IN THE COURT OF APPEALS OF IOWA

No. 9-179 / 07-1563
Filed May 29, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

STANLEY ALAN TRIBBLE,
Defendant-Appellant.

Appeal from the Iowa District Court for Pottawattamie County, G. C. Abel, Judge.

Stanley Alan Tribble appeals following his conviction for first-degree murder. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Dennis D. Hendrickson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Matthew D. Wilber, County Attorney, and Jon Jacobmeier, Assistant County Attorney, for appellee.

Heard by Mahan, P.J., and Eisenhauer and Doyle, JJ.

DOYLE, J.

Stanley Alan Tribble appeals following his conviction for first-degree murder. He contends the district court erred in instructing the jury on felony-murder as an alternative to murder in the first degree, in admitting several instances of inadmissible hearsay testimony from the victim, and in allowing the victim's father to inject the notorious case of Scott and Lacy Peterson into the presentation of evidence. He also maintains his trial counsel were ineffective in several respects. Upon our review, we affirm his conviction for first-degree murder and preserve his claims of ineffective assistance of counsel for a possible postconviction proceeding.

***I. Background Facts and Proceedings*.**

On August 21, 2006, Stanley Tribble was charged with murder in the first degree for the death of his wife, Tracy Tribble. Viewed in the light most favorable to the State, the jury could have found the following facts:

Stanley and Tracy Tribble were married in July 2003. The Tribbles had a rocky relationship and fought frequently. Officers were dispatched to the Tribble residence on several occasions in response to 911 calls. Stanley was arrested after a number of these domestic disputes. The Tribbles' neighbors, friends, and family members were aware of the Tribbles' fights and their use of alcohol. Their neighbors often heard the Tribbles arguing, slamming doors, and banging on the walls. Additionally, the Tribbles' friends and family members would often mediate the Tribbles' disputes.

On May 1, 2006, the Tribbles had an argument. Stanley called Chris Bryson, the Tribbles' friend and landlord, to mediate their fight. While waiting for

Bryson to arrive, he spoke with his sister, Joan Marion, about the fight. Stanley's sister advised Stanley to just leave, but Stanley insisted he stay until Bryson arrived so Bryson would see Tracy's conduct. When Bryson arrived at the Tribbles' home, he found Stanley in the kitchen and Tracy yelling and screaming in another room. They were fighting about their relationship. Both Stanley and Tracy had been drinking. At one point Tracy threw the house phone across the room. Bryson observed that Tracy was swaying back and forth and was mumbling a lot. She stated to Bryson that she "didn't want to be here anymore." Bryson asked her, "Here, at the house?" And she said, "No. I don't want to be here in this life." Bryson told Tracy she just needed to sleep it off, and he eventually asked Stanley to call his sister and see if Stanley could stay with her for the night. Stanley called his sister and then went to her house for the night.

The next day, May 2, 2006, both Stanley and Tracy spoke with Stanley's sister. Tracy told Stanley's sister that she wanted to go to marriage counseling but Stanley refused. Tracy called Stanley's sister back later and stated that Stanley was threatening to interfere with her job and have her evicted. Stanley's sister talked to Stanley and told him to stop messing with Tracy. That day, Stanley and Tracy also both called Bryson multiple times. Stanley had thought Bryson was going to evict them, and Stanley told Tracy this. Bryson told them both that he was not evicting them, and calmed Tracy down when she called him. Tracy also called several other friends that day about her fight with Stanley, including her friend Melissa Harkin. Tracy and Melissa were to meet the following morning to have their nails done.

At about 11:15 p.m. on May 2, Tracy called Stanley's sister again. Tracy had been drinking and was frantic, upset, and crying. She told Stanley's sister that she had been trying to apologize to Stanley, but he refused to talk to her. Stanley's sister told her to calm down and go to sleep, and that she would give her a call in the morning and check on her.

The next morning, May 3, 2006, Stanley's sister spoke with Stanley to see how things had gone the previous night. He told her he was tired, that Tracy had been up and down all night. He was in one room, Tracy was in another room, and Tracy kept coming back and forth, saying something, slamming the door, saying something, slamming the door. He said it was the wee hours of the morning before he got some sleep and that his alarm clock was going off at 5:30 in the morning.

That same morning, Tracy did not show up for her nail appointment with her friend Melissa. After Stanley got home from work on May 3, Stanley made calls to his sister, Bryson, Tracy's mother, and others asking if they had heard from Tracy. He stated he had not seen Tracy since that morning when he had said goodbye. Stanley told them that when he got home, Tracy's car was there, and her billfold, purse, cell phone, and ring were left on the kitchen counter and that Tracy was nowhere to be found. Stanley had received a message from the animal shelter telling Tracy that her dog had been found running the streets, something very unusual for Tracy. Stanley told Tracy's mother that they had been in an argument and that Tracy had said terrible things to him, including that he was the worst mistake she ever made, and that she had thrown her cell phone

at him. Stanley sounded unconcerned, disinterested, and even bored during these conversations.

Stanley reported Tracy missing, and the police responded to the call at the Tribbles' home around 4:00 p.m. on May 3. Stanley told the investigating officer that he had last seen his wife early that morning. He told the officer it was not the first time she had disappeared following a fight: on a previous occasion, she had left for a while to cool off after they had argued. Stanley told the officer they had had a similar argument, "a little tiff," the prior evening. Stanley told the officer Tracy had not taken a vehicle and the keys were left at the house, as well as Tracy's cell phone. Stanley was polite to the officer and appeared calm and normal in every manner. Nothing in the house appeared to be out of order or broken or suspicious. The officer did not observe any obvious injuries on Stanley's arms or hands. The officer alerted all other patrolling units, but he did not file a missing person's report. A search to find Tracy followed.

On May 4, 2006, Stanley was interviewed at his place of employment, a car dealership, by Detectives Miller and Mann concerning Tracy's disappearance. They met Stanley in a service alley where cars drive in to be serviced. Detective Miller asked Stanley if they could go somewhere and talk, and Stanley said it was fine there, which the detective found odd, since this was a public area where customers and employees were coming and going. The detectives talked about the circumstances prior to Tracy's disappearance, and Stanley admitted he and Tracy had an argument the night before. He told the detectives he suspected Tracy might be at a friend's home, her mother's home, or even at an ex-boyfriend's home in Las Vegas. He gave the detectives

permission to search their home, garage, and Tracy's vehicle. Detective Mann did not notice any signs of injuries on Stanley or on Stanley's hands. Stanley appeared calm to the detectives; he was not upset and showed very little emotion. The search of the Tribbles' home revealed nothing of significance. A black wallet containing Tracy's driver's license was found. There were no signs of burglary, robbery, or any kind of struggle.

On Saturday, May 6, 2006, Bryson and Stanley handed out missing person fliers in downtown Omaha. On Monday, May 8, Bryson and Stanley went to the Platte River to look for Tracy—Stanley and Tracy liked to go there to get away. They next went a friend's home, a former member of Stanley's band, to see if he had heard from Tracy. Stanley also dropped off his guitars with the friend, and told Bryson that "if anybody was going to take care of them or could take care of them, it would be [this friend]." Stanley later told Bryson that he had a dream that Tracy was by water and garbage.

On May 19, 2006, Tracy's naked body was found floating in the Missouri River four to five miles from the Tribbles' home. Her body was in a moderate stage of decomposition. When informed of the discovery of his wife's body, Stanley had no reaction and asked no questions.

Following an autopsy, the medical examiner reported numerous blunt force injuries to Tracy's body, evidenced by bruises on her lower abdomen, upper chest, the back of her leg, and the back of her thigh. Additionally, the examiner reported blunt force injuries to her head, evidenced by bruises on her forehead and the left side of her face and temple; subcutaneous hemorrhages of the frontal scalp and occipital scalp; numerous facial bone fractures; and

fractures of two teeth from her upper jaw. The examiner also found acute alcohol intoxication.

The medical examiner opined that the blunt force injuries to Tracy's head and the acute alcohol intoxication were significant conditions contributing to her death, but the conditions did not result in her death. The examiner opined that the cause of Tracy's death was probable asphyxia, but the examiner could not confirm the specific type of asphyxia due to the decomposition of the body. Although the examiner found redness on Tracy's neck, the examiner was not able to determine the actual cause of the redness, noting that such redness could be caused by strangulation or the settling of fluids and blood around the neck in the decomposition process. The examiner found no petechial hemorrhages, small burst blood vessels typically seen in people who have undergone an asphyxia process in which there is either pressure on the neck or in the chest. However, the examiner found this factor to be less significant in this case because it was possible that the hemorrhages had existed at the time of her death but were no longer visible due to the decomposition of the body. The examiner found no fractures to the bones around Tracy's neck.

Although the examiner was aware Tracy had threatened suicide in the past, the examiner opined the manner of Tracy's death was homicide. The examiner testified that Tracy's injuries were inconsistent with the injuries seen from people who fall from heights. Additionally, the examiner testified that it was unlikely Tracy's head injuries were caused by hitting something while falling, given that her three head injuries were in totally different parts of the skull. The examiner admitted he was unaware that Tracy had been committed on July 22,

2005, concerning a suicide attempt, that her treating doctor in that case had considered her a risk to herself, or that there was a witness who had said Tracy had suicide ideation on May 1, 2006. Nevertheless, the examiner testified that even if that information were true, he would not change his opinion that the manner of death was homicide and not suicide.

After Stanley was told of the autopsy results and the medical examiner's ruling it was a homicide, not a suicide, and that he was a "person of interest", Stanley responded with a lack of emotion and asked no questions. Stanley was later charged with the murder of his wife. Stanley was arrested and confined in the Pottawattamie County jail. Inmate Mark Anderson testified that Stanley admitted killing his wife. Anderson further testified that Stanley described the blows he inflicted on Tracy. Inmate Richard Baird testified Stanley told him that his alibi to police was that he had last seen Tracy at 6:00 in the morning when he kissed her goodbye. Baird further testified that Stanley described the argument he and Tracy had and that the last time he saw her was at 1:30 or 2:00 in the morning. In response to Baird's question whether Tracy left or took off, Baird testified that Stanley said "I took care of it."

The State charged Stanley, by trial information, with murder in the first degree in violation of Iowa Code sections 707.1, 707.2(1); and/or 707.1, 707.2(2), and 708.4 (2005). The State asserted Stanley committed murder in the first degree by willfully, deliberately, and with premeditation, and with malice aforethought, killing Tracy; and/or by killing Tracy while participating in a forcible felony, specifically willful injury causing serious injury. A jury trial followed.

The jury found Stanley guilty of murder in the first degree. One juror found Stanley committed premeditated murder, eleven found Stanley committed felony-murder, and one juror found both. Thereafter, Stanley filed a motion in arrest of judgment, which was denied by the court. Stanley was sentenced to life imprisonment.

Stanley appeals.

***II. Discussion*.**

On appeal, Stanley contends the district court erred in instructing the jury on felony-murder as an alternative to murder in the first degree, in admitting several instances of inadmissible hearsay testimony from the victim, and in allowing the victim's father to inject the notorious case of Scott and Lacy Peterson into the presentation of evidence. He also maintains his trial counsel were ineffective in several respects. We address each argument in turn.

***A. Jury Instructions*.**

Stanley first argues that the district court erred in overruling his challenges to the jury instructions on the grounds they violated the supreme court's ruling in *State v. Heemstra*, 721 N.W.2d 549 (Iowa 2006). Challenges to jury instructions are reviewed for correction of errors at law. *Heemstra*, 721 N.W.2d at 553. Error in instructing a jury does not merit reversal unless it results in prejudice. *State v. Fintel*, 689 N.W.2d 95, 99 (Iowa 2004).

In *Heemstra*, our supreme court ruled that if the act causing willful injury as a forcible felony is the same act that causes the victim's death, the former is merged into the murder and cannot serve as the predicate felony for felony-murder purposes. *Heemstra*, 721 N.W.2d at 558. However, the court did not say

in *Heemstra* that willful injury could *never* serve as the predicate felony for felony-murder purposes. *Goosman v. State*, _____ N.W.2d _____, _____ (Iowa 2009). Rather:

> [The court] narrowed *Heemstra*'s scope by noting, for example, that where a "defendant assaulted the victim twice, first without killing him and second with fatal results," only the second act would be merged with the murder and that the first act could be considered as a predicate felony. [*Heemstra*, 721 N.W.2d] at 557. Thus, the merger rule announced in *Heemstra* applied only in cases involving a single felonious assault on the victim which results in the victim's death.

Id. at _____.

Stanley argues the State's allegations of nonspecific asphyxia and blunt force head trauma are not discrete acts for purposes of murder. He argues the two are inseparable and that both contributed to death, and therefore the district court erred in instructing the jury on felony-murder. The State relies on the exception noted in *Heemstra* to uphold Stanley's convictions contending the charges were based on separate acts. This theory was presented to the district court and argued to the jury. The court ruled that, from the evidence, the jury could find the willful injury was a separate forcible felony and the death resulted not from the injuries initially inflicted but from asphyxiation.

The record supports the instructions given. The medical examiner testified that although the injuries from the head trauma were significant conditions, they were not the cause of Tracy's death. The medical examiner opined that Tracy's cause of death was probable asphyxiation. We agree with the district court that under these circumstances there was sufficient evidence from which a jury could conclude the underlying felony of willful injury was a

separate crime and separate incident from the asphyxiation that killed Tracy. We find no error.

***B. Hearsay*.**

Stanley next argues the trial court erred in numerous rulings on hearsay testimony. We review hearsay claims for errors at law. *State v. Newell*, 710 N.W.2d 6, 18 (Iowa 2006). To warrant reversal, error in the admission of evidence must have prejudiced the defendant. *State v. Williams*, 574 N.W.2d 293, 298 (Iowa 1998). 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*.

A hearsay statement is a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted. Iowa R. Evid. 5.801(*c*). "Hearsay is not admissible except as provided by the Constitution of the state of Iowa, by statute, by the rules of evidence, or by other rules of the Iowa Supreme Court." Iowa R. Evid. 5.802. 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 third party took certain action because the jury is likely to misuse the relayed statement for its truth. *Doughty*, 359 N.W.2d at 442.

When determining whether an out-of-court statement was properly admitted by the district court, we will look to the true purpose of the offer and will not accept blindly the offering party's stated purpose. *State v. Summage*, 532 N.W.2d 485, 487 (Iowa Ct. App. 1995). If the district court concludes the offer of the alleged hearsay was not for an improper purpose, that decision may be affirmed on any ground of admissibility appearing in the record. *See State v. Murphy*, 462 N.W.2d 715, 717 (Iowa Ct. App. 1990) ("This court will affirm a trial ruling admitting hearsay on any permissible ground which appears in the record, whether or not it was urged below.").

***1. Dispatch Officers' Testimony*.**

Stanley argues the district court erred in admitting dispatch officers' testimony concerning the 911 calls. Stanley contends the testimony concerning the 911 calls related out-of-court statements offered for the truth of the matter asserted, and was thus hearsay and inadmissible. Among other things, the State argues that given the amount of evidence about the fighting that occurred between Stanley and Tracy over an extended time period, the dispatch officers' testimony could not have had a discernible impact on the verdict and was therefore not prejudicial. We agree.

Although we cannot say the evidence in this case was overwhelming, the evidentiary value of the dispatch officers' testimony was minimal. In view of all of the testimony concerning the Tribbles' disputes, we conclude even if the

testimony was inadmissible hearsay, it was not prejudicial and did not impact the jury's finding of guilt.

2. Officer Robinson's Testimony.

Stanley argues the district court erred in admitting Officer Robinson's testimony that Tracy told him she had been strangled by Stanley on October 19, 2003. Stanley argues the testimony related an out-of-court statement offered for the truth of the matter asserted, and was thus hearsay and inadmissible. The State argues the statement was properly admitted under the excited utterance hearsay exception.

Under Iowa Rule of Evidence 5.803(2), "[a] statement relating to a startling event or condition made while the defendant was under the stress of excitement caused by the event or condition" is an exception to the hearsay rule. To be considered an excited utterance, the statement must be made under the influence of the excitement of the incident rather than upon reflection or deliberation. *State v. Cagley*, 638 N.W.2d 678, 681 (Iowa 2001) (quoting *State v. Atwood*, 602 N.W.2d 775, 782 (Iowa 1999)). "A lapse of time between a startling event and an excited utterance does not necessarily foreclose admission of the statement." *See State v. Augustine*, 458 N.W.2d 859, 861 (Iowa Ct. App. 1990) (holding a statement made within approximately one and one-half hours of the event was admissible as an excited utterance).

Here, the officer testified that he arrived five to six minutes after being dispatched to the Tribbles' residence following a 911 call. He testified he found Tracy in an excited state and she stated Stanley had strangled her. Although another officer's report stated Tracy was calm, the evidence revealed that officer

spoke with Tracy at a later time. We agree with the district court that under these circumstances the statement was admissible under the excited utterance hearsay exception, rule 5.803(2), and find no error.

Stanley also argues that even if the statement was an excited utterance, the statement was more prejudicial than probative and thus irrelevant and inadmissible. However, this issue was not raised or determined by the district court. "We may not consider an issue that is raised for the first time on appeal, 'even if it is of constitutional dimension.'" *State v. Webb*, 516 N.W.2d 824, 828 (Iowa 1994) (quoting *Patchette v. State*, 374 N.W.2d 397, 401 (Iowa 1985)). Issues must ordinarily be presented to and passed upon by the district court before they may be raised and adjudicated on appeal. *Jain v. State*, 617 N.W.2d 293, 298 (Iowa 2000). We determine Stanley has not preserved the relevancy claim for our review and therefore do not address it.

3. Tracy's Mother's Testimony Concerning the Pizza Incident.

Stanley argues the district court erred in admitting Tracy's mother's testimony that Tracy told her Stanley had held her down and spit chewed-up pizza on her. Stanley argues the testimony related an out-of-court statement offered for the truth of the matter asserted and was thus hearsay and inadmissible. The court ruled the statement was admissible under the excited utterance hearsay exception.

Applying the standards of the excited utterance hearsay exception, rule 5.803(2), set forth above, we believe the circumstances surrounding the statement supported the district court's finding of excitement on the part of Tracy. Tracy was angry, upset, and full of emotion when Tracy arrived at her mother's

house, and it was about a fifteen-minute drive to her mother's house. We conclude the court did not err in admitting the testimony as an excited utterance.

***C. Ineffective Assistance of Counsel*.**

In addition to his previous hearsay arguments, Stanley argues his trial counsel were in effective for failing to object to several other instances of alleged hearsay, an exception to the general rule of error preservation. *See Earnest v. State*, 508 N.W.2d 630, 632 (Iowa 1993). Additionally, Stanley argues his trial counsel were ineffective for failing to object to the hearsay declarations from Tracy to Officer Robinson, violating the Confrontation Clause. We review claims of ineffective assistance of counsel de novo. *State v. Bentley*, 757 N.W.2d 257, 262 (Iowa 2008). Generally, we do not resolve claims of ineffective assistance of counsel on direct appeal. *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002) (citing *State v. Kinkead*, 570 N.W.2d 97, 103 (Iowa 1997)). We prefer to leave ineffective-assistance-of-counsel claims for postconviction relief proceedings. *State v. Lopez*, 633 N.W.2d 774, 784 (Iowa 2001). "[W]e preserve such claims for postconviction relief proceedings, where an adequate record of the claim can be developed and the attorney charged with providing ineffective assistance may have an opportunity to respond to defendant's claims." *Biddle*, 652 N.W.2d at 203.

We conclude the record before us is inadequate to address Stanley's claims of ineffective assistance of counsel on direct appeal. Under these circumstances, we pass on the issue of ineffective assistance in this direct appeal and preserve them for a possible postconviction proceeding. *See State v. Bass*, 385 N.W.2d 243, 245 (Iowa 1986).

***D. Peterson Case*.**

Finally, Stanley contends the district court erred in allowing Tracy's father to inject the notorious case of Scott and Lacy Peterson into the presentation of evidence. On direct examination, Tracy's father testified he spoke with Stanley after Tracy went missing:

> I told [Stanley] that it sounded like a Scott Peterson repeat, and he asked me who is Scott Peterson. And I told him the SOB that killed his pregnant wife and dumped her body in the ocean or in the bay in San Francisco. And he hung up then or—he said "I resent that" and hung up.

Prior to Tracy's father's testimony, Stanley's counsel made an oral motion in limine to exclude any reference to the Peterson case as highly prejudicial and irrelevant. The district court found the testimony was relevant and was not unduly prejudicial.

Challenges to evidentiary rulings are reviewed for correction of errors at law. Iowa R. App. P. 6.4. A court has wide discretion in making such rulings, and its decisions in this regard are reversed only for a demonstrated abuse of discretion. *State v. Sallis*, 574 N.W.2d 15, 16 (Iowa 1998). Abuse is found where a district court exercised its discretion on grounds or for reasons clearly untenable, or to an extent clearly unreasonable. *State v. Bayles*, 551 N.W.2d 600, 604 (Iowa 1996). "Even though an abuse of discretion may have occurred, reversal is not required if the court's erroneous admission of evidence was harmless." *State v. Henderson*, 696 N.W.2d 5, 10 (Iowa 2005) (citing *State v. Sullivan*, 679 N.W.2d 19, 29 (Iowa 2004); Iowa R. Evid. 5.103(*a*)).

Assuming without deciding that the district court abused its discretion in allowing the challenged testimony, we conclude any such error was harmless

under the record before us. The reference was made by the witness in response to learning that his daughter was missing. No other reference was made to the Peterson case during the trial. We find the admission of evidence was harmless.

***III. Conclusion*.**

We have considered all arguments presented and find no basis for overturning Stanley's conviction. Accordingly, we affirm his conviction for first-degree murder. We preserve his claims of ineffective assistance of counsel for a possible postconviction proceeding.

AFFIRMED.