IN THE COURT OF APPEALS OF IOWA

No. 1-803 / 10-1186
Filed January 19, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BRENDA JEAN YAGGY,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Joseph Moothart, Judge.

Brenda Yaggy appeals her conviction of assault causing bodily injury in violation of Iowa Code sections 708.1 and 708.2(2). **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Teresa R. Wilson, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Dustin Lies, Assistant County Attorney, for appellant.

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

TABOR, J.

Brenda Yaggy was convicted of assault causing bodily injury after striking her downstairs neighbor. She contends the district court erred in allowing the State to impeach a defense witness with his prior conviction for first-degree harassment, and that her trial counsel was ineffective for failing to object to prosecutorial misconduct in the State's closing argument and rebuttal. Although the probative value of the harassment conviction was low, it was not substantially outweighed by the danger of unfair prejudice. The court did not abuse its discretion under Iowa Rules of Evidence 5.403 and 5.609. Additionally, because none of the prosecutor's statements amounted to misconduct such that Yaggy was deprived of her right to a fair trial, her counsel had no duty to object. Even if the prosecutor's statements constituted misconduct, trial counsel effectively refuted the statements during the defense closing argument, mitigating any potential prejudice.

I. Background Facts and Procedures

Brenda Yaggy and William Sires Jr. lived on the second floor of a four-unit apartment building in Waterloo. They kept three adult cats and four kittens in their apartment. Michelle Sinkuler and Christopher Buhmann resided on the first floor of the building, near the entrance to the complex. On August 7, 2008, the neighbors clashed, resulting in Yaggy's arrest. The four participants' accounts of the incident substantially differ from one another.

According to the testimony of Sinkuler and Buhmann, they woke up at 5:00 a.m. when Yaggy ran down the stairs, pounded on their apartment door,

and accused them of taking one of her kittens. When Buhmann opened the door, the couple's Shih Tzu escaped. Yaggy kicked the dog down the stairs outside the complex. As Sinkuler reached for her dog, Yaggy kneed her in the back and pushed her to the ground. When Sinkuler tried to return to her feet, Yaggy punched her in the jaw. Sinkuler admits she may have "brushed past" Yaggy as she pursued her dog. Buhmann directed Sinkuler to go inside their apartment and call the police. He waited outside to prevent Yaggy from continuing her assault on Sinkuler.

Officer Dustin Yates of the Waterloo police department responded to a dispatch of an assault in progress. He spoke with the four residents, but took written statements from only Sinkuler and Buhmann. Officer Yates also photographed marks on Sinkuler's chin and scrapes on her toes. She received no medical treatment for her injuries. Although Yaggy initially denied any physical contact with Sinkuler, she later admitted she pushed her.

Yaggy's account of events substantially diverges from that of Sinkuler and Buhmann. She testified to waking up to the sound of a distressed cat. Believing two of her own cats were outside, she descended the stairs from her apartment unit with a flashlight to search for them. Yaggy threw open the main door to the complex, which banged against the doorstop next to Sinkuler's apartment door. She denies knocking on their door. Yaggy contends Sinkuler opened the door and that the couple began swearing at her and calling her names. She went outside to look for her cats on the front porch of the building when the Shih Tzu rushed by. She almost stepped on the dog, and kicked him out of the way to

avoid falling down the steps. As one of her cats came running up the steps, she believes Sinkuler made a grab for it, which prompted Yaggy to push her out of the way and hit her shoulder, knocking Sinkuler off balance. Yaggy believes Buhmann came out and "clubbed" her, causing her to briefly lose consciousness, but she did not testify to suffering any physical injuries.[1]

Sires also said he heard a commotion at 5:00 a.m. he attributed to cats fighting outside. He watched Yaggy run downstairs and saw Sinkuler open her apartment door and hit Yaggy. Both Sires and Yaggy note the police never took statements from them, and that the police were aggressive with Yaggy.

On September 19, 2008, the State charged Yaggy with assault causing bodily injury in violation of Iowa Code section 708.1 and 708.2(2) (2007). The jury found her guilty as charged on March 4, 2010. On July 2, 2010, the court sentenced her to 180 days in jail, with all but thirty-nine days suspended and gave her credit for thirty-nine days served. The court also placed her on supervised probation for one year. She now appeals.

II. Scope and Standard of Review

We review the district court's evaluation of the probative value and prejudicial effect of impeachment evidence for an abuse of discretion. *State v. Redmond*, 803 N.W.2d 112, 117 (Iowa 2011). An abuse of discretion occurs when the court exercised its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *State v. Roby*, 495 N.W.2d 773, 775 (Iowa 1992) (citations omitted). If the ground or reason is not supported by

[1] Yaggy's use of the term "clubbed" differs from the mainstream use of the word. She testified to being clubbed "over the head spiritually or soulfully," which caused her to lose consciousness for a minute.

substantial evidence, or is based on an erroneous application of the law, it is untenable. *Graber v. City of Ankeny*, 616 N.W.2d 633, 638 (Iowa 2000).

A claim of ineffective assistance of counsel is an alleged constitutional violation, and therefore our review is de novo. *State v. Blair*, 798 N.W.2d 322, 328–29 (Iowa Ct. App. 2011).

III. Analysis

A. Admission of Prior Conviction

Before the defense called Yaggy's boyfriend William Sires to testify, the State informed the court that it planned to impeach him with his 2004 conviction for first-degree harassment. Over Yaggy's objection, the district court ruled that pursuant to Iowa Rule of Evidence 5.609(*a*), so long as the State only referred to the fact of the prior conviction, the probative value of the evidence was not substantially outweighed by the factors listed in rule 5.403. The State limited its questioning to whether Sires was convicted of harassment and the date of the conviction.

Yaggy argues the court abused its discretion by allowing in the conviction and that such error was not harmless. She contends the harassment charge had little bearing on Sires's veracity, and asserts the similarity between harassment and assault compounded the risk that the prior conviction prejudiced her case. She also points to the corroborating nature of Sires's testimony, the lack of additional witnesses, and the contrasting versions of the events presented at trial.

The State counters the district court properly balanced the conviction's probative value against the danger of unfair prejudice under the rule 5.403 test applied to witnesses other than the accused. The State contends that even had the court abused its discretion, error would be harmless because the jury could find Yaggy guilty based on her inconsistent statements and admission that she "hit [the victim's] shoulder and her back and just pushed her, and [ ] knocked her off balance." Moreover, the court instructed the jury to use the conviction solely for determining Sires's credibility.

The rule for impeachment based on prior convictions states, in part:

> a. *General rule.* For the purpose of attacking the credibility of a witness:
>
> (1) Evidence that a witness other than the accused has been convicted of a crime shall be admitted, subject to rule 5.403, if the crime was punishable by death or imprisonment in excess of one year pursuant to the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and
>
> (2) Evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

Iowa R. Evid. 5.609(*a*). Because Sire's conviction for first-degree harassment does not involve a crime of dishonesty or false statement, we focus our analysis on subsection 1.[2]

[2] Yaggy notes that under the predecessor to this rule, a conviction was required to also involve dishonesty or false statement to be admitted at trial. *See State v. Martin*, 217 N.W.2d 536, 542 (Iowa 1974). In 1996, Iowa adopted Federal Rule 609(a), which offered a substantially different approach to admissibility of previous convictions of witnesses. As reaffirmed in the recent decision of *State v. Redmond*, the *Martin* approach to the predecessor rule is obsolete in view of rule 5.609(*a*). 803 N.W.2d 112, 121 (Iowa 2011) ("Our jurisprudence must move past *Martin*'s framework and embrace the comprehensive approach instructed by Iowa Rule of Evidence 5.609.").

The recent holding in *State v. Redmond* clarifies the admissibility framework under rule 5.609(*a*)(1). *See* 803 N.W.2d 112, 119–22 (Iowa 2011). *Redmond* held the rule "applies to a witness's prior convictions that: (1) are punishable by death or imprisonment in excess of one year, (2) do not involve dishonesty or false statement (governed by rule 5.609(*a*)(2)), and (3) are within ten years (governed by rule 5.609(*b*))." *Id.* Because Sires was convicted of harassment, harassment is punishable by imprisonment in excess of one year, and the conviction occurred within ten years of his testimony, rule 5.609(*a*)(1) applies. Therefore we must turn to a review of the district court's balancing of the probative value against the prejudicial effect of the testimony.

We measure a prior conviction's probative value by how greatly it undermines the witness's credibility. *Id.* at 122. We gauge prejudicial effect by anticipating the extent to which a jury may misuse a witness's prior conviction thereby deciding the case on an improper basis. *Id.* at 124. When balancing the two, the trial court should consider factors such as "the conviction's (1) nature, (2) bearing on veracity, (3) age, and (4) tendency to improperly influence the jury." *State v. Martin*, 704 N.W.2d 674, 676 (Iowa 2005). Because Sires is a witness other than the accused, Yaggy had the burden to prove the unfair prejudice from introducing Sires's prior conviction substantially outweighed its probative value. Iowa R. Evid. 5.609(*a*) (admitting prior convictions of witnesses other than the accused subject to rule 5.403). We find little probative value in

Sires's harassment conviction.[3] Harassment "does not generally involve stealth or theft," nor does it necessarily require premeditation, but may well demonstrate impulsive behavior. *Redmond*, 803 N.W.2d at 125–26 (noting the probative value of harassment is limited to showing the witness has intended to upset or disturb others). Because crimes based on disorderly conduct do not generally bear on veracity, the probative value in admitting Sires's previous conviction is very low. Additionally, the conviction occurred more than five years before Sires's testimony. Although well within the ten-year limit for purposes of the rule, the probative value of the conviction diminishes with each passing year. *See id.* at 123 (noting the ten-year limitation "suggests older convictions become less probative").

Despite the relatively low probative value of Sires's conviction, we do not find it likely that its admission improperly influenced the jury. Yaggy argues that based on the similarity between harassment and assault, the jury could misuse the evidence as substantive proof of her guilt. The State distinguished the two offenses. Such comparison is not required here. The extent to which prior convictions are prejudicial depend on whether the impeached is the accused or another witness. If the prior conviction is that of the accused, the jury may assume guilt through propensity to commit a crime, a risk which is elevated when the two crimes are similar. *Id.* at 126. Because Sires was merely a witness,

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[3] The State refers only to the fact Sires was convicted of harassment, but does not expound on the underlying facts. When circumstances surrounding the harassment are not introduced, courts assume a general definition of harassment applies. *See Redmond*, 803 N.W.2d at 126 (quoting definition of harassment under Iowa Code section 708.7(1)(*a*)(1)).

such danger does not present itself here. It is not logical for the jury to infer a conviction by a defense witness shows the propensity of the defendant to commit a separate act five years later.

Yaggy directs our attention toward *Redmond*, wherein our supreme court found the admission of a prior conviction for first-degree harassment for purposes of impeaching the defendant was an abuse of discretion. 803 N.W.2d at 127. Although *Redmond* gives guidance on many aspects of rule 5.609(*a*), including the low probative value of a prior conviction of first-degree harassment, we find the case is ultimately distinguishable on the issue of unfair prejudice. In *Redmond*, the defendant was on trial for exposing his genitals to a neighbor. *Id.* at 115. The defendant was the only defense witness, and denied seeing the victim on the night in question. *Id.*

The overarching distinction between *Redmond* and the present case relates to the witness being impeached. In *Redmond*, the defendant's testimony was impeached through his own prior conviction, whereas Sires was a defense witness. First, because the witness in *Redmond* was the defendant, under rule 5.609(*a*) only if the State carries its burden to show "the prior conviction's probative value *outweighs* its prejudicial effect to the accused is the defendant's prior conviction admissible for impeachment purposes." *Id.* at 122. This inverse standard switches the burden of proof from the defendant to the State, and elevates the threshold for admitting such evidence.

Second, the *Redmond* court found the similarity between harassment and indecent exposure increased the danger of unfair prejudice, because "[j]uries are

more susceptible to making an improper propensity inference when the prior conviction involves a similar crime." *Id.* at 126. Any similarity between the offenses here is not relevant for Yaggy, as the prior conviction is not her own.

Third, although the facts of both cases were contested by each side, the defendant in *Redmond* was his one and only witness. *Id.* at 125. Both his credibility and that of the victim were essential to ascertaining the true facts of the case. When the defendant is the only witness in a swearing contest, the prior conviction may improperly tip the scales against the defendant. *Id.* But these risks subside when contemplating the prejudicial value of a witness other than the accused. Because the unfair prejudice to Yaggy from the introduction of Sires's first-degree harassment conviction does not substantially outweigh its probative value, we find the trial court did not abuse its discretion in admitting the prior conviction.

On this record, we do not find that the district court abused its discretion in allowing the State to impeach Sires with his prior conviction.

B. Ineffective Assistance of Counsel for Failure to Object to Prosecutorial Misconduct

Yaggy claims trial counsel had a duty to object to statements made by the prosecution during its closing argument and rebuttal. She alleges these statements constitute prosecutorial misconduct. The State counters that the prosecutor's statements during closing arguments did not constitute misconduct, and even if they amounted to misconduct, Yaggy suffered no prejudice.

While allegations of ineffective assistance of counsel are normally considered in postconviction relief proceedings, if there is a sufficient record to consider the claims, we will address them on direct appeal. *State v. Palmer*, 791 N.W.2d 840, 850 (Iowa 2010). We elect to do so here.

When such claims are based on prosecutorial misconduct, we first look to whether a due process violation exists. *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003). Therefore, we must determine whether the prosecutor's statements amounted to misconduct, and whether Yaggy was denied a fair trial. *Id.* If both are answered affirmatively, we then analyze whether counsel's failure to object was a breach of an essential duty, and whether the outcome would have been different, but for counsel's breach. *Id.* at 870.

1. Existence of Prosecutorial Misconduct

The prosecutor owes a duty to the defendant to comply with the requirements of due process throughout a proceeding. *Id.* 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). Second, she must prove that the misconduct resulted in prejudice denying her a fair trial. *Id.*

Yaggy's claims of misconduct are based on statements by the prosecutor in its closing arguments. We begin our analysis with the well-established principle that "[c]ounsel is entitled to some latitude during closing argument in analyzing the evidence admitted in the trial." *Graves*, 668 N.W.2d at 874 (quoting *State v. Phillips*, 226 N.W.2d 16, 19 (Iowa 1975)). The State is

permitted to draw conclusions and argue any permissible inferences reasonably flowing from the record, so long as the facts are not misstated. *State v. Williams*, 334 N.W.2d 742, 744 (Iowa 1983) (quoting *Phillips*, 226 N.W.2d at 19). But counsel may not create evidence by argument nor interject personal beliefs, as it is the province of the jury to determine the weight and logic of the conclusions drawn. *Id.* Additionally, the prosecutor may not make inflammatory or prejudicial statements about the defendant. *Graves*, 668 N.W.2d at 874.

a. Prosecutor's Description of Defendant's Story as "Ridiculous"

Yaggy points to four statements in the State's closing argument and rebuttal where the prosecutor refers to Yaggy's version of events as "ridiculous" and "unbelievable." Although witness credibility may be discussed in closing argument, the prosecutor may not reveal or suggest his personal belief as to any witness's credibility. *State v. Martens*, 521 N.W.2d 768, 772 (Iowa Ct. App. 1994). Our supreme court in *Graves* directs us to ask three questions in determining whether a prosecutor's remarks were proper:

> (1) Could one legitimately infer from the evidence that the defendant lied? (2) Where the prosecutor's statements that the defendant lied conveyed to the jury as the prosecutor's personal opinion of the defendant's credibility, or was such argument related to specific evidence that tended to show the defendant had been untruthful? And (3) 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?

Id. at 874–75. We address each question in turn.

First, the account of events presented by Sinkuler and Buhmann differed dramatically from the version articulated by Yaggy and Sires. Officer Yates documented Sinkuler's injuries, but observed no injuries to Yaggy. Thus, the physical evidence corroborated the version offered by Sinkuler and Buhmann, and cut against the version offered by Yaggy and Sires. Based on the evidence presented, the jury could legitimately infer that Yaggy was not telling the truth. *See State v. Carey*, 709 N.W.2d 547, 557 (Iowa 2006) (finding legitimate inference that defendant lied because "his version of events differed substantially from that of every other witness").

The second question addresses whether the State vouched for any witnesses. Such statements are impermissible if the jury could reasonably believe the State was expressing a personal belief in a witness's credibility, "either through explicit personal assurances or implicit indications that information not presented to the jury supports the witness." *Martens*, 521 N.W.2d at 772. When placed in context, each challenged statement is based in evidence.

The first statement came directly after the prosecutor summarized testimony of all the witnesses, highlighting multiple inconsistencies. The State noted that despite Yaggy's testimony Buhmann "clubbed" her, knocking her unconscious, Officer Yates failed to find any injuries. The prosecutor referred to the story as "ridiculous," "unbelievable," and "so clearly out of character and out of complete sense it doesn't fit at all with what the true facts are and what the other information is you have heard about the case." The specific evidence

mentioned immediately before his characterization of Yaggy's testimony suggested Yaggy was lying.

The prosecutor's second statement that he "think[s] it is so ridiculous that it essentially should not even be considered" referred to Yaggy's claim she was acting to protect her cat. Testimony by Sinkuler and Buhmann support a logical inference that Yaggy fabricated her justification for striking Sinkuler. Similarly, the prosecutor's assertion "we're operating under her story which is ridiculous . . ." and depiction of Yaggy's story as "this ridiculous story that no one could believe" were made after he pointed to multiple discrepancies throughout the evidence, which a juror could legitimately use to infer Yaggy was not being truthful. *See Graves*, 668 N.W.2d at 875 (concluding that because the "comments were generally made in the context of references to the evidence and not as an expression of the prosecutor's personal opinion," the statements did not amount to his personal opinion).

Finally, we turn our attention to the third question in the *Graves* analysis. When read in context, the challenged comments do not tend to inflame the passions of the jurors. Although calling a defendant "a liar" is presumed to be misconduct, referring to the defendant's version of events as "ridiculous" and "unbelievable" does not rise to the same level of inflammatory language. *See Carey*, 709 N.W.2d at 557–58 (summarizing cases showing both inflammatory and acceptable statements). Although more professional terminology could have been used by the prosecutor, the oratorical freedom afforded during closing argument does not foreclose such language in all instances. *Id.* at 557 (holding

prosecutor's reference to defendant's version of events as "a ridiculous story," "baloney," "absolutely not true," "lies," was within the latitude to which he was entitled in closing).

b. Additional Allegations of Prosecutorial Misconduct

i. Reference to Objective Standard for Justification.

Yaggy also alleges the following statement constituted misconduct: "What you're asked and required to do is look at it from the perspective of a reasonable person. Not the defendant; a reasonable person. And ask if she acted in a way that was consistent with that." The defendant argues the statement, when considered in conjunction with the State's other allegations that Yaggy's story was "ridiculous," encouraged the jury to view the defendant as unreasonable or irrational, and drew the jury's attention away from the subjective element of justification.

When viewed in context, these statements do not constitute misconduct. The prosecutor discussed jury instructions in his closing, and explained the difference between a subjective and objective standard, which is the expected role of the advocates. His emphasis on the objective aspect of justification did not dictate to the jury that it should ignore the additional consideration of Yaggy's subjective belief.[4]

[4] It is also significant that the defense counsel's closing argument pointed the jury to the justification instruction and reminded the jurors of the subjective element, *i.e.* it was "not necessary that there was an actual danger but the defendant must have an honest and sincere belief that the danger actually existed."

ii. Comparison of Witnesses' Motives and Credibility

Yaggy also points to the prosecutor's suggestion Yaggy had a motive to lie because she was risking conviction, whereas the other witnesses had no interest in lying. The prosecutor concluded the witnesses' stories fit because they were all telling the truth, but that Yaggy concocted a "made-up fairy tale." The prosecutor in *Carey* made similar closing arguments, telling the jurors they could find the victim was telling the truth "[b]ecause he doesn't have any motive in here to try to get this defendant convicted of any crime. . . . [H]e's here because he's subpoenaed." 709 N.W.2d at 556. Like our supreme court in *Carey*, we find the comparison of the witnesses' motivations did not amount to prosecutorial misconduct.

During rebuttal, the prosecutor highlighted the fact Yaggy read prepared statements, whereas Sinkuler testified from memory, suggesting the lack of rehearsal demonstrated Sinkuler's testimony was truthful. This suggestion does not rise to the level of prosecutorial misconduct. Yaggy stated she based her testimony on a statement she wrote after being released from jail so that she could accurately remember the event. The State is 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." *Graves*, 668 N.W.2d at 876 (citations omitted). Because the prosecutor based his theory on evidence properly before the jury, the argument was not improper.

We also find the prosecutor's statement that the officer did a "good job" investigating the case did not amount to vouching. The prosecutor made this statement immediately before reciting the officer's observation of Sinkuler's injuries and absence of Yaggy's injuries, as well as his interview of those individuals involved in the dispute. Through testimony by the officer and other witnesses, the jury could assess the adequacy of the officer's actions. *See Graves*, 668 N.W.2d at 876.

iii. Sharing of Personal Story

In the course of the defense closing argument, counsel stated "I'm not a cat lover. I'm more of a dog lover." During its rebuttal, the prosecutor responded, "I'm more of a cat person myself than Mr. Shoeberl," then relayed a story involving his own cat that needed a $5000 surgery, which he funded with a loan from his parents. Yaggy contends the prosecutor intended this story to inflame the passions of the jury by showing that a cat lover could find Yaggy's actions to be unreasonable. We do not think the jury would have necessarily reached that conclusion. Defense counsel initiated the topic by mentioning his preference in pets during his summation, and on rebuttal the prosecutor did the same. The story is collateral to the facts of the case and did not create new evidence not already on record. *See State v. Deases*, 479 N.W.2d 597, 600–01 (Iowa Ct. App. 1991) (addressing prosecutor's recollection of specific details of an accident scene he witnessed as a child, holding "[a]lthough relating one's own childhood memories in a closing argument is not analyzing the evidence, we do not find this so prejudicial as to deprive the defendant of a fair trial"). While the

prosecutor's cat story may have been better left untold, it did not cross the line into prejudicial misconduct.

2. No Due Process Violation

Because we find the challenged statements did not constitute prosecutorial misconduct, we need not address whether they prejudiced Yaggy. But even if we had found misconduct, the references did not deny Yaggy a fair trial. In evaluating prejudice, we consider five factors:

> (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.

State v. Boggs, 741 N.W.2d 492, 508–09 (Iowa 2007) (citations omitted). Here, the only instances of alleged prosecutorial misconduct occurred during closing arguments, and not throughout the trial. Because Yaggy admitted to pushing Sinkuler, the State's evidence of an assault was solid. The instructions admonished the jury that "statements, arguments and comments by lawyers are not evidence." Moreover, the prosecutor's personal cat anecdote was evoked by defense counsel's revelation of his own pet preferences. Similarly, the prosecutor stated the officer did a "good job," in response to the defense argument that the officer's investigation was insufficient. Even if misconduct had occurred, the prejudice would not have deprived Yaggy of due process. We now turn to whether Yaggy's counsel provided effective assistance.

3. Yaggy's Counsel Was Not Ineffective.

To prevail on a claim of ineffective assistance of counsel, the defendant must show failure of a duty on the part of counsel, and resulting prejudice to the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). The defendant must prove both elements by a preponderance of the evidence. *Id.*, 104 S. Ct. at 2065, L. Ed. 2d at 693.

In proving counsel's performance was deficient, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 687–88, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693; *see also Graves*, 668 N.W.2d at 870 (holding counsel fails this standard when "there is no possibility that trial counsel's failure to act can be attributed to reasonable trial strategy. . . ."). To show prejudice, the defendant must prove a reasonable probability that, but for trial counsel's unprofessional errors, the result at trial would have been different. *Id.* at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. A reasonable probability is established by "a probability sufficient to undermine confidence in the outcome." *Id.*, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698.

At the outset, we reiterate the fact that because the State's comments did not amount to prosecutorial misconduct, trial counsel had no duty to object. *Graves*, 668 N.W.2d at 881 ("Trial counsel has no duty to raise an issue that has no merit."). Even if the comments were verboten, Yaggy's trial counsel pursued a reasonable strategy in response. While not objecting during the State's closing argument, defense counsel specifically addressed the prosecutor's comments in his own closing:

> Now, I don't think the defense that we presented is ridiculous. I think the testimony that we presented justifies or gives you an explanation as to what happened that day and as to why according to Miss Yaggy's testimony why at the end of the incident she pushes Miss Sinkuler out of the way to get her cat. That's not ridiculous. That's someone telling us what happened, and you can clearly tell by her testimony that I believe that she was sincere in what she was saying and that she believed that this was a danger that was existing.

Counsel's choice not to object but to refute the prosecution's argument is within the scope of normal competency. *See Graves*, 688 N.W.2d at 882 (noting when prosecutor's comments are an isolated occurrence, letting such comments go may be a sound trial strategy). Tactical decisions are immune from defendant's subsequent claims that trial counsel was ineffective. *Osborn v. State*, 573 N.W.2d 917, 924 (Iowa 1998). Addressing the State's comments in his own closing rather than calling the jury's attention to potentially inflammatory statements is a recognized trial strategy and was sufficient to combat any possible prejudice. Yaggy has not shown trial counsel to be ineffective.

AFFIRMED.