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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-550 / 98-0268
Filed December 13, 1999

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LINDA K. GREY,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Todd A. Geer, Judge.

Linda Grey appeals her convictions, following a jury trial, for delivery of a controlled substance (marijuana), failure to affix drug tax stamp, and delivery of a controlled substance (marijuana) as an accommodation offense in violation of Iowa Code sections 124.401(1)(d), 453B.12, and 124.410 (1997). **REVERSED AND REMANDED.**

Patrick E. Ingram of Mears Law Office, Iowa City, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kimberly Griffith, Assistant County Attorney, for appellee.

Heard by Huitink, P.J., and Mahan and Hecht, JJ.

HECHT, J.

Linda Grey ("Grey") appeals from her convictions, for delivery of a controlled substance, failure to affix drug tax stamp, and delivery of a controlled substance as an accommodation offense in violation of Iowa Code sections 124.401(1)(d) 453B.12, and 124.410 (1997). She contends: (1) she was denied her Sixth Amendment right to counsel when the trial court allowed her trial attorney to represent her as well as her co-defendant, (2) she received ineffective assistance of counsel when counsel failed to conduct pretrial discovery; failed to request a mistrial after prosecutorial misconduct; and failed to object to incorrect and misleading jury instructions, (3) she was denied a fair and impartial trial by recurrent acts of prosecutorial misconduct, (4) she was denied a fair trial when her right to cross-examine a particular witness was prevented by the trial court, and (5) the State deliberately violated her right to confront witnesses and to testify on her own behalf. We reverse and remand for a new trial.

I. Factual Background and Proceedings. Grey and her husband, Daniel Grey, reside at a motel in Cedar Falls, Iowa. Grey is employed at the motel as the manager on a full-time basis, and Daniel is employed there part-time. On April 18, 1998, Harold Wolff ("Wolff") and his daughter moved into the motel. Wolff was a paid informant hired by the Tri-County Drug Task Force to make drug purchases in the Cedar Falls area. The task force pays Wolff for each buy he completes and provides him with housing and other necessities.

During the time Wolff lived at the motel, he and the Greys became friends. He told the Greys he suffered from back pain, was very poor, and received state assistance. The Greys testified they babysat his daughter, gave him groceries, and allowed him to continue living at the motel when he had not paid his bills because they felt sorry for him.

Mr. Grey is a veteran of the Vietnam War and is partially disabled due to a work-related back injury. He claims the only relief he gets from his back pain is from smoking marijuana. Wolff told the Greys he had medication for his back, but it did not work well. After smelling marijuana in the Greys' residence, Wolff told them marijuana relieved his pain and asked them if they could sell him some. The Greys agreed to provide marijuana to Wolff and an undercover police officer posing as a friend of Wolff. Wolff notified a task force officer about the Greys' willingness to obtain drugs and a purchase was arranged.

Drug sale transactions were completed on May 21, 1997, and on May 23, 1997. At trial, the Greys both acknowledged selling marijuana to Wolff, but asserted entrapment by government agents as a defense. On October 10, 1997, the jury found Grey guilty of all three counts. Grey appeals.

II. Standard of Review. Grey alleges on appeal that she was denied her Sixth Amendment right to counsel when the district court allowed trial counsel to represent Grey and her husband as co-defendants. She also raises issues of ineffective assistance of counsel. Because Grey raises constitutional issues, our review is

de novo. *State v. Fox*, 491 N.W.2d 527, 530 (Iowa 1992). In our review, we independently evaluate the totality of the circumstances as evidenced by the whole record. *State v. Simpson*, 587 N.W.2d 770, 771 (Iowa 1998).

III. Dual Representation. Grey claims she was denied her Sixth Amendment right to counsel when the district court allowed trial counsel to represent Grey and her husband as co-defendants. The purpose of the Sixth Amendment guarantee of assistance of counsel is to ensure criminal defendants receive a fair trial. *Wheat v United States*, 486 U.S. 153, 159, 108 S. Ct. 1692, 1696-97, 100 L. Ed. 2d 140, 148 (1988). The United States Supreme Court has held a defendant must establish an actual conflict of interest adversely affected the lawyer's performance in order to demonstrate a violation of Sixth Amendment rights. *Cuyler v. Sullivan*, 446 U.S. 335, 350, 100 S. Ct. 1708, 1719, 64 L. Ed. 2d 333, 348 (1980). In Iowa we have adopted a less stringent standard, stating "it is enough if there is a 'substantial possibility' that a conflict of interest affected the lawyer's representation." *In re J.P.B.*, 419 N.W.2d 387, 390 (Iowa 1988); *see also Nichol v. State*, 309 N.W.2d 468, 470 (Iowa 1981); *Jackson v. Auger*, 239 N.W.2d 180, 183 (Iowa 1976); *Bumgardner v. State*, 401 N.W.2d 211, 213 (Iowa App. 1986). Actual prejudice need not be shown. *Cosgrove v. State*, 304 N.W.2d 184, 186 (Iowa 1981).

Although we review these issues de novo, the Iowa Supreme Court has indicated our review should be somewhat limited:

> The legal standard is actual conflict of interest or serious potential for conflict of interest. *Wheat* requires that appellate courts give deference

> to a trial court's factual findings leading to the legal conclusion whether there is or is not an actual conflict of interest or a serious potential for conflict of interest. *See Wheat,* 486 U.S. at 164, 108 S. Ct. at 1700, 100 L. Ed. 2d at 152 ("The evaluation of the facts and circumstances of each case under [the actual conflict or serious potential for conflict standard] must be left primarily to the informed judgment of the trial court.")

State v. Vanover, 559 N.W.2d 618, 627 (Iowa 1997) (alteration in original).

Dual representation occurs when persons jointly charged are represented by the same lawyer. *State v. Gatewood,* 179 N.W.2d 520, 521 (Iowa 1970). We have many times discouraged dual representation. *Jackson,* 239 N.W.2d at 183. In the present case, trial counsel was retained by both Mr. and Mrs. Grey and represented them throughout the entire course of the proceedings, including trial. An actual or serious potential for conflict that might occur during trial necessitates an inquiry by the court to assess its gravity. *State v. Atley,* 564 N.W.2d 817, 829 (Iowa 1997). The district court in this case did make a pro forma inquiry of both defendants and trial counsel as to whether counsel had discussed the potential conflicts with his clients. Both Mr. and Mrs. Grey stated they understood the possibility of conflicts and indicated they still wanted trial counsel to represent them. However, the district court did not ascertain on the record whether conflicts actually existed and made no findings as to whether or not there was a serious potential for conflicts.

We find many serious potential conflicts existed in this case. First, both defendants testified at trial. Trial counsel was unable to effectively question or cross-examine defendants as to the other's involvement in the transactions because, if he

had done so, he would have been acting adversely to one client or the other. An attorney's freedom to cross-examine one defendant on behalf of another is restricted where the attorney represents both defendants. *Gatewood,* 179 N.W.2d at 522. This freedom is essential to a competent defense.

Secondly, by representing both defendants, counsel was not able to emphasize one defendant's lesser involvement as compared to the other's. The evidence demonstrates Mrs. Grey does not have a history of drug use and was only minimally involved in the transactions underlying the charges in this matter. On the other hand, Mr. Grey admitted using drugs since the Vietnam War and to current usage for medicinal purposes. In addition, Mr. Grey actually sought out the dealers, went to the dealers to pick up the marijuana, and delivered it to Wolff. If defense counsel had emphasized these facts in an effort to minimize the role of Mrs. Grey, he would have disadvantaged his other client. Furthermore, counsel was unable to discuss other differences between Mr. and Mrs. Grey. She is employed and physically fit, while he is disabled, unable to work, and arguably more vulnerable to entrapping enticements offered by undercover employees of the state. These facts could have been emphasized on behalf of Mr. Grey, but would arguably have been detrimental to Mrs. Grey.

This court is mindful we are viewing the dynamics of this case in hindsight. It is possible, even with separate counsel, the Greys might have presented a united front and claimed entrapment as their only defense. However, the dual representation

by one attorney necessitated this strategy. The Greys were deprived of the possibility of independent defenses and trial strategies, and were also precluded from plea bargain possibilities which may have been available if they had been represented by separate counsel. In addition, it was a risky proposition for the Greys to lock themselves into a singular defense that would not allow for the uncertainties of trial. The court in *Wheat* noted:

> It is a rare attorney who will be fortunate enough to learn the entire truth from his own client, much less be fully apprised before trial of what each of the government's witnesses will say on the stand. A few bits of unforeseen testimony or a single previously unknown or unnoticed document may significantly shift the relationship between multiple defendants. These imponderables are difficult enough for a lawyer to assess, and even more difficult to convey by way of explanation to a criminal defendant untutored in the niceties of legal ethics.

Wheat, 486 U.S. at 163, 108 S. Ct. at 1699, 100 L. Ed.2d at 150.

The State asserts the dual representation was actually beneficial to the Greys. It argues the Greys' use of the entrapment defense, their consistent testimony, and use of a single attorney was an appropriate strategic choice. However, the risks inherent in dual representation ordinarily outweigh any imagined advantage from co-defendants' use of the same lawyer during trial. *Jackson,* 239 N.W.2d at 183; *Janvrin v. Haugh,* 171 N.W.2d 275, 280 (Iowa 1969).

We hold the district court should not have accepted Grey's waiver of the possible conflicts of interest and should have appointed separate counsel. Although defendants have the presumptive right to counsel of choice, this right is not absolute.

Vanover, 559 N.W.2d at 626. Courts have an independent interest in ensuring criminal trials are conducted within the ethical standards of the profession and legal proceedings appear fair to all who observe them. *Id.* "Not only the interest of a criminal defendant, but the institutional interest in the rendition of just verdicts in criminal cases may be jeopardized by unregulated multiple representation." *Wheat*, 486 U.S. at 160, 108 S. Ct. at 1698, 100 L. Ed. 2d at 149. We reverse and remand this case for a new trial.

IV. Prosecutorial Misconduct. Grey contends she was denied a fair trial due to prosecutorial misconduct and the failure of her attorney to move for a mistrial due to prosecutorial misconduct amounted to ineffective assistance of counsel. Ordinarily, we preserve claims of ineffective assistance of counsel raised on direct appeal for postconviction proceedings to allow full development of the facts surrounding counsel's conduct. *State v. Query*, 594 N.W.2d 438, 445 (Iowa App. 1999). However, we will resolve ineffective assistance of counsel claims on direct appeal when the record is adequate to decide the issue. *State v. Arne*, 579 N.W.2d 326, 329 (Iowa 1998). The record in this case is adequate for us to address the issue of ineffective assistance of counsel. A defendant receives ineffective assistance of counsel when (1) the defense attorney fails in an essential duty and (2) prejudice results. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984).

Prosecutorial misconduct warrants a new trial when it is "so prejudicial as to deprive the defendant of a fair trial." *State v. Escobedo,* 573 N.W.2d 271, 277 (Iowa App. 1997) (quoting *State v. Lyons,* 210 N.W.2d 543, 549 (Iowa 1973)). Defendant must establish both misconduct and the resulting prejudice to successfully prove the claim. *State v. Farmer,* 492 N.W.2d 239, 242 (Iowa App. 1992).

We must first consider whether the prosecutor engaged in misconduct. Grey argues the prosecutor attempted to delve into evidence which she knew to be inadmissible. At multiple points during trial, the prosecutor would ask a question and defense counsel would object. After the district court had sustained an objection to the line of questioning, the prosecutor would ask an almost identical question. She persisted in this manner until directed to move on by the court. Several of these instances involved attempts to elicit evidence that had been ruled inadmissable by the court.

Grey also alleges the prosecutor elicited testimony which was irrelevant and prejudicial to Grey. For example, she questioned a law enforcement officer as to the number of convictions achieved in cases in which Wolff was a paid informant. This was a blatant attempt to suggest since Wolff's conduct had been deemed acceptable in prior cases, he must have conducted himself properly in Grey's case. The prosecutor also asked whether Wolff had ever tried to entrap other individuals. Again, the prosecutor asked this question in an attempt to suggest if Wolff had never

tried to entrap other individuals, he must not have entrapped the Greys. These questions were clearly improper and prejudicial.

Further, at the beginning of cross-examination of both Mr. and Mrs. Grey, the prosecutor asked each of them if they were present throughout the entire trial and able to tailor their statements to conform to the evidence. Defense counsel objected and the court sustained the objection. However, undaunted, the prosecutor forged onward continuing the same line of questioning, commenting on the defendants' presence in the courtroom. In determining whether prosecutorial impropriety provides the basis for reversal, it is relevant whether the prosecutor's conduct was isolated and/or deliberate. *State v. Blanks*, 479 N.W.2d 601, 604 (Iowa App. 1991). In this case, the prosecutor's misconduct was repeated and deliberate.

We also note in the record the prosecutor's repeated disparaging remarks toward and about defense counsel. Trial counsel[1] obviously have some animosity between them, whether brought on by this trial or by previous interactions. Regardless, it is never appropriate to turn the courtroom into a personal forum for the attorneys' personal attacks and grievances. The prosecuting attorney is under a duty to ensure the defendant receives a fair trial. Her job is not just to secure convictions. *State v. Tate*, 341 N.W.2d 63, 65 (Iowa App. 1983); *State v. Webb*, 244 N.W.2d 332, 333 (Iowa 1976). Considering the totality of the conduct discussed above, we

[1] Counsel for the parties on appeal were not trial counsel in this case.

conclude this prosecutor stepped over the line between "zealous advocacy" and misconduct.

We next consider whether Grey was prejudiced by the prosecutor's misconduct. Prejudice ordinarily results from the persistent efforts to inject prejudicial matter before the jury. *Escobedo,* 573 N.W.2d at 277. Prejudice to both of the Greys has been shown here. Even after the court sustained an objection, the prosecutor persisted with her improper line of questioning. Several times the court had to instruct her to move on. The prejudicial effect of such misconduct can ordinarily be eliminated by an admonition from the trial court. *State v. Williams,* 315 N.W.2d 45, 56 (Iowa 1982). In this case, however, the trial court did not instruct the jury to disregard the behavior of the prosecutor. Even if it had, it is unlikely such instruction could have cured the misconduct in this case. Prosecutorial misconduct coupled with the resulting prejudice deprived Grey of a fair trial.

Grey raises the issue of prosecutorial misconduct as a claim of ineffective assistance of counsel because her trial counsel failed to preserve error on this issue by failing to request a mistrial. Because the misconduct of the prosecutor was pervasive, we hold defendant's trial counsel failed in an essential duty by not requesting a mistrial. Grey was prejudiced by this failure as she ultimately was denied a fair trial as a result of prosecutorial misconduct. Therefore, we reverse and remand this case for a new trial.

V. Other Claims. Having granted Grey a new trial on the above stated grounds, we do not address the other issues presented to us on appeal.

REVERSED AND REMANDED.

Huitink, P.J., concurs; Mahan, J., specially concurs.

MAHAN, J. (concurring specially)

I concur specially. An attorney for the state is under a duty to ensure both the state and the defendant receive a fair trial. *State v. Tate,* 341 N.W.2d 63, 65 (Iowa App. 1983). I agree with the conclusion in this case that the prosecutor "stepped over the line, between 'zealous advocacy' and misconduct." The prosecutor used bad judgment in allowing personal animosity and overzealousness to overshadow her duties of professional responsibility. As a result, the right of the defendant to a fair trial was compromised.