IN THE COURT OF APPEALS OF IOWA

No. 1-700 / 10-2050
Filed January 19, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DONALD CORTEZ GIBSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Nancy S. Tabor, Judge.

Donald Gibson appeals from his convictions of delivery of a controlled substance (crack cocaine) and possession with intent to deliver a controlled substance (crack cocaine). **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Shellie L. Knipfer, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, Michael J. Walton, County County, and Kelly Cunningham, Assistant County Attorney, for appellee.

Considered by Eisenhauer, P.J., and Doyle and Mullins, JJ.

MULLINS, J.

Donald Gibson appeals from his convictions of delivery of a controlled substance (crack cocaine) in violation of Iowa Code sections 124.206(2)(d), 124.401(1)(c)(3), and 703.1; and possession with intent to deliver a controlled substance (crack cocaine) in violation of Iowa Code sections 124.206(2)(d), 124.401(1)(c)(3), and 703.1.[1] He raises an ineffective-assistance-of-counsel claim, arguing his trial counsel should have objected to prosecutorial misconduct during closing arguments. Our review is de novo. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006).

Although ineffective-assistance-of-counsel claims do not need to be raised on direct appeal, a defendant may do so if he has reasonable grounds to believe the record is adequate to address his claim. *State v. Johnson*, 784 N.W.2d 192, 198 (Iowa 2010). If we determine the record is adequate, we resolve the claim. *Id.* If we determine the record is inadequate, we must preserve the claim for postconviction-relief proceedings, regardless of our view of the potential viability of the claim. *Id.* We find the record is adequate in the present case.

To prevail on an ineffective-assistance-of-counsel claim, a defendant must show by a preponderance of the evidence that (1) his trial counsel failed to perform an essential duty, and (2) prejudice resulted from this failure. *Straw*, 709 N.W.2d at 133. A defendant's inability to prove either element is fatal and

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[1] Gibson was also convicted of possession of a controlled substance (marijuana) in violation of Iowa Code sections 124.204(4)(m) and 124.401(5), but that conviction is not at issue on appeal.

therefore, we may resolve a claim on either prong. *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003).

Gibson's trial attorney objected multiple times during closing arguments. On appeal, Gibson identifies other statements made by the prosecutor that he alleges were prosecutorial misconduct, to which his trial attorney should have also objected. *See DeVoss v. State*, 648 N.W.2d 56, 64 (Iowa 2002) (stating prosecutorial misconduct that denies the defendant a fair trial is a violation of due process). In order to establish prosecutorial misconduct, there must be (1) "proof of misconduct" and (2) "proof the misconduct resulted in prejudice to such an extent that the defendant was denied a fair trial." *Graves*, 668 N.W.2d at 869.

> A prosecutor is entitled to some latitude during closing argument in analyzing the evidence admitted in the trial. Moreover, a prosecutor may argue the reasonable inferences and conclusions to be drawn from the evidence. A prosecutor may not, however, express his or her personal beliefs. The key point is that counsel is precluded from using argument to vouch personally as to a defendant's guilt or a witness's credibility. This is true whether the personal belief is purportedly based on knowledge of facts not possessed by the jury, counsel's experience in similar cases, or any ground other than the weight of the evidence in the trial. A defendant is entitled to have the case decided solely on the evidence. . . .
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> 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.

Id. at 874 (citations and quotation marks omitted). Thus, we examine whether any of the statements identified by Gibson are prosecutorial misconduct.

A. Witness Credibility and Outside the Record. Gibson cites to the following portion of closing arguments, claiming the portions in italics were improper. In the closing argument, the prosecutor stated:

> Now when you consider Mr. VanAusdall's behavior that night and you consider the testimony that he provided here in the courtroom, isn't that inconsistent? But when you consider the behaviors of Michael McCubbin and Michael McCubbin's willingness to work with the police and even his testimony here, *it's obvious who's the credible witness*.

(Emphasis added.) Defense counsel then argued that police officers have "incentives to get a conviction," specifically that the detective and sergeant got to their positions by "getting successful arrests." He further stated: "I'm not suggesting that they lie on every occasion, but when the evidence is a little weak, [cites to the evidence], just a little something to make him look more guilty, just a little thing." In the rebuttal portion of her closing argument, the prosecutor responded:

> It's offensive to argue that Sergeant Smull, Detective Lansing, Detective Canas, Detective Morel and Michael McCubbin had something to gain by walking into the courtroom and lying. These officers, you've heard about the number of years that they've worked with the department. When it comes to working in the field of law enforcement, your one stock in trade, the one thing you need is you need your credibility because *these are officers who walk into the court and they take oaths on a regular basis, on a weekly basis to tell the truth, and officers are not going to risk their careers by simply trying to get a conviction against Donald Gibson*.
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> There is too much crime going on out there on the street. Law enforcement is tasked with the responsibilities, these are individuals who not only work their shifts, they have to come in, they have to be present for all of their court hearings to provide testimony. They have to be here for depositions. *They have to be here for motions, and a lot of these individuals work part[ ]-time jobs to support their families*. Trust me, Donald Gibson—
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> Defense Counsel: I'm gonna object.
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> Prosecutor: I will rephrase that.
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> The Court: [Prosecutor], this is about the evidence, not about your personal opinions.
>
> Defense Counsel: That's an inappropriate argument.
>
> Prosecutor: All right. At any rate, *these officers are not going to risk their careers*, and folks, do you honestly believe that?

(Emphasis Added.)

Gibson first argues the prosecutor was personally vouching for the credibility of the State's witnesses in the first, second, and fourth italicized portions. As to the first statement, the prosecutor pointed to specific evidence and was arguing the evidence proved who the credible witnesses were. *State v. Carey*, 709 N.W.2d 547, 557 (Iowa 2006) (explaining there was no misconduct where "the prosecutor did not state that it was her personal opinion that the defendant lied, nor did she personally vouch for the victim's credibility"). As to the second and fourth identified statements, both of those were in response to defense counsel's argument police officers lie in order to get promotions, which the prosecutor responded to by arguing that police officers do not routinely lie—they take an oath and would not risk their careers. In light of the responsive nature of the arguments, we find the statements were not prejudicial.

Gibson next argues the prosecutor was arguing outside of the record when she stated: "They have to be here for motions, and a lot of these individuals work part[ ]-time jobs to support their families." We agree with Gibson that this statement was outside the record and improper. Again, this statement was made in response to the defense counsel's argument police officers lie in order to get promotions, which was also not supported by the evidence. Shortly after the statement was made, defense counsel objected and the court redirected the prosecutor. This statement was not prejudicial.

B. Disparaging the Defense. Gibson next argues the prosecutor characterized his photo-lineup argument as a smoke screen or sham. During

cross-examination of a witness, defense counsel questioned a witness as to why he would examine the photo lineup when he did not see the seller of the crack cocaine. The witness maintained he never saw the seller and only examined the photo lineup because that is what officers instructed him to do. As defense counsel later stated, he made a "challenge to [an officer's] credibility because . . . nobody ever asked [the witness] to identify whether he could pick out the seller of the drugs from a lineup." In her closing argument, the prosecutor may have been somewhat sarcastic in arguing the evidence did not support the attack on the officer's credibility, but the comments were based upon a legitimate assessment of the evidence. *See Carey*, 709 N.W.2d at 555 ("These three comments, while sarcastic and snide, were based on a legitimate assessment of the evidence and especially of the defendant's credibility and did not constitute misconduct, given the considerable latitude accorded to lawyers in final arguments."). These statements were not misconduct.

C. Association with Law Enforcement.

Finally, Gibson cites to the prosecutor's use of the word "we,"[2] claiming it was an impermissible association with law enforcement. After reviewing the trial transcript and the numerous times the term was used, we agree with the State that "the prosecutor used the term 'we' to refer to generic groups of people—those present in the courtroom, the law enforcement officers, the litigants, [and] society" in general. While the indiscriminate use of "we" is somewhat troubling, we find there was no misconduct.

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[2] The prosecutor also occasionally used the term "our."

Because we find there was no prosecutorial misconduct, an ineffective assistance of counsel claim based upon this claim must fail. *See Graves*, 668 N.W.2d at 870 (setting forth the framework to analyze an ineffective-assistance-of-counsel claim based upon alleged prosecutorial misconduct—if the defendant establishes prosecutorial misconduct then a defendant must prove "an attorney performing within the range of normal competency would have made an objection" and "there is a reasonable probability the outcome of the trial would have been different"). Therefore, we affirm.

AFFIRMED.