IN THE COURT OF APPEALS OF IOWA

No. 0-550 / 09-1631
Filed September 9, 2010

STATE OF IOWA,
Plaintiff-Appellant,

vs.

ROBERT ARLIN WHITE II,
Defendant-Appellee.

Appeal from the Iowa District Court for Black Hawk County, Joseph Moothart, Judge.

Defendant appeals his conviction arguing error in the admission of hearsay evidence and ineffective assistance of counsel. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Dustin S. Lies, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Eisenhauer and Danilson, JJ. Tabor, J., takes no part.

EISENHAUER, J.

Following a jury trial, Robert White II appeals his conviction for domestic abuse assault causing bodily injury. White contends the court erred in admitting hearsay evidence and also claims ineffective assistance of counsel. We affirm.

I. Hearsay Evidence.

We review White's hearsay claims for errors at law. *State v. Newell*, 710 N.W.2d 6, 18 (Iowa 2006). 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*). Hearsay is excluded as evidence unless it falls within an exception. Iowa R. Evid. 5.802. Our rules of evidence establish an excited utterance exception:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
> . . . .
> (2) *Excited Utterance*. 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.

Iowa R. Evid. 5.803. "Obviously, an excited utterance must be made under the influence of the excitement of the incident rather than upon reflection or deliberation." *State v. Atwood*, 602 N.W.2d 775, 782 (Iowa 1999). Further,

> The application of the exclusion lies largely within the discretion of the trial court, which should 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.

Id. (allowing declarant's statement made two and one-half hours after a traffic accident).

Early in the morning of April 10, 2009, eighteen-year-old Katie Rema and a female friend pounded on the locked doors of the bar they had exited five to fifteen minutes earlier. Amy Jo Fish, Patrick Lindquist, and Kelly Schake were inside cleaning. Fish testified she unlocked the doors and let Rema and her friend back inside. Fish stated Rema was crying and hysterical, very upset, and had a fat lip. After the court ruled the excited utterance exception to the hearsay rule applied, Fish testified Rema stated White hit her twice.

Lindquist and Schake also testified Rema was crying and upset when she reentered the bar. The court allowed into evidence Rema's statements to Lindquist and Schake under the excited utterance exception. Lindquist testified Rema stated White hit her twice. Schake testified Rema and her friend were scared and Rema stated her boyfriend had struck her in the face outside the bar and hit her twice.

Rema called 911 and reported she had been assaulted by White. Rema stayed on the phone with the 911 operator until the sheriff's deputies arrived. The court allowed the 911 audio tape to be played for the jury under the excited utterance exception. On the tape Rema is crying and sobbing while stating White hit her in the face and broke her glasses and hit her lip and now her "lip is fat." Rema states she did not want to call the police, but needed help calming White down.

Deputy Harris testified he observed Rema had a swollen lip and some puffiness to an eye.

White claims the court erred in allowing Fish, Lindquist, and Schake to repeat what Rema said to them. He also claims error in admitting the recording made of Rema's 911 call. At the time of the above statements Rema was clearly still experiencing the trauma of the situation. The trial court discussed and applied the *Atwood* factors and the circumstances surrounding these statements support the trial court's rulings. We conclude the court did not abuse its discretion in admitting the testimony under the excited utterance exception to the hearsay rule.

II. Ineffective Assistance of Counsel.

White summarily argues his trial counsel was ineffective for not objecting to the admission of Rema's statements recorded on the sheriff deputy's audio/video CD. She is heard saying White punched her, broke her glasses, hit her lip, and went psycho. In order to prevail on this claim White must show (1) counsel failed to perform an essential duty, and (2) prejudice resulted. *See State v. Lane*, 726 N.W.2d 371, 393 (Iowa 2007). His inability to prove either element is fatal. *See State v. Greene*, 592 N.W.2d 24, 29 (Iowa 1999). We evaluate the totality of the relevant circumstances in a de novo review. *Lane*, 726 N.W.2d at 392.

We normally preserve ineffective-assistance-of-counsel claims for postconviction relief proceedings. *State v. Reynolds*, 670 N.W.2d 405, 411 (Iowa 2003). Direct appeal is appropriate, however, when the record is adequate to determine as a matter of law the defendant will be unable to establish one or both of the elements of the ineffective-assistance claim. *Id*.

We can resolve White's ineffective-assistance-of-counsel claim on this direct appeal because we conclude, as a matter of law, White cannot prove "prejudice resulted."[1] To meet the prejudice prong, White is required to show but for counsel's error, there is a reasonable probability that the results of the trial would have been different. *See State v. Carey*, 709 N.W.2d 547, 559 (Iowa 2006). Because other evidence, properly admitted and described above, proved White was guilty, there is no reasonable probability the verdict would have been different if White's counsel had objected. Rema's statements on the deputy's CD were merely cumulative of her above-described excited utterances. Accordingly, White has failed to prove prejudice.

AFFIRMED.

[1] White's trial counsel objected to the admission of three specific sections of the deputy's CD (drag racing, broken windshield, and racism). White does not claim the trial court erred in overruling these objections.