

IN THE COURT OF APPEALS OF IOWA

No. 6-822 / 05-1776
Filed December 13, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

SHAUNA LEA KELLY,
Defendant-Appellant.

Appeal from the Iowa District Court for Kossuth County, Nancy L. Whittenburg, Judge.

Defendant appeals from her conviction of second degree theft, alleging ineffective assistance of counsel. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Greta Truman, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, and Todd M. Holmes, County Attorney, for appellee.

Considered by Sackett, C.J., and Zimmer and Eisenhauer, JJ.

SACKETT, C.J.

Defendant-appellant, Shauna Kelly, appeals from her conviction of second degree theft, following a jury trial. She contends trial counsel was ineffective in (1) not objecting to a jury instruction, (2) not objecting to character evidence, (3) not objecting to evidence of defendant's pre-arrest decision to remain silent after being Mirandized, and (4) not objecting to a police officer's opinion testimony on credibility. We affirm.

I. Background

In April of 2005, defendant was hired to provide in-home care part time for eighty-three-year-old Agnes A., who lived alone in a rural home. The defendant's first check was dated April 6, 2005, in the amount of \$840 and covered her wages for the period of April 2 through April 11. During the first week in April, Agnes fell in her home. The defendant arranged for her to be taken to the hospital for observation. The hospital stay lasted from April 5 to April 12. During the hospital stay, the defendant stopped by Agnes's home to feed and water the dog. The defendant took a check from Agnes's checkbook and brought it to the hospital on April 7 for Agnes to pay the defendant's wages for April 12 to April 22. On April 12 the family expanded the care arrangement to twenty-four hours, seven days a week. The son, who lived in Florida, asked the defendant to line up additional care givers and to handle the scheduling for these employees. He said he would send paychecks to the employees because he had power of attorney for his mother. The defendant was not listed among the care givers whose names were forwarded to him to receive payment. The defendant told him his mother wanted to pay her directly. With defendant's added administrative responsibilities, the son agreed to

raise the defendant's pay from \$8.25 to \$11 per hour. On April 13 the defendant obtained a check for \$336 to make up the difference in the hourly rates for April 12 through April 22.

During April, the defendant continued to obtain paychecks for weeks she had not yet worked. April 13 she received a second check signed by Agnes for work to be performed from April 23 through April 30. Just two days later, defendant obtained a check in the amount of \$1650 from Agnes for 150 hours from May 1 through May 13. In addition to the \$4701 in checks, designated for work performed between April 2 and May 13, on April 28, the defendant filled out another pre-signed check to herself in the amount of \$800. The memo line of the check said it was for "mowing May/April all the extra work." Agnes testified in her deposition that she did not authorize any payment for extra work. She also explained that her daughter Ruby mowed the lawn, not the defendant; "she didn't touch the mower." The defendant claimed the extra \$800 was to reimburse her for washing the cigarette smoke stained walls in Agnes's home. The defendant also deposited a check dated May 3, in the amount of \$2000. The memo line on that check stated: "Loan to be paid back by July 15th." On May 9, the defendant obtained another check from Agnes in the amount of \$3500, described in the memo line as "loan for work in June." Agnes testified that she did not authorize either of these checks. Agnes acknowledged her signature was on the checks, but explained that she sometimes pre-signed blank checks so her daughter could take them to buy groceries.

One week after receiving the \$3500 check from her elderly client, the defendant obtained two more checks made out to her, both dated May 16, 2005, bearing Agnes's signature, each in the amount of \$4300. The defendant cashed

one of the checks at the Iowa State Bank in Algona and the other \$4300 check at the Farmer's State Bank in Algona. The defendant told tellers at both banks that she was on her way to Missouri to be with her dying father-in-law and needed the cash to buy airline tickets for other family members. She immediately went to a local truck dealer and bought a truck with the cash.

When the tellers contacted Agnes's bank to verify funds, it was discovered her account did not contain sufficient funds to cover both. The bank contacted Agnes's son, James, as he had power of attorney for his mother. He stopped payment on the checks. James contacted the county sheriff's office. After meeting with bank personnel, a deputy went to the defendant's home and spoke with her.

She told the deputy she knew why he was there, but thought she should speak with her attorney before talking to him. She eventually waived her *Miranda* rights and told him about the loans from Agnes. The defendant also showed him a file containing her employment contract and loan documents. She told the deputy that Agnes authorized her to use the pre-signed checks for her wage payments.

The State charged the defendant with first-degree theft. During trial, the court granted defendant's motion for judgment of acquittal on first-degree theft. The jury found the defendant guilty of second-degree theft. The court imposed a suspended sentence of incarceration not to exceed five years. It also imposed a fine, surcharges, and ordered restitution. Following the court's denial of defendant's motion to reconsider, the defendant appealed.

II. Scope and standards of review

We review claims of ineffective assistance of counsel de novo. *State v. Philo*, 697 N.W.2d 481, 485 (Iowa 2005). To prevail, a defendant must show that trial

counsel failed to perform an essential duty and that prejudice resulted from this failure. *State v. McCoy*, 692 N.W.2d 6, 14 (Iowa 2005). Failure to perform an essential duty means counsel's performance fell outside the normal range of competency. *Id.* To show prejudice, a defendant must show a reasonable probability the outcome of the proceeding would have been different had counsel not failed in an essential duty. See *State v. Simmons*, 714 N.W.2d 264, 276 (Iowa 2006). "Ineffective-assistance claims fail if the defendant cannot prove both prongs." *State v. Leckington*, 713 N.W.2d 208, 218 (Iowa 2006).

We normally preserve claims counsel was ineffective for postconviction relief proceedings because preserving the claim allows the defendant to make a complete record of the claim, allows trial counsel an opportunity to explain his or her actions, and allows the trial court to rule on the claim. *State v. Shanahan*, 712 N.W.2d 121, 136 (Iowa 2006). We will not preserve such claims, but will affirm the defendant's conviction on direct appeal if the record shows the defendant cannot prevail on a claim. See *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003). Accordingly, we will address those claims on appeal where the record is sufficient and preserve those claims for postconviction relief where the record is insufficient. *Shanahan*, 712 N.W.2d at 136.

III. Discussion

A. Jury instructions. Defendant first contends trial counsel was ineffective in not objecting to jury instructions that were not supported by the evidence. The record before us is not adequate to resolve this claim. We therefore preserve it for possible postconviction relief proceedings. See *Leckington*, 713 N.W.2d at 217.

B. Character evidence. The defendant contends trial counsel failed to object to improper character testimony by the president of Agnes's bank and by Agnes's son, James. She points to testimony that the questionable checks were "completely out of character" for Agnes and that she was not a "giving person." The defendant argues the testimony was offered to prove Agnes "acted in conformity" with this character.

Iowa Rule of Evidence 5.404 provides in part:

a. Character evidence generally. Evidence of a person's character or a trait of the person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, . . .

The State contends the testimony was offered to show why the checks raised concerns, not to show that Agnes acted in conformity with her character.

We conclude the record is adequate for us to address this claim. We agree with the State that the testimony was not offered to show Agnes acted in conformity with her frugal character. Consequently, trial counsel had no duty to object to the testimony under rule 5.404. As counsel had no duty to object, counsel did not fail in an essential duty and this claim must fail. See *Leckington*, 703 N.W.2d at 218 ("Ineffective-assistance claims fail if the defendant cannot prove both prongs.").

C. Evidence of invoking right to remain silent. The defendant contends trial counsel failed to object to testimony concerning her choice to remain silent and to consult an attorney when interviewed by the deputy sheriff.

We preserve this claim for possible postconviction relief proceedings. See *Shanahan*, 712 N.W.2d at 136.

D. Testimony on credibility or guilt. The defendant contends trial counsel failed to object to testimony by the deputy sheriff that after talking with Agnes, he

was “quite confident” she had not allowed the defendant to use the pre-signed checks, and that he “felt [the defendant] did not have permission” to use the checks.

The State contends the testimony merely shows why the deputy sheriff decided to charge the defendant and was not an improper comment on the victim’s credibility or the guilt of the defendant.

Opinion testimony concerning the truthfulness of a victim generally should be excluded as invading the province of the fact finder. *See State v. Meyers*, 382 N.W.2d 91, 95 (Iowa 1986). Nor should testimony be allowed that essentially passes on the guilt or innocence of the defendant. *Id.* at 94-95.

We conclude the deputy sheriff was not testifying as an expert in this case and his testimony did not give an opinion on the truthfulness of the victim or the guilt or innocence of the defendant. Defense counsel had no obligation, therefore, to object to the testimony and cannot be ineffective for not objecting.

IV. Summary.

We affirm the defendant’s conviction. We conclude defense counsel was not ineffective in not objecting to what the defendant characterizes as improper character evidence and improper expert opinion testimony on the credibility of the victim or the guilt of the defendant because we determine the evidence was not objectionable. We preserve defendant’s claims concerning jury instructions and the mention of her choice to remain silent for possible postconviction proceedings so that an adequate record may be made for appellate review. *See Shanahan*, 712 N.W.2d at 136.

AFFIRMED.