IN THE COURT OF APPEALS OF IOWA

No. 1-486 / 10-1039
Filed August 10, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BOBBY DALE FARRAR,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Scott D. Rosenberg, Judge.

A defendant contends (1) the jury's finding of guilt was not supported by sufficient evidence and (2) his trial attorney was ineffective in failing to object to the prosecutor's attempt to introduce hearsay evidence in a roundabout way and circumvent his constitutional right to confront a witness. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, John P. Sarcone, County Attorney, and Michael A. Salvner, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., Vaitheswaran, J., and Miller, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

VAITHESWARAN, J.

Des Moines police officers were called to an apartment complex to deal with possible domestic abuse. Bobby Farrar was subsequently arrested and charged with domestic abuse assault causing bodily injury against a woman named Keyara Clark. Clark, who was subpoenaed to testify for the State, did not appear at trial. The State nonetheless proceeded to trial, with the officers as witnesses. A jury found Farrar guilty as charged.

On appeal, Farrar contends (1) the jury's finding of guilt was not supported by sufficient evidence and (2) his trial attorney was ineffective in failing to object to the prosecutor's attempt to introduce hearsay evidence in a roundabout way and circumvent his constitutional right to confront a witness.

I. Sufficiency of the Evidence

The jury was instructed that the State would have to prove the following:

1. On or about the 10th day of February, 2010, the defendant, without justification, did an act which was meant to cause pain or injury or result in physical contact which was insulting or offensive to Keyara Clark.
2. The defendant had the apparent ability to do the act as defined in Instruction No. 19.
3. The defendant caused a "bodily injury" as defined in Instruction No. 20.
4. The act occurred between "family or household members" who resided together at the time of the incident or were married at the time of the incident.

A reasonable juror could have found the following facts. Police received a call stating that occupants of an apartment had been fighting for "quite some time" and it was believed that a female was pushed down the stairs in the public area of the complex. When police arrived at the complex, they were met by the caller, who directed them to the appropriate apartment. Farrar answered the

door. He told the officers that he and his fiancée had a fight. He confirmed that his fiancée lived in the apartment but said she left after the fight. He also indicated that he and his son were the only two individuals left in the apartment. He denied that any physical violence took place.

The officers asked to take a look around the apartment. Farrar consented. As the officers approached the bathroom, Farrar's demeanor changed and he attempted to block the officers from opening the door. One of the officers pushed the door open and saw a woman, later identified as Clark, tending to wounds on her face. She "appeared scared." Officers described Clark's injuries as consistent with having been struck in the face.[1]

We are obligated to view the evidence in the light most favorable to the State. *State v. Bass*, 349 N.W.2d 498, 500 (Iowa 1984). We are also obligated to make all legitimate inferences and presumptions in favor of the State. *Id.* Finally, we consider circumstantial evidence to be as probative as direct evidence. *State v. Hamilton*, 309 N.W.2d 471, 479 (Iowa 1981).

With these principles in mind, we find the evidence minimally sufficient to establish that Farrar was the perpetrator of an act meant to cause pain or injury against a family or household member with whom he lived. For that reason, we affirm the jury's finding of guilt on the charge of domestic abuse assault causing bodily injury.

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[1] This testimony is part of the exchange that Farrar contends should have been the subject of an objection. We nonetheless are obligated to consider it for purposes of determining the sufficiency of the evidence. *State v. Dullard*, 668 N.W.2d 585, 597 (Iowa 2003) (considering evidence claimed to have been erroneously admitted in determining sufficiency of evidence).

II. Ineffective-Assistance-of-Counsel Claim

As noted, Clark did not respond to the State's subpoena to appear at trial. When her non-appearance came to light, the prosecutor acknowledged that the introduction of Clark's statements to the officers absent her availability for cross-examination would run afoul of the Confrontation Clause of the Sixth Amendment to the United States Constitution, as interpreted by the United States Supreme Court. U.S. Const. amend. VI (guaranteeing that in all criminal prosecutions, the accused is entitled to be confronted with those witnesses testifying against the accused); *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 1374, 158 L. Ed. 2d 177, 203 (2004) (concluding introduction of testimonial hearsay statement without showing of unavailability and prior opportunity to cross-examine witness was a violation of the Sixth Amendment). The prosecutor stated, "[T]he State intends to only offer evidence that is allowed by the rules of evidence as well as the Supreme Court's ruling in *Crawford v. Washington* and its following cases" and does "not intend to offer any of those statements made by Ms. Clark to the officers."

At trial, the prosecutor engaged in the following exchange with one of the officers:

> Q. Without telling me what Ms. Clark told you, did Ms. Clark tell you what occurred in that apartment that night? A. Yes.
>
> Q. Without telling me what she told you, did she tell you how she received these injuries? A. Yes.
>
> Q. After the accounts of what occurred or the injuries, were the injuries to her face and eyes consistent with being struck in the face? A. Yes.
>
> Q. Obviously, there was injury to both eyes. Was it being consistent with being struck more than once? A. Yes.
>
> Q. Without telling me what Ms. Clark told you, after speaking with her, were you investigating a crime? A. Yes.

> Q. What crime were you investigating? A. Domestic assault causing bodily injury.
> Q. Did you have a possible, primary aggressor or suspect? A. Yes.
> Q. Who was that? A. Mr. Farrar.

On appeal, Farrar contends this exchange amounted to an end run around the Confrontation Clause. He specifically asserts,

> Without "telling the jury what Ms. Clark told the officer," the prosecutor allowed the officer to tell the jury exactly what the officer may have thought Ms. Clark may have told him, circumventing [his] right to confront the witness against him in contravention of *Crawford*, and leaving it to the jury to speculate what Ms. Clark may have said to fill the void in the prosecution case.

In his view, his trial attorney was ineffective in failing to object to the exchange on Confrontation Clause grounds.

The State counters that "[b]ecause the State's evidence did not include Clark's hearsay statements, the confrontation clause was not implicated." It continues,

> [T]he State's careful questioning is exactly what was proper in order to avoid hearsay and confrontation clause problems. Police officers only testified to what they had done, observed and to what Farrar had done and said. Neither witness testified about what Clark had said to them.

But see United States v. Check, 582 F.2d 668, 679 (2d Cir. 1978) (concluding out-of-court statements of an informant, "audaciously introduced through the artifice of having [an undercover agent] supposedly restrict his testimony to his half of his conversations" with the informant, were hearsay as they were offered for the truth of the matter asserted).

We conclude the question of whether Farrar's attorney should have objected to the exchange on Confrontation Clause or hearsay grounds should be

preserved for postconviction relief proceedings to allow trial counsel an opportunity to address the issue. *See State v. Shortridge*, 589 N.W.2d 76, 84 (Iowa Ct. App. 1998).

AFFIRMED.

Miller, S.J., concurs; Vogel, P.J., specially concurs.

VOGEL, P.J. (concurring specially)

I specially concur. While I agree with the majority that Farrar's conviction is supported by sufficient evidence, I disagree as to the resolution of Farrar's ineffective-assistance-of-counsel claim. Rather than preserving the claim for postconviction relief proceedings, I would resolve the claim on direct appeal.

In *United States v. Check*, 582 F.2d 668, 679 (2d Cir. 1978), the court examined an officer's testimony in which he testified to one-half of several conversations with an informant. In that case, the testimony conveyed the "precise substance," "indeed, the minutiae" of out-of-court statements made by an informant, and supplied the details of the drug-related crime. *Check*, 582 F.2d at 675, 683. The court found the testimony served as a "transparent conduit for the introduction of inadmissible hearsay information obviously supplied by and emanating from the informant." *Id* at 683.

In this case, however, the officer testified to the investigation he conducted, including his conduct and observations. While the officer's testimony included the fact that he interviewed the victim as part of his investigation, at no point did his testimony convey the "precise substance of the [victim's] out-of-court statements." *Id.* at 675; *see also United States v. Wells*, 347 F.3d 280, 290 (8th Cir. 2003) (finding that unlike *Check*, "the officer's testimony was limited to his observations of the informant's conduct and his own unilateral instructions to the informant" and was not hearsay). I would find the challenged testimony was not hearsay and trial counsel has no duty to object to it. Consequently, I would further find that Farrar cannot prevail on his ineffective-assistance-of-counsel claim as a matter of law.