IN THE COURT OF APPEALS OF IOWA

No. 8-142 / 06-1702
Filed April 30, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

WALLACE NORMAN GALBREATH,
Defendant-Appellant.

Appeal from the Iowa District Court for Johnson County, Silvia A. Lewis, District Associate Judge.

Defendant appeals his conviction for domestic abuse assault causing bodily injury. **AFFIRMED.**

Philip B. Mears of Mears Law Office, Iowa City, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, Janet M. Lyness, County Attorney, Deborah Farmer Minot, Assistant County Attorney, and Thomas D. Farnsworth, Student Legal Intern, for appellee.

Considered by Zimmer, P.J., and Miller, J., and Brown, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

BROWN, S.J.

Wallace Galbreath was found guilty by a jury of domestic abuse assault causing bodily injury. He appeals his conviction, asserting error in evidentiary rulings by the district court. We affirm.

I. Background Facts & Proceedings

On April 24, 2006, Lynn Toussaint was living in an intimate relationship with Wallace Galbreath in a home in Coralville, Iowa. Also living in the home were Maria Medina, Manuel Reveles, and Johnny Hunter. At the trial Toussaint testified that throughout that day Medina and Reveles were arguing. After 11:00 p.m. Toussaint attempted to intervene, and Galbreath told her to mind her own f***ing business. Galbreath then struck her in the face four times. Toussaint believed her nose was broken. She walked about two blocks to a bar and asked the bartender to call the police.

Coralville police officer Jackie Rich responded to the call. Toussaint told her she had been struck by her boyfriend. Officer Rich saw Toussaint was bleeding and "[h]er nose had an obvious deformity on the bridge and needed to be looked at." She took Toussaint to a hospital for medical assistance. Officer Rich contacted Galbreath, and Galbreath told her he had no idea what had occurred. Galbreath presented the testimony of Hunter, who stated Toussaint was very intoxicated on April 24, 2006. He stated that at about 8:30 p.m. he saw Toussaint fall in the patio area of the home and hit her head on a bench. He testified he then went to bed.

Galbreath was charged with domestic abuse assault causing bodily injury, in violation of Iowa Code sections 236.2, 708.1(1) and 708.2A(2)(b) (2005). The jury returned a verdict finding Galbreath guilty. Galbreath filed a motion for new trial, claiming the district court improperly permitted the State to ask Toussaint and officer Rich an unusually high number of leading questions. The district court denied the motion for new trial. Galbreath was sentenced to 180 days in the county jail, with 150 days suspended, and he was placed on probation for two years. A no-contact order was entered, and Galbreath was ordered to participate in a batterer's education program. Galbreath appeals his conviction.

II. Leading Questions

Galbreath contends the district court abused its discretion by overruling his objections to the prosecutor's use of leading questions to Toussaint. Although Galbreath asserts most of the questions asked by the State were leading, defense counsel only objected to eight questions asked of Toussaint on the ground they were leading questions. We conclude Galbreath failed to preserve error on those questions to which no objection was made. *See State v. Jefferson*, 574 N.W.2d 268, 278 (Iowa 1997).

Iowa Rule of Evidence 5.611(*c*) provides:

> Leading questions should not be used on the direct examination of a witness except as may be necessary to develop that witness's testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

"Where the question assumes any fact which is in controversy, so the answer may really or apparently admit that fact, it is leading." *Giltner v. Stark*, 219 N.W.2d 700, 713 (Iowa 1974).

The district court has considerable discretion in admitting or excluding the answers to leading questions. *State v. Leonard*, 243 N.W.2d 887, 891 (Iowa 1976). In order to justify a reversal there must be a clear abuse of discretion. *State v. Mueller*, 344 N.W.2d 262, 266 (Iowa 1983). This is because the district court is in a better position "to observe the circumstances that may justify the asking of leading questions." *Id.*

We question whether some of the questions were in fact leading. In particular the following questions do not necessarily suggest the answer to the question so that the answer was apparent: "Had you stayed at Mr. Galbraith's house on the night of April 23rd?" "When you woke up, were Mr. Reveles and Ms. Medina at the house?" "At any time during the day of April 24th, or the early hours of April 25, did you ever strike Mr. Wallace?" "Did you have blood on any of your clothing?"

Other questions might have been leading, but they primarily recapped evidence already in the record. Toussaint was asked: "And was that relationship, did that last about as long as – how long you've been living there, so it was about a month, two-month-long relationship?" "So after he hit you the first time, did he stop and then continue to hit you?" "Did you believe that was your best opportunity to make a telephone call to police?" "Were you worried you might be arrested?"

We conclude the district court did not abuse its discretion in ruling on Galbraith's objections on the grounds some questions were leading. We find Galbraith was not prejudiced by the questions because substantially the same evidence had come in through other questions. *See National Properties Corp. v. Polk County*, 386 N.W.2d 98, 108 (Iowa 1986) ("[N]o material prejudice to the rights of plaintiff resulted from the leading questions because defendants elicited substantially the same testimony from the witnesses in defendants' case in chief."). Although the questions might have been more artfully crafted, we conclude the district court did not clearly abuse its discretion on this issue.

III. Hearsay

Galbreath asserts the district court erred by overruling his hearsay objections to testimony by officer Rich. We review a district court's rulings on hearsay objections for the correction of errors at law. *State v. Newell*, 710 N.W.2d 6, 18 (Iowa 2006).

When officer Rich first met Toussaint at the bar, Toussaint had a "decent amount of blood" on her and officer Rich helped stop the bleeding. Toussaint was crying and upset. Over Galbreath's hearsay objection, officer Rich testified Toussaint told her:

> She and her female friend were there with two male subjects. Maria and her boyfriend had been fighting on and off all day. The victim said that she had tried to get in between Maria and her boyfriend when the other subject that was there, who she referred to as Blue, as a nickname Blue at the time, got angry with her, told her to stay out of their business, and then punched her in the nose.

After Toussaint received medical attention, officer Rich interviewed her at the police station. The district court overruled Galbreath's hearsay objection to testimony about the interview. Officer Rich testified as follows:

> She stated that she had been at the house with Mr. Reveles, Maria, and her boyfriend, who she first referred to as Blue. . . . She had interjected herself into the fight between Maria and Mr. Reveles. Mr. Galbreath became upset, said stay out of their business. Things escalated, and Mr. Galbreath punched her in the nose. He then said, excuse the profanity, "F*** it, I don't care anymore," and punched her several more times in the nose.

Generally, inadmissible hearsay is considered prejudicial unless the non-prejudicial nature of the evidence is established. *Id.* However, "erroneously admitted hearsay will not be considered prejudicial if substantially the same evidence is properly in the record." *Id.* at 19. To put it another way, improperly admitted hearsay evidence is not prejudicial if it is merely cumulative. *State v. Hildreth*, 582 N.W.2d 167, 170 (Iowa 1998).

Officer Rich's statements about what Toussaint told her were already in the record through Toussaint's own testimony. Toussaint testified to the same circumstances, that Reveles and Medina had been arguing, she tried to intervene, and Galbreath told her to mind her own business and struck her in the face several times. Officer Rich's testimony was not prejudicial because it was cumulative to evidence that was already properly in the record.[1] The admission

[1] Additionally, Galbreath admits Toussaint's statements to officer Rich at the bar might come within the excited utterance exception to the hearsay rule found in Iowa Rule of Evidence 5.803(2). To the extent these statements were properly admitted under an exception to the hearsay rule, officer Rich's testimony concerning the later interview at the police station was merely cumulative to these properly admitted statements.

of hearsay evidence in this case does not constitute reversible error.

We affirm Galbreath's conviction.

AFFIRMED.