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IN THE COURT OF APPEALS OF INDIANA

TARA K. MATEYKO,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 29A02-1002-CR-226
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable Richard Campbell, Judge
Cause No. 29D04-0805-FD-2806

November 23, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary and Issues

In this case, a homeowner left her house while the new housekeeper finished cleaning. She returned and discovered that her laundry detergent was missing. Later, she noticed that other items, including her Oreck vacuum cleaner, were also missing. Witnesses testified that they saw a vacuum cleaner matching the description of the missing Oreck in the back of the housekeeper's van. Witnesses also testified that the housekeeper had offered to sell the Oreck on at least two occasions.

The State charged the housekeeper, Tara K. Mateyko, with class D felony theft, and a jury found her guilty as charged. On appeal, Mateyko claims that her trial counsel provided ineffective assistance, the prosecutor engaged in misconduct, and the evidence is insufficient to support her conviction for class D felony theft. Finding no error, we affirm.

Facts and Procedural History

In September 2007, Mateyko was employed as a housekeeper for "As You Wish Cleaners" ("As You Wish"). On September 25, 2007, she was assigned to clean Susanne Sobek's home. Since it was her first time at Sobek's home, Sobek gave her specific instructions regarding the cleaning procedures. Because of allergies in the family, Sobek instructed Mateyko not to use As You Wish's vacuum, but to use Sobek's Kenmore vacuum instead. Sobek also owned an Oreck vacuum, which she used when she did her own vacuuming on weekends. Sobek had used the Oreck three days before Mateyko came to clean. When Sobek instructed Mateyko to use only the Kenmore, Mateyko remarked that she liked Orecks and that if Sobek wanted to sell the Oreck, she would like to buy it.

Before Mateyko was finished cleaning, Sobek left to run a few errands. Sobek instructed Mateyko to lock the house. When Sobek returned, she found the house locked, but noticed that her Cheer laundry detergent was missing. She had used the detergent the night before, and none of her family members had been home to use it that day. She asked her neighbor and sister if either of them had come over to borrow some detergent, and neither of them had done so. She also noticed that some cash was missing, but she thought that her sons might have taken it to school. There was no sign of any forced entry. Sobek called As You Wish to report the missing items.

Sobek later discovered that her flat iron and a bottle of perfume were missing. On September 28, 2007, she called the Carmel police. Officer Sarah Harris responded and prepared a police report. After Officer Harris left, Sobek decided to vacuum. At that point, she realized that her Oreck was also missing. She called Officer Harris and added the Oreck to the list of missing items.

Soon after, Officer Harris questioned Mateyko regarding the Oreck, and Mateyko denied stealing it. By early October 2007, Mateyko ceased to be employed by As You Wish and began working as a housekeeper for "Tidy Clean." During an October 2007 police interview, Tidy Clean employee Shawntel Sinclair reported that she had seen an Oreck vacuum cleaner in Mateyko's van and that Mateyko had offered to let her use it or buy it. Sinclair's description matched both Sobek's description and a photograph of the make and model of Sobek's Oreck.

Tidy Clean supervisor Loretta Harlow also told police that she had seen an Oreck in Mateyko's van. Again, the description matched that of the stolen vacuum. Harlow also told police that Mateyko had asked her to find out whether Scott Brame, Harlow's boss, would like to buy the Oreck.

On May 20, 2008, the State charged Mateyko with class D felony theft of the Oreck vacuum and/or the Cheer detergent. After numerous continuances, a jury trial was scheduled for December 10, 2009. The day before trial, Mateyko filed a motion in limine to exclude testimony regarding "allegations of other thefts from other clients from the cleaning companies." Tr. at 10. The trial court granted Mateyko's motion, and after a one-day trial, the jury found Mateyko guilty as charged. This appeal ensued. Additional facts will be provided as necessary.

Discussion and Decision

I. Ineffective Assistance of Counsel

Mateyko contends that she was denied her constitutional right to effective assistance of counsel. A defendant must satisfy two components to prevail on an ineffective assistance claim. *Smith v. State*, 822 N.E.2d 193, 202-03 (Ind. Ct. App. 2005), *trans. denied*. She must demonstrate both deficient performance and prejudice resulting from it. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Deficient performance is representation that fell below an objective standard of reasonableness, wherein counsel has "committ[ed] errors so serious that the defendant did not have the 'counsel' guaranteed by the Sixth Amendment." *Brown v. State*, 880 N.E.2d 1226, 1230 (Ind. Ct. App. 2008), *trans. denied*. We assess

counsel's performance based on facts that are known at the time and not through hindsight. *Shanabarger v. State*, 846 N.E.2d 702, 709 (Ind. Ct. App. 2006), *trans. denied*. "[C]ounsel's performance is presumed effective, and a defendant must offer strong and convincing evidence to overcome this presumption." *Ritchie v. State*, 875 N.E.2d 706, 714 (Ind. 2007). Prejudice occurs when a reasonable probability exists that "but for counsel's errors the result of the proceeding would have been different." *Brown*, 880 N.E.2d at 1230. We can dispose of claims upon failure of either component. *Id*.

Here, Mateyko raises ineffective assistance on direct appeal. As such, we are limited to the facts contained in the record of proceedings through trial and judgment. *Jewell v. State*, 887 N.E.2d 939, 941 (Ind. 2008). Because extrinsic evidence is often needed to overcome the presumption of competence, "[i]t is no surprise that [ineffective assistance] claims [brought on direct appeal] almost always fail." *Woods v. State*, 701 N.E.2d 1208, 1216 (Ind. 1998) (citation and quotation marks omitted).

"Counsel is afforded considerable discretion in choosing strategy and tactics, and we will accord those decisions deference." *Timberlake v. State*, 753 N.E.2d 591, 603 (Ind. 2001), *cert. denied* (2002). "[E]ven the finest, most experienced criminal defense attorneys may not agree on the ideal strategy or the most effective way to represent a client." *Id.* Thus, isolated mistakes, poor strategy, inexperience, and instances of poor judgment do not necessarily render representation ineffective. *Id*. Strategies are assessed based on facts known at the time and will not be second-guessed even if the strategy in hindsight did not serve the defendant's best interest. *Curtis v. State*, 905 N.E.2d 410, 414 (Ind. Ct. App. 2009),

trans. denied.

Here, Mateyko alleges that her trial counsel was ineffective in three ways. First, she claims that her counsel was ineffective for failing to object to testimony regarding uncharged conduct. Indiana Evidence Rule 404(b) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pre-trial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

The day before trial, Mateyko's counsel filed a motion in limine, based on Indiana Evidence Rule 404(b), seeking to exclude testimony regarding Mateyko's uncharged conduct. On the day of trial, outside the jury's presence, the trial court inquired as to specifically what testimony the motion in limine was intended to exclude, and Mateyko's counsel responded, "allegations of other thefts from *other clients* from the cleaning companies." Tr. at 10 (emphasis added). The trial court granted the motion without objection from the State.

Mateyko now asserts that her counsel was ineffective for failing to object to testimony regarding other items that Sobek reported as missing from her home: the cash, the flat iron, and the perfume. We disagree. First, the challenged testimony concerned items missing from *Sobek's* home, not from other clients. As such, it was not covered by the motion in limine. Moreover, the testimony was offered not to show the conformity of *Mateyko's* actions or character; rather, it merely explained and gave context to the progression of

Sobek's actions and investigation that culminated in her decision to contact police to report a theft. Thus, it does not fall within the prohibitions laid out in Indiana Evidence Rule 404(b). As such, defense counsel's failure to object to this testimony did not amount to ineffective assistance.

Next, Mateyko asserts that her trial counsel was ineffective for failing to question potential jury members to determine whether they understood the concept of reasonable doubt. Notably, she concedes in her brief that "no Indiana authority was uncovered establishing a duty of counsel to inquire of the jury's understanding of burden of proof during voir dire." Appellant's Br. at 15, n.1.

"The function of voir dire examination is not to educate jurors, but to ascertain whether jurors can render a fair and impartial verdict in accordance with the law and the evidence." *Von Almen v. State*, 496 N.E.2d 55, 59 (Ind. 1986). In *Barber v. State*, 715 N.E.2d 848, 850-51 (Ind. 1999), our supreme court addressed the propriety of raising the topic of reasonable doubt during voir dire, stating that the task of instructing the jury on reasonable doubt generally rests on the trial court and that a clear preliminary and final instruction on reasonable doubt should clear up any questions a juror might have on the matter of burden of proof. Faced with the specific question of whether it was reversible error for the State to have addressed reasonable doubt during voir dire, the *Barber* court held that "it is *permissible* for the prosecutor to ask questions of potential jurors to determine whether they understand reasonable doubt and are capable of rendering a verdict in accordance with the law." *Id*. at 850 (emphasis added).

Here, defense counsel did not address reasonable doubt while engaging in voir dire. Instead, he thoroughly covered it during his opening and closing arguments, and the jurors twice received instruction from the trial court on the matter. The identical language found in Preliminary Instruction No. 8 and Final Instruction No. 6 provides a detailed explanation of the concept of reasonable doubt. Appellant's App. at 44, 51. It is difficult to see how trial counsel could be found incompetent for failing to perform a task that, although mandatory for the trial court, is merely permissible for counsel. Moreover, the concept was so thoroughly covered both by argument and by instruction that its absence from voir dire could not be deemed prejudicial.[1] Thus, Mateyko has failed to establish ineffective assistance by her trial counsel in the performance of voir dire.

Mateyko also alleges that her trial counsel was ineffective for failing to submit a specific instruction on impeachment of witnesses. When faced with an allegation of deficient performance on the basis of an untendered instruction, we will uphold the conviction if the trial court could have properly refused the instruction under applicable law. *Lambert v. State*, 743 N.E.2d 719, 738 (Ind. 2001). "Failure to submit an instruction is not deficient performance if the court would have refused the instruction anyway." *Id*. at 739 (citation and quotation marks omitted). "A trial court may not accept a tendered instruction unless it correctly states the law, is supported by evidence in the record, *and is not covered by other*

[1] To the extent Mateyko claims that her trial counsel should have addressed other burdens of proof, such as preponderance of evidence and clear and convincing evidence, to ensure that the jurors knew the difference among them, we reiterate that trial counsel has no duty to make such distinctions during voir dire and also note that the introduction of numerous burdens of proof might have done more to confuse the jurors than educate them.

instructions." *Id*. (emphasis added).

The trial court gave the following preliminary instruction regarding conflicting testimony:

COURT'S PRELIMINARY INSTRUCTION NO. 9

> You are the exclusive judges of the evidence, which may be either witness testimony or exhibits. In considering the evidence, it is your duty to decide the value you give to the exhibits you receive and the testimony you hear.
>
> In determining the value to give to a witness's testimony, some factors you may consider are:
>
> - the witness's ability and opportunity to observe;
> - the behavior of the witness while testifying; any interest, bias or prejudice the witness may have;
> - the reasonableness of the testimony considering the other evidence; your knowledge, common sense, and life experiences.
>
> You should not disregard the testimony of any witness without a reason and without careful consideration. If you find conflicting testimony, you must determine which of the witnesses you will believe and which of them you will disbelieve.
>
> The quantity of evidence or the number of witnesses need not control your determination of the truth. You should give the greatest value to the evidence you find most convincing.

Appellant's App. at 45. In Final Instruction No.1, the trial court directed the jury to consider all of the preliminary and final instructions together. *Id*. at 49.

Mateyko essentially claims that the trial court's instruction was not specific enough,

given the nature of the testimony in this case.[2] She predicates her claim on an assertion that three of the State's witnesses had committed perjury or had, at least, been impeached on the stand. She cites as support *J.J. v. State*, 858 N.E.2d 244, 250-51 (Ind. Ct. App. 2006), *opinion on reh'g*. In *J.J.*, we held that defense counsel was ineffective for failure to inform the jury the defendant's co-conspirator, a key witness at trial, had been granted use immunity.

Here, there was no special circumstance such as a grant of use immunity. Simply put, there were inconsistencies between some pretrial and in-court statements provided by some of the State's witnesses. Mateyko claims that these inconsistencies amounted to perjury; the State claims that they were minor and amounted neither to perjury nor to impeachment. At trial, the parties disputed the extent and effect of the inconsistencies. Thus, the trial court excused the jury and a lengthy argument ensued, followed by the questioning of two of the witnesses outside the jury's presence. After this, the trial court made no conclusion that the witnesses had committed perjury or even been impeached. Tr. at 128-44. Rather, the trial court was concerned with the parameters of the order in limine, which prohibited the introduction of evidence connecting Mateyko to uncharged thefts committed against other house-cleaning clients. To confront these alleged inconsistencies in the jury's presence would necessitate lines of questioning which, if covered fully, would lead to testimony that would violate the order in limine.

[2] Mateyko asserts that her trial counsel should have tendered a more specific instruction, such as the following: "The credibility of a witness may be attacked by introducing evidence that on some former occasion the witness [made a statement] [in former testimony testified] [acted in a manner] inconsistent with his testimony in this case. Evidence of this kind may be considered by you in deciding the value of the testimony of the witness." Ind. Pattern Jury Instructions Criminal Instruction No. 12.21.

Specifically, defense counsel wanted to question Harlow and Carmel Police Detective Clark Tilson, in the jury's presence, about a sting operation that they had arranged at the home of Brame, wherein Mateyko would be videotaped selling the Oreck to Brame and/or stealing some "bait money" that would be laid out in plain view. Defense counsel alleged that these witnesses had perjured themselves regarding the number of conversations each had engaged in and with whom and thus wanted the jury to hear the testimony. Conversely, the State argued against it, claiming that a full and fair questioning of these alleged inconsistencies would necessitate a violation of the order in limine to the extent that it would require questioning about the witnesses' suspicion that Mateyko had stolen from other clients as well. In other words, the State was asserting that the police would not go to such elaborate lengths to recover one $800 vacuum cleaner, but instead, had set up the sting based on its suspicions that Mateyko's thievery was more widespread. When the trial court brought the jury back into the courtroom, defense counsel concluded by asking Detective Tilson a few clarification questions, which were limited to other alleged discrepancies, such as whether Mateyko's co-workers had observed one or two Orecks in the back of her van.

In sum, we are limited by the trial court record on this direct appeal ineffective assistance claim, and the record demonstrates that the jury was allowed to hear only the inconsistent statements that did not violate the order in limine and that the trial court's instruction adequately equipped the jury to assess the conflicting testimony presented to it. Thus, defense counsel's failure to tender a more specific instruction did not amount to ineffective assistance of counsel.

II. Prosecutorial Misconduct

Mateyko also asserts that her conviction should be reversed because the prosecutor engaged in misconduct.

> A claim of prosecutorial misconduct requires a determination that there was misconduct by the prosecutor and that the misconduct, under all of the circumstances, placed the defendant in a position of grave peril to which he should not have been subjected. The gravity of peril is measured not by the degree of the misconduct but by the probable persuasive effect on the jury's decision.

Donnegan v. State, 889 N.E.2d 886, 893-94 (Ind. Ct. App. 2008) (citation and quotation marks omitted), *trans. denied*.

Mateyko first asserts that the prosecutor engaged in misconduct by introducing testimony by Harlow and Detective Tilson that constituted perjury or false informing. A person commits perjury when he "makes a false, material statement under oath or affirmation, knowing the statement to be false or not believing it to be true." Ind. Code § 35-44-2-1(a)(1). A person commits false informing when he "gives a false report of the commission of a crime or gives false information in the official investigation of the commission of a crime, knowing the report to be false." Ind. Code § 35-44-2-2(d)(1).

Here, the inconsistencies concerned the number of communications between Harlow and Detective Tilson, as well as the number of vacuum cleaners—one or two—that eyewitnesses Harlow and Sinclair had seen in the back of Mateyko's van. As previously discussed, despite the lengthy sidebar on the issue of the sting operation, the trial court never concluded that Harlow's and/or Detective Tilson's testimony amounted to perjury. Moreover, the State charged Mateyko with the theft of only one vacuum, so the issue of

whether one or two Oreck vacuums matching the description of Sobek's vacuum were present in her van is irrelevant. The mere inconsistency of a witness's statements does not amount to perjury absent evidence of materiality and intent. *See Daniels v. State*, 658 N.E.2d 121, 123 (Ind. Ct. App. 1995) (stating that confusion or inconsistency alone is not enough to prove perjury). Finally, the lengthy sidebar on the issue of limitation of witness testimony based on the order in limine demonstrates the care that was taken to avoid placing potentially objectionable testimony before the jury. In this regard, we note that it was the prosecutor, not defense counsel, who voiced concern over the extent to which the introduction of certain statements by Harlow and Detective Tilson would violate the order in limine. Tr. at 129, 132. In sum, having failed to establish that the statements themselves constitute perjury, it is difficult to see how the prosecutor could have knowingly invited perjury. As such, Mateyko has failed to establish prosecutorial misconduct in the treatment of Harlow's and Detective Tilson's testimony.

Mateyko also contends that the prosecutor committed prejudicial misconduct based on certain statements he made during voir dire. However, we note that Mateyko did not timely object to such statements. As such, she has failed to preserve this allegation of prosecutorial misconduct for review. *Oldham v. State*, 779 N.E.2d 1162, 1175 (Ind. Ct. App. 2002), *trans. denied* (2003). However, we may address an unpreserved claim of prosecutorial misconduct to determine whether fundamental error occurred. *Id*. For prosecutorial misconduct to constitute fundamental error, it must "make a fair trial impossible or constitute clearly blatant violations of basic and elementary principles of due process and present an undeniable and

substantial potential for harm." *Booher v. State*, 773 N.E.2d 814, 817 (Ind. 2002) (citation and quotation marks omitted).

Mateyko alleges prosecutorial misconduct based on certain statements made by the prosecutor during voir dire. A trial court has broad discretionary power to regulate the form and substance of voir dire. *Von Almen*, 496 N.E.2d at 59. The purpose of voir dire is to determine whether potential jurors can render a fair and impartial verdict, with the goal of eliminating bias. *Id*. Thus, questions seeking to shape or condition a jury to be favorable toward one side's position are improper. *Id.*

Here, Mateyko claims that the prosecutor made unqualified statements that a crime had occurred and that Sobek was the victim, and that such statements "conditioned the potential jurors to form opinions." Appellant's Br. at 18. First, as a matter of context, we note that it was the trial court that invited counsel for each side to make a statement to the jury pool. *See* Tr. at 14 ("COURT: At this time I am going to give each side two minutes to briefly describe the facts of this case so that we know what the case is about before we ask any questions"). Neither party objected to this activity. The State went first, and the prosecutor began by saying, "As the Judge has stated[,] this case is a theft. The victim is Suzi Sobek." *Id*. at 15. The prosecutor then gave an overview of the State's version of the essential facts and concluded by stating, "we believe that the essential issue before the jury today is going to be whether or not it was Tara Mateyko that took the vacuum and the laundry detergent." *Id*. at 16.

Defense counsel was then afforded his two minutes and used them to argue that the

State's case was based on numerous assumptions. i.e., that the Oreck vacuum cleaner even existed, that it was present at Sobek's house between the time Sobek last used it and the day Mateyko came to clean, that it was present at Sobek's house when Mateyko came to clean, and that it was gone from Sobek's house from the time Mateyko left to the time when Sobek discovered that it was missing. Defense counsel concluded by stating, "Ms. Mateyko denied taking the vacuum cleaner and she continues to maintain her innocence and we believe that you will also find that there is not evidence that shows Ms. Mateyko committed that alleged theft." *Id*. at 17.

We note that it was within the trial court's discretion to solicit the help of counsel to provide a factual backdrop, and the defense not only participated, but also pointed out its disputes with the State's version of the essential facts. Thus, both parties had equal opportunity to lay the background for eventual voir dire questions, which are not contained in the record before us. In sum, Mateyko has failed to establish prosecutorial misconduct that made a fair trial impossible.

III. Sufficiency of Evidence

Finally, Mateyko contends that the evidence is insufficient to support her theft conviction.[3] When reviewing a sufficiency claim, we neither reweigh evidence nor judge witness credibility; rather, we consider only the evidence and reasonable inferences most favorable to the verdict. *Kenney v. State*, 908 N.E.2d 350, 351 (Ind. Ct. App. 2009), *trans.*

[3] In this portion of her brief, Mateyko fails to provide a statement of the standard of review. We remind counsel that Indiana Appellate Rule 46(A)(8)(b) requires that the argument section of the appellant's brief contain a concise statement of the applicable standard of review.

denied. We affirm the conviction unless no reasonable trier of fact could find the elements of the crime proven beyond a reasonable doubt. *Id*. at 351-52. The evidence need not negate every reasonable hypothesis of innocence, and circumstantial evidence is deemed sufficient if inferences may reasonably be drawn that enable the trier of fact to find the defendant guilty beyond a reasonable doubt. *Id*. at 352.

Mateyko was convicted of class D felony theft. Indiana Code Section 35-43-4-2(a) states in part, "A person who knowingly or intentionally exerts unauthorized control over property of another person, with intent to deprive the other person of any part of its value or use, commits theft, a Class D felony." Here, the Oreck was present at Sobek's home when Mateyko was there to clean and was missing from the home shortly thereafter. When Mateyko was receiving her cleaning instructions, she saw the Oreck and made specific remarks to Sobek regarding her desire to buy it. Sobek had used the laundry detergent the night before, and it was missing when she returned home after Mateyko had cleaned. When Sobek returned home, the doors were locked, and there was no sign of forced entry. Others with access to Sobek's home were either at school, at work, or indicated that they had not entered the home.

Two of Mateyko's co-workers testified that they had seen an Oreck in the back of Mateyko's van and that it fit the description of and looked similar to the photograph depicting the exact make and model of Sobek's Oreck. These witnesses testified regarding at least two instances in which Mateyko offered to sell the Oreck to distinct purchasers.

In sum, the evidence most favorable to the verdict indicates that Mateyko knowingly

or intentionally exerted unauthorized control over Sobek's property with intent to deprive her of its value or use. To the extent Mateyko challenges minor inconsistencies in the witnesses' statements and relies on the lack of evidence regarding the Oreck's serial number, she merely invites us to reweigh evidence and judge witness credibility, which we may not do. Accordingly, we affirm.

Affirmed.

FRIEDLANDER, J., and BARNES, J., concur.