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CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CRAIG REUTER, Petitioner, v. JOHN MATHES, Warden, Respondent.	* * * * * * * * * * *	CIVIL NO. 4-98-CV-90255 MEMORANDUM OPINION, RULING, AND ORDER DENYING APPLICATION FOR WRIT OF HABEAS CORPUS

On April 28, 1994, a jury sitting in the Iowa District Court for Black Hawk County found petitioner, Craig Reuter, guilty of first degree arson. The Iowa Court of Appeals affirmed the conviction. *State v. Reuter*, No. 5-367/94-0934 (Iowa Ct. App. Sep. 22, 1995). The Iowa District Court for Black Hawk County denied Reuter's application for postconviction relief, and the Iowa Supreme Court dismissed the appeal as frivolous. *Reuter v. State*, No. 96-2264 (Iowa Dec. 19, 1997). Reuter brings an application for writ of habeas corpus, pursuant to 28 U.S.C.A. § 2254 (West 1994 & Supp. 1999), raising six grounds for relief.

I.

Reuter argues that the record contains insufficient evidence to support his conviction. Arson is defined in Iowa Code § 712.1 (1993). First degree arson occurs when "the property which the defendant intends to destroy or damage, or which the defendant knowingly endangers, is property in which the presence of one or more persons can be reasonably anticipated...." *Id.* § 712.2. The Iowa Court of Appeals found sufficient evidence to support the conviction. *Reuter*, No. 5-367/94-0934, at *2-5.

The applicable standard of review is contained in 28 U.S.C.A. § 2254(d)(1) and (2) (West

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Supp. 1999). *Thiel v. Schuetzle*, 200 F.3d 1120, 1122 (8th Cir. 1999). The facts stated by the Iowa Court of Appeals, which this court presumes are correct, *see* 28 U.S.C.A. § 2254(e)(1), are sufficient to support the conviction. This claim is without merit.

II.

Reuter argues that the trial court erred in not granting a new trial because of the prosecutor's improper statements at summation. Reuter did not present any defense at trial. At summation, the prosecutor made the statement, "uncontroverted physical evidence." Trial Transcipt, pp. 197-99. Reuter contends the comment was improper and deprived him of a fair trial.

"Prosecutorial misconduct is grounds for a mistrial where (1) the prosecutor's remarks are in fact improper, and (2) the remarks prejudicially affect the defendant's substantial rights so as to deprive the defendant of a fair trial." *United States v. O'Dell*, No. 99-2460, 2000 WL 228357, at *3 (8th Cir. Feb. 29, 2000) (citing *United States v. Hernandez*, 779 F.2d 456, 458 (8th Cir.1985)). "[A]mbiguous comments such as references to 'uncontradicted testimony' may constitute error when the statements either (1) manifest the prosecutor's intention to call attention to the defendant's failure to testify, or (2) are such that the jury would naturally and necessarily take them as a comment on the defendant's failure to testify." *United States v. Durant*, 730 F.2d 1180, 1184 (8th Cir. 1984).

The facts of *Durant* are similar to this case, and there the court rejected the same argument that Reuter makes. *Id.* Reuter attempts to distinguish *Durant* on the ground that the *Durant* court analyzed the context in which the comments were made, while here there is no record from which to view context. He urges this court to adopt a rule presuming impropriety in

such circumstances. Reuter's argument misplaces the weight of the presumption. This court's review is in the context of a habeas application, and the statute is clear where the presumptive force lies—in this case, with the respondent. *See* 28 U.S.C.A. § 2254(d)(1), (2), (e)(1), (2). Reuter, therefore, must convince the court that his challenge meets the *Durant* standard.

The prosecutor's comment was not improper. Aside from being an isolated comment, it does not manifest any intention to call attention to the defendant's failure to testify. A jury would not naturally and necessarily take the comment as one concerning Reuter's failure to testify. Reuter's isolated attention to the word "uncontroverted" ignores the presence of the other two words in the comment, "physical evidence." It is plausible and probable that the comment was "intended to address [Reuter's] failure to...present evidence...." *United States v. Carl*, 978 F.2d 450 , 453 (8th Cir. 1992); *see United States v. Singer*, 732 F.2d 631, 637-38 (8th Cir. 1984); *State v. Bishop*, 387 N.W.2d 554, 562-64 (Iowa 1986). This claim is without merit.

III.

Reuter argues that the trial court erred in admitting evidence over his chain of custody objection. This is a challenge to Iowa's evidentiary rules concerning proper foundation. The Iowa Court of Appeals held that a proper foundation had been laid. *Reuter*, No. 5-367/94-0934, at *6-8. That ruling is binding on this court. *Knox v. State of Iowa*, 131 F.3d 1278, 1281 (8th Cir. 1997). This claim is without merit.

IV.

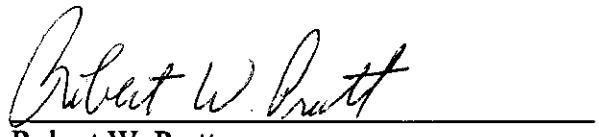
Reuter raises three claims of ineffective assistance of trial counsel. None of the claims were raised on direct appeal. The issues were raised on postconviction review, but the Iowa District Court denied relief. The Iowa Supreme Court rejected the appeal as frivolous. *Reuter*,

No. 96-2264. In the appeal, Reuter did not raise ineffective assistance of appellate counsel as cause for his failure to raise the three issues on direct appeal. If the Iowa Supreme Court had not found the appeal frivolous, it would have found the claims procedurally barred. *Wyldes v. Hundley*, 69 F.3d 247, 252-54 (8th Cir. 1995). Petitioner cannot show cause to overcome the procedural bar.

V.

Reuter's application for writ of habeas corpus is **DENIED**.

Dated this 20th day of March, 2000.



Robert W. Pratt
U.S. District Judge