to have been found guilty based on anything other than his own conduct as a principal or an aider and abettor of the crime with which he is charged.

State v. Jackson, 587 N.W.2d 764, 766 (Iowa 1998) (citations omitted). Due to the very strong evidence against Simmons, there was no opportunity for him to be found guilty of first-degree robbery based on anything other than his own conduct.

Given the strong evidence of Simmons's guilt as set forth in detail above, and the negligible effect the joint criminal conduct jury instruction could have had on the verdict, we conclude there was no reasonable probability that, but for counsel's failure to object to the instruction the result of the proceeding would have been different. See *Maxwell*, 743 N.W.2d at 197 (finding that where the prosecution presents ample evidence of the defendant's guilt and the effect of the superfluous jury instruction is merely speculative, no prejudice results in an ineffective-assistance-of-counsel analysis); *State v. Tejada*, 677 N.W.2d 744,

755 (Iowa 2004) (same). Therefore, we conclude Simmons has not met his burden to establish he was prejudiced by counsel's alleged breach and thus has not proved his ineffective assistance claim. The postconviction court did not err in denying this claim of ineffective assistance.

Finally, Simmons claims the postconviction court erred in not finding his trial counsel ineffective for not objecting to statements made by the prosecution during closing arguments. He contends the challenged statements constituted prosecutorial misconduct and violated his constitutional right to due process of law as set forth in *State v. Graves*, 668 N.W.2d 860 (Iowa 2003).⁴ More specifically, he contends the prosecutor stated ten times in his closing argument that Simmons had lied.

The initial requirement for a due process claim based on prosecutorial misconduct is proof of misconduct. *Graves*, 668 N.W.2d at 869. It is "improper for a prosecutor to call the defendant a liar, to state the defendant is lying, or to make similar disparaging comments." *Id.* at 876. However, "a 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." *Id.* (internal quotation and citation omitted). It is not misconduct to argue that a defendant has lied, provided the evidence in the record sufficiently supports such a characterization. See *State v. Carey*, 709 N.W.2d 547, 556 (Iowa 2006).

⁴ Initially we note that the *Graves* decision was not decided until after the trial court proceedings in this case were concluded. Thus, Simmons's trial counsel did not have the benefit of the holdings in *Graves* while trying this case.

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?

Graves, 668 N.W.2d at 874-75.

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.

Carey, 709 N.W.2d at 556 (citation omitted). Applying the *Graves* factors set forth above, we agree with the postconviction court that the prosecutor's comments do not rise to the level of misconduct.

The prosecutor's closing argument here commented on the lie Simmons initially told police after his arrest and then repeated later that morning while in jail. As set forth above, after he was stopped and arrested near the scene of the robbery Simmons told the police he was walking to a local pizza place and he denied being in a cab at all that night. At his criminal trial Simmons changed his story and said he had been in the cab with Bowles but claimed that Bowles attacked the driver without his knowledge or participation. Due to his changed

story, by necessity he also admitted, both on direct examination and cross-examination, that he had lied to police. Thus, there was not just a legitimate inference from the evidence that Simmons had lied, there was direct evidence based on Simmons's own testimony that he had lied.

Further, Simmons relied, in part, on an intoxication defense. The prosecutor's closing argument drew attention to Simmons's lies to the police as evidence that if he could form the intent to deceive on the night of the robbery, he could also form the requisite specific intent to commit the robbery. Thus, because these comments were within the permissible bounds of closing argument based on Simmons's own testimony and his intoxication defense they did not amount to misconduct. We also note that only approximately four of the nearly twenty pages of closing argument from the prosecution mentioned anything about Simmons's lies and lying.

We conclude it was not misconduct for the prosecutor to state during closing argument that Simmons had lied because one could clearly find from the evidence that he had lied, the prosecutor's statements were related to specific evidence that tended to show Simmons had been untruthful and to his intoxication defense, and the statements were made in a professional manner that did not unfairly disparage Simmons. See *Graves*, 668 N.W.2d at 874-75. As set forth above, misconduct does not reside in the fact that the prosecution attempted to tarnish Simmons's credibility; such tactics are not only proper, but part of the prosecutor's duty, especially when the dispute rests upon two or more different versions of events in question. See *Carey*, 709 N.W.2d at 556.

Because we have determined the prosecutor's comments did not rise to the level of misconduct, we conclude Simmons's trial counsel did not breach an essential duty by not objecting to the statements. See *State v. Atwood*, 342 N.W.2d 474, 477 (Iowa 1984) (finding counsel not ineffective for failing to make questionable objection). Nor is there a reasonable probability the outcome of the trial would have been different if she had objected. Simmons has not met his burden to prove his trial counsel was ineffective for not making these objections and the district court did not err in denying this claim of ineffective assistance.

IV. CONCLUSION.

For the reasons set forth above, we conclude Simmons did not show that the exculpatory evidence he offered was "newly discovered" evidence or that its admission would probably change the result if a new trial were granted. We further conclude Simmons did not meet his burden to show that his trial counsel was ineffective or that the prosecutor engaged in misconduct. The postconviction court did not err in denying Simmons's application for postconviction relief.

AFFIRMED.