IN THE COURT OF APPEALS OF IOWA

No. 6-893 / 05-0559
Filed April 25, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DAVID CHARLES SCHAER,
Defendant-Appellant.

Appeal from the Iowa District Court for Cerro Gordo County, Jon Stuart Scoles, Judge.

Defendant appeals following conviction and sentence for domestic abuse assault with intent to cause serious injury and willful injury causing bodily injury. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Patricia Reynolds, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, Paul L. Martin, County Attorney, and Sandra Murphy, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Zimmer and Eisenhauer, JJ.

ZIMMER, J.

David Schaer appeals following conviction and sentence for domestic abuse assault with the intent to cause serious injury in violation of Iowa Code sections 708.1, 708.2A(1), and 708.2A(3)(b) (2003), and willful injury causing bodily injury in violation of section 708.4(2). He asserts the district court erred in admitting hearsay testimony in violation of his constitutional right to confrontation, that trial counsel was ineffective, and that the court erred when imposing sentence. We affirm the district court.

I. Background Facts and Proceedings.

On June 3, 2004, Teresa Bergan was physically assaulted. She suffered abrasions, bruises, bite marks, and a "blowout" fracture of the interior orbit wall of her left eye socket. Bergan identified Schaer as her assailant. Schaer was arrested in connection with the assault and charged with one count of domestic assault with intent to cause serious injury and one count of willful injury causing serious injury. The matter proceeded to trial in February 2005.

Prior to the receipt of evidence, Schaer moved to exclude certain testimony from Bergan's step-sister, Sarah Reckner; nurse Marsha Wedmore and Dr. Robert Mott, who treated Bergan after the assault; and Officer Curtis Blake, who spoke with Bergan at the hospital and later arrested Schaer. Schaer asserted that, pursuant to *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), allowing these witnesses to testify to out-of-court statements made by Bergan would violate the Confrontation Clause of the Sixth Amendment.

The district court concluded the statements Bergan made to Reckner, Wedmore, and Dr. Mott were not subject to exclusion under *Crawford*, but reserved ruling on the statements she made to Officer Blake. The court determined the admissibility of this testimony would turn on the nature of Officer Blake's interaction with Bergan, and invited counsel to make an appropriate record outside the presence of the jury when the officer was called to testify.

At trial the State relied on the testimony of Reckner, Wedmore, Dr. Mott, and Officer Blake to demonstrate the circumstances surrounding the assault on Bergan. By the time of trial, Bergan had recanted her statements implicating Schaer. She did not testify at trial.

Reckner testified that at approximately 9:00 or 10:00 p.m. on the day in question she drove Bergan to Bergan's home, located on Southwest 25th Street in Mason City. According to Reckner, Bergan shared the home with Schaer, her boyfriend of four years. Reckner watched Bergan enter the home before driving away. Approximately ten minutes later, Reckner received a phone call from Bergan. Reckner stated Bergan was "hysterical" and "crying," and told Reckner "they had gotten into a fight and that she left and [Reckner] needed to come pick her up" at a nearby church. Reckner assumed that "they" referred to Bergan and Schaer.

When Reckner arrived at the church she observed that Bergan was bloody, "[h]ysterical, crying," and "freaking out." Reckner took Bergan to the hospital, where she observed that Bergan was still "pretty shook up" and crying. Reckner noted Bergan's eye was injured and she had bruises on different parts of her body.

Nurse Wedmore testified that, while she was assessing Bergan at the hospital, Bergan was "anxious, tearful, upset." Wedmore further testified that, when she asked Bergan "what happened," Bergan told her "[s]he had been beaten by her ex-boyfriend approximately a half hour before she came to the ER." Bergan was then seen by Dr. Mott, who described Bergan as "extremely distressed." Dr. Mott testified that, in the course of taking a patient history, he asked Bergan "how she sustained her injuries." Bergan replied that "she had been punched and bitten several times by her significant other."

Hospital personnel called the police, and Officer Blake was dispatched to the hospital. Approximately twenty minutes passed before he was able to speak with Bergan. According to Officer Blake, Bergan was initially "quiet and calm," but began crying as soon as he started to speak to her and continued to cry during their thirty to forty-five minute conversation. Reckner confirmed that, when Bergan spoke with Officer Blake, Bergan was still upset and crying.

According to Officer Blake he asked Bergan "what happened . . . [and she] told me what had happened, how she had arrived at the hospital." Officer Blake testified that Bergan had identified her attacker, and that he asked Bergan where the attacker could be found. The following exchange then occurred between the prosecutor and Officer Blake:

> Q. And so where did you go? A. I went to her address. Her home address was 413 25th Southwest here in Mason City.
> Q. Do you recall whose home was that? A. That was her shared residence along with the David Schaer who she identified as her assailant.
> Q. So was it your understanding you would find Mr. Schaer at this residence? A. Yes. She said she –
> [DEFENSE COUNSEL]: Your Honor, I'm going to object. He's testifying to hearsay.

[PROSECUTOR]: If I may, "yes" or "no," Officer. A. Yes.

Reckner testified that she heard Bergan's conversation with Officer Blake, and that Bergan told the officer "her and David got into a fight and he beat her up."

Officer Blake stated that he and another officer arrived at the home on Southwest 25th Street around midnight. The house was quiet and dark. No one responded when the officers knocked on the door. Acting on consent obtained from Bergan at the hospital, the officers entered the house and located Schaer sleeping on the bed in the back bedroom. The officers woke Schaer and told him why they were there. Schaer claimed Bergan did not live at the home. He refused to answer questions about the alleged assault, and otherwise declined to cooperate with the officers.

Following the close of evidence at trial, Schaer moved for a judgement of acquittal on the basis that the State had failed to prove that (1) Bergan's injuries were sufficient to support a charge of willful injury, (2) Schaer intended to cause Bergan serious injury, and (3) serious injury in fact occurred. The court concluded there was insufficient evidence of a serious injury and dismissed that alternative of the willful injury charge. The remainder of the motion was denied. The matter was submitted and the jury found Schaer guilty of domestic abuse assault with intent to cause serious injury and willful injury causing bodily injury. The court sentenced Schaer to the statutorily authorized term of incarceration on each conviction, to be served concurrently.

Schaer appeals. He asserts the district court erred in admitting testimony that recounted out-of-court statements made by Bergan. Alternatively, regarding the testimony of Officer Blake only, Schaer asserts trial counsel was ineffective

for failing to properly preserve error on the confrontation clause claim. He asserts trial counsel was also ineffective for failing to move for a judgment of acquittal on the basis the State did not prove that he and Bergan lived together at the time of the assault. Finally, Schaer asserts the court considered an impermissible factor when imposing sentence.

II. Scope and Standards of Review.

We conduct a de novo review of alleged constitutional violations. *See Wemark v. State*, 602 N.W.2d 810, 814 (Iowa 1999). In all other matters, we review the court's actions for the correction of errors of law. Iowa R. App. P. 6.4.

III. Confrontation Clause.

We begin with Schaer's claim that testimony from Reckner, Nurse Wedmore, Dr. Mott, and Officer Blake, which repeated Bergan's out-of-court statements, was admitted into evidence in violation of the Confrontation Clause of the Sixth Amendment. In support of his claim, Schaer relies on *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 1374, 158 L. Ed. 2d 177, 203 (2004), which held that admission of testimonial hearsay evidence violates the Confrontation Clause unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination. He asserts Bergan's statements to the witnesses were testimonial hearsay and thus excluded under *Crawford*.

In *Crawford,* the Supreme Court held as follows:

> Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law . . . . Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of "testimonial." Whatever else the term

> covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.

Crawford, 541 U.S. at 68, 124 S. Ct. at 1374, 158 L. Ed. 2d at 203.[1]

Contrary to Schaer's suggestion, the statements Bergan made to Reckner, Wedmore, and Dr. Mott shortly after the assault, in their capacity as a family member or medical provider, do not fall within the framework of testimonial evidence. In addition, to the extent Schaer challenges the admissibility of the statements on the basis that they are nontestimonial hearsay, the record demonstrates the statements fall within the excited utterance and/or the medical diagnosis and treatment exceptions to the hearsay rule. *See* Iowa R. Evid. 5.803(2), (4). The district court committed no error in admitting this evidence.

The statements made to Officer Blake, which also fall within the excited utterance exception to the hearsay rule, present a closer question. If those statements were made in response to an interrogation by Officer Blake, they would fall within *Crawford's* definition of testimonial evidence. If the statements were not solicited by law enforcement but voluntarily supplied by Bergan, they would not. Thus, the context in which Bergan's statements were made is critical to resolution of the issue. However, that context cannot be gleaned from the record before the district court. Significantly, although defense counsel was

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[1] We recognize "testimonial" was further defined by the Supreme Court in *Davis v. Washington*, ___ U.S. ___, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). However, that decision was not rendered until after Schaer filed his notice of appeal, and Schaer does not contend it is applicable in this case. We accordingly assess the issue under the law in existence at the time of Schaer's trial.

given an opportunity to make an additional record regarding the conversation between Bergan and Officer Blake, she failed to do so.

As it stands, the record does not establish that Bergan's statements were made in the context of a police interrogation. Because Schaer has not shown any of the disputed statements fall within *Crawford's* definition of testimonial evidence, and because all the statements fall within an exception to the hearsay rule, the district court did not err by allowing them into evidence.[2] Accordingly, we turn to Schaer's claims of ineffective assistance of trial counsel.

IV. Ineffective Assistance of Trial Counsel.

Schaer asserts his trial counsel was ineffective for failing to (1) preserve error on the claims that Bergan's statements to Officer Blake were admitted in violation of his right to confrontation, and (2) move for a judgment of acquittal on the ground the State failed to prove he and Bergan lived together at the time of the assault. To establish these claims, Schaer must overcome a strong presumption of his counsel's competence. *State v. Nucaro*, 614 N.W.2d 856, 858 (Iowa Ct. App. 2000). He has the burden of proving his attorney's performance fell below "an objective standard of reasonableness" and "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). Prejudice is shown by a reasonable probability that, but for counsel's errors, the

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[2] Although Schaer asserts Article I, Section 10 of the Iowa Constitution provides broader protection than the federal Confrontation Clause, he offers no argument or authority in support of that proposition. We have, in fact, in a case involving excited utterances and statements made to secure medical treatment, expressly declined to hold that Section 10 provides broader protection than the federal constitution. *See State v. Campbell*, 539 N.W.2d 491, 495 (Iowa Ct. App. 1995).

result of the proceeding would have been different. *State v. Atwood,* 602 N.W.2d 775, 784 (Iowa 1999).

Typically, ineffective assistance of counsel claims are preserved for a possible postconviction proceeding to allow a full development of the record regarding counsel's actions. *State v. DeCamp*, 622 N.W.2d 290, 296 (Iowa 2001). We address such a claim on direct appeal only where the record establishes that either (1) as a matter of law the defendant cannot prevail on this claim or (2) both prongs of the *Strickland* test are satisfied, and a further evidentiary hearing would not change the result. *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003). Here, we find the record insufficient to resolve Schaer's claim that trial counsel was ineffective for failing to properly preserve error regarding the admissibility of Bergan's statements to Officer Blake. We accordingly preserve this claim for a possible postconviction relief proceeding.

The record is, however, adequate to resolve Schaer's claim that trial counsel was ineffective for failing to move for a judgment of acquittal on the ground the State did not prove Bergan and Schaer lived together at the time of assault. A review of the record convinces us that this claim is without merit.

To establish Schaer was guilty of domestic assault, the State was required to prove, in relevant part, that Schaer and Bergan were "household members residing together within the past year and are not residing together at the time of the assault." *See* Iowa Code § 236.2(2)(d), 708.2A. To successfully move for judgment of acquittal it must appear, upon a review of all the evidence in the light most favorable to the State, that no rational trier of fact could have found this element to be shown beyond a reasonable doubt. *See State v. Dominguez*, 482

N.W.2d 390, 392 (Iowa 1992). Stated another way, if the evidence in the record was sufficient to convince a rational juror that Schaer and Bergan did live together at the time of the assault, such a motion would fail. Under those circumstances Schaer could not prove the ineffectiveness of trial counsel, because an attorney will not be deemed ineffective for failing to make a meritless motion. *See Love v. State*, 543 N.W.2d 621, 623 (Iowa Ct. App. 1995).

The record in this matter contains evidence Schaer and Bergan were living together at the time of the assault. Recker testified that Bergan and Schaer resided together at the house on Southwest 25th Street and that she took Bergan to and watched her enter the house just prior to the assault. According to Officer Blake, the house on Southwest 25th Street was Bergan's home address, which she shared with Schaer. Officer Blake and another officer discovered Schaer sleeping at that address the night of the assault. Although Schaer attacks the quality of this evidence, credibility assessments are for the jury, and it was free to accept, reject, and weigh the evidence as it saw fit. *State v. Maring*, 619 N.W.2d 393, 395 (Iowa 2000).

The foregoing evidence is sufficient, if accepted by the jury, to establish Bergan and Schaer lived together at the time of the assault. Accordingly, a motion for a judgment of acquittal that asserted the State failed to demonstrate cohabitation would have been unsuccessful. Schaer cannot demonstrate ineffective assistance on this basis.

V. Sentencing.

Finally, we turn to Schaer's challenge to the sentence imposed by the district court. In determining the proper sentence, the district court

> should weigh and consider all pertinent matters in determining proper sentence, including the nature of the offense, the attending circumstances, defendant's age, character and propensities and chances of his reform. The courts owe a duty to the public as much as to defendant in determining a proper sentence. The punishment should fit both the crime and the individual.

State v. August, 589 N.W.2d 740, 744 (Iowa 1999) (citation omitted). The foregoing are some of the "minimal essential factors" to consider when exercising sentencing discretion. *State v. Hildebrand*, 280 N.W.2d 393, 396 (Iowa 1979). A sentence will be vacated, and the matter will be remanded for resentencing, if the district court considered an improper factor when imposing sentence. *State v. Carrillo*, 597 N.W.2d 497, 501 (Iowa 1999).

Schaer asserts the district court improperly considered the fact that he had not accepted responsibility for his actions. Specifically, after considering the violent nature of the offense and Schaer's prior criminal record, the court stated:

> The court also considers the fact that in this case the defendant—you, Mr. Schaer—have not accepted any responsibility for your actions. The pre-sentence investigation report asks for a defendant's version of the events and you simply put not guilty. . . . Somebody beat up Ms. Bergan and the jury in this case concluded that it was you. . . . The court believes that that conclusion is supported by substantial evidence, notwithstanding the fact that Ms. Bergan now is telling us it was someone else. And the fact that you are unable or unwilling to accept responsibility for your activities is also a factor the court believes it can consider.

We have held that a trial court may properly consider "the defendant's lack of remorse or acknowledgment of the jury's finding of his guilt as influencing his attitude about the incident . . . ." *State v. Bragg*, 388 N.W.2d 187, 192 (Iowa Ct. App. 1986). Although a "trial court must carefully avoid any suggestions in its comments at the sentencing stage that it was taking into account the fact defendant had not pleaded guilty but had put the prosecution to its proof," *State*

v. Nichols, 247 N.W.2d 249, 256 (Iowa 1976), "this prohibition does not preclude a sentencing court from finding a lack of remorse based on facts other than the defendant's failure to plead guilty." *State v. Knight*, 701 N.W.2d 83, 87 (Iowa 2005). Moreover, "[a] defendant's lack of remorse can be discerned 'by any admissible statement made by the defendant pre-trial, at trial, or post-trial,' or by 'other competent evidence properly admitted at the sentencing hearing.'" *Id*. at 87-88 (citation omitted). Here, the district court properly considered Schaer's failure to accept responsibility for his actions when imposing sentence. No error is shown.

VI. Conclusion.

Schaer has not shown that the district court erred in admitting witness testimony or imposing sentence. Nor has he demonstrated the ineffective assistance of his trial counsel in regard to the motion for judgment of acquittal. Schaer's convictions and sentences are affirmed, and we preserve for a possible postconviction relief proceeding his claim that trial counsel was ineffective for failing to preserve error on the contention that portions of Officer Blake's testimony were admitted in violation of his right to confrontation.

AFFIRMED.

Eisenhaer, J., concurs; Sackett, C.J., concurs in part and dissents in part.

SACKETT, C.J. (concurring in part and dissenting in part)

I concur in part and dissent in part.

The defendant appeals following an assault conviction contending, in part, that his constitutional right to confront witnesses against him was violated. The alleged victim of the assault was taken to the hospital by her step-sister following the incident. The woman told the doctor her "significant other" assaulted her. She told a nurse an "ex-boyfriend" assaulted her. The defendant's name was not given to either the doctor or the nurse. The police were called, and the woman was interviewed by a police officer at the hospital. In the course of the interview, the woman told the officer the defendant assaulted her. The step-sister heard the woman tell the officer that the defendant had assaulted her. The woman later recanted the statements she made to the officer. She did not testify at trial and apparently now contends she was assaulted by another woman, not the defendant.

The State sought to prove its case principally through the testimony of these four witnesses, who would testify to the woman's injuries and recount her statements. The defendant objected contending that allowing these witnesses to testify to the woman's hearsay statements would violate his Sixth Amendment right to confront the witnesses against him. The district court denied the motion, and the majority has affirmed.

The focal question is whether the hearsay statements are testimonial. If they are not testimonial, then the question is whether they are admissible as an exception to the hearsay rule. We review the admission of hearsay for correction

of errors at law. *State v. Tangie*, 616 N.W.2d 564, 568 (Iowa 2000). Confrontation Clause issues are reviewed de novo. *Id*.

I would agree with the majority that the woman's statements recounted by the doctor and the nurse fall within a hearsay exception as medical history and that some of the statements made to the step-sister fall within a hearsay exception as excited utterances. However, I do not find that the answers to the officer's interrogation fall within any hearsay exception.

The issue of whether the statements are testimonial is not as easily resolved. The fact that evidence is subject to a hearsay exception does not exempt it from a challenge under the Confrontation Clause. *See State v. Castaneda*, 621 N.W.2d 435, 444 (Iowa 2001) (noting the Confrontation Clause bars the admission of some evidence that would otherwise be admissible hearsay). Only testimonial statements cause a declarant to be a witness for purposes of the Confrontation Clause. *Davis v. Washington*, ___ U.S. ___, 126 S. Ct. 2266, 2273, 158 L. Ed. 2d 177, 237 (2006) (citing *Crawford v. Washington*, 541 U.S. 36, 51, 124 S. Ct. 1354, 1364, 158 L. Ed. 2d 177, 192-93 (2004)). Statements are testimonial when the circumstances objectively indicate there is no ongoing emergency and the primary purpose of the interrogation is to prove past events potentially relevant to later criminal prosecution. *Id*., ___ U.S. at ___, 126 S. Ct. at 2273-74, 165 L. Ed. 2d at 237.

I first look at the testimony of the doctor and the nurse. Statements taken for the primary purpose of enabling assistance to meet an ongoing emergency are not testimonial. *Id*. The doctor and nurse asked questions to determine how to treat the woman, who was in immediate need of medical help. The woman's

statements that provided information necessary to determine treatment for her injuries were a call for immediate medical help. However, these statements were describing past events, rather than describing what was actually happening at the time, and the woman was not in a place of danger. Even considering the latter two factors, I believe in this situation, the statements were not testimonial as it does not appear they were intended to establish facts for a future prosecution.

The statements made to the woman's step-sister, at least until the point that she and the victim were safely in the hospital, would appear to be statements made when there was yet a need to meet an ongoing emergency. *Id*. Whether the statements the step-sister recounted that the woman made to the officer during his interrogation are testimonial would seem to depend on whether the statements taken by the officer were testimonial.

The only conclusion I can draw is that the statements taken by the officer were testimonial. The woman was in the hospital being treated and no longer subject to any danger. Furthermore, the primary purpose of the interrogation was to establish or prove past events potentially relevant to later criminal prosecution. *Id*. To say otherwise is to ignore the officer's testimony. Unlike the majority, I find the context in which the statements were made to the officer is clearly evident from this record. For when asked the purpose of his questioning, the officer stated:

> A. I had to determine – obviously I was sent there in reference to an assault. I had to determine if an assault occurred. If it was an assault, if it occurred in our jurisdiction. And who the assailant may have been.

> Q. So you're still trying to determine if a crime even occurred? A. Exactly.

Later he was asked:

> Q. So the assumption of this form is that this person – this other person, you have a victim and you have a defendant: right? A. Yes, absolutely.
> Q. So it's prepared in anticipation of possible trial? A. Yes.

In *Crawford*, though the court left for another day any effort to give a comprehensive definition of "testimonial," it said, "Whatever else the term covers, it applies at a minimum to . . . police interrogations." *Crawford*, 541 U.S. at 68, 124 S. Ct. at 1374, 158 L. Ed. 2d at 203. The court has since further defined what is "testimonial." In *Hammon v. Indiana*, No. 05-5705, the Court found statements made by a victim when an officer reported to her home were testimonial in nature as there was no emergency in progress, and the officer was seeking to determine what had happened. *Davis*, ___ U.S. at ___, 126 S. Ct. at 2278, 165 L. Ed. 2d 242-43. Furthermore, the investigation was formal enough to qualify as an interrogation as it was conducted away from her attacker and "statements deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed." *Id*.

The primary if not the sole purpose of the interrogation was to investigate a possible crime. The officer was not seeking to determine what was happening but rather what had happened. The woman was separated from the defendant, her statements recounted how potentially criminal past events began and progressed, and the interrogation took place after the events were over. She was not seeking aid but relating past events. *Id*., ___ U.S. at ___, 126 S. Ct. at 2279, 165 L. Ed. 2d at 243.

The statements were testimonial. The officer's testimony, as well as the step-sister's testimony, as to what the woman said in answer to the officer's interrogation should not have been admitted.

However, our inquiry does not end here. The reversal of a judgment is not required if the defendant suffered no prejudice or harm from the admission of inadmissible testimony. *State v. Brown*, 656 N.W.2d 355, 361-62 (Iowa 2003). For testimony admitted in violation of the Confrontation Clause, "'the State must establish that the error was harmless beyond a reasonable doubt.'" *Id.* (quoting *State v. Kite*, 513 N.W.2d 720, 721 (Iowa 1994)). In making the Confrontation Clause assessment, a court must look at:

> The importance of the witness's testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross examination otherwise permitted, and the overall strength of the prosecution's case.

Id. at 361(citations omitted).

While there is considerable evidence the woman was injured there was no evidence other than the officer's that the woman specifically identified defendant as inflicting the injuries. The doctor and nurse testified the woman identified the person who inflicted the injuries only as an "ex-boyfriend" or a "significant other." The step-sister testified at the time of the incident the woman was living with the defendant. The step-sister testified she took the woman to that home and was called a short time later to pick her up as the woman reported they had gotten in a fight. Officers found the defendant sleeping at the woman's residence the same evening as the assault, but they did not note any evidence of a fight in the

home or anything about defendant's appearance to indicate he had been assaulted or been in a fight. They saw no blood on him but indicated he was not happy to see them. Unfortunately, the only conclusion I can reach is that the State has failed to show the defendant was not prejudiced by the admission of the officer and step-sister's testimony.