IN THE COURT OF APPEALS OF IOWA

No. 1-662 / 10-1583
Filed November 9, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DONNA SUE SINGH,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, James Birkenholz, District Associate Judge.

Donna Singh appeals her conviction for third-degree theft. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Martha J. Lucey, Assistant State Appellate Defender, and Kevin Patrick, Student Intern, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney General, John Sarcone, County Attorney, and Olu Salami, Assistant County Attorney, for appellee.

Heard by Danilson, P.J., and Tabor and Mullins, JJ.

TABOR, J.

Donna Singh appeals from her conviction for third-degree theft, alleging her trial counsel was ineffective for failing to lodge the proper objection to the State's closing rebuttal argument. Specifically, she argues her counsel breached an essential duty by not arguing that the prosecutor's comment on her failure to call witnesses shifted the burden of proof under *State v. Hanes*, 790 N.W.2d 545 (Iowa 2010), a case decided after the trial. Because we find counsel had no duty to object under the existing Iowa case law and because Singh was not prejudiced by the lack of an objection, we affirm.

I. Background Facts and Proceedings

Just before five p.m. on March 4, 2009, Gordman's department store employee Brandee Thies was taking a cigarette break outside the front of the store. She noticed a green sports utility vehicle (SUV) with a broken rear window parked in the fire lane near the front entrance. A female driver was looking at the entrance while talking on her cellular telephone. Thies noted the SUV license plate as she had been trained to do.

Around the same time, Medeja Donlagic was arriving to start her five p.m. shift. She too saw the suspicious SUV. After talking briefly with Thies, Donlagic entered the store and saw a woman pushing a cart near the front doors. Donlagic noticed two purses in the cart that were not inside a Gordman's bag. Gordman's policy requires employees to place all purchased merchandise in a store bag. She heard the woman say, "There she is," but did not see her push

the cart out of the store. Donlagic reported what she observed to her manager, Kristi Peddycoart.

Thies entered the store shortly after Donlagic and saw a woman with a shopping cart and another woman talking to her. The other woman, who was not pushing the cart, left the store. Thies saw the cart held two purses—not in bags—as well as a plastic bag. She too reported her observations to Peddycoart.

After Peddycoart heard the employees' suspicions, she went to the entrance of the store and saw the woman with a cart containing three handbags and a clear plastic bag over the top. She witnessed the woman pushing the cart exit the store and enter the SUV. She relayed the SUV's license plate number over a walkie talkie. Peddycoart estimated the value of the purses to be less than $200.

Store employees reported the theft to the West Des Moines Police Department. Officer Christopher Morgan interviewed Peddycoart, Thies, and Donlagic. Peddycoart and Officer Morgan watched a surveillance video of the front door. Although the merchandise was not visible on the video, the woman with the cart could be seen walking from the right and leaving the store with the cart; Peddycoart followed. In his police report, Officer Morgan described the woman who pushed the cart out of the store as a white woman in her late teens or early twenties. Singh was forty-eight years of age.

Metro area police departments were instructed to stop and hold any vehicle matching the description of the SUV so West Des Moines officers could

question the occupants. Des Moines Officer Todd Wilsusen saw the vehicle parked at a residence. He went to the door and inside the home found four women, including Singh. Officer Wilsusen tried to interview the women but only one, Bobbi Montoya, responded to questions. Officer Wilsusen was unable to locate the merchandise taken from Gordman's.

A trial information filed on April 20, 2009, charged Singh with third-degree theft based on the enhancement at Iowa Code section 714.2(3) (2009). The court scheduled trial for July 6, 2009. On July 2, 2009, the State filed a notice of additional witnesses to include two other women who had been charged with and subsequently convicted of the same theft. Singh sought to exclude the witnesses based on the late notice.

On the morning of trial, the court held a hearing on Singh's motion to exclude. The State initially resisted but later agreed not to call additional witnesses, adding:

> I'm giving notice now, and I would have the case ready for you over the lunch break that allows the prosecutor to argue if they have exculpatory evidence that they didn't present. I can argue in closings without referring to her right to remain silent which she has not to testify. . . . [S]o I'm giving you heads up if that's the case then I will withdraw my resistance.

Following jury selection, the State again requested the court allow the additional witnesses. The court ruled the State could not call the witnesses in its case in chief, but that their testimony would be allowed on rebuttal if necessary.

At trial, all three Gordman's employees identified Singh as the woman they saw pushing the cart on March 4, 2009. In cross examining the State's witnesses, the defense pursued a misidentification theory, pointing out that

Officer Morgan's report listed all three suspects' ages as between eighteen and twenty-two. Singh elected not to present any evidence at trial. Therefore the State did not call rebuttal witnesses.

In the defense closing, trial counsel emphasized the discrepancy between the ages of the suspects noted in the officer's report and Singh's actual age. Counsel also argued the State "nowhere established the relationship between Donna Singh and these people. . . . There is no evidence from any witnesses that she was involved in any of that. Zero."

In the State's rebuttal during closing argument the prosecutor asked the jury why Singh had not called the two other women charged with the theft:

> We know that there are two other people with the Defendant. We know that because they were described and they were also home when the Des Moines officer got there. Okay, she knows she's been charged since March or somewhere around there. She was charged. Where are those two people? Where are they? She could have brought them here—the two witnesses—white females I believe they're described in their late 20s could have brought them here. You know why she didn't bring them here? Because she knows—

At that point, Singh's counsel objected that the prosecutor was speculating. In a hearing outside the presence of the jury, the prosecutor stated he "was going to say the reason she didn't bring them in is because she knows that they won't corroborate her story." The court did not specifically rule on the objection. When closing argument resumed, the prosecutor stated, "We know there were two witnesses with her. The question you have to ask yourself is why aren't those witnesses here? That's the question you have to ask yourself."

The jury found Singh guilty of theft in the fifth degree. Because she had two prior theft convictions, the district court entered judgment on theft in the third degree and sentenced Singh to a term of incarceration not to exceed two years, to be served consecutively with an unrelated sentence.

II. Standard of Review

Ineffective-assistance-of-counsel claims find their basis in the Sixth Amendment of the United States Constitution. *State v. Lyman*, 776 N.W.2d 865, 877 (Iowa 2010). We review such claims de novo. *Id.*

IV. Analysis

To succeed on a claim of ineffective assistance of counsel, a defendant must prove (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Id.* To prove the first element, a defendant must show counsel's performance was deficient. *Id.* In other words, the attorney must have "made errors so serious that counsel was not functioning as 'counsel' as guaranteed by the Sixth Amendment." *Id.* at 878. Counsel's performance is measured objectively by determining whether it was reasonable under prevailing professional norms, considering all the circumstances. *Id.* Reviewing courts indulge a strong presumption that trial counsel's conduct fell within a wide range of reasonable professional assistance. *Id.* To prove the prejudice element, a defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*

Singh contends her trial counsel was ineffective in failing to object to prosecutorial misconduct. She argues the prosecutor asked the jury to infer that she had not called the two other witnesses because their testimony would have been unfavorable to her. Singh alleges this improperly shifted the burden of proof to her. Singh claims her attorney's failure to object caused her prejudice because the court never admonished the jurors that she did not have to call any witnesses and they could not draw any inferences from her decision.

Singh's argument relies on our supreme court's statement in *Hanes* that "it is generally improper for a prosecutor to comment on a defendant's failure to call a witness" because "[s]uch comment can be viewed as impermissibly shifting the burden of proof to the defendant." 790 N.W.2d at 556 (quoting *Byford v. State*, 994 P.2d 700, 709 (Nev. 2000)). In *Hanes*, the State did not call certain witnesses who were mentioned by the prosecutor in opening argument. *Id.* Defense counsel pointed out this inconsistency during closing argument. *Id.* In rebuttal, the prosecutor argued the defense could have called the witnesses if there was anything helpful for the defendant's case, stating:

> Now, the-the defense brought up Paul McGonigle. And I mentioned Paul McGonigle in my opening. I also mentioned Willie Brown. You didn't see them; did you? No, we didn't call them. You know who else didn't call them? The defense didn't call them. The defense called witnesses. The defense can call any witness they so desire. If there was anything helpful for the defendant, the defense could have called Paul McGonigle or Willie Brown.
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> . . . .
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> . . . If there was anything the defense really wanted from either one of these individuals that they felt was beneficial or helpful to the defendant, they could have called them.

Id.

Our supreme court stated:

> It was appropriate for defense counsel to call attention to the State's failure to call these witnesses after the State outlined the witnesses' expected testimony in the opening statement. 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 defendant's failure to call the witnesses that they would not have said anything helpful to the defense. This situation is not one where the prosecutor generally referenced an absence of evidence supporting the defense's theory of the case.

Id. at 557.

The *Hanes* decision noted courts in some jurisdictions have held an attempt by the State to shift the burden of proof may be cured by an instruction regarding the State's burden. *Id.* The court did not decide the prejudice issue in *Hanes* because it reversed the case on other grounds. *Id.* Singh now argues her counsel had a duty to object to the prosecutor's statement so the trial court could give instructions to cure the attempted burden shifting.

The State refers to the *Hanes* language on burden shifting as an "undeveloped departure" from established case law. Nevertheless, the State appears to acknowledge that in light of *Hanes*, counsel now has a duty to object to a prosecutor's comment on the defense failure to call a witness. But *Hanes* was not decided until after Singh's trial.

When an area of law is unsettled, counsel is not required to be a "'crystal gazer' who can predict future changes in established rules of law in order to provide effective assistance to a criminal defendant." *State v. Westeen*, 591 N.W.2d 203, 210 (Iowa 1999). Counsel is required to use due diligence in deciding whether an issue is "worth raising." *Millam v. State*, 745 N.W.2d 719,

723 (Iowa 2008). Factors to consider in determining whether counsel's failure to raise an issue constituted a breach of duty include: (1) whether Iowa case law would have foreclosed the argument and (2) whether case law from other jurisdictions supported the defendant's position. *See State v. Schoelerman*, 315 N.W.2d 67, 72 (Iowa 1982).

Long before our supreme court decided *Hanes*, a prosecutor was forbidden from commenting on a defendant's failure to testify. *Griffin v. California*, 380 U.S. 609, 612-15, 85 S Ct. 1229, 1232-33, 14 L. Ed. 2d 106, 109-10 (1965). Such comments violate the self-incrimination clause of the Fifth Amendment of the United States Constitution. *Id.* The Iowa Supreme Court interpreted the *Griffin* rule to prohibit the prosecution from directly or indirectly using the silence of the accused in a way that would "naturally and necessarily" be understood by the jury to be a comment on the failure of the accused to testify. *State v. Taylor*, 336 N.W.2d 721, 727 (Iowa 1983).

But our supreme court found it acceptable for a prosecutor to comment generally on a defendant's failure to present exculpatory evidence. *See, e.g., State v. Craig*, 490 N.W.2d 795, 797 (Iowa 1992); *State v. Bishop*, 387 N.W.2d 554, 563 (Iowa 1986). The *Craig* court articulated the "correct rule" regarding a prosecutor's comment on a defendant's failure to call witnesses as follows: "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." 490 N.W.2d at 779 (overruling *State v. White*, 225 N.W.2d 104, 106 (Iowa 1975) to the extent that it intimated that "it is always

misconduct for a prosecutor to comment on a defendant's failure to call witnesses").[1] The *Craig* holding foreclosed an objection to the prosecutor's statement in the instant case. Given the strong presumption that counsel's performance fell within the wide range of reasonable professional assistance, *Wemark v. State,* 602 N.W.2d 810, 814 (Iowa 1999), we find Singh has failed to show her trial counsel breached a duty to object given the existing case law.

Even assuming counsel had a duty to object on burden-shifting grounds and to secure a ruling, we find counsel's omission did not amount to ineffective assistance because Singh cannot show she was prejudiced. Singh argues she was harmed because the jury instructions did not cure the prosecutor's burden shifting. While the defense did not ask the court to admonish the jury specifically about the prosecutor's statement, the court did instruct the jury: "The burden is on the State to prove DONNA SINGH guilty beyond a reasonable doubt" and the "presumption of innocence remains on the defendant throughout the trial unless the evidence establishes the defendant's guilty beyond a reasonable doubt."[2] We presume the jury followed the instructions given. *State v. Simpson*, 438 N.W.2d 20, 21 (Iowa 1989). The fact that the court instructed the jury before the prosecutor made the disputed statements does not change this presumption.

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[1] Even in *White*, the court recognized that the prosecutor's remarks would have been permissible if "provoked and in reply to comments of defense counsel." *White*, 225 N.W.2d at 106 (citing *State v. O'Kelly*, 211 N.W.2d 589, 597 (Iowa 1973)). In this case, defense counsel argued in closing that the State did not establish the relationship between Donna Singh and the other women involved in the theft.

[2] In addition, both the prosecutor and defense counsel reminded the jury in closing arguments that the State had the burden of proving Singh's guilt beyond a reasonable doubt.

All three eyewitnesses identified Singh at trial as the woman they saw pushing the cart out of the store on the day of the theft. Both Thies and Peddycoart testified to having no doubts about their identification. In addition to the eyewitness identification, Singh was present at the house where the SUV was parked after the commission of the crime. Given the strength of the State's evidence against Singh, coupled with the presumption the jury followed the instructions, we find no reasonable likelihood the outcome of trial would have been different if counsel had objected on the basis later revealed in *Hanes*.

Because Singh's claim fails on both prongs of the ineffective-assistance-of-counsel test, we affirm.

AFFIRMED.