IN THE COURT OF APPEALS OF IOWA

No. 2-419 / 10-1283
Filed August 8, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

PERCY LEE MOORE,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Joseph Moothart, District Associate Judge.

Appeal from conviction of domestic abuse assault causing bodily injury. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Dustin Lies, Assistant County Attorney, and Calynn M. Walters, Student Legal Intern, for appellee.

Considered by Eisenhauer, C.J., and Potterfield and Mullins, JJ.

EISENHAUER, C.J.

Percy Moore appeals from his conviction, following a jury trial, of domestic abuse assault causing bodily injury. He contends the court erred in its evidentiary rulings and his attorney was ineffective. We affirm.

I. Background Facts and Proceedings. In November 2009 a 911 operator received a call from Diana Moore's cell phone. Loud and mostly unintelligible arguing could be heard before the call terminated without response to the operator's repeated questions. Attempts to call back went directly to voice mail. A few minutes later, Diana Moore called 911 again and told the operator her husband "beat me up" and locked her out of the apartment. She complained her head and jaw hurt. The 911 operator sent paramedics and a police officer.

When the paramedics arrived, Diana was standing outside. She had visible swelling on the side of her face. She told the paramedic her husband had hit her. The police officer arrived a few minutes later. Diana was still crying and upset. She told the officer Moore had hit her and said he would kill her if she was still home when he returned. After the paramedics stabilized Diana, the officer helped her into the ambulance for transport to the hospital. Later the officer was notified an individual matching Moore's description was near the apartment. The officer approached Moore and arrested him. Moore was charged with domestic abuse assault causing bodily injury.

Diana was not available to testify at Moore's trial. Moore moved in limine to exclude her statements made to the 911 operator and the police officer identifying him as the perpetrator. He asserted the statements violated his right to confront the witnesses against him and also were hearsay. The court denied

the motion, concluding the statements were not testimonial, so did not infringe Moore's right of confrontation. The court also concluded the statements fell within the excited utterance exclusion to hearsay. *See* Iowa R. Evid. 5.803(2).

Moore indicated his intent to introduce evidence of Diana's prior convictions of assaulting him. The State moved in limine to exclude the evidence. The court sustained the motion, but left the door open for later reconsideration of the evidence.

The jury found Moore guilty as charged. He appeals.

II. Scope and Standards of Review. Our review generally is for correction of errors at law. Iowa R. App. P. 6.907. Evidentiary rulings, such as rulings on motions in limine, are reviewed for an abuse of discretion unless the ruling implicates constitutional issues, where our review is de novo. *State v. Eliott*, 806 N.W.2d 660, 667 (Iowa 2011); *see also State v. Rainsong*, 807 N.W.2d 283, 286 (Iowa 2011). Ineffective-assistance claims are reviewed de novo. *State v. Brubaker*, 805 N.W.2d 164, 171 (Iowa 2011).

III. Merits.

A. Admitting evidence. Moore contends the court erred in overruling his motion in limine and objections to testimony and a recording of his wife's out-of-court statements when she did not appear at trial to testify. He asserts admitting her statements through the testimony of others and a recording of 911 calls violated his right of confrontation. He further asserts the statements were inadmissible as hearsay. The district court determined the out-of-court statements fell within the excited utterance exception to hearsay, they were not

testimonial, and their probative value was not substantially outweighed by the danger of unfair prejudice.

Confronting witnesses. The United States and Iowa constitutions provide an accused the right "to be confronted with the witnesses against him." U.S. Const. amend. VI; Iowa Const. art. I, § 10. Moore's wife did not appear to testify. The district court allowed the jury to hear the recorded 911 calls she made. In the second call, after she was outside the apartment away from Moore, she told the 911 operator Moore had hit her. The court also allowed the testimony of the paramedic and the responding officer concerning her statements to them identifying Moore as the person who assaulted her.

Moore argues his wife's statements were testimonial, and admitting them through others violated his right to confront her. *See Crawford v. Washington*, 541 U.S. 36, 68-69 (2004) ("Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."). The State responds the statements were not testimonial, so no confrontation issue exists. *See Davis v. Washington*, 547 U.S. 813, 822 (2006).

The distinction between testimonial and nontestimonial statements set forth in *Davis* is helpful.

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Id.

Moore argues the second 911 call and the arrival of the officer in response to the 911 call both occurred after the emergency was over. Therefore, under the distinction described in *Davis*, the statements made in response to the 911 operator's questions and the officer's questions were testimonial because they served "to establish or prove past events potentially relevant to later criminal prosecution." *Id.*

Davis further refines the distinction, however, as it applies to 911 calls and "at least the initial interrogation conducted in connection with a 911 call," and notes they are "ordinarily not designed primarily to establish or prove some past fact, but to describe current circumstances requiring police assistance." *Id.* at 827 (internal quotation marks omitted). In other words, they are not "testimonial." These are contrasted with statements made in police interrogations such as in *Crawford*, 541 U.S. at 53, which are given in "interrogations solely directed at establishing the facts of a past crime in order to identify (or provide evidence to convict) the perpetrator." *Davis*, 547 U.S. at 826. Statements given in these circumstances are testimonial.

We conclude the district court correctly determined the statements in the 911 call and those given to the responding emergency personnel and police officer are nontestimonial. The statements were in the context of seeking help for injuries and protection from Moore, not as part of a police investigation. Therefore the court did not err in overruling the motion in limine and objections at trial grounded in an alleged violation of Moore's right to confront the witnesses against him.

Hearsay. Moore also challenges the same statements as inadmissible hearsay. The district court determined they fell within the "exited utterance" exception to hearsay. *See* Iowa R. Evid. 5.803(2). That exception provides statements "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" are not excluded by the hearsay rule. *Id.*

Moore contends the statements elicited by the 911 operator and the police officer do not qualify as excited utterances because the emergency was over by the time the second 911 call was made, and the statements were made in response to questioning. *See State v. Atwood*, 602 N.W.2d 775, 782 (Iowa 1999) (listing factors for a court to consider in determining whether the excited utterance exception applies).

In responding to Moore's assertion the statements did not fall within the excited utterance exception because the emergency was over and five to ten minutes had elapsed since the second 911 call, the district court focused on Diana's state (crying, upset) and the short time elapsed, so her statements "do not appear to be the result of further contemplation or meditation on her part." The officer was "acting as basically backup to first responders." Although he asked about who hit her and their relationship, the questions are in the context of asking about her injuries and whether she was going to the hospital and took place while she was still upset and crying. We conclude the district court correctly determined the challenged statements fall within the excited utterance exception to hearsay. *See State v. Harper*, 770 N.W.2d 316, 320 (Iowa 2009) (Noting "the fact that a statement was prompted by a question does not

automatically disqualify it as an excited utterance"). We find no abuse of discretion in the court's rulings on the motion in limine and the objections during trial.

In addition, the evidence from the 911 call and the officer's account of Diana's statements were merely cumulative to evidence of her statements that came in without objection through the paramedic's testimony, so Moore was not prejudiced. *See State v. Hildreth*, 582 N.W.2d 167, 170 (Iowa 1998). Moore contends, however, he was prejudiced because the repetition of the evidence was an "extra helping of evidence" so prejudicial as to warrant a new trial. *See United States v. Bercier*, 506 F.3d 625, 633 (8th Cir. 2007). *Bercier* is distinguishable because the evidence admitted in *Bercier* differed both in quantity and quality from the evidence in this case. *In Bercier*, the victim testified and, in addition, the extremely detailed evidence from the nurse and doctor who examined the victim was offered under the exception to hearsay for statements made for medical diagnosis or treatment. *Id.* at 631-32. The court determined the statements identifying Bercier did not qualify under the medical treatment exception, *id.* at 632, and when admitted in an effort to bolster the victim's credibility, reached the "extra helping of evidence" level so as to be prejudicial. *Id.* at 633. That is not the situation before us. We have concluded the evidence Diana identified Moore as her attacker was admissible under the circumstances as an excited utterance. It was not offered to bolster the credibility of her testimony at trial. It was not the kind of detailed, step-by-step description of the incident admitted in *Bercier.* We conclude the cumulative evidence did not "tip[] the scales unfairly." *See id.*

B. Excluding evidence. Moore contends the court erred in excluding evidence of his wife's prior convictions of assaulting him. Moore gave notice of his intent to introduce the evidence. Moore did not raise a justification defense, but claimed instead if he did strike her, it was involuntary—he did not intend to make contact with her. The State moved in limine to exclude the evidence as unfairly prejudicial. *See* Iowa Rs. Evid. 5.403, .404(b). The district court sustained the State's motion in limine, stating:

> In my opinion, even if Ms. Moore was here to testify, this would be a good objection because my concern in cases of this nature is that we expend a lot of time basically conducting trials within a trial, determining whether prior incidents were well-founded, allowing parties to make explanations as to why they have a prior conviction or previous conduct that involved both parties, and obviously there's . . . an unfair prejudice that we have to be concerned about because of the tendency of a jury to convict or not convict based not on this alleged incident, but based on the other alleged incidents.

The State asserts error was not preserved because the court's statements, when ruling on the motion in limine, clearly provide an opportunity for Moore to offer the evidence of his wife's convictions during trial, but Moore did not do so. The court stated:

> In the event that defense intends to offer evidence, I would direct that you make further record outside the presence of the jury, let me know and we'll take up the issue outside the presence of the jury. The motion in limine precludes you from presenting that evidence to the jury without first approaching the bench and asking for a hearing outside their presence. If the context of what you hear as evidence in your view changes, you can let me know and we'll conduct further hearing outside the presence of the jury.

The State is correct. The ruling on the motion in limine did not resolve the matter "in such a way that it was beyond question that the challenged evidence would not be admitted during trial," so Moore's failure to offer the evidence at trial

waived any claimed error in the court's ruling on the motion in limine. *See State v. Alberts*, 722 N.W.2d 402, 406 (Iowa 2006) (citations omitted). Error was not preserved for our review of this issue.

C. Ineffective assistance. Moore contends his attorney failed to make a number of evidentiary objections and he was prejudiced.

We acknowledge that ineffective-assistance-of-counsel claims are normally considered in postconviction relief proceedings. *State v. Soboroff*, 798 N.W.2d 1, 8 (Iowa 2011). When the record is adequate, however, the appellate court should decide the claim on direct appeal. *See State v. Rubino*, 602 N.W.2d 558, 563 (Iowa 1999). "Preserving ineffective assistance of counsel claims that can be resolved on direct appeal wastes time and resources." *State v. Truesdell*, 679 N.W.2d 611, 616 (Iowa 2004). We conclude the record is adequate to address Moore's claims.

To establish his attorney was ineffective, a defendant must prove by a preponderance of the evidence: (1) trial counsel failed to perform an essential duty and (2) prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Proof of the first prong requires a showing the attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* Proof of the second prong requires a showing of a reasonable probability the results of the proceeding would have been different, but for counsel's unprofessional errors. *State v. Artzer*, 609 N.W.2d 526, 531 (Iowa 2000). Failure to prove either prong is fatal to a claim of ineffective assistance. *State v. Buchanan*, 800 N.W.2d 743, 747 (Iowa Ct. App. 2011). An attorney has not failed to perform an essential duty by not raising a

claim or making a meritless objection. *State v. Barnes*, 791 N.W.2d 817, 827 (Iowa 2010).

Moore contends his attorney should have objected to the paramedic's testimony concerning what Diana said to him as containing hearsay and testimonial statements violating Moore's right of confrontation. We conclude, for the same reasons discussed above, Diana's out-of-court statements admitted through the paramedic's testimony were not testimonial and were admissible under the excited utterance exception to hearsay. We express no opinion whether they would be admissible under the medical diagnosis and treatment exception to hearsay. *See* Iowa R. Evid. 5.803(4). Moore's attorney was not ineffective for failing to make a meritless objection to the evidence.

Moore also contends his attorney should have objected to the 911 call recording and the police officer's testimony concerning Diana's identification of Moore as her attacker as so cumulative of the paramedic's testimony as to be prejudicial. We have addressed and dismissed this claim in our preceding discussion of *Bercier*. Moore's attorney was not ineffective for failing to make a meritless objection on this basis.

We have determined the district court did not abuse its discretion in its evidentiary rulings admitting evidence of Diana's statements and excluding evidence of her prior convictions of assaulting Moore, and have concluded Moore did not establish his attorney was ineffective. Therefore, we affirm.

AFFIRMED.

Mullins, J., concurs; Potterfield, J., concurs specially.

POTTERFIELD, J. (concurring specially)

I write separately to disagree with the conclusion reached by the majority that the responses of the complaining witness to the police officer's questions were nontestimonial. I agree that the 911 calls and the witness's statements to the paramedics were admissible as nontestimonial statements under the confrontation clause. *See State v. Schaer*, 757 N.W.2d 630, 636–37 (Iowa 2008). I disagree that the responses to the police officer's questions and the witness's narrative regarding a threat allegedly made by Moore were nontestimonial.

First, the statements to the officer are not fairly characterized as "the initial interrogation conducted in connection with" the 911 calls. *Davis*, 547 U.S. at 827. The officer did not testify to the five-to-ten-minute lapse following the assault upon which the majority relies. The record shows the ambulance arrived first, and the paramedics completed their work before the officer began his interview of the witness. The officer did ask two questions about the witness's physical condition when he arrived at the scene. But the majority's conclusion that he therefore was acting as a first responder is not logical. The officer was not asking those questions for the purpose of providing medical treatment, but rather as an investigator, determining whether an injury had been sustained.

The officer's interview of the witness proceeded in question-and-answer form, while the officer wrote the answers down. The officer began gathering information by asking the witness her name and address, relationship and the nature of the marriage. The witness asks whether she will need to sign a complaint, indicating that she is thinking the questions are about the prosecution

and trial.[1] Although some questions involve the witness's decision whether to go to the hospital, the officer goes on to ask about her coming to the police station to make a statement and the witness volunteers the information that Moore threatened her. The investigatory nature of the conversation is exemplified by the following exchange:

> OFFICER: So you'll go [to the hospital] on your own later? To get looked at?
> WITNESS: Don't I need to sign a complaint or something?
> OFFICER: Well, we need to talk about that.
> WITNESS: Okay so I need to go . . . .
> OFFICER: What kind of relationship do you guys have?
> WITNESS: He's my husband; we've been married for ten years . . .
> OFFICER: Okay.
> WITNESS: and there's been, um, some violence, on and off.
> OFFICER: Has he been arrested for it before?
> WITNESS: Actually I did.

She then goes on to explain the past circumstances of her arrest for domestic violence. The officer then asked, "How are things in the apartment? Do I need to get pictures of that?" To which the witness responded, "No he just pushed me and some things fell . . . ."

Though this excerpt was not heard by the jury, it provides background as to whether "circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id.* Here, the questioning clearly was designed as evidence gathering and not a response to an ongoing emergency.

[1] The jury did not hear this portion of the recording although the prosecutor was permitted to elicit from the officer the alleged threat.

To the extent the witness's out-of-court, testimonial statements consisted of the identification of Moore as her assailant, I agree that the evidence was cumulative to the 911 call and the statement to the paramedics. However, the witness's statement that Moore threatened her life was not cumulative and was prejudicial. I would find, however, the admission of that statement harmless beyond a reasonable doubt in light of the otherwise overwhelming evidence of guilt.

"To establish harmless error when a defendant's constitutional rights have been violated, the State must prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *State v. Cox*, 781 N.W.2d 757, 771 (Iowa 2010). A two-step analysis is employed to determine whether the State has met its burden under the harmless-error standard. *State v. Walls*, 761 N.W.2d 683, 686 (Iowa 2009).

> First, the court asks what evidence the jury actually considered in reaching its verdict. Second, the court weighs the probative force of that evidence against the probative force of the erroneously admitted evidence standing alone. This step requires the court to ask whether the force of the evidence is so overwhelming as to leave it beyond a reasonable doubt that the verdict resting on that evidence would have been the same without the erroneously admitted evidence.

Id. at 686–87 (internal citation and quotation marks omitted).

With respect to the evidence the jury actually considered in reaching the verdict, "we do not conduct a subjective inquiry into the jurors' minds." *State v. Peterson*, 663 N.W.2d 417, 431 (Iowa 2003). The inquiry "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been

rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." *Id.*

In this case, I believe a violation of Moore's Sixth Amendment right to confrontation occurred when the officer was permitted to testify that the witness told him Moore had voiced a threat against her. However, the properly admitted evidence against Moore was strong, consisting of the witness's description of the assault, her injuries, and her identification of Moore. The guilty verdict was "surely unattributable" to the statement regarding the threat allegedly made by Moore. That statement was harmless beyond a reasonable doubt.

I concur in the affirmance of Moore's conviction.