IN THE COURT OF APPEALS OF IOWA

No. 9-603 / 09-0100
Filed November 25, 2009

DENNIS K. PETERSEN,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Audubon County, Jeffrey L. Larson, Judge.

Appeal from the district court's order denying postconviction relief. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Gary Dickey Jr. of Dickey & Campbell Law Firm, P.L.C. and Edward W. Bull of Bull Law Office, P.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, and Francine O'Brien Andersen, County Attorney, for appellee.

Considered by Sackett, C.J., Vaitheswaran and Danilson, JJ.

SACKETT, C.J.

Dennis Petersen appeals from the district court order denying his application for postconviction relief. He contends the court erred (1) in not finding his trial counsel rendered ineffective assistance and (2) in not finding postconviction counsel ineffective for not claiming appellate counsel was ineffective in not preserving the issue of prosecutorial misconduct. We affirm in part, reverse in part, and remand.

BACKGROUND. Petersen was convicted, following a jury trial, of possession with intent to deliver more than five grams of methamphetamine while in possession of a firearm, going armed with intent, assault causing bodily injury, carrying weapons, and conspiracy to possess methamphetamine with intent to deliver.[1] His convictions were upheld on direct appeal, but his ineffective assistance claims were preserved for possible postconviction proceedings. *State v. Petersen*, No. 05-0757 (Iowa Ct. App. Sept. 7, 2006).

In September of 2007, Petersen filed an application for postconviction relief, claiming trial counsel was ineffective and listing ten alleged failures. In July of 2008, he filed a supplemental application, alleging two additional failures of trial counsel, alleged failures of appellate counsel concerning jury instructions, and allegations of prosecutorial misconduct. Following an evidentiary hearing on

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[1] Petersen was convicted of the following enumerated counts: Count I—possession with intent to deliver and/or manufacture methamphetamine, greater than five grams; Count II—going armed with intent/assault causing bodily injury; Count III—assault causing bodily injury; Count IV—carrying weapons; and Count V—conspiracy to manufacture and/or possess with intent to manufacture and/or deliver, methamphetamine.

the applications in October, the court denied the applications in its December 31 order. Petersen appeals.

SCOPE AND STANDARDS OF REVIEW. Postconviction relief proceedings are law actions generally reviewed for errors at law. Iowa R. App. P. 6.907 (2009); *Millam v. State*, 745 N.W.2d 719, 721 (Iowa 2008). Ineffective-assistance-of-counsel claims, however, are constitutional in nature and our review is de novo. *See Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). In order to prevail on a claim counsel was ineffective, the applicant must prove by a preponderance of the evidence, both that counsel failed to perform an essential duty and that the applicant was prejudiced. *State v. Williams*, 695 N.W.2d 23, 28-29 (Iowa 2005). Both elements, however, do not always need to be addressed because failure to prove either element is fatal to the claim. *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003). If the claim lacks prejudice, it can be decided on that ground alone without deciding whether the attorney performed deficiently. *Strickland v. Washington*, 466 U.S. 668, 697, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984); *State v. Artzer*, 609 N.W.2d 526, 531 (Iowa 2000). Prejudice is established by proof "that but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Heuser*, 661 N.W.2d 157, 166 (Iowa 2003); *see also Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698.

MERITS. ***Trial Counsel*****.** Petersen contends trial counsel was ineffective in several respects: (1) in not objecting to jury instructions that misstated the law concerning his justification defense, (2) in not pursuing the alternate fingerprint

theory to show someone else planted the drugs police found, (3) in not arguing the methamphetamine found in Petersen's truck was of a quality commonly found in rural communities, and (4) in not objecting to improper character evidence or a witness's invocation of her privilege against self-incrimination.

A. Justification defense jury instructions. Petersen contends Instruction 30, on assault causing bodily injury, lacked "the fourth essential element," that the State had the burden to prove Petersen was not justified. He also contends Instruction 34 incorrectly refers to "Instruction No. 30," when it should be Instruction 33.[2] As this is not a direct challenge to the instructions, but rather a claim counsel was ineffective with regard to the instructions on justification, our analysis follows the principles related to ineffective assistance cited above. In ineffective-assistance-of-counsel claims "the instruction[s] complained of [must be] of such a nature that the resulting conviction violate[s] due process." *State v. Hill*, 449 N.W.2d 626, 629 (Iowa 1989).

Instruction 30, listing three elements of assault causing bodily injury, was based on Iowa Criminal Jury Instruction 800.2 (2005), which contains the statutory elements set forth in Iowa Code sections 708.1-.2 (2003). Neither the uniform instruction nor the instruction given includes what Petersen calls "the fourth essential element," that the State must prove lack of justification. Appellate courts are reluctant to disapprove of uniform instructions. *State v.*

[2] Instruction 30 sets forth the elements of assault causing bodily injury. Instruction 33 defines justification and lists five elements the State might prove to show lack of justification. Instruction 34 explains the reasonable-person standard concerning "actual, real, imminent, or unavoidable" danger. Instructions 35 and 36 also incorrectly refer to Instruction 30, when they should refer to Instruction 33, but Petersen does not challenge these instructions.

Beets, 528 N.W.2d 521, 523 (Iowa 1995). Instruction 32[3] relates to Petersen's claim he acted with justification and includes the requirement: "The State must prove the defendant was not acting with justification." Instructions are to be read as whole, not in isolation. *Anderson v. Webster City Cmty. Sch. Dist.*, 620 N.W.2d 263, 268 (Iowa 2000). When a single jury instruction is challenged, it will be judged in context with all the other instructions. *State v. Stallings*, 541 N.W.2d 855, 857 (Iowa 1995). We conclude the district court's jury instructions numbers 30 and 32 correctly state the law when read together. *See State v. Uthe*, 542 N.W.2d 810, 815 (Iowa 1996) ("It is well settled that a trial court need not instruct in a particular way so long as the subject of the applicable law is correctly covered when all the instructions are read together.").

Concerning the internal cross-references in the jury instructions, we agree the references to Instruction 30 that are found in Instructions 34, 35, and 36 should be references to Instruction 33. Petersen argues this error "confuses or misleads the jury" to his prejudice. *See Anderson*, 620 N.W.2d at 268. He offers no evidence to support his conclusory claim. From our reading of all the jury instructions, we see little likelihood the jury was confused or misled by the internal cross-references. Trial counsel's testimony at the postconviction hearing concerning the cross-references that should be to Instruction 33, "then I suppose that's an error," does not affect our conclusion. Certainly we do not find a reasonable probability the result of the proceeding would have been different if trial counsel had brought the issue to the attention of the court. *See Strickland*,

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[3] Instruction 32 is uniform instruction 400.1.

466 U.S. at 693-94, 104 S. Ct. at 2068, 80 L. Ed. 2d at 697-98. Because Petersen has not demonstrated prejudice from trial counsel's alleged errors in not objecting to the jury instructions, and the instructions complained of do not render his convictions for violative of due process, his claim of ineffective assistance, as it relates to the jury instructions, fails. *See Graves*, 668 N.W.2d at 869. We need not address Petersen's arguments concerning how the postconviction court analyzed his claim because on our de novo review we determine counsel was not ineffective in not objecting to the jury instructions. We affirm that portion of the postconviction court's order denying relief as to the jury instructions claim. Accordingly, Petersen's convictions on Count II, going armed with intent/assault causing bodily injury, and Count III, assault causing bodily injury, are affirmed.

B. Evidentiary Claims. Petersen raises a number of claims concerning trial counsel's alleged failure to present evidence or to object to certain evidence and testimony. He contends the postconviction court erred in dismissing these claims and in concluding he suffered no prejudice as a result of the alleged errors.

1. Unidentified Fingerprint. Petersen contends the court erred in dismissing his claim trial counsel should have pursued the alternate fingerprint theory. The theory was that during the twenty to twenty-five minutes Petersen's truck was unlocked and unattended, someone planted the drugs found in it. He argues the jury was prevented "from asking themselves how a fingerprint that did not belong to either defendant got into that bag in the first place." At her

deposition and at the postconviction proceeding, trial counsel stated her recollection was that the fingerprint testing was not complete at time of trial, but had eliminated Petersen, his girlfriend, and his brothers. The trial court denied her motion to continue to await completion of the testing.

The postconviction court concluded there was no prejudice because one unidentified fingerprint, "does not create a reasonable probability sufficient to undermine confidence in the outcome," considering the methamphetamine found in two separate travel bags, the travel logs, and the matching drug-related items found in Petersen's home. The State argues that trial counsel pursued the "planted drugs" theory at trial by securing testimony the unidentified fingerprint did not match Petersen or his girlfriend and also suggesting the police might not have conducted a thorough investigation of fingerprints on items seized—in particular, the plastic baggies containing the drugs.

From our review of the record, we find trial counsel's performance, as it relates to the unidentified fingerprint, falls within the bounds of normal competence. *See Graves*, 668 N.W.2d at 881 (noting a "strong presumption" trial counsel's conduct falls within "the wide range of reasonable professional assistance" as measured by "prevailing professional norms" (citations omitted)). Counsel, therefore, did not render ineffective assistance in this area.

2. "Ice Meth." Petersen contends trial counsel was ineffective in not making an argument to counter the testimony concerning "ice meth" and the inference it comes from out of state because it is not available locally. He argues the tested purity of the methamphetamine seized was much lower than "ice

meth" and was readily available in the area where his family resides, so it could have been planted by someone who obtained it locally; it did not have to come from out of state.

The State contends there is no prejudice because the purity or availability of the drugs "planted" in the truck does not affect the defense theory they were planted. It argues that trial counsel thoroughly cross-examined the State's witnesses concerning the possibility the drugs could have been planted, which was a reasonable trial strategy and should not be second-guessed. *See Van Hoff v. State*, 447 N.W.2d 665, 670 (Iowa Ct. App. 1989) (stating we will not second-guess a reasonable strategy used by trial counsel).

We cannot agree trial counsel's actions in not objecting to the repeated reference to "ice" methamphetamine was based on any reasonable trial strategy. By allowing repeated and improper references to the methamphetamine found in Petersen's truck as "ice," which was not readily available locally but easily obtained in California, where Petersen had just been, trial counsel did not effectively present Petersen's defense the drugs were planted and did not adequately counter the inference the drugs must have been brought from out-of-state by Petersen. Trial counsel did not rebut the ice meth references by showing the methamphetamine seized was of a much lower quality and thus not necessarily from California. We conclude trial counsel "failed to perform an essential duty." *State v. Tejeda*, 677 N.W.2d 744, 754 (Iowa 2004). Considering the totality of the evidence, the factual findings that would have been affected by counsel's performance, and the pervasiveness of the "ice" testimony, our

confidence in the outcome on Counts I and V is undermined by counsel's conduct. *See Graves*, 668 N.W.2d at 883.

3. Character Evidence and Expert Testimony. Petersen contends the testimony about pornography found on his cell phone and home computer was not relevant and, even if relevant, was unfairly prejudicial because it was likely to inflame the jurors' passions and cause them to see him as "a morally bankrupt pervert" instead of an innocent man. *See* Iowa Rs. Evid. 5.404(b), 5.403. He argues counsel was ineffective in not objecting to the testimony or seeking to have it excluded. He also contends the officer's opinion testimony tending to link pornography with heightened sexual activity of methamphetamine users should not have been admitted under rules 5.702 and 5.403 and counsel should have objected to the testimony. The postconviction court determined there was no prejudice.

The State argues trial counsel "made a reasonable strategic decision to combat this testimony through cross-examination and closing arguments rather than by making an objection that would 'highlight' it for the jury." It also argues there was ample evidence concerning Petersen's character including violence toward his family and use of "colorful" language. Therefore, the evidence that he also had a graphic photo on his cell phone "was not the type of evidence likely to rouse the jury into 'overmastering hostility.'" *See State v. Zeliadt*, 541 N.W.2d 558, 562 (Iowa Ct. App. 1995).

"Miscalculated trial strategies and mere mistakes in judgment normally do not rise to the level of ineffective assistance of counsel." *Ledezma*, 626 N.W.2d

at 143. "The fact that a particular decision was made for tactical reasons does not, however, automatically immunize the decision from a Sixth Amendment challenge." *Graves*, 668 N.W.2d at 881. While we can understand counsel's desire not to highlight the challenged testimony for the jury, counsel did not take advantage of opportunities to address this issue outside the presence of the jury and to have the court apply the balancing test in rule 5.403. We agree with the State there was ample evidence concerning Petersen's violent character and his use of "colorful" language, but neither of those characteristics would be likely to arouse the passion of a jury like possession of pornography. Although the evidence there was pornography on Petersen's computer and cell phone arguably is relevant, the logical link that could make such evidence relevant was supplied by the officer's testimony about heightened sexual interest and activity in users of methamphetamine. Counsel should have challenged the testimony as improper expert opinion testimony or improper scientific evidence. *See* Iowa R. Crim. P. 5.702. We conclude trial counsel failed in an essential duty in not challenging the officer's testimony and the evidence concerning Petersen's possession of pornography.

Evidence, though relevant, "may be excluded if the probative value is substantially outweighed by the danger of unfair prejudice." Iowa R. Crim. P. 5.403. Unfair prejudice is an "an undue tendency to suggest decisions on an improper basis, commonly though not necessarily, an emotional one." *State v. Plaster*, 424 N.W.2d 226, 231 (Iowa 1988). Our confidence in the outcome on

Counts I and V is undermined by the admission of the challenged testimony and evidence. *See Graves*, 668 N.W.2d at 883.

4. Witness's Invocation of Fifth Amendment Privilege / Prosecutorial Misconduct. Petersen contends the postconviction court erred in not finding he was prejudiced by his girlfriend's repeated invocation of her Fifth Amendment privilege not to testify against herself and the prosecutorial misconduct involved in asking questions that would call for such a response. He argues trial counsel knew or should have known she would exercise her right not to testify against herself from her "pleading the fifth" to such questions in deposition. Trial counsel did not object and did not request a curative jury instruction.

Depending on the circumstances, our supreme court has considered it improper for a prosecutor to ask questions that would cause a witness to invoke the privilege against self-incrimination when the prosecutor knew or had reason to know the witness would invoke that privilege. *See State v. Allen*, 224 N.W.2d 237, 240 (Iowa 1974) ("When an alleged accomplice invokes the privilege in the presence of the jury, prejudice arises from the human tendency to treat the claim of privilege as a confession of crime, creating an adverse inference which an accused is powerless to combat by cross-examination."); *accord State v. Whitfield*, 212 N.W.2d 402, 408 (Iowa 1973). In her deposition, trial counsel testified she "strategically chose not to call more attention to that testimony" by objecting. At the postconviction hearing counsel further testified, "I wasn't entirely certain that I had any right to get her to testify any differently." But she felt, "It only heightened the allegations against my client."

We conclude counsel's performance here was "outside the range of normal competency." *See Graves*, 668 N.W.2d at 881. When we look at the likely effect on a jury of a codefendant repeatedly exercising her privilege against self-incrimination, "the probability of a different result is sufficient to undermine confidence in the outcome." *Id.* (citation and internal quotation omitted).

From our review of the record, we conclude Petersen suffered prejudice as a result of counsel's performance concerning the ice meth testimony, the evidence and testimony concerning Petersen's possession of pornography, and his codefendant's repeated invocation of her right against self-incrimination. Accordingly, the postconviction court erred in dismissing these claims, in concluding Petersen did not suffer prejudice from counsel's performance in these areas, and in denying relief. We therefore reverse that portion of the postconviction court's order denying relief on these claims, and remand for new trial on Counts I and V.[4] Because of our resolution of these claims concerning trial counsel, we need not address Petersen's claim that postconviction counsel was ineffective.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

[4] Count IV—carrying weapons is not challenged on appeal. Nothing in our decision should be construed as precluding use of evidence of Peterson's possession of weapons to enhance any convictions on drug-related charges. *See* Iowa Code § 124.401.