IN THE COURT OF APPEALS OF IOWA

No. 1-743 / 10-1812
Filed December 7, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOHN ROBERT LINDSEY,
Defendant-Appellant.

Appeal from the Iowa District Court for Poweshiek County, Joel D. Yates, Judge.

Defendant appeals from his conviction and sentence alleging his trial counsel rendered ineffective assistance. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Vidhya K. Reddy, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon Hall, Assistant Attorney General, Becky Petig, County Attorney, and Michael W. Mahaffey, former County Attorney, for appellee.

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

SACKETT, C.J.

John Robert Lindsey appeals from his conviction and sentence on four counts of sexual abuse in the second degree, class B felonies, in violation of Iowa Code sections 709.1(3) and 709.3(2) (2009). Lindsey contends his trial attorney was ineffective when he failed to object when the prosecutor (1) personally vouched for the credibility of the victim, (2) encouraged the jury to infer guilt when Lindsey asserted his Fifth Amendment right to silence, and (3) made inflammatory and prejudicial statements about him which diverted the jury from a neutral consideration of the evidence and the law. Lindsey contends the prosecutor's misconduct denied him due process and a fair trial. We affirm.

I. BACKGROUND AND PROCEDINGS. From July 2009 to March 2010, Lindsey resided with his then girlfriend and her three sons, including the victim, ten-year-old K.B. The relationship between Lindsey and K.B.'s mother terminated in March of 2010, and Lindsey moved out. On April 14, 2010, K.B. told his mother that Lindsey had raped him four times while Lindsey lived in their home.

K.B.'s mother took him to the Child Protection Center where he submitted to a medical examination and videotaped interview, which was not under oath. The medical examination did not produce any physical evidence of sexual abuse. In the interview, K.B. alleged Lindsey held him down on his mother's bed and anally penetrated him with Lindsey's penis on four occasions; two of the incidents were before Christmas and two were after Christmas. K.B. said the incidents all happened in his mother's bedroom when his mother was out of the house. K.B.

said he screamed as loud as he could for the entire duration of all the rapes. He said his two brothers were in the house during the incidents, but no one heard him because they were playing video games and listening to loud music. He said Lindsey also closed the floor vent in his mother's bedroom to make it more difficult for anyone downstairs to hear. K.B. admitted he did not tell anyone about the abuse until after Lindsey moved out of the house because Lindsey had threatened K.B. that he and his brothers would be taken away from their mother if K.B. told.

On June 21, 2010, the State charged Lindsey with four counts of sexual abuse in the second degree. The charges alleged that Lindsey on four unspecified occasions in December of 2009 or January of 2010 committed a sex act with K.B., a child under the age of twelve years.

K.B. was deposed under oath prior to trial. During the deposition, K.B. initially testified there were four rapes, but later said during the third rape "we were not raping." He said during that incident Lindsey showed him a pornographic movie, but there was no sexual contact. He said that the rape part happened the first, second, and fourth times, so there were actually three rapes not four. He also asserted he told his mother he had been raped three times, not four.

During a pre-trial conference, the parties stipulated that the videotaped interview of K.B. at the Child Protection Center and the transcript of his deposition could be admitted at trial. K.B. also testified at trial outside the presence of the defendant through closed-circuit television.

At trial K.B. testified Lindsey anally raped him three times. He said during one of these incidents Lindsey put his mouth on K.B.'s penis. K.B. also said there was a separate instance where Lindsey showed him a pornographic video, but there was no sexual contact during that particular incident. During trial K.B. acknowledged he had told his mother and the social worker that he had been raped four times.

At his deposition and at trial K.B. said during one instance his younger brother knocked on the bedroom door asking what was going on. K.B. said Lindsey answered the door and told his brother they were just lying on the bed. K.B.'s younger brother could not corroborate this testimony.

At trial K.B.'s mother testified K.B. told her Lindsey had raped him four times. She stated she found three sexually explicit videos in her bedroom after Lindsey left. She denied ever showing K.B. any sexually explicit or pornographic materials. She said she had been in counseling nearly all her life and K.B. had been seeing a remedial counselor for three years.

Poweshiek County police officer, Steve Kivi, testified he investigated the allegations of sexual abuse by K.B. He said K.B. seemed confident he had been raped at least four times. Kivi also testified he interviewed Lindsey who strongly denied any guilt.

The case was submitted to the jury, and on September 15, 2010, the jury returned a guilty verdict on all four counts. On November 1, 2010, the court sentenced Lindsey to an indeterminate term of imprisonment not to exceed twenty-five years on each count. The court ordered counts one and two be

served concurrently, counts three and four be served concurrently, and counts one and two be served consecutively with counts three and four for a maximum term of incarceration of fifty years. Lindsey was ordered to serve the 70% mandatory minimum sentence as provided in Iowa Code section 902.12, reimburse attorney fees in an amount not to exceed $3600, and pay court costs. Lindsey must successfully complete the sexual offender treatment program, register as a sexual offender, pay the section 692A civil penalty, and submit a DNA sample for profiling. The court entered a no contact order to protect the victim and his immediate family for a period of five years, and also imposed the section 903B.1 lifetime supervision requirement.

Lindsey appeals claiming his trial counsel rendered ineffective assistance when counsel failed to object to certain statements made by the prosecutor during opening and closing statements. Specifically he complains the prosecutor vouched for the credibility of the victim, K.B.; encouraged the jury to infer guilt from his silence; and made inflammatory and prejudicial statements disparaging him, which diverted the jury away from a neutral consideration of the evidence and the law.

II. INEFFECTIVE ASSISTANCE OF COUNSEL. Ineffective-assistance-of-counsel claims are constitutional in nature, and are therefore reviewed de novo. *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008). In order to prove his trial counsel was ineffective, Lindsey must demonstrate 1) counsel failed to perform an essential duty, and 2) he suffered prejudice as a result. *King v. State*, 797 N.W.2d 565, 571 (Iowa 2011). "Miscalculated trial strategies and

mere mistakes in judgment normally do not rise to the level of ineffective assistance of counsel," *Ledezma v. State*, 626 N.W.2d 134, 143 (Iowa 2001), and we presume counsel's representation "fell within the wide range of reasonable professional assistance." *State v. Graves*, 668 N.W.2d 860, 881 (Iowa 2003). To demonstrate prejudice, Lindsey must prove, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Carey*, 709 N.W.2d 547, 559 (Iowa 2006). A reasonable probability means a probability "sufficient to undermine confidence in the outcome." *Bowman v. State*, 710 N.W.2d 200, 206 (Iowa 2006).

Generally, ineffective-assistance-of-counsel claims are preserved for postconviction relief actions to provide the defendant an evidentiary hearing in order to fully develop the record. *Graves*, 668 N.W.2d at 869. An evidentiary hearing also allows counsel an opportunity to explain the conduct. *State v. Slayton*, 417 N.W.2d 432, 436 (Iowa 1987). However, we may address the claim on direct appeal if the record is adequate. *State v. Fountain*, 786 N.W.2d 260, 263 (Iowa 2010). If the record on appeal shows the defendant cannot prevail on his claim as a matter of law, we will affirm the conviction without preserving the claim. *Graves*, 668 N.W.2d at 869. If the record establishes both elements as a matter of law, we will reverse the conviction and remand for a new trial. *Id.* We find the record sufficient in this case to address Lindsey's claims.

III. BREACH OF A DUTY: PROSECUTORIAL MISCONDUCT. Lindsey claims counsel failed to perform an essential duty when counsel failed to

object to prosecutorial misconduct that denied him a fair trial. In order to prove prosecutorial misconduct, Lindsey must prove there was misconduct and the misconduct resulted in prejudice to such an extent to deny him a fair trial. *Id.* "It is the prejudice resulting from misconduct, not the misconduct itself, that entitles a defendant to a new trial." *Id.* Several factors are considered when determining whether prejudice resulted from the misconduct. The factors include:

> (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. (internal citations omitted).

Lindsey claims his trial counsel should have objected when the prosecutor (1) personally vouched for the credibility of the victim, K.B., (2) made statements inferring guilt from his Fifth Amendment right to silence, and (3) made inflammatory and prejudicial statements disparaging him.

A. Vouching for the Credibility of a Witness. First, Lindsey complains that during opening and closing arguments the prosecutor made statements vouching for the credibility of K.B. During opening arguments, the prosecutor stated, "The incidents that are alleged to have occurred, *and I believe did occur*, occurred when K.B. was 10 years of age." (Emphasis added.) The prosecutor then went on to discuss the anticipated testimony of each of the State's witnesses. Then near the end of his opening statement the prosecutor informed the jury that because of the age of K.B., he may not be able to remember things the same way an adult would. He stated,

> At the heart of the matter, *I think [K.B.'s] testimony is going to hold* up because the essence, the very serious essence of what he says has been there from the very beginning when he first said something to his mother about this.

(Emphasis added.) After the conclusion of all evidence, the prosecutor made the following additional argument during closing arguments:

> And then you have the testimony of Officer Kivi and . . . one of the things we did find out if there were some pornographic videos that were in the house. And you heard the explanation from [K.B.] as to what those were; *and it didn't appear to me, I don't know if it appears to you*, that this was a ten-year old that was real conversive with these types of things and had sat around and seen hard core pornography before.

(Emphasis added.)

While the credibility of witnesses is a proper subject for discussion during argument, a prosecutor is precluded from using his or her argument to vouch personally for a witness's credibility. *See State v. Martens*, 521 N.W.2d 768, 772 (Iowa Ct. App. 1994). When a prosecutor vouches for the credibility of a witness, it may jeopardize the defendant's right to be judged solely on the evidence presented at trial because it conveys to the jury that the prosecution knows of evidence that supports the charges but is outside the record. *Id.* There is also the potential that the jury will trust the judgment of the prosecutor rather than their own view of the evidence because the prosecutor carries the imprimatur of the government. *Id*. However, not all personalized remarks are prohibited; only those that do not appear to be based on evidence presented at trial. *State v. Williams*, 334 N.W.2d 742, 745 (Iowa 1983).

The State disagrees with Lindsey's argument that these statements interjected the prosecutor's personal opinion as to K.B.'s credibility. While the

statement "I believe did occur" standing alone reflects a personal opinion, the State contends the statement was made in the context of outlining the State's evidence. The State further argues the statement "I think his testimony is going to hold up" is simply alerting the jury that they will hear some minor differences in K.B.'s allegations, but that the substance will remain the same. Finally, the State claims the statement made by the prosecutor in closing arguments, "it did not appear to me, I don't know if it appears to you" was simply an un-artful way of telling the jury to consider K.B.'s demeanor and language when evaluating his credibility.

The State argues that when the statements are viewed in context, none of them insinuate the prosecutor knows of evidence that supports the charges that was not in the trial record. We agree. While the prosecutor's use of the word "I" was perhaps unfortunate, in this case the statements made did not insinuate to the jury that his opinion was based on non-record facts. *See id.* Each remark was related to evidence the jury would hear or did hear. Thus, we cannot conclude that these statements amount to prosecutorial misconduct.

B. Commenting on Defendant's Right to Remain Silent. Next, Lindsey alleges the prosecutor committed misconduct by commenting on his assertion of his right to remain silent. During closing arguments, Lindsey's attorney drew the jury's attention to what he called a very important piece of evidence. This evidence was Officer Kivi's testimony where he stated during his interview with Lindsey that Lindsey strongly "denied any and all involvement with any crime of this nature or type with this child." Lindsey's counsel went further to

say that because Lindsey did not testify at trial, Officer Kivi's testimony regarding what Lindsey said in the police interview, and his not-guilty plea, were Lindsey's testimony to the jury that "I did not do this. I was not involved in this crime. I am not guilty."

During rebuttal argument the prosecutor responded,

> Mr. Lindsey says to Deputy Kivi "I didn't do this." *That's the extent of his statement.* "I didn't do it. Prove it. Prove it. I don't have to prove anything. You have to prove something. Prove it."
>
> And he's right. We do have to prove it.

(Emphasis added.) Lindsey contends this comment indirectly commented on his Fifth Amendment right to silence by emphasizing that he denied guilt, but provided no further statement or explanation. Lindsey asserts these comments encouraged the jury to draw a negative inference from the silence by suggesting the denial of guilt was not an assertion of innocence, but an attempt to take advantage of the State's burden of proof.

We note the United States Supreme Court announced in *Griffin v. California*, 380 U.S. 609, 615, 805 S. Ct. 1229, 1233, 14 L. Ed. 2d, 106, 110 (1965), a prosecutor may not comment on a defendant's failure to testify because such comments violate the self-incrimination clause of the Fifth Amendment. Our courts have interpreted *Griffin* to "prohibit the prosecution from using, directly or indirectly, silence of an accused." *State v. Taylor*, 336 N.W.2d 721, 727 (Iowa 1983). This prohibition "is violated if the language used by the prosecutor, in context, would 'naturally and necessarily' be understood by a jury to be a comment on the failure of the accused to testify." *Id*. (citing *United States v. Harris*, 627 F.2d 474, 476 (D.C. Cir. 1980)). Our courts will not find a violation

when an equally plausible explanation exists for the comments. *Van Hoff v. State*, 447 N.W.2d 665, 675 (Iowa Ct. App. 1989).

The State agrees that a prosecutor may not directly or indirectly comment on a defendant's failure to testify, but it contends in this case the jury would not have "necessarily" understood the statement to be a comment on Lindsey's failure to testify. We agree. The statement when taken in context accurately describes the State's burden of proof. In addition, we find the comment was a fair response to defense counsel's closing argument where he drew the jury's attention to the fact Lindsey did not testify at trial, the importance of Lindsey's statement to Officer Kivi, and his not-guilty plea. *Brewer v. State*, 444 N.W.2d 77, 84 (Iowa 1989). We do not find the prosecutor committed misconduct by making these statements.

C. Making Inflammatory and Prejudicial Statements. Finally, Lindsey contends the prosecutor improperly made statements that were likely to inflame the jury and appeal to their emotions rather than the objective consideration of evidence. The prosecutor, in rebuttal argument after making the above comment on Lindsey's denial of guilt, stated,

> And he's right. We do have to prove it. And by the way, your main witness is a ten-year-old boy who has some problems speaking, has some developmental disabilities; and is he really—is he really going to say what happened to him on those nights in December [and] in January of 2009, 2010? Is he really going to do that? Will he do it once? Will he do it twice? Will he do it three times? Will he do it four times? Will he do it five times?
>
> The answer is yes. You can bet on the fact that he's not going to do that. *You can bet on the fact that this never sees the light of day, that it stays under a rock*, but it didn't.
>
> Yesterday [defense counsel] asked you about courage, and he asked you a question about whether you felt that you had

> courage. I looked up the definition of courage at noontime today—and this is a paraphrase—but it says "The ability to stand up to something that you're afraid of and" basically do something about it. That is what courage is.
>
> Well, I'm going to submit to you, ladies and gentlemen of the jury, that *[K.B.] has exhibited courage in this case*; and because of his courage and because of what we have been able to show you, what happened is now in the light of day. And the question is what do you do with it?
>
> And the answer is you do justice based on the facts. You do justice and you reward the facts that have been presented in this case—not reward them—you follow the facts presented in this case. You take into consideration instead of saying there's no explanation for why he would say these things as many times as he did, there's no explanation; but there is one explanation that makes sense. And that is that it is the truth, that what he has told you is the truth.
>
> What is true in this case? What is true? What is true is not to lie. What is true is to have the courage to say what happened, not once, not twice, not three times, not four times, but five times. *And if [K.B.] had the courage to do that, then I ask you to do justice for him and find that man over there guilty*.

(Emphasis added.)

Lindsey contends the statements highlighted above suggest to the jury that he was betting on the case never "see[ing] the light of day" and on K.B. not having the courage or the ability to testify. These statements, Lindsay asserts, improperly urged the jurors to decide the case on something other than the evidence. Lindsey states the argument asks the jury to decide the case based on K.B.'s courage to testify on multiple occasions, which was not an issue in the case.

The State disagrees that the statements were inflammatory or intended to divert the jury's attention away from the evidence. The State asserts the prosecutor was reviewing the evidence heard by the jury by pointing out that K.B. told his story five times despite his developmental disabilities and communication

problems. This argument, the State contends, was a fair response to defense counsel's earlier challenge to K.B.'s credibility. In addition, the State claims the prosecutor repeatedly asked the jury to focus on the facts presented in order to do justice in the case.

A prosecutor is not an advocate in the normal meaning of the word. *Graves*, 668 N.W.2d at 870. A prosecutor's primary objective should be to see that justice is done, not to obtain a conviction. *Id.* The prosecutor is entitled to some latitude during closing argument, and "may draw conclusions and argue permissible inferences which reasonably flow from the evidence presented." *Carey*, 709 N.W.2d at 554.

> [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.

Id. at 556 (internal citations omitted). The prosecutor is not allowed to suggest the jury decide the case on any ground other than the weight of the evidence, and may not make inflammatory or prejudicial statements about the defendant. *State v. Musser*, 721 N.W.2d 734, 754 (Iowa 2006). In deciding whether these comments amount to misconduct, we must answer the question, "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.

We find in this case that the statements were made in a professional manner, did not unfairly disparage Lindsey, or cause the jury to decide the case on emotion rather than the evidence presented. We find the comments were made to boost the credibility of K.B. by pointing out the fact he told his story on five occasions despite his developmental and speech difficulties. The prosecutor did not use evidence outside the record in order to accomplish this goal, and did not improperly incite the passions of the jury. *Carey*, 709 N.W.2d at 556. We again find no prosecutorial misconduct on this ground.

D. Prejudice. Because we find no misconduct in any of the statements Lindsey asserts were improper, we need not address the second prong of prosecutorial misconduct, prejudice. *Graves*, 668 N.W.2d at 869. In addition, because we find no prosecutorial misconduct in this case, Lindsay has failed to demonstrate his trial counsel failed to perform an essential duty as required to prove an ineffective-assistance-of-counsel claim. *Id.* at 870.

AFFIRMED.