IN THE COURT OF APPEALS OF IOWA

No. 3-828 / 12-1695
Filed November 6, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BELINDA ANN CLARK,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Mary Pat Gunderson, Judge.

The defendant, Belinda Clark, appeals the judgment and sentence entered upon her conviction of attempted burglary in the third degree. **AFFIRMED.**

Michael J. Piper of Dickey & Campbell Law Firm, P.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant County Attorney, John Sarcone, County Attorney, Jim Ward, Assistant County Attorney, and Derek Moran, Student Legal Intern, for appellee.

Considered by Potterfield, P.J., and Mullins and Bower, JJ.

MULLINS, J.

The defendant, Belinda Clark, appeals the judgment and sentence entered upon her conviction of attempted burglary in the third degree. On appeal, she asserts: (1) the district court abused its discretion by denying her motion for new trial for prosecutorial misconduct, (2) there was not sufficient evidence to find her guilty beyond a reasonable doubt of attempted burglary in the third degree, and (3) her counsel provided ineffective assistance. We affirm.

I. BACKGROUND FACTS AND PROCEEDINGS.

In the early morning hours of March 11, 2012, Des Moines Police Officer Martin Seibert was on patrol near the Old Abbey, a disused retirement home in Des Moines, where he encountered Belinda Clark walking around the side of the Abbey. The officer asked Clark what she was doing. Clark claimed she was out running. She was wearing a hooded sweatshirt and was covered in soot and sweating. Siebert detected a "strong odor of burnt garbage." Giving her "the benefit of the doubt," he allowed her to continue.

As Siebert reached the rear of the Abbey, he noticed a man walking down the stairway into the basement. The man identified himself as Cory Fyler. Fyler wore dark clothing, his face was covered in ash, and he smelled like burnt garbage. He told Siebert that "Kevin" had given him permission to remove copper and other metals from the Abbey. Siebert observed metal-working tools, and a tub and canvas bag filled with various metals, which he estimated weighed around 100 pounds. Fyler did not have a car located at the scene.

Given these facts, the officer called other patrol units and told them to look for another suspect—Clark. Officer Curtis found Clark sitting in her Jeep next to a car wash, directly south of the Abbey. After questioning, Clark again stated that she had been out for a run. Clark now wore a gray sweatshirt and her face was clean. Officer Curtis smelled smoke on Clark that he asserts was identical to the smoke smell from the Abbey.

The officers contacted the Abbey property managers David and Patricia Rogers to determine if they had given anyone permission to remove metal from the Abbey. The Rogers told the officers that no one had permission to remove metal from the basement. David Rogers later testified that there had been a fire in the basement of the Abbey, and that the basement was covered in soot and smelled like burning garbage.

The officers arrested Fyler and Clark. The State charged them both with burglary. A jury found Clark guilty of the lesser-included offense of attempted burglary in the third degree. Clark then filed a motion for new trial that alleged prosecutorial misconduct. The court denied the motion for new trial and sentenced Clark to not more than two years in prison. On appeal, Clark asserts prosecutorial misconduct, insufficiency of the evidence, and ineffective assistance of counsel.

II. SCOPE AND STANDARD OF REVIEW.

We review a motion for new trial for an abuse of discretion. *State v. Maxwell,* 743 N.W.2d 185, 192 (Iowa 2008). The reviewing court will find an abuse of discretion when the basis for the trial court's ruling was "untenable or to

an extent clearly unreasonable." *State v. Craig*, 562 N.W.2d 633, 634 (Iowa 1997). A ruling "is untenable when it is not supported by substantial evidence or when it is based on an erroneous application of the law." *Graber v. City of Ankeny*, 616 N.W.2d 633, 638 (Iowa 2000). We review challenges to the sufficiency of the evidence for errors at law. *State v. Atkinson,* 620 N.W.2d 1, 3 (Iowa 2000). The State bears the burden of proving every element of the crime with which Clark is charged. *State v. Cashen,* 666 N.W.2d 566, 569 (Iowa 2003). We review claims of ineffective assistance of counsel de novo. *Anfinson v. State,* 758 N.W.2d 496, 499 (Iowa 2008).

III. ANALYSIS.

A. Prosecutorial Misconduct

Clark argues the prosecutor committed prosecutorial misconduct by making improper statements during his closing argument, and that the trial court erred in overruling Clark's objections to those statements and denying Clark's motion for new trial. The prosecutor owes a duty to the defendant to comply with the requirements of due process throughout a proceeding. *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003). The defendant must satisfy two elements to prove a due process violation through prosecutorial misconduct. First, the defendant must establish misconduct. *State v. Musser,* 721 N.W.2d 734, 754 (Iowa 2006) (citing *Graves*, N.W.2d at 869). Second, she must prove that the misconduct resulted in prejudice denying her a fair trial. *Id.* We look to several factors in determining prejudice including: "the severity and pervasiveness of the misconduct, the significance of the misconduct to the central issues in the case,

the strength of the State's evidence, the use of cautionary instructions or other curative measures, and the extent to which the defense invited the improper conduct." *Id.*

During his closing argument, the prosecutor made the following statement:

> You heard from Officer Seibert that Mr. Fyler had over 100 pounds of copper. And he had a tool bag. And he had a box of tools. And yet the defense would have us believe he was there alone. He was going to cart that stuff off just himself. Middle of the day to wherever he resided. *Now, I don't believe that. But it doesn't matter what I believe.*

(Emphasis added.) Clark objected, alleging the statement constituted the prosecution's opinion and was an improper argument. The court sustained Clark's objection and allowed the prosecutor to continue. The prosecutor then stated:

> The defense would have you believe that was the case. That Mr. Flyer was there by himself with no one helping him. But Mr. Flyer told the police he didn't have a car. He didn't even have a driver's license.
>
> What was he going to do with all that copper? What was he going to do with it? *I will tell you what he was going to do with it. He was going to have Ms. Belinda Ann Clark pick him up in her Jeep so that they could take the copper away.*

(Emphasis added.) Clark objected on the same grounds. The court sustained the objection and, after a meeting in chambers with counsel, admonished the prosecutor. Finally, near the end of the prosecution's closing argument he stated: "Things just don't make sense with the *story that we have been told*." (Emphasis added.) Clark again objected and argued that the word "story" implied fiction. The court overruled the objection and allowed the prosecutor to finish.

At the hearing on Clark's motion for new trial, the district court did not find misconduct in the first statement, noting that the prosecutor qualified his opinion with: "it doesn't matter what I believe." The court advised that "[t]his is a fine line. And, boy, did [the prosecutor] walk right up to it." The district court did not find misconduct in the prosecutor's second statement, and remarked again about the prosecution's close proximity to misconduct. Finally, the court refused to find misconduct for the use of the word "story" in describing Clark's testimony, "[t]he Court believes there are truthful stories and factual stories. And simply because the prosecutor chose to use the word story does not implicate to the jury that it was a fiction . . . ."

While some of the arguments were improper, we agree with the district court that these statements do not rise to the level of prosecutorial misconduct. "In closing arguments, counsel is allowed some latitude. Counsel may draw conclusions and argue permissible inferences which reasonably flow from the evidence presented." *State v. Carey*, 709 N.W.2d 547, 554 (Iowa 2006) (citing *State v. Phillips*, 226 N.W.2d 16, 19 (Iowa 1975)). "Counsel has no right to create evidence by his argument nor interject his personal beliefs. It is for the jury to determine the logic and weight of the conclusions drawn." *Phillips*, 226 N.W.2d at 19. This rule does not preclude personal remarks that appear to be based on the evidence. *State v. Williams*, 334 N.W.2d 742, 745 (Iowa 1983); *Carey*, 709 N.W.2d at 556 ("[M]isconduct occurs when the prosecutor seeks this end through unnecessary and over inflammatory means that go outside the record or threaten to improperly incite the passions of the jury."). In *Williams*, the

prosecutor used the following phrases: "I think," "It's my opinion," "It seems to me," and "I find that very hard to believe." 344 N.W.2d at 744. The court refused to find prosecutorial misconduct since the prosecutor "did not in any statement insinuate that his opinion was based on non-record facts nor can it fairly be said that he personally vouched against the credibility of defendant's testimony." *Id.* at 745.

The reasoning in *Williams* is persuasive in this case. The prosecutor's remarks of belief were fairly grounded in the evidence presented at trial, and while improper, did not rise to the level of prohibited misconduct. We temper this holding by emphasizing that a prosecutor's use of personalized remarks, especially repeated use, is not advisable.[1] Given that Clark has not satisfied the misconduct prong of the *Graves* test, we decline to reach the prejudice prong. The district court did not abuse it's discretion in declining to find prosecutorial misconduct and rejecting Clark's motion for new trial.

B. Sufficiency of the Evidence

Clark contends that the State presented insufficient evidence prove to the jury beyond a reasonable doubt that she committed attempted burglary in the third degree. The jury's finding of guilt is binding on appeal if supported by substantial evidence. *State v. Enderle*, 745 N.W.2d 438, 443 (Iowa 2007). Substantial evidence exists to support a verdict when the record reveals evidence that could convince a rational trier of fact a defendant is guilty beyond a reasonable doubt. *State v. Brubaker*, 805 N.W.2d 164, 171 (Iowa 2011). We

[1] Multiple trips to the edge of the cliff increase the likelihood of going over.

consider all of the evidence in the record in the light most favorable to the verdict and make all reasonable inferences that may fairly be drawn from the evidence. *Id.* But "it is the State's 'burden to prove every fact necessary to constitute the crime with which the defendant is charged, and the evidence presented must raise a fair inference of guilt and do more than create speculation, suspicion, or conjecture.'" *Id.* (quoting *State v. Kemp*, 688 N.W.2d 785, 789 (Iowa 2004)).

Clark argues the State failed to satisfy its burden and show beyond a reasonable doubt Clark committed attempted burglary. In support of her claim, Clark cites evidence supporting her innocence that she argues effectively rebuts the State's circumstantial evidence. The State argues it presented substantial evidence to prove Clark aided and abetted the burglary.

Based on the evidence presented by the State, we agree it met its burden and presented substantial evidence supporting the jury's verdict of attempted burglary in the third degree. A number of factors show Clark was involved with the burglary at the Abbey: her presence at the Abbey, the denial of her acquaintance with Fyler, Clark's criminal history of theft, the burnt smell on Clark that matched the smell in the basement, the soot on her face and clothing, and Fyler's lack of transport for the burgled metal. Further, the jury received detailed instructions on the elements of attempted burglary in the third degree. We find that the State bore its burden and presented substantial evidence upon which a jury could find beyond a reasonable doubt that the elements of attempted burglary in the third degree were proven. There was no error.

C. Ineffective Assistance of Counsel

Clark argues that at the sentencing hearing her counsel provided ineffective assistance for failing to argue that Clark qualified for placement in the Residential Corrections Facility (RCF), and that counsel failed to follow the district court's invitation to file for a motion to reconsider sentence. To establish a claim of ineffective assistance of counsel, a defendant must satisfy a two prong test: (1) the attorney failed to perform an essential duty and (2) prejudice resulted to the extent it denied the defendant a fair trial. *State v. Carroll*, 767 N.W.2d 638, 641 (Iowa 2009) (citing *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). If either prong is lacking, we affirm. *Anfinson v. State*, 758 N.W.2d 496, 499 (Iowa 2008) "In determining whether an attorney failed in performance of an essential duty, we avoid second-guessing reasonable trial strategy." *Everett v. State*, 789 N.W.2d 151, 158 (Iowa 2010). In order to show prejudice, a defendant must show that, but for counsel's unprofessional errors, there is a reasonable probability the result of the proceeding would have been different. *State v. Madsen*, 813 N.W.2d 714, 727 (Iowa 2012).

The State rebuts Clark's two grounds for ineffective assistance of counsel. First, concerning the RCF, the State explains that the presentence investigative report provides that Clark is qualified for placement in a RCF, but the report recommends Clark for incarceration. At trial, the court asked Clark's counsel if he had looked into a RCF for Clark. He replied that he had not looked into whether or not Clark was qualified for a RFC. Clark's counsel recommended that the court give her probation and allow the Department of Corrections to place her

in a RFC if it determined that she was qualified. The court declined this invitation and, citing Clark's history of probation violations, imposed a prison sentence. Second, concerning the motion to reconsider sentence, the court asked Clark's counsel to file a motion to reconsider within ninety days of the sentence. Clark's counsel did not file a motion to reconsider; he withdrew from the case a week after the court entered the sentence. The State observes that the court could have reviewed its previous ruling[2] *sua sponte*, but the court chose not to exercise this option. The State concludes that Clark cannot show that if her counsel had filed the motion to reconsider the court would have substituted a lesser sentence.

We determine the record in this case is inadequate to address Clark's claim of ineffective assistance of counsel. Generally, we do not resolve claims of ineffective assistance of counsel on direct appeal. *State v. Bearse*, 748 N.W.2d 211, 219 (Iowa 2008); *see* Iowa Code § 814.7(3) ("If an ineffective assistance of counsel claim is raised on direct appeal from the criminal proceedings, the court may decide the record is adequate to decide the claim or may choose to preserve the claim for determination under chapter 822."). "In only rare cases will the defendant be able to muster enough evidence to prove prejudice without

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[2] Iowa Code section 903.2 (2013) states:

> For a period of thirty days from the date when a person convicted of a misdemeanor begins to serve a sentence of confinement, the court may order the person to be returned to the court, at which time the court may review its previous action and reaffirm it or substitute for it any sentence permitted by law. The sentencing court retains jurisdiction for the limited purposes of conducting such review and entering an appropriate order notwithstanding the timely filing of a notice of appeal or an application for discretionary review. . . . Such action is discretionary with the court and its decision to take the action or not to take the action is not subject to appeal.

a postconviction relief hearing." *Bearse*, 748 N.W.2d at 219 (citing *State v. Straw*, 709 N.W.2d 128, 138 (Iowa 2006)). Postconviction relief hearings allow an adequate record of the claim to be developed, and the attorney charged with providing ineffective assistance may have an opportunity to respond to the defendant's claims. *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002).

IV. CONCLUSION.

The district court did not abuse its discretion in denying Clark's motion for new trial, Clark's conviction was based on sufficient evidence, and we preserve the claim of ineffective assistance of counsel for determination under chapter 822.

AFFIRMED.