IN THE COURT OF APPEALS OF IOWA

No. 3-888 / 12-1141
Filed October 23, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CARLOS GIL FUENTES,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Odell G. McGhee II, District Associate Judge.

Carlos Fuentes appeals from his convictions for driving while barred and operating while intoxicated third offense, claiming he was not driving the vehicle and his counsel was ineffective. **AFFIRMED.**

John Audlehelm of Audlehelm Law Office, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Kyle P. Hanson, Assistant Attorney General, John Sarcone, County Attorney, and David Porter, Assistant County Attorney, AND Kailyn Heston, Student Legal Intern, for appellee.

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

POTTERFIELD, P.J.

Carlos Fuentes appeals from his convictions for driving while barred and operating while intoxicated third offense. He argues his counsel was ineffective in failing to object to the prosecutor's comments during closing arguments regarding Fuentes's failure to present evidence. We affirm and preserve the case for possible postconviction proceedings, finding the record is insufficient to determine whether his counsel was ineffective for failing to object.

I. Facts and proceedings.

Fuentes was found intoxicated with his friend Christopher Hamner at the scene of a one-car collision on November 26, 2011. Police concluded from evidence at the scene, including the statements of Fuentes and Hamner, that Fuentes was driving and Hamner was the passenger. Fuentes was charged on December 5, 2011, by trial information with operating a motor vehicle while intoxicated and driving while barred. Fuentes filed a motion for continuance of trial, and a hearing on the motion was held April 6, 2012. Fuentes's attorney stated he requested the continuance because he was going to serve a subpoena on Hamner, as they expected him to confess to being the driver of the vehicle.

Trial was held April 23, 2012. Hamner did not appear for trial. During his opening statement, Fuentes's counsel stated:

> The only people who truly know what happened in that car that night who were there while the vehicle was in motion that we will know from the facts here today is Mr. Hamner and Mr. Fuentes. Mr. Hamner won't be here. Draw your own conclusion from that. And Mr. Fuentes is professing his innocence.

The State did not comment on Hamner's absence during its opening statement. During closing argument, Fuentes's counsel again mentioned Hamner's absence, stating:

> [An officer testified] that the other guy was saying he was the driver, . . . meaning Mr. Hamner. So there was a dispute. . . . And we don't have Mr. Hamner here. He's not here. The State didn't bring him in. They could have hauled him in here. He was the other witness. He was the other person there when this happened.

The State, in its rebuttal argument, also commented on Hamner's absence and Fuentes's failure to produce Hamner as a witness:

> Mr. Hamner has not come to court and told you his side of the story. The defense has the same subpoena power that the State does, and they could have called him as a witness to tell you, "I was driving," but they didn't. And that was because Mr. Hamner was not driving that motor vehicle. Mr. Fuentes was.

Fuentes' counsel did not object to this comment by the State. The jury found Fuentes guilty of operating a vehicle while intoxicated, third offense, and driving while his license was barred. He appeals, arguing his counsel was ineffective in failing to object to the State's closing argument.

II. Analysis.

Our standard of review for ineffective-assistance-of-counsel claims is de novo. *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008). In order to demonstrate he was provided with ineffective assistance, Fuentes must show his counsel failed to perform an essential duty and that but for his counsel's omission, the outcome of the proceeding would have been different. *See id.*

We find the record is not sufficient to determine whether Fuentes's counsel failed to perform an essential duty. Our supreme court has stated, "'A prosecutor may properly comment upon the defendant's failure to present

exculpatory evidence, so long as it is not phrased to call attention to the defendant's own failure to testify.'" *State v. Craig*, 490 N.W.2d 795, 797 (Iowa 1992) (quoting *State v. Bishop*, 387 N.W.2d 554, 563 (Iowa 1986)) (emphasis omitted). However, in *State v. Hanes*, 790 N.W.2d 545, 557 (Iowa 2010), the court distinguished this rule from when a prosecutor comments on a defendant's failure to call witnesses. The court found that a prosecutor's comment in closing argument regarding a defendant's failure to call certain witnesses after the prosecutor announced in opening statement the State would call those witnesses shifted the burden of proof from the State to the defendant. *Hanes*, 790 N.W.2d at 557. The court wrote, "It is improper for the State to shift the burden to the defense by suggesting the defense could have called additional witnesses." *Id.* at 556.

Here, Fuentes did not testify and did not present any evidence in his defense. The State's argument, though made in response to the defense's argument, may have improperly shifted the burden of proof to Fuentes. *See id.* at 557 ("It was not proper for the State to attempt to shift the burden to the defense to call the witnesses or to suggest the jury could infer from the defense's failure to call the witnesses that they would not have said anything helpful to the defense.").

The record before us contains no information as to whether the decision by Fuentes's counsel not to object was tactical in nature. *See State v. Ondayog*, 722 N.W.2d 778, 785–86 (Iowa 2006). "Because improvident trial strategy, miscalculated tactics, and mistakes in judgment do not necessarily amount to ineffective assistance of counsel, postconviction proceedings are often

necessary to discern the difference between improvident trial strategy and ineffective assistance." *Id.* at 786 (internal citations and quotation marks omitted). We evaluate counsel's decision from the perspective of when the decision was made during trial. *Id.* "If the challenged actions of counsel implicate trial tactics or strategy, we will not address the issue until the record is fully developed." *State v. Clay*, 824 N.W.2d 488, 499 (Iowa 2012). We therefore affirm and preserve Fuentes's claim for possible postconviction proceedings.

AFFIRMED.