

**IN THE COURT OF APPEALS OF IOWA**

No. 3-673 / 12-1753  
Filed August 21, 2013

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**DENISE MARIE VESEY,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Polk County, William A. Price,  
District Associate Judge.

Defendant appeals her operating-while-intoxicated conviction, alleging  
ineffective assistance of counsel, insufficient evidence, and sentencing error.

**AFFIRMED.**

Francis P. Hurley of Phil Watson P.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney  
General, John Sarcone, County Attorney, and Brendan Greiner, Assistant County  
Attorney, for appellee.

Considered by Eisenhauer, C.J., and Vaitheswaran and Tabor, JJ.

**TABOR, J.**

Denise Marie Vesey appeals her conviction for operating while under the influence of drugs. She alleges ineffective assistance of trial counsel, insufficient evidence to convict, and sentencing error. Because Vesey cannot show she was prejudiced by counsel's performance in regard to her waiver of a jury trial, the cross-examination of the citizen informant, or the handling of the pharmacy labels, we reject those claims of ineffective assistance. Because the record is not sufficient to decide her claim regarding the redacted videotape, we preserve that claim for possible postconviction proceedings. We also find substantial evidence she was driving while impaired, cannot benefit from the prescription drug defense, and received a reasonable sentence.

**I. Background Facts and Proceedings.**

On April 7, 2012, a citizen reported a passenger van driving erratically. Adam Mead told the 911 operator that a van swerved into his lane and almost hit his car. The van then overcorrected and smashed a curb. Mead also saw the van run a red light. Mead followed the van to a Quiktrip. Des Moines Police Officer Ben Ihde responded to the call and arrived at the convenience store. After discussing the incident with the van's driver, Denise Vesey, and administering field sobriety tests to her, Officer Ihde arrested and charged Vesey with operating while under the influence of drugs (OWI), in violation of Iowa Code section 321J.2 (2011). She waived her right to a jury trial. Following a bench trial, the district court convicted Vesey and, on September 13, 2012, sentenced her to one year of incarceration with all but twenty days suspended. Vesey is appealing that conviction.

In this direct appeal, Vesey argues her trial counsel was ineffective in the following ways: (1) recommending waiver of trial by jury, (2) failing to properly cross-examine a State's witness, (3) failing to object to the admission of a redacted patrol car video, and (4) failing to present evidence for a pharmacy labeling defense and in failing to preserve that issue for review. Vesey also argues the district court erred in finding she failed to establish her prescription drug affirmative defense and in finding sufficient evidence to convict her. Finally, she argues the court abused its discretion in sentencing her to twenty days in jail.

## **II. Scope and Standards of Review.**

To prevail on her claims of ineffective assistance of counsel, Vesey 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). Improvident trial strategy, miscalculated tactics, or mistakes in judgment do not necessarily amount to ineffective assistance of counsel. *Osborn v. State*, 573 N.W.2d 917, 922 (Iowa 1998). To prove prejudice, Vesey must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. See *id.* We evaluate the totality of the relevant circumstances in a de novo review. *Lane*, 726 N.W.2d at 392.

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). We prefer to leave such claims for postconviction relief proceedings. *State v. Lopez*, 633 N.W.2d 774, 784 (Iowa 2001). Those proceedings allow an adequate record of the claim to be developed "and the attorney charged with providing ineffective assistance may have an opportunity to respond to defendant's claims." *Biddle*,

652 N.W.2d at 203. But we will decide ineffective-assistance claims when the record is sufficient to resolve them. *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978).

On the claim of insufficient evidence of guilt, we review on assigned error. *State v. McPhillips*, 580 N.W.2d 748, 753 (Iowa 1998).

We review the sentencing issue under an abuse-of-discretion standard. *State v. Formaro*, 638 N.W.2d 720, 724 (Iowa 2002).

### **III. Analysis.**

#### **A. Did Vesey receive ineffective assistance of counsel?**

Vesey alleges four instances of ineffective assistance of counsel. We will address each allegation in turn.

Vesey first argues counsel performed subpar by allowing her to waive a jury trial. She does not assert the jury waiver was involuntary. Vesey personally waived the right to a jury in open court. She told the court she understood the rights she was giving up. See Iowa R. Crim. P. 2.17(1); *State v. Liddell*, 672 N.W.2d 805, 812 (Iowa 2003). On appeal, she does not argue a reasonable probability existed that having a jury trial would have achieved a different result. Accordingly, Vesey cannot show prejudice. See *State v. Feregrino*, 756 N.W.2d 700, 707 (Iowa 2008) (requiring a showing of prejudice).

Vesey next complains trial counsel did not perform a vigorous cross-examination of the citizen who reported her erratic driving. But Mead's identification of Vesey was not a contested issue at trial. Vesey's counsel chose to concede the fact her client was driving and concentrate on the prescription

drug defense.<sup>1</sup> We do not reverse where counsel has made a reasonable decision concerning trial tactics and strategy, even if the strategy fails. *Brewer v. State*, 444 N.W.2d 77, 83 (Iowa 1989).

In her third claim of ineffective assistance, Vesey challenges the admission of a redacted recording of her encounter with Officer Ihde. She argues an unredacted version “would have revealed the arresting officer’s belligerence toward the Defendant and may have served to undermine the arresting officer’s credibility.” The prosecutor offered a redacted version of the officer’s in-car video recording. Because our record does not reveal what was edited from the video-recording, we preserve this claim of ineffective assistance for a possible application for postconviction relief. Iowa Code § 814.7 (2011); *State v. Straw*, 709 N.W.2d 128, 138 (Iowa 2006).

In her final claim of ineffective assistance, Vesey argues counsel breached a duty by failing to present evidence of pharmacy labeling instructions and in not preserving that issue for review. Vesey claims failing to present this evidence was fatal to her affirmative defense. While the labels might have been helpful, the district court rejected the defense based on the entirety of the record, including proof Vesey had not taken her medication as prescribed.

Even with the establishment of the defense, Vesey’s admission to taking Vicodin, which was not prescribed, would have defeated the defense. Accordingly, Vesey cannot show prejudice from her counsel’s performance regarding the pharmacy labels.

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<sup>1</sup> Vesey’s recorded conversation with Officer Ihde confirms she was driving the van.

**B. Did the district court err in finding sufficient evidence to convict and in rejecting her prescription drug defense?**

Vesey alleges the district court erred in finding she did not establish a prescription drug affirmative defense under Iowa Code § 321J.2(11).<sup>2</sup> Vesey asserts the labels on the medications would establish her affirmative defense. When a defendant raises a prescription drug defense, the State has the burden of disproving each element beyond a reasonable doubt. *State v. Schories*, 827 N.W.2d 659, 665 (Iowa 2013). But the defense only applies to medications taken under prescription and in accordance with the directions of a medical practitioner. The district court found as both trier of fact and law that Vesey had not been following the doctor's directives. It also determined her doctor did not fill her prescription between October 2011 and April 7, 2012. The court also concluded if Vesey was taking the prescriptions properly, she would not have exhibited the loss of body control and impaired judgment evident on the video. Vesey told Officer Ihde several times she was taking Vicodin, while Vesey's doctor testified she did not prescribe Vicodin for Vesey. Taking a prescription drug outside the

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<sup>2</sup> Iowa Code section 3221J.2 provides:

11. a. This section does not apply to a person operating a motor vehicle while under the influence of a drug if the substance was prescribed for the person and was taken under the prescription and in accordance with the directions of a medical practitioner as defined in chapter 155A or if the substance was dispensed by a pharmacist without a prescription pursuant to the rules of the board of pharmacy, if there is no evidence of the consumption of alcohol and the medical practitioner or pharmacist had not directed the person to refrain from operating a motor vehicle.

b. When charged with a violation of subsection 1, paragraph "c", a person may assert, as an affirmative defense, that the controlled substance present in the person's blood or urine was prescribed or dispensed for the person and was taken in accordance with the directions of a practitioner and the labeling directions of the pharmacy, as that person and place of business are defined in section 155A.3.

monitoring or instructions of a medical practitioner eliminates the possibility of the affirmative defense under section 321J.2(11). The district court did not err in finding Vesey failed to establish her prescription drug defense.

Vesey also claims the district court erred in finding sufficient evidence to convict. She argues the State did not produce enough evidence to find her guilty of operating under the influence of drugs.

To convict Vesey of OWI, the State was required to prove beyond a reasonable doubt that Vesey (1) operated a motor vehicle (2) while under the influence of an alcoholic beverage or other drug or combination of such substances. Iowa Code § 321 J.2(1)(a). A person is “under the influence” within the meaning of the statute when the ingestion of the drug affects her reasoning or mental ability, impairs her judgment, visibly excites her emotions, or causes her to lose control of bodily actions. See *State v. Truesdell*, 679 N.W.2d 611, 616 (2004). We view the evidence in the light most favorable to the State. *Id.* at 615.

This record includes substantial evidence to support Vesey’s conviction. Vesey did not dispute she was driving the vehicle, either the night of the incident or in court. The court heard testimony from Mead, who witnessed her erratic driving. Officer Ihde corroborated Mead’s version of events by noting the flat tire on her van at the QuikTrip. The officer also testified to noticing “some swaying in her stance,” as well as watery and bloodshot eyes and slurred speech. The officer also recalled Vesey “giving statements that weren’t making sense.” Vesey was not able to follow the officer’s instructions during the walk-and-turn field sobriety test. He also noted her demeanor was “irritated” and “hostile.” Vesey

told Officer Ihde she was taking Vicodin and conceded: “You’re right, I shouldn’t be driving.” Given all the evidence produced at trial, the State met the burden to show Vesey was under the influence of drugs while operating a vehicle.

**C. Did the district court abuse its discretion in sentencing Vesey to twenty days in jail?**

Finally, Vesey argues the district court abused its discretion in sentencing her to twenty days in jail instead of the minimum two-day term. We recognize a strong presumption that sentencing courts properly exercised their discretion. *State v. Pappas*, 337 N.W.2d 490, 494 (Iowa 1983). In Vesey’s case, the district court weighed all the relevant factors within its discretion. See Iowa Code § 901.5; *State v. Thomas*, 547 N.W.2d 223, 225 (Iowa 1996). The district court reviewed Vesey’s criminal history, the facts of case, the results of her substance abuse evaluation, as well as the safety of the community and Vesey’s potential for rehabilitation. The district court reached a reasonable conclusion from this information. Therefore, the district court did not abuse its discretion.

**AFFIRMED.**