IN THE COURT OF APPEALS OF IOWA

No. 0-308 / 09-0973
Filed May 26, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LAMONT RANDELL BUTLER,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, J. Hobart Darbyshire, Judge.

Lamont Butler appeals his conviction and sentence for second-degree burglary. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Patricia Reynolds, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Mary E. Tabor and Thomas S. Tauber, Assistant Attorneys General, Michael J. Walton, County Attorney, and July Walton, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., Doyle, J., and Mahan, S.J.* Tabor, J., takes no part.

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

DOYLE, J.

Lamont Butler appeals his conviction and sentence for second-degree burglary. He contends his trial counsel was ineffective for failing to object to improper hearsay evidence. We affirm.

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

In September 2008, Lamont Butler was charged with second-degree burglary for the burglary of Cynthia Kirk's home. A jury trial was held on April 13, 2009. The following testimony was presented at trial:

Kirk awoke in the early morning of August 9, 2008, to find an intruder in her upstairs bedroom. The intruder was an African-American male she did not know. Kirk went for a knife she kept under her mattress, and the intruder ran off. Kirk ran out to her porch and saw her neighbor, Lester Burrage. She asked Burrage if he had seen anyone leaving her house. Burrage told Kirk he saw Lamont Butler coming from the side of her house. Butler's counsel did not voice an objection to this testimony. Kirk then called the police. She later identified Butler as the intruder after police had detained Butler.

Officer Dennis Manion testified he was dispatched to Kirk's house following the burglary. He testified that Kirk told him Butler was the intruder and that Burrage told him that he saw someone he recognized as Butler crawling out of Kirk's window. Butler's counsel did not voice an objection to this testimony. Officer Manion further testified that Butler was apprehended several blocks from Kirk's residence and that he took Kirk to where the officers had detained Butler for identification. He testified that Kirk identified Butler as the intruder.

Burrage was called as a witness. On direct examination by the State, Burrage testified:

> Q. And Ms. Kirk testified that you identified [the intruder] that night as Lamont Butler. Are you denying that you identified to Ms. Kirk that the man you saw running was Lamont Butler? A. She came out of the house and approached me with that. I was not close enough to see him directly. . . .
>
> . . . .
>
> Q. And then you told Officer Manion that you thought the person was Lamont Butler? A. Yeah, I'm not for sure.

Burrage was then cross-examined by Butler's trial counsel. Burrage testified that Butler is his first cousin and that Burrage is also the cousin of Kirk's children. The following exchange then occurred:

> Q. Did you see Lamont Butler run from that house that morning? A. Like I said, I was at least five houses away and I seen a black male figure running, you know.
>
> Q. Do you think you would recognize your own cousin running from somebody's house? A. Yes.
>
> Q. And did you see your cousin running from somebody's house that morning? A. I seen a black male figure in black and red just running.

The jury ultimately found Butler guilty as charged. Butler now appeals.

***II. Discussion*.**

On appeal, Butler contends his trial counsel should have objected on hearsay grounds to Kirk's and Officer Manion's testimony that Burrage told them he saw Butler coming from Kirk's residence. 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*.

In order to prevail on an ineffective-assistance-of-counsel claim, a defendant must show that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). We may resolve the claim on either prong. *Id*. at 697, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699. If Butler 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).

Ordinarily, we preserve ineffective assistance claims for possible postconviction relief proceedings. *State v. Bearse*, 748 N.W.2d 211, 214 (Iowa 2008). 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 record is sufficient to address Butler's claim.

Hearsay is an out-of-court statement offered in evidence to prove the truth of the matter asserted. Iowa R. Evid. 5.801(*c*) (2007); *Musser*, 721 N.W.2d at 751. However, a prior statement by a witness is not hearsay if "[t]he declarant testifies at trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . one of identification of a person made after perceiving him." Iowa R. Evid. 5.801(*d*)(1)(C). As one treatise explains:

> Introduction of the out-of-court identification does not depend on the identifying witness making an in-court identification, nor, if an in-court identification is made, must the witness be impeached. If the

> prerequisites are met, testimony concerning the circumstances of the witness'[s] out-of-court identification can come into evidence through another witness, for example a police officer, present at the time of the identification.
>
> . . . .
>
> Rule 5.801(d)(1)(C) imposes no limits on the type of out-of-court identification statement that will be admissible. The "perceiving" of the individual identified can be the result of a line-up, on-scene identification, photograph or photographic array, or a chance or previously arranged encounter.

7 James A. Adams & Joseph P. Weeg, *Iowa Practice Series*, *Evidence*, § 801.8, at 632-34 (2002-03 ed.) (internal footnotes and citations omitted).

Burrage testified at trial and was subject to cross-examination. Burrage did not deny that he previously identified the intruder running from Kirk's house as Butler. Because Burrage testified to the identification and was subject to cross-examination, Kirk's and Officer Manion's testimony is not hearsay pursuant to Iowa Rule of Evidence 5.801(*d*)(1)(C). We therefore conclude Butler's counsel acted reasonably when he chose not to object to its admission. Accordingly, he did not breach an essential duty.

However, even if the statements were deemed hearsay, Butler failed to establish the requisite prejudice for his counsel's failure to object. Here, there was ample evidence presented of Butler's guilt independent of the statements. Officers apprehended Butler five blocks from Kirk's residence shortly after they responded to Kirk's call. Thereafter, Kirk visually identified Butler as the intruder she saw in her home. We conclude there is no reasonable probability of a different result and Butler suffered no prejudice as a result of his counsel's alleged breach of an essential duty. We accordingly reject Butler's ineffective-

assistance-of-counsel claim, and we affirm his conviction and sentence for burglary in the second degree.

AFFIRMED.