IN THE COURT OF APPEALS OF IOWA

No. 9-973 / 09-0589
Filed December 30, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MICHAEL JOHN OBERBROECKLING,
Defendant-Appellant.

Appeal from the Iowa District Court for Dubuque County, Michael J. Shubatt, Judge.

Defendant appeals his conviction of domestic abuse assault, second offense. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Shellie Knipfer, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Cristen Douglass, Assistant Attorney General, Ralph Potter, County Attorney, and Robert Richter, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Doyle and Mansfield, JJ.

MANSFIELD, J.

Michael Oberbroekling appeals his conviction of second offense domestic abuse assault in violation of Iowa Code section 708.2A(3)(a) (2007). The conviction stems from an October 21, 2007 incident when Michael allegedly struck his wife, Pamela Oberbroekling, in the face with a metal tray. Michael argues the district court erred in admitting testimony of Pamela and a police officer as to out-of-court statements made by the couple's seven-year-old son regarding the incident. Because we conclude Michael has not established the testimony should not have been admitted under the excited utterance exception to the hearsay rule, we affirm.

I. Facts and Procedural Background.

This case went to a jury trial commencing October 13, 2008. According to Pamela's trial testimony, Michael, herself, and their son Marvin were in the apartment on the day in question. Pamela and Michael had a rocky relationship. Both Pamela and Michael had been drinking that day. Michael fell asleep on the couch.

Pamela testified that after cooking supper, she sat down on the reclining chair that was located in the same room as the couch. She began to roll a cigarette on a metal tray that was in front of her. Michael "got up out of the blue and came over to me and grabbed the tray out of my hand and hit me in the face with it a few times." According to Pamela, Marvin saw the incident from the hallway. As soon as she was hit by the tray, Pamela grabbed Marvin and fled upstairs to a neighbor. She asked the neighbor to call the police.

When the police arrived, both Pamela and Marvin related what they had seen. Pamela refused to give a written statement, however.

Officer Brook Huberty testified that she was one of the officers who responded to the call. She confirmed that she interviewed both Pamela and the seven-year-old son Marvin. She also looked for Michael; however, Michael had left the apartment.

According to Huberty's testimony, Pamela said she and her husband had been arguing over a divorce throughout the day, both of them had been drinking, and Michael had struck her with the tray at a time when their argument resumed. Huberty noticed a red mark and a lump over Pamela's left eye. Huberty testified that Pamela gave indications to her of being under the influence but still appeared to have her mental abilities when she interviewed her.

Huberty also said she saw a metal TV tray on the floor of the living room of the apartment. She did not see any signs of a disturbance.

Officer Ted McClimon testified that he also responded to the call and took photographs of the tray, which were introduced into evidence at trial. McClimon confirmed the lump above Pamela's left eye. A photograph of this injury was also introduced, although McClimon conceded it was somewhat difficult to see the lump. McClimon confirmed that the officers were unable to locate Michael that evening.

Officer Michael McTague testified that he came upon Michael the following morning at his residence and placed him under arrest. At the law enforcement center, Michael gave both oral and written statements indicating there had been

an argument between himself and Pamela, that nothing physical happened, and that he left because Pamela was "hot."

The son, Marvin, did not testify at trial. However, during the State's case in chief, both Pamela and Officer Huberty testified regarding statements made by Marvin to Officer Huberty following the incident. Over Michael's hearsay objection, Pamela was permitted to testify that Marvin told Officer Huberty her father had hit Pamela with a tray. Later, when Huberty took the stand herself, she also testified—without objection—that Marvin told her his father had hit his mother with a tray. Pamela characterized Marvin as "scared to death"; Huberty testified that Marvin "appeared shooken up."

Michael Oberbroekling took the stand in his own defense. He again denied striking Pamela, but for the first time added the detail that Pamela had bruised her forehead that day by walking into their entertainment center.

During deliberations, the jury sent out a written question, "Was the child's statement recorded or documented in writing? Can we ask for this information." After receiving a negative answer, the jury found Michael guilty of domestic abuse assault, a lesser-included offense of the original charge of domestic abuse assault causing bodily injury.

Michael moved for a new trial, arguing that the district court erred in admitting hearsay testimony concerning statements made by Marvin. The district court denied the motion. Based on Michael's stipulation to a prior offense, he was found guilty of being a second offender, and was sentenced to ninety-two days in jail, with ninety of those days suspended.

Michael now appeals, raising the same grounds he asserted in his unsuccessful motion for new trial.

II. Analysis.

Because Michael objected at trial to Pamela's testimony regarding Marvin's statements but not to Officer Huberty's testimony, two different sets of legal standards need to be considered. Hearsay rulings are reviewed for errors at law. *State v. Newell*, 710 N.W.2d 6, 18 (Iowa 2006). Hearsay is not admissible unless it falls within one of the exceptions to the rule. *Id*. The State has the burden of proving that hearsay falls within an exception. *State v. Cagley*, 638 N.W.2d 678, 681 (Iowa 2001). However, when no contemporaneous objection is made, the issue becomes whether the defendant received ineffective assistance of counsel. *State v. Martin*, 704 N.W.2d 665, 669 n.2 (Iowa 2005). Ineffective assistance claims are reviewed de novo, and the defendant bears the burden of proof on all aspects of this claim. *Id.* If the defendant cannot affirmatively establish that the evidence was inadmissible hearsay, the ineffective assistance claim necessarily fails because counsel cannot be ineffective "for failing to make a meritless objection." *State v. Belken*, 633 N.W.2d 786, 801 (Iowa 2001).

Although two different standards are involved, we believe this appeal can be simplified somewhat for purposes of our analysis. Pamela's testimony regarding Marvin's statements was cumulative of Officer Huberty's testimony regarding the same statements. A jury would logically find Huberty's testimony much more important and persuasive. Pamela's testimony about what her son supposedly said adds little value to her own testimony about the incident. Either

a jury will believe Pamela or it will not. However, Huberty's testimony that Marvin told him essentially the same version of the assault as Pamela did *is* significant, especially given Pamela's admitted use of alcohol that day and inconsistencies in her testimony.

Thus, we conclude that any error with respect to the admission of Pamela's hearsay testimony regarding Marvin's statements was harmless, in light of Huberty's unobjected-to testimony regarding the same statements. *See State v. Thomas*, 766 N.W.2d 263, 272 (Iowa Ct. App. 2009) (holding "we will not find prejudice if the admitted hearsay is merely cumulative").[1] We therefore turn to whether Michael received ineffective assistance of counsel when his attorney failed to object to Huberty's testimony.

Ordinarily, we preserve ineffective assistance claims for possible postconviction relief proceedings. This enables a more complete record to be made regarding the reasons for counsel's action or inaction and any prejudice suffered by the defendant. However, if the record on direct appeal shows the defendant cannot prevail on such a claim as a matter of law, it is appropriate to resolve it then. *State v. Schaer*, 757 N.W.2d 630, 637-38 (Iowa 2008) (quoting *State v. Musser*, 721 N.W.2d 734, 752-53 (Iowa 2006)).

The State argues that Michael cannot show a timely objection to that testimony would have been successful, because Marvin's statements qualified as an excited utterance. *See* Iowa R. Evid. 5.803(2) (providing that a statement

[1] Michael has not claimed the admission of testimony regarding Marvin's statements violated his rights under the Confrontation Clause of the Sixth Amendment or its Iowa counterpart (Art. I § 10 of the Iowa Bill of Rights). His arguments are limited to the Iowa hearsay rule itself.

"relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is not excluded by the hearsay rule). In ruling on this exception, the trial court should ordinarily consider:

> (1) the time lapse between the event and the statement, (2) the extent to which questioning elicited the statements that otherwise would not have been volunteered, (3) the age and condition of the declarant, (4) the characteristics of the event being described, and (5) the subject matter of the statement.

Cagley, 638 N.W.2d at 681 (quoting *State v. Atwood*, 602 N.W.2d 775, 782 (Iowa 1999)). Here we believe those factors would have permitted admission of the testimony. The time elapsed was brief, presumably less than the two to two and a half hours involved in *Atwood*. 602 N.W.2d at 782. The event, *i.e*., seeing one's father hit one's mother with a metal tray, was clearly a startling event. The boy was described by Huberty as "shooken up" at the time. Although the statement was given in response to police questioning, a factor that was also present in *Atwood*, *id*., Huberty testified that the questioning was open-ended: "I basically just asked him what happened and that's exactly what he told me." In short, Michael is unable to demonstrate that an objection to Huberty's testimony would have been sustained. Based on the record before us, Marvin's statement "relat[ed] to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." *See* Iowa R. Evid. 5.803(2).

For the foregoing reasons, we affirm Michael Oberbroekling's conviction and sentence.

AFFIRMED.