

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Shay Lloyd,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

February 8, 2023

Court of Appeals Case No.
21A-CR-1265

Appeal from the Newton Superior
Court

The Honorable Daniel J. Molter,
Judge

Trial Court Cause No.
56D01-1907-F6-734

Memorandum Decision by Judge Weissmann
Judges May and Crone concur.

Weissmann, Judge.

- [1] First responders approached Shay Lloyd after she appeared semi-conscious in a parked car with the windows rolled up on a warm day. Lloyd told an investigating officer that she had used one of the two syringes in her vehicle to inject heroin, but the State did not test or retain the syringes. Lloyd ultimately was charged with and convicted of unlawful possession of a syringe, a Level 6 felony.
- [2] Lloyd appeals, claiming, among other things, that the trial court should have dismissed the charge because the State violated her right to due process by discarding the syringes before testing. Rejecting that argument and her remaining claims of insufficient evidence, prosecutorial misconduct, and judicial bias, we affirm.

Facts

- [3] A customer outside a Roselawn pharmacy noticed Lloyd sitting in a car with her head resting on the steering wheel. Although the day was warm and Lloyd appeared hot, the car's windows were rolled up. The customer continued watching Lloyd, who appeared to wake up, move her arms, and lean to the side. The customer, who worked in the medical field, saw bruises on Lloyd's inner right forearm near her elbow. Believing Lloyd might be impaired, the customer called 911.
- [4] Firefighters were first to arrive on the scene. They saw Lloyd moving in and out of consciousness and an uncapped hypodermic syringe in the center console

area. However, Lloyd appeared to become more alert while waiting for an ambulance to arrive. She eventually exited the car and was checked by paramedics.

[5] When Indiana State Police Trooper Kevin King arrived on the scene, he saw through the window of Lloyd's car two hypodermic needles on the front passenger side floor. The paramedics, who found no evidence of impairment, approached Trooper King to inform him that Lloyd was refusing treatment. Trooper King placed Lloyd in handcuffs, advised her of her rights, and asked her if the car contained anything that would "poke" or "stick" him. Tr. Vol. II, p. 135. Lloyd responded that there "may be a needle or two in the vehicle." *Id.* In response to further questioning, Lloyd admitted she had used one of the needles to inject heroin that she had received from a friend at a birthday party. She said she injected the drug because she was unable to fill her prescription that day. Although Lloyd continued to indicate that she was fine, she appeared to Trooper King to be "very fidgety" and "unable to stand still." *Id.*

[6] Trooper King searched Lloyd's vehicle and recovered the two syringes. One was uncapped and appeared to have blood particles on it. The other was capped and did not appear to have been used. Trooper King also discovered a bag of pills for which Lloyd had a prescription. But the pharmacy had no record of any prescription for injectable drugs or syringes for Lloyd, who had a history of seizures and anxiety.

- [7] Trooper King photographed the syringes and contacted the Newton County Prosecutor to determine whether further testing was required. Based on that contact, Trooper King believed no testing was needed. He took the syringes to the Indiana State Police Laboratory, where the syringes were photographed and ultimately destroyed in accordance with lab protocol.
- [8] The State charged Lloyd with unlawful possession of a syringe, a Level 6 felony, which Lloyd moved to dismiss based on the State's destruction of the syringes before testing. The trial court denied Lloyd's motion, and after a jury trial, Lloyd was convicted as charged and sentenced to 18 months imprisonment. Lloyd appeals, challenging only her conviction.

Discussion and Decision

- [9] Lloyd claims the State failed to prove she committed unlawful possession of a syringe, a Level 6 felony. She next argues that the court should have dismissed the prosecution because the State violated her right to due process by discarding allegedly exculpatory evidence: the syringe. Lloyd also alleges prosecutorial misconduct arising from statements made by the State during closing arguments that Lloyd interprets as commentary on her failure to testify. Finally, Lloyd alleges the trial court was biased against her.
- [10] We conclude that the trial court was not obligated to dismiss the charge, the evidence to support her conviction was sufficient, prosecutorial misconduct either did not occur or was cured through an admonishment, and Lloyd waived any claim of judicial bias.

I. Sufficiency of the Evidence

[11] When reviewing Lloyd's claim of insufficient evidence to support her conviction, we consider only the probative evidence and reasonable inferences supporting the verdict. *Pimentel v. State*, 181 N.E.3d 474, 482 (Ind. Ct. App. 2022). Without reweighing the evidence or judging witness credibility, we will affirm the conviction unless no reasonable fact finder could conclude the elements of the crime were proven beyond a reasonable doubt. *Id.*

[12] The State charged Lloyd with violating Indiana Code § 16-42-19-18, which provides:

(a) A person may not possess with intent to:

(1) violate this chapter; or

(2) commit an offense described in IC 35-48-4;

a hypodermic syringe or needle or an instrument adapted for the use of a controlled substance or legend drug by injection in a human being.

(b) A person who violates subsection (a) commits a Level 6 felony.

Lloyd argues that the State did not prove she possessed the syringe with the requisite intent to violate either Indiana Code § 16-42-19 ("the Legend Drug Act") or an offense described in Indiana Code § 35-48-4.

[13] The State proved its case. Lloyd admitted to Trooper King that she had used the syringe to inject heroin. Indiana Code § 35-48-4-6 criminalizes possession of

a narcotic drug, including heroin. *See* Ind. Code § 35-48-4-1 (treating heroin as a narcotic drug). Other evidence showed Lloyd had bruising on her arm near her elbow—a common site for intravenous injections. She appeared to repeatedly lose consciousness while sitting in her hot car with the windows rolled up and later seemed unable to stand still. Based on this evidence, the jury could conclude that the State proved beyond a reasonable doubt that Lloyd possessed the syringe with the intent to violate Indiana Code § 35-48-4-6 (possession of heroin), thereby violating Indiana Code § 16-42-19-18 (unlawful possession of a syringe).

II. Due Process Violation

[14] Lloyd contends the State's failure to preserve and test the syringes violated her right to due process under the Fourteenth Amendment to the United States Constitution. To determine whether the State violated Lloyd's process rights through its failure to preserve the syringe, we first determine whether the evidence was "materially exculpatory" or "potentially useful." *Pimentel*, 181 N.E.3d at 479. Lloyd does not allege that the syringe was "potentially useful."¹

¹ Evidence is "potentially useful" if "it could have been subjected to tests, the results of which might have exonerated the defendant." *Chissell v. State*, 705 N.E.2d 501, 504 (Ind. Ct. App. 1999) (quoting *Arizona v. Youngblood*, 488 U.S. 51, 57 (1988)). But the State's failure to preserve potentially useful evidence does not deny due process "unless a criminal defendant can show bad faith on the part of the police." *Id.* Bad faith is more than bad judgment or negligence; it "implies the conscious doing of wrong because of dishonest purpose or moral obliquity." *Wade v. State*, 718 N.E.2d 1162, 1166 (Ind. Ct. App. 1999) (quoting *Samek v. State*, 688 N.E.2d 1286, 1288 (Ind. Ct. App. 1997)). Lloyd has alleged no bad faith, and the record would not support such a finding.

We therefore limit our analysis to whether the syringe was "materially exculpatory."

[15] Evidence is "materially exculpatory" if it possesses two essential characteristics: 1) an exculpatory value that was apparent before the evidence was destroyed; and 2) a nature such that the defendant would be unable to obtain comparable evidence by other reasonably available means. *Id.*

[16] Lloyd claims the syringe was materially exculpatory because, had it tested negative for heroin, the syringe might have refuted Trooper King's testimony that Lloyd admitted using one syringe to inject heroin. However, because future testing was the only means to determine whether the syringes were exculpatory, their exculpatory nature would not have been apparent prior to their disposal. The syringe therefore does not possess one of the two essential characteristics of materially exculpatory evidence. *See id.* As Lloyd has not established the syringe was either materially exculpatory or potentially useful, her due process claim fails. *Id.* at 479. The trial court did not err in denying her motion to dismiss.

III. Prosecutorial Misconduct

[17] Lloyd claims that during closing arguments, the prosecutor commented on her failure to testify during trial, thereby violating her right against self-incrimination under the Fifth Amendment to the United States Constitution.² A

² The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V.

prosecutor violates this right when making "a statement that is subject to reasonable interpretation by a jury as an invitation to draw an adverse inference from a defendant's silence." *Moore v. State*, 669 N.E.2d 733, 739 (Ind. 1996).

[18] When reviewing a claim of prosecutorial misconduct, we first determine whether the prosecutor engaged in misconduct. *Craft v. State*, 187 N.E.3d 340, 347 (Ind. 2022). We then consider whether that misconduct, as defined by case law and the Indiana Rules of Professional Conduct, placed the defendant in a position of grave peril to which he should not have been subjected. *Id.* We measure the gravity of the peril by the probable persuasive effect of the misconduct on the jury's decision. *Collins v. State*, 966 N.E.2d 96, 106 (Ind. 2012). The defendant bears the burden of proving the prosecutor's statement penalized the defendant's exercise of the right to remain silent. *Moore*, 669 N.E.2d at 736.

[19] The first challenged statement occurred after the prosecutor had outlined the evidence against Lloyd. The prosecutor stated:

This is very cut and dry. Despite a lot of conjecture and hypotheticals and fanciful language by the defense, they haven't given you anything that refutes or contradicts any of the testimony that was presented.

Tr. Vol. II, p. 201.

[20] Lloyd objected, leading to the following jury admonishment by the trial court:

Ladies and gentleman [sic] of the Jury, so often this happens. I think humans are imperfect. The Defendant has no obligation to present a defense or anything. So for anybody to comment on the testimony or the things the Defendant did or didn't do would be out of order. So you are ordered to disregard any testimony with regard to what the Defendant did or did not do. Does everybody understand that? . . . I must admonish you not to take into consideration anything the Defendant did or didn't do.

Id. at 202.

[21] The second challenged statement occurred later in the prosecutor's closing argument, as follows:

Yesterday, I told you that this case was not going to be dramatic like your favorite TV crime show or movie. And I think that's held true. There was no plot twist here. What there actually was was a lot of far-fetched possibilities, so many that it was hard to keep up. I had to make a list. So, I'm confused. Was the needle for treatment of diabetes? But there was no evidence that she was diabetic. In fact, there was a report from the ambulance that collected a medical history that didn't note diabetes. Were the bruises on her arms from domestic violence? But there was no testimony that the Defendant was ever a victim of domestic violence.

Id. at 210-11. Defense counsel interjected and, after a sidebar conference and no admonishment, the prosecutor continued with her closing argument.

[22] As to the first challenged statement, the trial court admonished the jury. "[W]here the trial court adequately admonishes the jury, such admonishment is presumed to cure any error that may have occurred." *Johnson v. State*, 901 N.E.2d 1168, 1173 (Ind. Ct. App. 2009). Lloyd does not allege any deficiencies

in the admonishment or that the jury misunderstood the admonishment's clear directive to ignore any reference to Lloyd's silence. Therefore, Lloyd has not overcome the presumption that any error in the first challenged statement was cured. Because Lloyd has not shown she was placed in grave peril by the first challenged statement, we reject her claim that this statement constituted prosecutorial misconduct. *See Craft*, 187 N.E.3d at 347 (ruling that grave peril is an essential element of prosecutorial misconduct).

[23] As to the second challenged statement, the prosecutor was commenting on unrefuted evidence showing that Lloyd, when providing her medical history, did not report that she was a diabetic. Tr. Vol. II, p. 177. That second statement also related to the defense's cross-examination of the pharmacy customer who called 911 and reported seeing bruises on Lloyd's arms. Lloyd asked that witness whether "you have ever seen a woman, who has been in an abusive relationship, have bruises on their forearms where they've been grabbed or otherwise abused?" *Id.* at 107.

[24] "Prosecutors are entitled to respond to allegations and inferences raised by the defense even if the prosecutor's response would otherwise be objectionable." *Dumas v. State*, 803 N.E.2d 1113, 1118 (Ind. 2004). And commenting on the lack of defense evidence is proper so long as the prosecutor focuses on the absence of any evidence to contradict the State's evidence and not on the accused's failure to testify. *Id.*

[25] Here, the second challenged statement was not directed to Lloyd's decision not to testify but, rather, was specifically focused on the State's evidence and the defense that Lloyd *did* present (specifically, her inferences to the jury that the bruising might have resulted from domestic violence or that she possessed the syringes for a diabetic condition). The second statement was not prosecutorial misconduct.

IV. Judicial Bias

[26] Lloyd's final claim is that the trial judge was biased against her. Lloyd points only to the judge's statement during a pretrial conference after Lloyd rejected a proposed plea agreement. The agreement called for no incarceration, 18 months of probation, and possible alternative misdemeanor sentencing. After advising Lloyd that "we are done plea bargaining at this point," the judge asked her, "Do you understand if you're convicted of a felony--and I don't know if you will be--but if the jury comes back with a guilty verdict[,] you will go to jail that night?" Tr. Vol. II, pp. 4-5.

[27] Lloyd alleges the final part of the judge's statement--"you will go to jail that night"--establishes the judge's bias against her. She fails to expand on this conclusion, however, and merely cites various judicial conduct rules relating to bias without incorporating them into any argument. She concludes, without further explanation, that she is entitled to reversal of her conviction based on the judge's bias allegedly reflected in that single statement.

[28] Lloyd's judicial bias argument fails for three reasons. First, she has waived it by failing to present cogent argument. *See Loomis v. Ameritech Corp.*, 764 N.E.2d 658, 668 (Ind. Ct. App. 2002) (ruling that lack of cogent argument waives appellate issues); Ind. Appellate Rule 46(A)(8)(a) (requiring appellant's brief contain cogent reasoning and supporting citations to authority). Second, she has waived any claim of judicial bias by raising it for the first time on appeal. *See Mathews v. State*, 64 N.E.3d 1250, 1253 (Ind. Ct. App. 2016) (ruling that judicial bias justifying a change of judge must be raised first in the trial court through compliance with Indiana Criminal Rule 12, which requires the defendant to file in the trial court an affidavit outlining the bias).

[29] Third, we view the challenged statement as merely a statement of fact. The trial judge's stated policy was to revoke a defendant's bond at the time of the defendant's conviction for a felony. Tr. Vol. II, p. 223. The judge's statement to Lloyd simply advised her that, if convicted, she would immediately be taken into custody. The trial court was attempting to ensure that Lloyd understand that a trial, unlike the proposed plea agreement, would result in at least some incarceration. We fail to see how such an advisement reflects bias.

[30] We affirm the trial court's judgment.

May, J., and Crone, J., concur.