IN THE COURT OF APPEALS OF IOWA

No. 2-455 / 10-1163
Filed August 8, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JACK ANTHONY RICHARDS,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Joel D. Novak, Judge.

Jack Richards appeals from his convictions for domestic abuse assault causing bodily injury and criminal mischief in the fifth degree. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and David Arthur Adams, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Calynn M. Walters, Legal Intern, John Sarcone, County Attorney, and Steve Foritano, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Tabor and Bower, JJ.

TABOR, J.

Jack Richards appeals from his convictions for domestic abuse assault causing bodily injury and criminal mischief in the fifth degree, alleging that he received ineffective assistance of counsel. He claims that his trial attorney should have objected to hearsay statements offered by a police officer and to the use of the word "victim" to describe complaining witness Christine Medici.

Because the hearsay statements were admissible under recognized exceptions, counsel had no duty to object. As for references to Medici as the "victim," Richards cannot show that he was prejudiced by counsel's inattention to that issue. Accordingly, we affirm.

I. Background Facts and Proceedings

In the early morning hours of February 21, 2010, Christine Medici drove her Chevy S-10 pickup to the residence of her boyfriend, Jack Richards. She believed that Richards had taken jewelry from her apartment, and she wanted to get it back. She cracked the driver's side window a few inches so that she could talk to Richards. Richards asked her to get out of the truck and go into his house. She declined, and he broke the driver's side window, showering Medici with glass.

According to the evidence offered the jury, Richards put his body through the window and yanked out the stereo and other wires from the dashboard. He also pulled out "wads" of Medici's hair and tore her shirt. When Richards retreated from inside the cab, he circled the truck, "popping" all of the tires. Medici fled through the passenger door, taking off, in her words, "like a bat out of

hell." She ran four blocks to a trailer park where one of the residents called 911 for her.

Officer Jake Lancaster located Medici, listened to her story, and took her back to her truck—finding its tires slashed and several windows shattered. He also interviewed Richards, who admitted breaking the driver's side window "in an attempt to get to Ms. Medici." Richards claimed the other damage was preexisting. Richards told the police that Medici assaulted him and that her clothes may have ripped when the couple slipped and fell to the ground.

The State filed a trial information on March 17, 2010, charging Richards with domestic abuse assault causing bodily injury, a serious misdemeanor in violation of Iowa Code section 708.2A(2)(b) (2009), and criminal mischief in the second degree, a class "D" felony in violation of Iowa Code sections 716.1 and 716.4. The State eventually amended the second count to a lesser degree of criminal mischief.

The court held a jury trial on May 12 and 13, 2010. After hearing evidence from the police officers and Medici, as well as Richards, his mother, and his neighbor, the jury returned a verdict of guilty on the serious misdemeanor domestic abuse assault charge. On the second count, the jury determined the cost to repair or replace the damage to Medici's truck was not more than $200 and returned a verdict on the lesser charge of criminal mischief in the fifth degree, a simple misdemeanor. The court sentenced Richards to 365 days in jail. He now appeals his convictions.

II. Scope and Standards of Review

We review ineffective-assistance claims de novo because they are based on the constitutional right to counsel. *State v. Lyman*, 776 N.W.2d 865, 877 (Iowa 2010). The burden rests with Richards to show that his trial counsel failed to perform an essential duty and prejudice resulted. *See id*. at 877-78 (*citing Strickland v. Washington,* 466 U.S. 668, 687 (1984)).

If a defendant requests that an appellate court decide a claim of ineffective assistance of counsel on direct appeal—as Richards does here—it is for the court to determine whether the record is adequate and, if so, to resolve the claim. *See State v. Johnson,* 784 N.W.2d 192, 198 (Iowa 2010). Because we find the trial record provides enough information to assess counsel's performance on the points raised, we will reach the merits of Richards's claims in this appeal.

III. Analysis of Ineffective Assistance of Counsel Claims

A. Hearsay

Richards alleges his trial attorney provided ineffective assistance by failing to object to hearsay offered through the testimony of Officer Lancaster. At issue are the following passages from the officer's direct examination:

> Q. Tell me, when you and Officer White first arrived, describe Ms. Medici for us. A. When we first met at the scene we spoke with the homeowner. She had stated that she was sleeping and this female came knocking on her door, screaming, yelling, crying, very frantic, that she needed help. At that time I spoke with Ms. Medici. She had stated that she had gotten into a fight with somebody that she knows. She was worried that this suspect was still chasing her and worried that he was going to find her. She was—
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> Q. Let me stop you right there. Did she say suspect? A. I'm sorry. She said Mr. Jack Richards.

> Q. She told you who was involved? A. Yes, sir. She stated the name at that time.

The officer also testified to the following statements from Medici.

> Q. Tell me what she told you then. A. She had stated that she had went to this address on Southeast First Court, just a little bit further south than the location where we were at. She had gotten into an altercation with Jack; and he had tried to physically hurt her. She was worried that now he was tearing her truck apart. After we received those statements, we loaded her into the squad car and made our way to the scene where she thought that the truck was at and where Mr. Richards was at.

It is undisputed that the officer was allowed to convey hearsay statements. *See* Iowa R. Evid. 5.801(c) (defining hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted"). The question is whether the statements were admissible under any recognized exception. If they were not admissible, then counsel breached a material duty by failing to object on hearsay grounds.

The first passage from Officer Lancaster's testimony constitutes double hearsay. The first layer is an extrajudicial statement to the officer by the homeowner who was awakened by Medici's cry for help. The second layer is Medici's statement to the homeowner that Medici needed help. Medici's statement to the homeowner falls within the exception for excited utterances. *See* Iowa R. Evid. 5.803(2) (defining an excited utterance as "a statement relating to a startling event or condition made while the declarant was under the stress of the event or condition"). "The rationale behind the exception is that statements made under the stress of excitement are less likely to involve

deception than if made upon reflection or deliberation." *State v. Harper*, 770 N.W.2d 316, 319 (Iowa 2009). The homeowner said Medici was "crying" and "screaming" and described her demeanor as "very frantic." These reactions are typical of an individual who is under the stress of an exciting or traumatic event, and whose statements would be admissible under rule 5.803(2). *See State v. Richards*, 809 N.W.2d 80, 95 (Iowa 2012) (describing declarant as "upset and crying").

The homeowner's conversation with the police officer was admissible under the exception for present sense impressions. *See* Iowa R. Evid. 5.803(1) (excepting from general hearsay prohibition statements "describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter"). "The underlying theory of this exception is that substantial contemporaneity of event and statement negate the likelihood of deliberate or conscious misrepresentation." *Fratzke v. Meyer*, 398 N.W.2d 200, 205 (Iowa Ct. App. 1986). In *Fratzke*, our court held that an officer's interview with a declarant fifteen to twenty minutes after he witnessed an accident was "substantially contemporaneous." *Id.* In this case, the officers responded to the 911 call within five minutes. The slight lapse between the homeowner's observations of Medici and her conversation with police does not preclude the statement's admissibility as a present sense impression.

Moving to the next disputed statements, we find that Medici's identification of Jack Richards and her ensuing conversation with Officer Lancaster also qualify as excited utterances. Officer White described Medici as "crying and

quite hysterical" to the point that the officers were initially unable to understand what she was trying to tell them. Richards claims that Medici's declarations were not admissible under the excited-utterance exception because they were in response to police questioning. The extent to which a statement is elicited by questioning is one of several factors for the trial court to consider when determining its admissibility. *See State v. Atwood*, 602 N.W.2d 775, 782 (Iowa 1999). In *Atwood*, our supreme court found the statement in question to be admissible as an excited utterance despite the fact that it was elicited by a detective during his questioning of the declarant at the hospital. *Id*. at 782-83; *see also State v. Mateer*, 383 N.W.2d 533, 535 (Iowa 1986) (finding statement admissible as excited utterance because the officer's questions "merely anticipated excited descriptions of the incident," which the complainant was "bound to volunteer"). In this case, we believe that Medici's conduct demonstrated that she was anxious to report the stressful events to police and would have volunteered the information even if no questions were posed to her.

The statements highlighted by Richards on appeal were all admissible under recognized exceptions to the hearsay rule. Accordingly, counsel had no duty to object. *See State v. Belken*, 633 N.W.2d 786, 801 (Iowa 2001) (finding counsel has no duty to make a meritless hearsay objection).

B. Use of the word "victim"

Richards also contends that his counsel had a duty to prevent the use of the word "victim" in front of the jury. He asserts that police witnesses referred to Medici as the "victim" six times during their testimony and his attorney referred to

her as the "victim" four times during his cross examination. Richards claims he was prejudiced by counsel's omission because the emotional connotations of the word "appealed to the jury's sympathies and provoked its instinct to punish the defendant."

The term "victim" is commonly understood to mean a person harmed by a crime or other injurious event. *See State v. Cortes*, 885 A.2d 153, 158 n.4 (Conn. 2005). Our supreme court has not addressed the propriety of using the term "victim" when referring to a complaining witness during a trial. Courts from other jurisdictions have determined that the word "victim" may be appropriately used during a trial where there is no doubt that a crime has been committed, but the identity of the perpetrator is in dispute. *See Jackson v. State*, 600 A.2d 21, 24 (Del. 1991). But when the commission of the crime is at issue, repeated references to the complainant as the "victim" may lead the jury to improperly infer that the defendant committed the offense. *See Cortes*, 885 A.2d at 158, n.4 (highlighting State's concession that trial court's seventy-six references to the complainant as the victim in its jury charge was improper).

It appears that the officers in this case considered "victim" to be a term of art synonymous with "complaining witness." Four of the five times that Officer Lancaster used the word during his testimony, he was identifying the damaged pickup truck as "the victim's vehicle." Defense counsel also appeared to use the word "victim" as shorthand for identifying Medici in her questions to the officer. On appeal, Richards does not identify any instances when the trial court or the prosecutor referred to Medici as the victim.

While defense counsel may have been able to successfully object to the officers' use of the word "victim" in this case, where the defendant was contesting the commission of the crimes against Medici, we do not find it essential to decide the breach-of-duty question. Our analysis is complete by considering the prejudice prong of *Strickland,* 466 U.S. at 694. To prevail, Richards must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See id.* We do not believe that Richards can make that showing on this record.

The half-dozen police officer references to Medici as the "victim" were not so pervasive throughout the two-day trial that the jurors would have been impermissibly influenced to convict on that basis. Defense counsel's own use of the word "victim" came during questions that cast doubt on Medici's story. The moniker was not adopted by the prosecutor or judge in their statements to the jury, so it did not appear to have an official imprimatur. The State presented evidence highlighting Medici's upset demeanor, her torn clothes, and her damaged truck that corroborated her version of events. After carefully reviewing the trial record, we find no reasonable probability that the result of the proceeding would have been different if counsel had successfully objected to the officers' use of the word "victim" or had refrained from using the term herself. Because we conclude that Richards has failed to satisfy the prejudice prong of *Strickland*, we reject this assignment of error.

AFFIRMED.