IN THE COURT OF APPEALS OF IOWA

No. 1-859 / 11-0239
Filed December 7, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BOBBIE JEAN BLAISE,
Defendant-Appellant.

Appeal from the Iowa District Court for Lee County, Gary R. Noneman, District Associate Judge.

Bobbie Blaise appeals the judgment and sentence imposed upon her convictions for four counts of purchasing more than 7500 milligrams of pseudoephedrine in a thirty-day time period. **AFFIRMED IN PART; SENTENCE VACATED IN PART.**

Mark C. Smith, State Appellate Defender, and Patricia Reynolds, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, Michael P. Short, County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Doyle, JJ.

POTTERFIELD, J.

I. Background Facts and Proceedings

On February 10, 2010, Bobbie Blaise was charged with four counts of purchasing more than 7500 milligrams of pseudoephedrine in a thirty-day time period in violation of Iowa Code section 124.213 (2009). Blaise's alleged purchases of pseudoephedrine were made at Walmart, Walgreens, and Hy-Vee.

At a jury trial on the charges, managers from each of the three stores testified regarding the procedures followed when a customer purchased pseudoephedrine. Each manager stated that photo identification was required and that information from the identification was verified and kept electronically, along with the date and amount of the purchase, as a record of the transaction. The buyer was required to sign for each purchase, and the signature was also kept as part of the electronic record. The Walmart pharmacy manager testified she recognized Blaise as a regular customer. She further testified that two other members of her staff would also know Blaise as a regular customer.

Blaise testified in her own defense. She explained she purchased a lot of pseudoephedrine because of extreme allergies, but she denied exceeding the legal limit for the purchase of pseudoephedrine. Blaise testified that her purse and identification had been stolen on April 11, 2009. She admitted to making some of the purchases, but she stated she believed someone else had used her identification to complete some of the pseudoephedrine purchases. She specifically denied making several of the listed purchases and testified she was unsure about others. She asserted she had consulted her phone records, which showed she was out of town at the time several of the purchases were

completed. She also testified some of the signatures given at the time of the purchases did not belong to her. During closing arguments, the prosecutor asserted that Blaise's denial of some of the purchases was not credible.

A jury found Blaise guilty as charged. Blaise now appeals, asserting her trial counsel was ineffective for: (1) failing to object to and eliciting improper hearsay evidence; (2) failing to object to testimony about prior crimes; and (3) failing to object to the prosecutor's improper comments during closing arguments on her credibility. Blaise also asserts the district court erred in imposing a ten dollar drug abuse resistance education (DARE) surcharge on each count.

II. Ineffective Assistance of Counsel

We review Blaise's claims of ineffective assistance of counsel de novo. *State v. Utter*, 803 N.W.2d 647, 651 (Iowa 2011). Although we ordinarily preserve ineffective-assistance-of-counsel claims for postconviction proceedings, we find that in the present case the record is adequate to decide the claims on direct appeal. *See State v. Stewart*, 691 N.W.2d 747, 751 (Iowa 2004).

In order to prove her counsel was ineffective, Blaise must show that: (1) counsel failed to perform an essential duty; and (2) prejudice resulted from that failure. *Id*. In order to establish the first prong of the test, Blaise must show that her counsel did not act as a "reasonably competent practitioner" would have. *State v. Simmons*, 714 N.W.2d 264, 276 (Iowa 2006). To satisfy the second prong, Blaise must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Utter*, 803 N.W.2d at 654. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Id.*

A. Hearsay

Blaise asserts her trial counsel was ineffective for first failing to object to impermissible hearsay evidence and for later eliciting further impermissible hearsay evidence to the effect that she was or was not recognizable to store employees who did not testify at trial. Lori Griswold, the Walmart pharmacy manager, testified that she recognized Blaise as a customer. The prosecutor then asked:

> Q. And you know her. Do other members of your staff know her as well? A. Yes.
> Q. Regular customer? A. Right.

Blaise asserts her counsel was ineffective in failing to object to this testimony as impermissible hearsay.

Blaise also asserts her counsel was ineffective in eliciting the following hearsay statements from Griswold:

> Q. And you know [Bobbie] pretty well from talking with her? A. She's a regular customer, sure.
> Q. How do you know these other people know her? . . . the other people who work in the pharmacy? A. Well, as being a regular customer, we all get to know, you know. I mean as a regular customer that we see three, four times a month, I'm fairly certain that all the other pharmacists would recognize and know Bobbie.
> Q. Fairly certain? A. I'm positive.
> Q. Have you sat down and discussed it with them? A. I've talked to my two full-time pharmacists, Ruth and Sara, yes, and they all know—we all know Bobbie.

We find Blaise cannot show she was prejudiced by counsel's failure to object to or elicitation of this testimony as hearsay. Blaise testified "the ladies at the counter" knew her. Thus, Griswold's testimony was merely cumulative of statements made by Blaise herself. Accordingly, Blaise cannot show she was

prejudiced by counsel's failure to object to and later elicitation of hearsay testimony from Griswold, even if we assume it was inadmissible hearsay. *See State v. Hildreth*, 582 N.W.2d 167, 170 (Iowa 1998) ("[W]e will not find prejudice if the admitted hearsay is merely cumulative.").

B. Prior Crimes

Blaise next asserts her counsel was ineffective for failing to object to testimony that her driver's license was suspended. Blaise asserts this evidence of prior crimes likely led the jury to believe she was a person who did not obey the law and influenced the jury's decision in this case.

The officer that investigated Blaise's purchases of pseudoephedrine testified regarding the process of compiling the purchase data from the pharmacies involved. In explaining this process, the officer briefly mentioned Blaise's driver's license was suspended.

Regardless of whether Blaise can establish her counsel breached a duty by failing to object to this evidence, she cannot show she was prejudiced by its admission. The State presented strong evidence of Blaise's guilt on each of the four counts. "[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Strickland v. Washington*, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984). This relatively minor fact mentioned in passing by the officer does not impugn Blaise's credibility to the extent that it undermines our confidence in the outcome of the case. Nor do we believe this is the type of information that appealed to the jury's sympathies and caused the jury to base its decision on something other than evidence that was properly admitted at trial.

We do not believe the jury would have reached a different verdict had they not heard that Blaise's license was suspended. We further note a person can have a license revoked for reasons that do not stem from a prior crime. *See* Iowa Code § 252J.8 (authorizing suspension of a driver's license for failure to pay child support).

C. Prosecutor's Closing Argument

Blaise next asserts her counsel was ineffective for failing to object to remarks made by the prosecutor during closing arguments, specifically two statements that questioned her credibility. First, she takes issue with the prosecutor's statement to the jury, "You are judges of the credibility of witnesses. Who's just shown us that she has no credibility?" She also takes issue with the prosecutor's later statement, "The defendant's whole story was fairly incredible, the whole story lacking in credibility." Blaise asserts the prosecutor's remarks improperly conveyed his personal belief that she was lying on the stand.

"Iowa follows the rule that it is improper for a prosecutor to call the defendant a liar, to state the defendant is lying, or to make similar disparaging comments." *State v. Graves*, 668 N.W.2d 860, 876 (Iowa 2003). "Notwithstanding this prohibition, 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.* (quoting *State v. Davis*, 61 P.3d 701, 710–11 (2003)). "[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." *State v. Carey*, 709 N.W.2d 547,

556 (Iowa 2006). "The key point is that counsel is precluded from using argument to vouch personally as to a defendant's guilt . . . ." *Graves*, 668 N.W.2d at 874 (quoting *State v. Williams*, 334 N.W.2d 742, 744 (Iowa 1983). In deciding whether the prosecutor's remarks were proper, we consider: (1) whether one could legitimately infer from the evidence that the defendant lied; (2) whether the prosecutor's statements were conveyed to the jury as the prosecutor's personal opinion or were related to specific evidence that tended to show defendant had been untruthful; and (3) whether the argument was made in a professional manner or in a manner that unfairly disparaged the defendant. *Id.* at 875.

The prosecutor's comments in this case did not impermissibly express or imply a personal belief in the falsity of Blaise's testimony. Viewed in context, the prosecutor's comments were based on the evidence presented at trial. In making his first comment, the prosecutor addressed Blaise's statement that her doctor had given her a prescription for pseudoephedrine. Blaise testified she did not have a copy of the prescription but would be able to obtain such a prescription. However, during trial, the parties took a short break to fax a release to Blaise's doctor to request a copy of that prescription. Her doctor faxed back a response that there was no prescription for pseudoephedrine. It was under this factual backdrop that the prosecutor stated, "Called her bluff, sent for [the prescription]. And you know what? It's not there. There is no pseudo[ephedrine]. You are judges of the credibility of witnesses. Who's just shown us that she has no credibility?" The prosecutor's statements were based on Blaise's credibility as demonstrated by the testimony, not his personal opinion.

See id. (holding the prosecutor's comments related to the credibility of the witness based on the evidence, not the prosecutor's personal opinion were proper).

We also believe the prosecutor's second statement was based on Blaise's testimony at trial. The prosecutor stated, "The defendant's whole story was fairly incredible, the whole story lacking in credibility." The prosecutor then proceeded to explain why, based on the evidence, Blaise's story that she was out of town at the time some purchases were made was not credible.

Neither of the prosecutor's statements unfairly disparaged Blaise. Rather, the prosecutor was merely using the evidence to support his argument that of the two stories told at trial, the State's story and Blaise's story, Blaise's version was less believable. We find the prosecutor's remarks were within the scope a prosecutor is allowed in analyzing the evidence admitted at trial. *See id.* at 874 ("A prosecutor is entitled to some latitude during closing argument in analyzing the evidence admitted in the trial." (internal quotation marks omitted)). Because we believe the prosecutor's remarks were proper, we find Blaise cannot show her counsel breached an essential duty by failing to object during closing arguments.

III. DARE Surcharge

Blaise asserts, and the State agrees, that the district court erred in assessing a ten dollar DARE surcharge on each of the four counts for which she was convicted. We review a challenge to the legality of a sentence for errors at law. *State v. Carstens*, 594 N.W.2d 436, 437 (Iowa 1999). Iowa Code section 911.2 requires the court to assess a DARE surcharge of ten dollars for a "violation of an offense provided for in chapter 321J or chapter 124, division IV."

Blaise was convicted of four counts in violation of section 124.213. This code section is found in division II of chapter 124, not division IV. Thus, the DARE surcharge was not provided for by law, and the district court erred in assessing the ten dollar DARE surcharge on any of the counts. Because the DARE surcharge was not provided for by law, we vacate this portion of Blaise's sentence.

AFFIRMED IN PART; SENTENCE VACATED IN PART.