IN THE COURT OF APPEALS OF IOWA

No. 1-161 / 10-1118
Filed May 25, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CARL ALLEN PETERSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Des Moines County, William L. Dowell, Judge.

Defendant appeals his conviction and sentencing for third-degree sexual abuse. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Vidhya K. Reddy, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Patrick C. Jackson, County Attorney, and Lisa Taylor, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Eisenhauer and Danilson, JJ. Tabor, J., takes no part.

EISENHAUER, J.

Following a jury trial, Carl Peterson was convicted of third-degree sexual abuse. Peterson appeals arguing his trial counsel was ineffective and, alternatively, the court erred in imposing the maximum sentence. We affirm.

I. Background Facts and Proceedings.

At trial, K.C. testified she was intoxicated during a party in December 2007, and Carl Peterson took her to a garden shed and had sexual intercourse with her. At this time K.C. was fifteen and Peterson was twenty-four. K.C.'s boyfriend at the time, David Jameson, testified he went to the garden shed and saw Peterson on top of K.C. Jameson testified he saw K.C.'s jeans and underwear pulled down and saw Peterson's penis. Jameson said he "grabbed [Peterson] off of her."

In August 2009, Peterson called K.C. K.C.'s mother refused to let Peterson speak with her. When K.C.'s mother talked to K.C. about the phone call, K.C. told her about the December 2007 incident. K.C.'s mother called the police.

Officer Merryman investigated and conducted a videotaped interview with Peterson in September 2009. Peterson stated he saw K.C. at the party, but did not have sexual contact with her and did not leave the party with her. Later in the interview, Peterson changed his story and stated he and K.C. attempted to have consensual sexual intercourse, but they were unsuccessful because he was too drunk. Peterson described other sexual contact with K.C.

In March 2010, Peterson was charged with third-degree sexual abuse. *See* Iowa Code § 709.4(2)(c)(4) (2007) (prohibiting a "sex act" between person fourteen or fifteen and "person four or more years older"). Peterson's videotaped interview was played for the jury. At trial, Peterson testified he had no sexual contact with K.C. and never left the party with her. Peterson told the jury his videotaped statements discussing sexual contact with K.C. were not truthful. Peterson testified he told the police about sexual contact because Jameson asked him to so Jameson would not get into trouble. The jury found Peterson guilty and the court sentenced him to a term of imprisonment not to exceed ten years. The assistant county attorney made several statements during her closing argument which are the basis of this appeal.

II. Ineffective Assistance of Counsel.

Peterson contends his counsel was ineffective in failing to object to several instances of prosecutorial misconduct. Generally, we do not resolve claims of ineffective assistance of counsel on direct appeal. *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002). "Yet, in some instances, the appellate record can be adequate to address the claim on direct appeal." *State v. Truesdell*, 679 N.W.2d 611, 616 (Iowa 2004). We find the record in this case is sufficient for us to rule upon the issue on direct appeal.

In order to prevail on his claim of ineffective assistance of counsel, Peterson must show (1) counsel failed to perform an essential duty, and (2) prejudice resulted. *See State v. Lane*, 726 N.W.2d 371, 393 (Iowa 2007). His inability to prove either element is fatal. *See State v. Scalise*, 660 N.W.2d 58, 62

(Iowa 2003). We evaluate the totality of the relevant circumstances in a de novo review. *Truesdell*, 679 N.W.2d at 615.

III. Counsel's Failure to Perform an Essential Duty.

A. Alleged *Graves* Violations. Peterson argues his trial counsel was ineffective in failing to object to the prosecutor's statements during rebuttal argument that Peterson was lying.

"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). "It is not so much the fact that the prosecutor suggests the defendant is untruthful that creates the misconduct. Instead, it is the use of the word "liar" itself . . . ." *State v. Carey*, 709 N.W.2d 547, 558 (Iowa 2006) (citation omitted).

Peterson also argues the prosecutor's rebuttal statements calling Peterson's trial testimony "preposterous, asinine, [and] nonsensical" violate another duty enunciated in *Graves*: "A prosecutor's duty extends beyond confining his or her arguments to the evidence. In addition, the prosecutor is not 'allowed to make inflammatory or prejudicial statements regarding a defendant in a criminal action.'" *Graves*, 668 N.W.2d at 874 (quoting *State v. Leiss*, 258 Iowa 787, 792, 140 N.W.2d 172, 175 (1966)). A prosecutor should "limit his argument to a discussion of whose testimony was most believable based on reasonable inferences from the evidence" and not improperly resort "to inflammatory characterizations of the defendant's testimony." *Id*. at 876.

We first detail the closing argument of Peterson's trial counsel:

> What we also know is that if you are to believe Officer Merryman and his testimony—and I'll just point out that Officer Merryman does not have a personal interest in the outcome of this case—but if you are to believe Officer Merryman, then [K.C.] lied, and [Jameson] lied to you. How did they do that? Officer Merryman says that [Jameson] told him that [K.C.] said: You need to tell the officer certain things. . . . [I]n other words, to imply that this all happened really fast and not over an hour or two.
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> [Jameson] denied that [K.C] asked him to do these things, and [Jameson] denied that he told Officer Merryman that [K.C.] asked him to do these things. But you heard Officer Merryman testify that, no, [Jameson] told me that she asked him to do that. So is the police officer lying? I don't think so. What's his motivation to lie? He has none. [K.C.] and [Jameson], on the other hand, have an interest in how this case comes out.
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> . . . .
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> Now, is it a good thing to tell a false story to the police? No, it's not. But that's not what Mr. Peterson is accused of today, giving false information to the police. That's a separate charge. . . .
>
> Now, I suspect the State will suggest that . . . it's a waste of time because Mr. Peterson's story is ridiculous. Or is it because [Jameson] has already lied to you in this trial? Is it because [K.C.] has already lied to you in this trial? Please think about that during your deliberations.

The prosecutor replied:

> Ridiculous. I think that was the word [defense counsel] said he thought I'd come up here and say about whatever it was that took place . . . yesterday afternoon with Mr. Peterson on the stand. *Actually, preposterous, asinine, nonsensical all came to my mind. I never thought of ridiculous.* That is a good one.
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> *[Defense counsel] wants you to focus on the testimony of [K.C.] and [Jameson] and their lying. The only person we know who lied is the defendant. He spent twenty minutes lying to Officer Merryman* on September 16th of last year. He spent twenty minutes telling him, yeah, I knew her but nothing happened, nothing happened, nothing happened.
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> . . . .
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> *We know he lied for twenty minutes*. We heard it. And what came out of his mouth yesterday, I have no idea. It makes absolutely no sense when you look at the facts as a whole.
>
> . . . .

> Ladies and gentlemen, when you go back think about the interview, that forty-five minute interview, *the first half of which he spent lying to the officer*, and the second half, where not only does he describe and admit to having sexual relations with [K.C.], he describes them in such graphic detail. And then to whatever it was that came out of his mouth yesterday afternoon, I'd ask you to look at that and compare it. Use your common sense.

(Emphasis added.)

B. Personally Vouching Against Peterson's Credibility. Peterson also argues prosecutorial misconduct occurred when the prosecutor personally vouched against the credibility of Peterson's trial statement that he had fabricated his videotaped statement at Jameson's request. The State admits "it would have been better if the prosecutor had not presented her remarks in the first person, but they were set within an evidence-based argument."

Iowa law provides:

> The key point is that counsel is precluded from using the argument to vouch personally as to a defendant's guilt or a witness's credibility.
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> . . . .
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> Expressions of personal belief that are not stated as reasonable inferences from the record are barred . . .
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> . . . .
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> "The line between permissible and impermissible argument is a thin one. . . . The prohibition goes to the advocate's personally endorsing or vouching for or giving his opinion; the cause should turn on the evidence, not on the standing of the advocate, and the witnesses must stand on their own."
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> . . . .
>
> The governing principle does not preclude all personalized remarks; it merely precludes those that do not appear to be based on the evidence.

State v. Williams, 334 N.W.2d 742, 745 (Iowa 1983) (quoting *ABA Standards, The Prosecution Function*, at 128) (finding no misconduct).

Here, the prosecutor argued:

> If, if for the sake of argument we accept what [Peterson] said on the stand; that this is all just some big brilliant plan of [Jameson's], I want you to think about *these questions that I have*. . . . .
>
> And why did [Jameson] do this? We heard Mr. Peterson testify, well, he didn't give me a reason. *If someone is asking me to provide false information* to a law enforcement officer; No. 1, *I don't care* how good of friends we are, it's not happening. But, No. 2, *I'm going to want a darn good reason for why you even want me to do it.* But [Peterson] didn't have one. He said [Jameson] never provided him one. I submit to you that the conversation never took place.

(Emphasis added.)

C. Breach of Duty. We recognize Peterson's counsel initiated the use of the word lying and also personally vouched for the testimony of Officer Merryman. However, when we consider the prosecutor's repeated use of language prohibited in *Graves*, combined with the prosecutor's language disparaging the defense and the language personally vouching against Peterson's credibility, we conclude Peterson's trial counsel breached a duty in failing to object.

D. Misstating Evidence. Peterson also argues the prosecutor acted improperly by misstating K.C.'s trial testimony and counsel was ineffective in failing to object. During closing arguments, counsel may argue permissible inferences which reasonably flow from the evidence but "has no right to create evidence or misstate the facts." *Carey*, 709 N.W.2d at 554. The prosecutor argued:

> The fact that [Peterson] was a 24-year-old man having sex with a 15-year-old girl makes it a crime, whether she said yes, no, or is completely indifferent.

> *But [K.C.] told you: I didn't; I didn't say yes.* That when they entered the shed, he pushes her in the corner in the front of the shed . . . pulls down her pants and underwear; opens up his fly; and, has sex with her, until just a few minutes later when [Jameson] sees them.

(Emphasis added.) The State admits K.C. did not give any testimony corresponding to the italicized statement, but argues the jury heard Officer Merryman tell Peterson numerous times during his taped interview that K.C. "says you forced her to have sex." Therefore, the information was in evidence. Further, the State points to the court's instructions that arguments are not evidence. Immediately before the closing arguments, the court told the jury:

> Counsel for each party will be summarizing the testimony that you have heard and the evidence which has been presented during the trial. They will merely be recalling the evidence, as you will later. They will not intentionally try to mislead you, and if their recollection of the testimony is not the same as yours, you must follow and rely on your own recollection.

As in *Carey*, it appears the prosecutor "probably confused, in good faith," K.C.'s trial testimony with the taped statements of Officer Merryman. *See id*. Further, "[e]ven if we assume the mistaken . . . reference was not made in good faith, we consider it only as bearing on the ultimate issue of prejudice." *See id*.

IV. Prejudice.

"The bright-line rule of *Graves* is not a bright-line rule for prejudice. Accordingly, we . . . consider whether the effect of the misconduct . . . was pervasive enough to undermine confidence in the verdict." *Nguyen v. State*, 707 N.W.2d 317, 326 (Iowa 2005). Peterson must prove "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See Graves*, 668 N.W.2d at 882. To

determine whether the prosecutor's conduct was prejudicial, "we must examine the entire record." *Bowman v. State*, 710 N.W.2d 200, 206 (Iowa 2006). "The most important factor under the test for prejudice is the strength of the State's case." *Carey*, 709 N.W.2d at 559. "Clearly, the stronger the case against the defendant, the less likely the jury is to look beyond the record." *Id*.

As the State points out, the evidence of Peterson's guilt was overwhelming. In addition to Peterson's properly admitted confession detailing sex acts with K.C., K.C. testified Peterson took her to the shed and they had sexual intercourse until Jameson interrupted them. Jameson testified he found Peterson and K.C. in the shed, pulled Peterson away from K.C. and saw Peterson's exposed penis.

Peterson told three different versions of the events: (1) there was no sex; (2) there were several sex acts; and (3) his prior admission was false and made under pressure from Jameson. When we consider the record as a whole, we conclude any alleged failure by counsel did not cause prejudice to Peterson sufficient to establish ineffective assistance of counsel. *See id.* (stating prosecutor's "several acts of questionable conduct" did not cause prejudice where the State's case was overwhelming given "the severe inconsistencies in [the defendant's] testimony").

V. Sentencing.

Alternatively, Peterson seeks resentencing contending the court abused its discretion in sentencing him to prison for the maximum time permitted. We review for correction of errors at law and will not reverse unless there has been

an abuse of discretion. *State v. Formaro*, 638 N.W.2d 720, 724 (Iowa 2002). "An abuse of discretion will not be found unless we are able to discern that the decision was exercised on grounds or for reasons that were clearly untenable or unreasonable." *Id*.

Peterson argues the court erred in failing to "recognize or consider" mitigating factors identified in the presentence investigation report supporting the imposition of a lesser sentence. Peterson also points out the State charged him only on the basis of age and not on the basis of force or lack of consent. Peterson admits the district court made a record of its reasons for the sentence imposed:

> Specifically, the Court made reference to [Peterson's] age, the nature of the offense in that it involved inappropriate sexual contact, [Peterson's] prior record of convictions, revocation of prior good behavior probation, lack of high school education or stable residence, denial of substance abuse problems despite evidence to the contrary, [Peterson's] failure to recognize the harm caused by crimes of this nature to the victims, and the Presentence Investigation (PSI) Report opinion that he was of moderate to high risk of reoffending.

"[O]ur task on appeal is not to second guess the decision made by the district court, but to determine if it was unreasonable or made on untenable grounds." *Id*. at 725. We find no abuse of discretion. At the beginning of the sentencing hearing, the court advised Peterson: "I have received my copy of the [PSI] in this matter and I've thoroughly read the report in preparation for your sentencing." The court's failure to detail the PSI's possible mitigating factors does not equate to a failure to consider them because the court is "not required to give its reasons for rejecting particular sentencing options." *State v. Vanover*,

559 N.W.2d 618, 635 (Iowa 1997). Under our standard of review, the record supports the sentence imposed.

AFFIRMED.