IN THE COURT OF APPEALS OF IOWA

No. 3-053 / 12-0331
Filed May 15, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ANTHONY JOSEPH MELTON,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Romonda D. Belcher, District Associate Judge.

Anthony Melton appeals his judgment and sentence for assault with intent to commit sexual abuse. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Rachel C. Regenold, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, John Sarcone, County Attorney, Steven Foritano, Assistant County Attorney, and Kailyn Heston, Student Legal Intern, for appellee.

Considered by Vaitheswaran, P.J., and Tabor and Mullins, JJ.

VAITHESWARAN, P.J.

Anthony Melton appeals his judgment and sentence for assault with intent to commit sexual abuse. He argues: (1) there is insufficient evidence to support the jury's finding of guilt, (2) the district court erred in admitting hearsay statements, and (3) his trial attorney was ineffective in failing to object to what he characterizes as irrelevant and prejudicial testimony.

I. Sufficiency of the Evidence

The jury was instructed that the State would have to prove the following elements of assault with intent to commit sexual abuse:

> 1. On or about January 22, 2011, Anthony Melton assaulted L.T.
> 2. Anthony Melton did so with the specific intent to commit a sex act, by force or against the will, of L.T.

Melton focuses on the second element and, in particular, the specific intent requirement. He argues, "In [his] drunken state he severely overestimated his charms with L.T. and she declined his advances," but "[t]here is nothing in the record to suggest that Melton intended to engage in sexual activity that was by force or against L.T.'s will." Our review of the issue is for substantial evidence. *State v. Hennings*, 791 N.W.2d 828, 832-33 (Iowa 2010).

A reasonable juror could have found the following facts. L.T. was "hanging out" with long-time friend Kyle and Kyle's brother, Joe, at the home of their mother. Kyle's cousin, Melton, was staying with Kyle and Joe's mother. He came home from work and offered to accompany L.T. to a fast food restaurant to pick up food for the group.

Once in the car, Melton asked L.T. if she wanted to have sex with him, using what L.T. characterized as "vulgar" terminology. L.T. made it clear she was not interested, but Melton continued his sexual advances. He spoke crudely about her breasts and put his hand inside her bra. L.T. grabbed his hand and pulled it away from her shirt.

When they arrived at the restaurant, Melton forced his hand down L.T.'s sweat pants, touching "the top" of the area near her vagina. He exposed himself to L.T. and tried to get her to touch his penis. L.T. pulled her hand away.

On returning home, Melton attempted to take L.T.'s car keys so she would have to spend the night. L.T. refused to relinquish the keys. When they went inside, L.T. told Kyle she wanted to leave. Melton brazenly persisted in his advances. He sat next to L.T. and tried to touch her buttocks on the outside of her clothing. He attempted to give her a hug while putting his hand between her legs. And, when she was on the verge of leaving, he pushed her into his bedroom, closed the door, and tried to kiss her. L.T. opened the door and left.

These facts amount to more than substantial evidence in support of a finding that Melton harbored a specific intent to commit a sex act by force or against L.T.'s will. *See State v. Radeke*, 444 N.W.2d 476, 478 (Iowa 1989) (finding sufficient evidence to generate a jury question on specific intent based on the defendant's use of deception about his background, use of force and threats to get the woman to unbutton her blouse, and failure to voluntarily release the woman when she pulled away). Accordingly, we affirm the jury's finding of guilt.

II. Hearsay Evidence

At trial, L.T. provided detailed and graphic testimony about the incident with Melton. Over Melton's objection, Kyle, Joe, and a police officer also testified about the incident, as recounted to them by L.T.

On appeal, Melton contends the district court erred in allowing these witnesses to repeat L.T.'s statements to them. *See State v. Paredes*, 775 N.W.2d 554, 560 (Iowa 2009) (reviewing the admission of hearsay evidence for errors of law). In response, the State concedes L.T.'s statements to these witnesses constituted hearsay. *See* Iowa R. Evid. 5.801(c) (defining hearsay as a statement, other than one made by the declarant while testifying at the trial, offered in evidence to prove the truth of the matter asserted). The State also concedes that hearsay evidence is generally inadmissible. *See* Iowa R. Evid. 5.802. The State invokes an exception to the general rule for excited utterances. That exception authorizes the admission of "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Iowa R. Evid. 5.803(2).

We need not decide whether L.T.'s out-of-court statements fell within that exception because, even if the statements were inadmissible hearsay, the statements were duplicative of L.T.'s duly-admitted testimony and, therefore, non-prejudicial. *See State v. McGuire*, 572 N.W.2d 545, 547 (Iowa 1997) ("[T]he court will not find prejudice if substantially the same evidence has come into the record without objection.").

In reaching this conclusion, we have considered Melton's argument that the three witnesses described Melton's acts in "more aggressive language" than

did L.T. We disagree with that characterization; in our view, the witness recitations were strong and unequivocal but L.T.'s testimony was equally strong and unequivocal. Be that as it may, Melton has cited no authority for the proposition that the prejudice analysis turns on the tenor of the statements rather than the content. Because the content was virtually identical, we conclude the admission of the hearsay evidence did not amount to reversible error.

III. Ineffective Assistance of Counsel

Melton next contends several witnesses improperly "commented on" his credibility, and his attorney was ineffective in failing to object to this testimony. To prevail, Melton must prove a breach of an essential duty and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Even though ineffective-assistance-of-counsel claims are generally preserved for postconviction relief, we will address them "when presented with a sufficient record." *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008). We find the record sufficient to address the claim.

The offending testimony came from Kyle's mother and others, who recounted that she asked Melton to leave the home following the incident with L.T. Melton acknowledges the testimony was not a direct comment on Melton's credibility but argues "it was equally damaging because the underlying message was that [Melton] is so bad his own family believes [L.T.] over him and so should the jury." Melton cites *State v. Graves*, 668 N.W.2d 860 (Iowa 2003), for the proposition that the testimony was improper.

In *Graves*, the Iowa Supreme Court decided whether a prosecutor committed misconduct in asking a defendant whether another witness lied. 668

N.W.2d at 873. The court stated the question was "incompatible with the duties of a prosecutor." *Id.* at 873. The court concluded "it is improper for a prosecutor to call the defendant a liar, to state the defendant is lying, or to make similar disparaging comments." *Id.* at 876. The court characterized this holding as a "bright-line rule." *Id.* at 873; *accord Bowman v. State*, 710 N.W.2d 200, 205 (Iowa 2006); *State v. Carey*, 709 N.W.2d 547, 553 (Iowa 2006).

Here, the prosecutor did none of these things. While she elicited testimony about actions taken by Kyle's mother in the wake of L.T.'s disclosures and while one might infer from this testimony that Kyle's mother supported L.T. rather than Melton, the questions and answers fell far short of the bright-line standard articulated in *Graves*. For that reason, we conclude counsel did not breach an essential duty in failing to object to the testimony. Accordingly, Melton's ineffective-assistance-of-counsel claim fails.

We affirm Melton's judgment and sentence for assault with intent to commit sexual abuse.

AFFIRMED.

Tabor, J., concurs; Mullins, J., concurs specially.

MULLINS, J. (concurring specially)

I concur in the result, but write separately. The conviction in this case is dependent almost entirely on the observations and conclusions of L.T., with no physical evidence. In order for the jury to convict Melton, they had to believe L.T.'s testimony. Each of the witnesses who testified as to alleged hearsay was repeating statements that L.T. made to them. The hearsay was the bootstrap used to corroborate her testimony.

I would find that the statements made to Kyle and Joe were admissible excited utterances, but the statements made to the police officer nearly twenty-four hours later should not have been admitted into evidence as excited utterances. The mere fact that L.T. became upset as she described the events of the day before does not, under the facts of this case, qualify the hearsay statements as excited utterances. Melton's hearsay objection to the police officer's testimony should have been sustained. I would then reluctantly find that the error was harmless, as "the erroneously admitted hearsay will not be considered prejudicial if substantially the same evidence is properly in the record." *State v. Newell*, 710 N.W.2d 6, 19 (Iowa 2006).