IN THE COURT OF APPEALS OF IOWA

No. 0-246 / 09-1208
Filed May 12, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

NED WILLIAM REYNOLDS JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Monona County, Gary E. Wenell, Judge.

Defendant appeals his conviction for sexual abuse in the second degree. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Thomas Gaul, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Michael P. Jensen, County Attorney, and Stephan W. Allen, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., Doyle, J., and Mahan, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

MAHAN, S.J.

I. Background Facts & Proceedings

On January 24, 2009, Becky W. had a card party at her house. Her next door neighbor, Ned Reynolds, came over to visit, carrying a drink. During the party Reynolds tickled Becky's ten-year-old daughter, B.W., to the point that B.W. started crying. B.W. told Reynolds to leave her alone. B.W.'s aunt also told Reynolds to leave the child alone.

Later that evening, Reynolds, B.W., and Becky all sat down together on the couch in the living room to watch a movie. Also present were B.W.'s sister and her sister's friend, Leah. Becky and the sister fell asleep. B.W. testified she was sitting next to Reynolds, and he moved her leg towards him and untied her sweatpants. B.W. stated Reynolds put his hands in her pants and "moved his fingers around on my private." B.W. pretended to be asleep because she was scared.

B.W. testified she then got up and told Leah to come with her into the bathroom. B.W. urinated and stated it caused her private parts to burn. She told Leah what had happened. Leah testified, "She said that Ned got into her pants." When they returned to the living room Reynolds was gone. The next day B.W. told her sister. About a week later she told an adult family friend, Brittney. Brittney testified B.W. was "very emotional, very scared, teary-eyed" while she recounted what happened. Brittney told B.W. to tell her mother, which she did.

B.W. was interviewed by Sherrie Schweder of the Child Advocacy Center. Schweder testified, "She told me about something that had happened to her with

a neighbor." Karin Ward, a registered nurse, examined the child and found no signs of acute trauma. During Ward's testimony the court admitted two pages of a three-page medical report generated in conjunction with the physical examination of the child.

Reynolds was charged with sexual abuse in the second degree, in violation of Iowa Code sections 709.1(3) and 709.3(2) (2009). A jury found Reynolds guilty of second-degree sexual abuse. The court denied his motion for a new trial. Reynolds was sentenced to a term of imprisonment not to exceed twenty-five years. He was also given a special sentence pursuant to section 903B.1. Reynolds appeals his conviction, claiming he received ineffective assistance of counsel.

II. Standard of Review

Reynolds contends he received ineffective assistance of counsel at his criminal trial. We review claims of ineffective assistance of counsel de novo. *State v. Bergmann*, 600 N.W.2d 311, 313 (Iowa 1999). To establish a claim of ineffective assistance of counsel, a defendant must show (1) the attorney failed to perform an essential duty, and (2) prejudice resulted to the extent it denied defendant a fair trial. *State v. Shanahan*, 712 N.W.2d 121, 136 (Iowa 2006). Absent evidence to the contrary, we assume that the attorney's conduct falls within the wide range of reasonable professional assistance. *State v. Hepperle*, 530 N.W.2d 735, 739 (Iowa 1995).

III. Hearsay

Reynolds contends he received ineffective assistance because his defense counsel failed to object to certain hearsay statements made during the trial. Generally, hearsay is not admissible. Iowa R. Evid. 5.802. "'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*). The rules of evidence contain certain exceptions to the general rule of inadmissibility for hearsay. *See* Iowa Rs. Evid. 5.803, 5.804. A party seeking to present hearsay evidence has the burden of proving it falls within an exception to the hearsay rule. *State v. Long*, 628 N.W.2d 440, 443 (Iowa 2001).

After B.W. testified during the trial, the district court ruled her credibility had not been attacked. The court determined that because of this, statements from other witnesses concerning what B.W. had said to them would not be admissible under rule 5.801(*d*)(1)(B), which permits the admission of prior consistent statements "offered to rebut an express or implied charge against a declarant of recent fabrication or improper influence or motive." *See State v. Johnson*, 539 N.W.2d 160, 165 (Iowa 1995).

A. Reynolds points out Leah was permitted to testify B.W. said, "Leah, come here," and "Leah, I need to talk to you," when she wanted Leah to come into the bathroom with her. Defense counsel did not object to these statements.[1]

---

[1] Defense counsel did raise hearsay objections to certain testimony given by Leah. Leah testified B.W. "said it kind of hurt" when she went to the bathroom. Defense counsel objected on the ground of hearsay and asked to have the objection precede the answer. The court overruled the objection. Leah was also questioned, "Did she say

We determine that even if defense counsel had objected, the statements would be admissible under the exception in rule 5.803(3) for excited utterances. *See* Iowa R. Evid. 5.803(3) ("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."). "[S]tatements made under the stress of excitement are less likely to involve deception than if made upon reflection or deliberation." *State v. Tejeda*, 677 N.W.2d 744, 753 (Iowa 2004).

In considering whether a statement is an excited utterance, we look to (1) the time lapse between the event and the statement; (2) whether the statement is voluntary or the result of questioning; (3) the age and condition of the declarant; (4) the characteristics of the event described; and (5) the subject matter of the statement. *State v. Harper*, 770 N.W.2d 316, 319 (Iowa 2009) (citation omitted). B.W.'s statements to Leah were excited utterances. B.W. talked to Leah about what happened immediately after the event. The statements were voluntary. Leah testified B.W. looked nervous or scared. In addition, B.W. was relating a startling event.

Furthermore, Leah could properly testify about her observation of B.W.'s demeanor. *See State v. Newell*, 710 N.W.2d 6, 18 (Iowa 2006) (finding testimony that a person "appeared scared, nervous, or distressed" was not hearsay because it contained only evidence of the witness's observations). We conclude Reynolds has failed to show ineffective assistance due to defense counsel's failure to make hearsay objections to the statements made by Leah.

---

anything else to you about why it hurt?" The court overruled defense counsel's hearsay objection to this question, and Leah responded, "She said that Ned got into her pants?"

B. Schweder, who had interviewed B.W., testified "[s]he told me about something that had happened to her with a neighbor." Schweder also stated the child indicated the incident happened in January, and she thought it was on a Saturday.[2] Reynolds argues defense counsel should have objected to these hearsay statements. We conclude Reynolds has failed to show he was prejudiced by counsel's conduct. No issues were presented at trial concerning the identity of the person involved in the alleged sexual contact, or the timeframe for the event. Reynolds has not shown he was denied a fair trial due to counsel's failure to object to these statements. *See State v. Mott*, 759 N.W.2d 140, 146 (Iowa Ct. App. 2008) (noting a defendant's failure to prove prejudice by a preponderance of the evidence is fatal to a claim of ineffective assistance of counsel).

C. Reynolds claimed defense counsel should have objected to statements made by Ward, the nurse who examined B.W. Ward testified she had asked the child if she knew why she was there to see her. Defense counsel then objected on the grounds of hearsay. The court told Ward, "try not to repeat what the child told you, ma'am." Also, during Ward's testimony the State offered a written summary of Ward's examination of the child. Defense counsel objected and a conference was held at the bench.[3] The court then ruled that only part of the report would be admissible.

---

[2] Schweder was further questioned, "What did she tell you happened?" Defense counsel objected on the grounds of hearsay. The court sustained the objection and Schweder gave no further testimony about what B.W. said to her.

[3] The grounds for defense counsel's objection are not apparent from the record. To the extent Reynolds may be arguing defense counsel should have objected on hearsay

The record shows defense counsel objected to those statements Reynolds now complains about on appeal. Reynolds has not shown ineffective assistance due to counsel's failure to object to hearsay statements during Ward's testimony, or in the medical report. *See State v. Canal*, 773 N.W.2d 528, 532 (Iowa 2009) (stating that in order to prove a claim of ineffective assistance of counsel, defendant must show counsel's performance was deficient).

D. On appeal, Reynolds contends defense counsel should have objected to certain statements made by Brittney. Brittney testified B.W. was very scared when she told her about what happened. At one point Brittney was questioned, "What did she tell you?" Defense counsel objected on the grounds of hearsay, and the court sustained the objection. Brittney then testified B.W. was "very emotional, very scared, teary-eyed." Defense counsel raised a hearsay objection and asked that his objection precede the answer. The court overruled the objection.

Reynolds cannot complain that defense counsel failed to raise hearsay objections to Brittney's testimony, because defense counsel objected on just this ground. Furthermore, Brittney's testimony about B.W.'s demeanor is admissible as her own observations. *See Newell*, 710 N.W.2d at 18. Reynolds has failed to show counsel failed to perform an essential duty.

---

grounds, and the actual objection was something else, we note that the testimony would be admissible under the exception in rule 5.803(4), statements for purposes of medical diagnosis or treatment. *See State v. Tracy*, 482 N.W.2d 675, 681 (Iowa 1992).

We conclude Reynolds has failed to show he received ineffective assistance of counsel on any of the grounds he has raised in this appeal. We affirm his conviction for second-degree sexual abuse.

AFFIRMED.