IN THE COURT OF APPEALS OF IOWA

No. 7-740 / 06-1339
Filed December 12, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CLARICIA MARIA WILMER,
Defendant-Appellant.

Appeal from the Iowa District Court for Dubuque County, Lawrence M. Fautsch, Judge.

Defendant appeals her convictions of involuntary manslaughter and nonconsensual termination of a pregnancy. **REVERSED AND REMANDED.**

Leslie M. Blair and Christopher M. Soppe of Blair & Fitzsimmons Law Firm, Dubuque, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Ralph Potter, County Attorney, and Christine Corken, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Vaitheswaran and Baker, JJ.

SACKETT, C.J.

Defendant-appellant, Claricia Wilmer, appeals her convictions of involuntary manslaughter, in violation of Iowa Code section 707.5(1) (2005), and nonconsensual termination of a human pregnancy in violation of Iowa Code section 707.8(2). The defendant contends the district court erred in: (1) refusing to suppress statements the defendant made when she was originally questioned by police; (2) ordering the defendant to wear a leg brace during trial; (3) making incorrect rulings on hearsay objections; and (4) admitting autopsy photographs of the victim. The defendant also argues she received ineffective assistance of counsel when her trial attorney failed to object to the marshaling instruction on nonconsensual termination of a human pregnancy and the court should have granted the defendant's motion in arrest of judgment on this conviction.

I. BACKGROUND.

On the evening of September 1, 2005, Alberta Wilmer, the defendant's fourteen-year-old cousin, and several friends were approached on the street by a group of people. A fight ensued and Alberta was injured. After a local adult broke up the fight, Alberta's twenty-eight-year-old cousin, the defendant, was called. The defendant called the police and an officer arrived to obtain information about the incident.

After the police left, the defendant drove Alberta and two others to an apartment house where the defendant planned to confront those who attacked Alberta earlier. April Johnson was standing outside of the apartment building. After April denied being at the earlier fight, the defendant, Alberta, and the two

other girls began hitting and kicking April. April fell down and after the group continued hitting and kicking her, April screamed that she was pregnant. The group then stopped the attack and returned to the car. At some point during the attack, April was stabbed. She and her unborn fetus died as a result of the stabbing. The group went to a parking lot of a casino in Dubuque, and after two of the girls left, the defendant and Alberta drove toward Wisconsin.

The police quickly obtained a description of the defendant's car and its license plate number and notified officers in Iowa, Illinois, and Wisconsin that the car was involved in a stabbing. At approximately 10 p.m., an hour after the stabbing, Wisconsin officers made a high risk traffic stop of the defendant's vehicle. They ordered the defendant to throw the keys out, to exit the vehicle, and to get on her knees to be checked for weapons. The defendant was told several times that if she did not comply with the orders she would be shot. The defendant was handcuffed and put into the back of a squad car to await the arrival of Dubuque officers. An hour later, at 11 p.m., one Dubuque officer arrived. He was told to "stand by" until superior officers arrived. At 1:45 a.m., the two superior officers arrived to the scene.

When the superior officers discovered the defendant was handcuffed, they had them removed and apologized to her. They informed her that her car would be towed back to Dubuque. They asked her to come with them back to Dubuque and she agreed. She rode in the back seat of an unmarked police vehicle. She was not handcuffed and the doors were unlocked. She was questioned in an interview room at the Dubuque Law Enforcement Center from 2:30 a.m. to approximately 4:30 a.m. with the door closed. During the questioning, the

defendant gave untruthful information that was used to attack her credibility at trial.

On September 14, 2005, the defendant was charged by trial information with first degree murder and non-consensual termination of a human pregnancy. A jury convicted the defendant of involuntary manslaughter and non-consensual termination of a human pregnancy. The defendant appeals, claiming the convictions must be reversed due to erroneous trial court rulings concerning *Miranda* violations, physical restraints on the defendant during trial, hearsay and unduly prejudicial evidence, and ineffective assistance of counsel. We consider each claimed error in turn.

II. MIRANDA RIGHTS.

Defendant first claims any statements she made during the questioning at the Dubuque Law Enforcement Center must be suppressed because she was never read her *Miranda* rights. The district court overruled the motion to suppress finding the defendant was not in custody at the time of questioning and gave statements voluntarily. Motions to suppress based on *Miranda* violations are reviewed de novo on appeal. *State v. Miranda*, 672 N.W.2d 753, 758 (Iowa 2003). We independently evaluate the totality of the circumstances shown by the record and "'give deference to the district court's fact findings due to its opportunity to assess the credibility of witnesses.'" *Id.* (quoting *State v. Turner*, 630 N.W.2d 601, 606 (Iowa 2001)). However, we are not bound by the trial court's findings. *State v. Simmons*, 714 N.W.2d 264, 271 (Iowa 2006).

The Fifth Amendment of the United States Constitution, made applicable to the states through the Fourteenth Amendment, promises that "[n]o person . . .

shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V; *Miranda*, 672 N.W.2d at 758. This constitutional guarantee applies when one is subject to "custodial interrogation" by police. *Miranda v. Arizona*, 384 U.S. 436, 444-45, 86 S. Ct. 1602, 1612, 16 L. Ed. 2d 694, 706-07 (1966). To safeguard this right, prior to custodial interrogation, a person must be informed of the right to remain silent, right to obtain or be appointed an attorney, and that any statements can be used against the person in court. *Id.* at 478-79, 86 S. Ct. at 1630, 16 L. Ed. 2d at 726. Evidence obtained without giving the *Miranda* warnings is inadmissible. *Id.* at 478-79, 86 S. Ct. at 1630, 16 L. Ed. 2d at 726. Waiver of these rights must be voluntary and "'made with a full awareness . . . both of the nature of the right being abandoned *and* the consequences of the decision to abandon [those rights]'". *State v. Mortley*, 532 N.W.2d 498, 502 (Iowa Ct. App. 1995) (quoting *Moran v. Burbine,* 475 U.S. 412, 421, 106 S. Ct. 1135, 1141, 89 L. Ed. 2d 410, 421 (1986)).

"Custodial interrogation is defined as 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.'" *Simmons*, 714 N.W.2d at 274 (quoting *Turner*, 630 N.W.2d at 607). We identify "'whether a reasonable person in the [defendant's] position would understand [herself] to be in custody.'" *State v. Countryman*, 572 N.W.2d 553, 558 (Iowa 1997) (quoting *State v. Deases*, 518 N.W.2d 784, 789 (Iowa 1994)). We look to all of the circumstances surrounding the questioning but use the following factors for guidance:

> (1) the language used to summon the individual;
> (2) the purpose, place, and manner of interrogation;
> (3) the extent to which the defendant is confronted with evidence of her guilt; and

> (4) whether the defendant is free to leave the place of questioning.

Id.

The State concedes that the defendant was in custody of the Wisconsin police officers when they made the high risk traffic stop and kept the defendant handcuffed in the squad car. However, the State argues that the defendant was not in custody at the time of the interrogation by the Iowa officers in the Dubuque Law Enforcement Center. The State urges the defendant was not in custody because the defendant agreed to return to Dubuque with the officers, she was not restrained by the Dubuque officers, the interview room was unlocked, she seemed calm, and exercised her rights to refuse giving consent to search her vehicle and give a DNA sample. The State argues that even if the defendant was in custody during the interview, the error was harmless. The district court found no fifth amendment violation on three grounds including: (1) the defendant was not in custody as a result of the high risk stop because police are entitled to use protective measures if reasonable under the circumstances; (2) the defendant was not in custody during questioning by the Dubuque officers because, among other things, they made it clear to her that she was not obligated to return with them to Dubuque and she was not restrained during the questioning; and (3) the defendant made the statements voluntarily.

After reviewing the principles demanded by *Miranda*, the guiding factors, and all of the circumstances surrounding the questioning evidenced by the record, we find the defendant was subject to custodial interrogation and *Miranda* warnings were required. Custody is more likely to exist when the encounter is initiated by police rather than the suspect. *Miranda*, 672 N.W.2d at 759. Also,

"[t]he *Miranda* safeguards 'become applicable *as soon as* a suspect's freedom of action is curtailed to a degree associated with formal arrest.'" *Id.* (quoting *Berkemer v. McCarty,* 468 U.S. 420, 440, 104 S. Ct. 3138, 3150, 82 L. Ed. 2d 317, 335 (1984) (emphasis added)). Even if the record is unclear as to what language was used, custody can be present if the police "took charge of [the defendant's] movement." *Id.*

Here, the interaction between the officers and the defendant was instigated by the police. Although police must use reasonable protective measures during high risk stops, there was no risk to the officers once the defendant was handcuffed and placed in the squad car. At this point, the defendant's freedom of movement was restrained to a degree comparable to that which occurs during arrest. We are not convinced that the arrival of the Dubuque officers and their less restrictive treatment of the defendant significantly changed the nature of the confrontation. The Wisconsin officers testified that they had the defendant "in custody" and intended to "transfer custody" to the Dubuque officers. The Wisconsin officers' action was in response to the request of Dubuque officers to stop this particular vehicle because it was involved in a stabbing. The Dubuque officers' ignorance of the restraints and apology to the defendant did not absolve the need for *Miranda* warnings. "The custody determination depends on the objective circumstances of the interrogation, not on subjective views harbored either by the officer or the person being questioned." *Countryman*, 572 N.W.2d at 557. Knowledge of constitutional rights may be imputed between state actors. *See Michigan v. Jackson*, 475 U.S. 625, 634, 106 S. Ct. 1404, 1410, 89 L. Ed. 2d 631, 641 (1986) (stating that when

an accused asserts their right to counsel to one official, Sixth Amendment right to counsel principals "require that we impute the State's knowledge from one state actor to another."). Moreover, in *Miranda v. Arizona*, the United States Supreme Court warned that when a defendant is transferred between authorities, the second authority should not be allowed to benefit from the first authority's failure to inform the defendant of her rights. *Miranda v. Arizona*, 384 U.S. at 496-497, 86 S. Ct. at 1639, 16 L. Ed. 2d at 736 (1966).

The restrictive circumstances did not end when the handcuffs were removed. Although the officers supposedly asked the defendant to accompany them back to Iowa, she was told she could not leave in her own car. At that late hour, the defendant's only available means of transportation was the police car. The defendant was escorted into the law enforcement center by two officers, and questioned in an interview room behind closed doors for two hours in the middle of the night. The defendant was also confronted by evidence of her guilt. The officers knew the car was involved in the stabbing prior to the stop of the vehicle and would not allow the defendant to leave in the car or retrieve any items from the car except for her house key. During questioning at the law center, the officers told the defendant they already had evidence that she was present when the stabbing occurred. They asked her directly if she stabbed April Johnson or knew who did.

The one factor that is unclear is whether the defendant was free to leave at the time of questioning. The officers testified they told the defendant she was free to leave. The defendant stated she did not remember if she was told this before or during questioning but knew she was told she could leave after the

questioning. She stated, "I read my statement and it said that they told me that, so they could have." Even if we accept the officers' testimony, we find the other factors support a finding of custodial interrogation under the facts. The record shows police efforts were immediately directed to locating the defendant's vehicle. Once the vehicle and defendant were located, police attention focused on securing the defendant for transfer to Dubuque officials. Once the Dubuque officials arrived, they sought to obtain evidence by impounding the defendant's vehicle, returning the defendant to Iowa, and questioning her. A reasonable person would not believe they were free to leave given this chain of events.

The defendant's rights were not waived. Her statements were in response to questions, not spontaneous. Also, any written waiver in her statement appears to have been provided after the incriminating statements were made. The defendant did not have full awareness of the rights being surrendered and the consequences when she signed her statement.

III. HARMLESS ERROR.

The State contends even if there was a *Miranda* violation, the error was harmless. Erroneous admission of evidence in violation of a defendant's Fifth and Fourteenth Amendment rights is subject to harmless error analysis. *State v. Peterson*, 663 N.W.2d 417, 430-31 (Iowa 2003). "The State is required to "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* We first look to the evidence the jury actually considered and then weigh "the probative force of that evidence against the probative force of the erroneously admitted evidence standing alone." *Id.* "[A] verdict or conclusion only weakly supported by the record is more likely to have been

affected by errors than one with overwhelming record support." *Nguyen v. State*, 707 N.W.2d 317, 326 (Iowa 2005). If credibility or corroboration is key to the verdict, error is not harmless. *See Peterson*, 663 N.W.2d at 434-35 (explaining that when the prosecution's case heavily depends on accomplice testimony that is best corroborated by defendant's erroneously admitted statements to police, the error is not harmless); *State v. Anderson*, 636 N.W.2d 26, 37-38 (Iowa 2001) (finding erroneously admitted evidence could not be harmless when physical evidence was lacking and verdict must have been based on a credibility determination of defendant and victim). If the erroneously admitted statements improperly presented a "contradiction of facts that constituted the heart and core of defendant's defense," error cannot be considered harmless. *State v. Metz*, 636 N.W.2d 94, 99 (Iowa 2001).

Although the jury considered extensive evidence and testimony, we do not find the evidence overwhelmingly implicated this defendant. No blood or DNA evidence linked the defendant to the stabbing. There were four persons attacking April Johnson at the same time. The defendant testified that Alberta stabbed April while Alberta testified that the defendant did the stabbing. Multiple knives were connected to the crime. There was testimony that one witness believed multiple people stabbed April yet the autopsy revealed a single stab wound. The State's case depended largely on the credibility of the accomplices and the defendant. The State attacked the defendant's credibility in their case in chief and through cross-examination of the defendant. They asked the officers about how the defendant changed her story during questioning and asked the defendant why she lied to police. The defense also relied on the jury believing

the defendant's testimony. The statements she gave without being advised of her *Miranda* rights were improperly used by the State to establish inconsistencies in her version of events. Due to the lack of other evidence implicating the defendant and the importance of credibility determinations in this case, we cannot find the error was harmless.

IV. PHYSICAL RESTRAINT.

Defendant next contends the district court erred in ordering the defendant to wear a leg restraint during the trial and it prejudiced her case. "The decision to impose physical restraints upon a defendant during trial lies within the informed discretion of the district court and will not be disturbed on appeal absent a clear showing of abuse of discretion." *State v. Wilson*, 406 N.W.2d 442, 449 (Iowa 1987). "[A] defendant is entitled to the indicia of innocence in the presence of the jury" and shackling is to be avoided because it may prejudice the jury against the defendant. *Id.* at 448-49. In *Wilson*, the court distinguished between cases where the jury observes the defendant in shackles during the entire trial and cases where the jury briefly sees the defendant shackled inadvertently. *Id.* at 448. There is inherent prejudice in the first situation and the restraint can only be used if the State proves the restraints are necessary. *Id.* at 449. In the second case, prejudice is not inherent and "the defendant has the burden to show the incident prejudicially affected the jury or that his ability to present his defense was impaired as a result of his being seen in shackles." *Id.* at 448. In making the determination whether to restrain a defendant, a court should minimize prejudice and cite specific facts supporting its decision. *Id.* at 449-50.

In this case, the defendant was not visibly shackled, but was required to wear a leg brace. She was ordered to wear the leg brace throughout the trial but was permitted to have the leg brace removed when she testified so abnormal walking caused by the brace would not be visible to the jury. The brace fit underneath loose clothing, and was secured above the defendant's knee and at the ankle. The brace operated to prevent the defendant from jumping or running if she were to try to escape. The court did not cite reasons for requiring the brace during trial except that it was the sheriff's standard operating procedure and the court would not interfere with that policy. The State concedes there was an abuse of discretion because the court did not cite adequate reasons for the restraint and we agree. We have reversed on other grounds, consequently we need not decide the prejudice issue.

V. HEARSAY EVIDENCE.

Defendant contends the trial court erred in numerous rulings on hearsay testimony. Most of the statements the defendant complains of concern the testimony of the investigating officers. The officers testified about statements others made to them during the investigation. An officer also referred to an exhibit showing the time line of the investigation. The State argued the statements were not offered to prove the truth of the statement but rather were presented to explain how the investigation proceeded. The trial court allowed the statements in for this purpose.

We review rulings on hearsay objections for errors at law. *State v. Newall*, 710 N.W.2d 6, 18 (Iowa 2006). Erroneously admitted hearsay evidence is presumed prejudicial unless affirmative proof shows no prejudice was caused.

State v. Hildreth, 582 N.W.2d 167, 170 (Iowa 1998). However, if the hearsay testimony is merely cumulative of other admissible evidence, there is no prejudice. *Id.* Hearsay "is 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." Iowa R. Evid. 5.801(*c*). Statements may be admissible to prove the mere fact the declaration was made and "to explain a third party's actions taken in response" to the statement. *State v. Doughty*, 359 N.W.2d 439, 442 (Iowa 1984). The statement "must not only tend to explain the responsive conduct but the conduct itself must be relevant to some aspect of the State's case." *State v. Mitchell*, 450 N.W.2d 828, 832 (Iowa 1990). "Even if the condition of relevancy is met, such evidence may be excluded if its probative value is outweighed by its prejudicial effect. *State v. Edgerly*, 571 N.W.2d 25, 29 (Iowa Ct. App. 1997). This type of testimony must be carefully limited to why the officer took certain action because the jury is likely to misuse the relayed statement for its truth. *Doughty*, 359 N.W.2d at 442. We also must search the record to ensure the State's real purpose is to show the officer's response and is not intended to prove the truth of the statements. *State v. Martin*, 587 N.W.2d 606, 610 (Iowa 1998).

In analyzing the officer testimony and the record, we find some statements were properly allowed to explain the investigation and some were impermissible hearsay and prejudicial. First, the statement concerning attempts to locate the defendant the day after her initial questioning was limited to investigation purposes. The officer testified that measures, such as obtaining a warrant and employing detectives, were necessary to locate the defendant. Similarly, an

officer's testimony about why officers searched a specific school yard was properly limited to the scope of the investigation and admissible for this purpose.

The time line exhibit was also generally limited to the steps taken by the police in response to 911 calls concerning the incident and describing when the defendant was located in Wisconsin and questioned. The brief portions referring to when the defendant was at a casino were cumulative and nonprejudicial as the defendant's own testimony placed her at the casino during this period.

The defendant claims that an officer should have been permitted to testify about how close witnesses were to the scene or whether they wore glasses. The court prohibited this testimony as based on hearsay. Even if this testimony was admissible, the defendant suffered no prejudice because the particular eyewitnesses themselves testified to these facts.

The trial court allowed a witness to testify that Alberta told her "[the defendant] stabbed that girl and I think she's dead." According to the record, this statement would have been made less than an hour after the reported stabbing. At the time Alberta made the statement, she was scared, crying, and the witness was trying to calm her down. We agree with the State that this statement falls within the excited utterance exception to the hearsay rule. An excited utterance is "[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). "A lapse of time between a startling event and an excited utterance does not necessarily foreclose admission of the statement." *State v. Augustine*, 458 N.W.2d 859, 861 (Iowa Ct. App. 1990) (finding excited utterance exception applied to eyewitness statement regarding who started a fire over an

hour after the incident). Here, Alberta was clearly still experiencing the trauma of the situation as multiple witnesses, including the defendant, testified Alberta was crying after the incident and persons were trying to console her. There was no error in admitting this statement.

There are two statements that were erroneously admitted hearsay that prejudiced the defendant. First, an officer was asked to testify what he learned which caused him to make certain assignments during the evening of the stabbing and the court allowed the answer after the state argued it was not being offered for the truth of the matter asserted. The officer's challenged answer was:

> A vehicle had pulled up, four females exited the vehicle, approached April Johnson who was sitting on some steps and talking to some other people in the 1500 block of Bluff Street. The four girls approached April Johnson, a brief altercation, physical altercation took place. They fell to the ground. The four got up, went back to the vehicle, the vehicle left. A few moments later April Johnson collapsed. She was bleeding from the left side of her chest.

This statement does not help explain the officer's subsequent conduct and goes beyond providing information about steps the officers took during the investigation. This statement does little to explain the investigation, and could be used improperly by the jury as "an 'official version' of the incident much to [the defendant's] prejudice" *State v. Mount*, 422 N.W.2d 497, 501-02 (Iowa 1988) (overruled on other grounds by *State v. Royer*, 436 N.W.2d 637 (Iowa 1989)) (explaining how an officer's repetition of a victim's account of a crime will likely be used by the jury for its truth). Although this statement is cumulative of other eyewitness testimony, we find the statement was not directed to or limited to explaining officer response and is inadmissible hearsay.

The final statement challenged by the defendant as hearsay involves testimony by a witness about a telephone conversation. The witness received a call the night of the incident pertaining to the defendant's children. The witness was asked, "[w]hat about this phone call that you received made you think you needed to take care of the kids or check on the kids?" The witness answered, "I don't remember the exact words but a friend of mine called and said that a friend stated that something had happened." The State argued this was not offered for the truth of the matter asserted and the trial court allowed the statement for this purpose. We agree this statement could be used, not for its truth, but to explain the witness's response. However, from a careful review of the record, it appears this was not the true purpose sought by the State. The record shows that even after the witness answered this question, the State continued to repeatedly ask about the content of the call even after the witness explained her response and reaction to the call. In this instance, the State's true purpose from the record appears to be an attempt to offer hearsay statements for their truth and admission of the statement was error.

VI. AUTOPSY PHOTOGRAPHS.

Defendant next contends the district court erred by allowing the State to admit autopsy photographs of the victim. The photographs admitted consisted of a picture of April's face with a head wound, a picture of the stab wound after it had been cleaned, and two photographs of April's dissected heart. The decision to admit photographs lies with the trial court and will only be reversed if there is an abuse of discretion. *State v. Aswegan*, 331 N.W.2d 93, 97 (Iowa 1983). The photographs are admissible if they are relevant and their probative value is not

outweighed by potential prejudice. *State v. Oliver*, 341 N.W.2d 25, 33 (Iowa 1983). In a murder case, pictures of wounds may be used to help the jury determine whether the death occurred intentionally or accidentally. *State v. Clark*, 325 N.W.2d 381, 384 (Iowa 1982). This is so even if the manner of death is not in dispute. *Oliver*, 341 N.W.2d at 33. The court did not abuse its discretion in admitting the photographs in this case. The photographs showed the injuries April suffered and could be used to help determine whether the death was intentional. The court did not abuse its discretion in admitting the photographs.

VII. INEFFECTIVE ASSISTANCE OF COUNSEL.

Defendant last contends counsel was ineffective for failing to object to a jury instruction listing the elements of nonconsensual termination of a human pregnancy. There are two classifications of this crime. If a pregnancy is terminated during the commission of a forcible felony, it is a class B felony. Iowa Code § 707.8(1). If a pregnancy is terminated during a non-forcible felony or during a felonious assault, it is a class C felony. Iowa Code § 707.8(2). This distinction was not made in the jury instruction. Therefore, it was unclear from the jury instruction whether the jury's guilty verdict under this section was based on a forcible or nonforcible felony. Double jeopardy protections allow defendants to only be subsequently tried on the lesser-included charge if they have been acquitted of the greater charge. *State v. Burgess*, 639 N.W.2d 564, 568 (Iowa 2001). Thus, this issue should not arise again for the jury should only be instructed as to section 707.8(2).

VIII. CONCLUSION.

We reverse the defendant's convictions and remand for trial on violation of sections 707.5(1) and 707.8(2), because the defendant's Fifth Amendment privilege against self-incrimination was violated when she was not read *Miranda* warnings prior to custodial interrogation.

REVERSED AND REMANDED.