

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LESLIE ANNE LAFRANCE,

Defendant-Appellant.

UNPUBLISHED

August 28, 2003

No. 239703

Macomb Circuit Court

LC No. 01-000427-FH

Before: Markey, P.J., and Cavanagh and Saad, JJ.

PER CURIAM.

Defendant appeals as of right her convictions of operating a vehicle under the influence of intoxicating liquor (OUIL), third offense, MCL 257.625(1), failure to stop after a collision, MCL 257.620, and illegal possession of a controlled substance, MCL 333.7403(2)(b), entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

At trial the evidence showed that two eyewitnesses observed a vehicle being driven in an erratic manner. The vehicle struck two parked vehicles and a fence before coming to rest in front of a residence. The witnesses stated that a female was driving the vehicle, and one witness identified defendant as the driver. Police officers found defendant hiding in the basement of the house where the vehicle was parked. Defendant denied that she had driven the vehicle that evening. An inventory search of defendant's purse revealed an unlabeled bottle containing various pills. Laboratory tests revealed that some of the pills contained the controlled substance known as Ritalin. Defendant's blood alcohol content was determined to be .17 %.

In his opening statement defense counsel stated that while defendant did not deny that she consumed alcohol on the night of the incident, she did deny that she drove the vehicle. Counsel stated that circumstantial evidence suggested that defendant's boyfriend, Greg Israel, drove the vehicle on the night of the incident.

Defendant testified that she socialized at a pool hall and consumed alcohol throughout the evening of the incident. She did not feel capable of driving due to the amount of alcohol she had consumed, but did not recall how she got back to Israel's residence. She woke up in the passenger seat of her vehicle, which was parked in front of Israel's home. The vehicle was damaged. When the police arrived, Israel ushered her to the basement. Defendant maintained

that the pills in the bottle found in her purse were prescribed for her son, but that she had put the bottle in her purse for safekeeping. The label had worn off the bottle over time. On cross-examination defendant stated that she had prescriptions for the medication, but she did not know why the prescription documentation had not been produced. She acknowledged that her son had not taken Ritalin for several years.

During closing argument the prosecutor noted that although defendant contended that her possession of the medication was legal because she had valid prescriptions, she did not produce the prescriptions. Moreover, while defendant contended there was no possibility she could have driven her vehicle to Israel's home, she did not produce evidence to show who might have driven the vehicle on that occasion. Defendant did not object to the prosecutor's argument.

At an evidentiary hearing held pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), defendant testified that the Ritalin and Zoloft found in her purse were prescribed to her son, and that she kept the medications in her purse for safety reasons. She contended that the bottle had been in her purse for so long the label had worn away. Defendant maintained that she provided counsel with physicians' letters verifying the prescriptions several months before trial. She acknowledged that her son was last prescribed Ritalin in 1997 and Zoloft in 2000.

Trial counsel testified that defendant provided him with the prescription documentation only days before trial. Counsel opined that testimony that the medication was prescribed for defendant's son would not have benefited defendant because the medication was in an unmarked bottle, was several years old, and was no longer being given to defendant's son. Counsel focused on the OUIL charge because it was the most serious of the charged offenses.

The trial court denied defendant's motion for a new trial. The court concluded that counsel's decision to forego presenting testimony from physicians and to concentrate on the most serious charge of OUIL, third offense, was legitimate trial strategy.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the federal and state constitutions. *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Counsel's deficient performance must have resulted in prejudice. To demonstrate the existence of prejudice, a defendant must show a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *Id.*, 600. Counsel is presumed to have afforded effective assistance, and the defendant bears the burden of proving otherwise. *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

The failure to call witnesses or to present other evidence constitutes ineffective assistance only when it deprives the defendant of a substantial defense. A substantial defense is one that might have made a difference in the outcome of the trial. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vac in part on other grds 453 Mich 902; 554 NW2d 899 (1996). The trial court correctly noted that even if counsel had presented evidence that physicians prescribed the substances found in defendant's possession for defendant's son, such evidence would not have necessarily resulted in defendant's acquittal of the charge of possession of a controlled substance. Documentary evidence would not have mandated a conclusion that the pills found in defendant's possession were in fact obtained pursuant to those prescriptions. It

would not explain why defendant carried the medications in her purse years after her son stopped using them. Counsel's failure to present other evidence did not deprive defendant of a substantial defense. *Id.* We do not substitute our judgment for that of trial counsel on matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Defendant has not shown that had counsel presented evidence regarding the prescriptions, it is reasonably probable she would have been acquitted of the charge of possession of a controlled substance. *Carbin, supra.*

Defendant argues that she was denied a fair trial when the prosecutor shifted the burden of proof and implied that she was required to prove her innocence by producing evidence that she had valid prescriptions for the medications found in her possession, and that her former boyfriend drove her vehicle on the night of the incident.

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). We review a claim of prosecutorial misconduct de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). No error requiring reversal will be found if the prejudicial effect of the prosecutor's remarks could have been cured by a timely instruction. *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002).

A prosecutor may not shift the burden of proof. *People v Fields*, 450 Mich 94, 113; 538 NW2d 356 (1995). However, a prosecutor may contest evidence presented by the defendant, *People v Reid*, 233 Mich App 457, 477; 592 NW2d 767 (1999), and may argue from the facts and evidence that the defendant is not worthy of belief. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

Defendant did not object to the prosecutor's argument; therefore, absent plain error, she is not entitled to relief. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Defendant testified that she had valid prescriptions for the medications found in her possession, and denied that she drove her vehicle to Israel's residence. The prosecutor did not shift the burden of proof by commenting on defendant's failure to produce either the prescriptions or evidence that Israel drove the vehicle. The argument constituted fair comment on defendant's failure to produce evidence that she relied upon in her defense. *Reid, supra.* Counsel's failure to object to the prosecutor's argument did not constitute ineffective assistance. Counsel was not required to make a meritless objection. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Affirmed.

/s/ Jane E. Markey
/s/ Mark J. Cavanagh
/s/ Henry William Saad