IN THE COURT OF APPEALS OF IOWA

No. 0-612 / 09-0633
Filed October 6, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MATTHEW JOSEPH ELLIOTT,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Scott D. Rosenberg, Judge.

Defendant appeals his convictions and sentences for willful injury causing serious injury and child endangerment resulting in death. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Robert P. Ranschau, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas Tauber and Mary E. Tabor (until withdrawal), Assistant Attorneys General, John P. Sarcone, County Attorney, and Nan Horvat, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Doyle and Mansfield, JJ. Tabor, J., takes no part.

DOYLE, J.

Alexis Gilbert was only seven months old when her short life came to a violent end on January 21, 2008. Matthew Elliott was charged with her murder and ultimately convicted of willful injury causing serious injury and child endangerment resulting in death. On appeal, Elliott claims the district court erred in certain evidentiary rulings and in its response to a question from the jury during deliberations. He additionally claims his trial attorneys were ineffective in failing to challenge the marshalling instruction for willful injury causing serious injury under our supreme court's recent holding in *State v. Schuler*, 774 N.W.2d 294 (Iowa 2009). Finding no error prejudicial to Elliot, we affirm his convictions and sentences.

I. Background Facts and Proceedings.

Alexis was born in June 2007, to sixteen-year-old Kristina. They lived with Kristina's mother, Jean, and Jean's eight-year-old son, Benjamin, in a two-story house in West Des Moines. Sometime after Alexis was born, Jean allowed Matthew Elliott move into the house after he escaped from the Fort Des Moines Correctional Facility. Jean instructed the family members to keep quiet about Elliott's presence in the home, as it would violate her housing contract. About a week and one half before Alexis died, Jean's twenty-year-old son, Matthew Gilbert (Gilbert), joined the household.

Elliott slept downstairs in the living room on a couch. Gilbert slept nearby on a couch in the computer room. The rest of the family slept upstairs. Elliott cared for Alexis while Kristina was in school or at work. Alexis did not sleep in a

crib at night. Instead, during the last few weeks of her life, she slept with Elliott on the couch.

Around 9:00 p.m. on January 20, 2008, Jean and Benjamin went upstairs to go to sleep. Kristina, Elliott, and Gilbert were downstairs playing videogames. Alexis was still awake and playing with her blocks. Kristina went to bed first, leaving Alexis with Elliott and Gilbert. When Gilbert went to bed around 1:00 a.m., Elliott was on the living room couch with Alexis. He was watching television, and Alexis was asleep.

Gilbert woke up around 3:00 a.m. when he heard Alexis crying. He went to check on her and saw she was still with Elliott on the couch. Gilbert asked Elliott if she had had a nightmare, and Elliott said yes. Gilbert went to the kitchen to get a drink of water. On his way back to bed, he stopped in the living room, gave Alexis a kiss, and told her to calm down. He said she looked up at him and stopped crying.

Jean got up for work around 4:30 a.m. She got ready upstairs and then went downstairs to the kitchen to get something to eat. It was dark, but she thought she heard "Alexis and her little cooing sounds." She left for work around 5:15 a.m.

Later that morning, Kristina was awakened by her little brother, Benjamin. She told him to tell Elliott to come upstairs to her bedroom. Benjamin left, and then Kristina heard Elliott running up the stairs. He was holding Alexis, and said, "You got to help me. She's not breathing." The left side of her face was bruised, and her left eye was swollen shut. Kristina started screaming. She asked him what happened, and he said, "I don't know." Kristina ran downstairs and woke

up Gilbert. He got a phone and called 911. Elliott left the house before the ambulance arrived, saying, "I got to leave. I can't be here." With the help of the 911 operator, Gilbert and Kristina administered CPR for Alexis until the paramedics were able to take over. When the paramedics arrived at 8:34 a.m., Kristina was asked when she last saw the infant. While still in a highly emotional state, Kristina told the paramedic "last night." Police officers also arrived at about the same time and stayed at the house conducting their investigation until about 2:00 p.m.

Alexis was rushed to the hospital where she was examined by a pediatric emergency room physician. She was completely unresponsive. She had multiple skull fractures—the worst the doctor had ever seen in an infant. He suspected her injuries had occurred fairly recently, within two or three hours of her arrival at the hospital, because she had a normal body temperature when she was brought in. The doctor told Kristina they needed to stop their resuscitation efforts because "it was a hopeless situation, that Alexis was going to die." She passed away soon after.

An autopsy later revealed Alexis "died as a result of abusive-head trauma," most likely caused by the back of her head forcefully striking a flat object. Given the severity of her multi-plated skull fractures, the emergency room physician opined her injuries could not have been sustained by, for example, falling onto the floor from a couch. The autopsy also revealed Alexis had several old rib fractures, often seen in "shaken baby" cases, which were healing at the time of her death.

When questioned by the paramedics, doctor, Iowa Department of Human Services, and police the day Alexis died, Kristina told them all that she "went to bed that night and [Alexis] was with me, and I woke up and she was like that." She did not mention Elliott because he was not supposed to be in the house, and she did not want people to think she was a bad mother for letting him care for Alexis. Jean and Gilbert also kept quiet about Elliott during their initial interviews with officials investigating the case at the house.

At about 12:30 p.m., Officer Paul Castelline interviewed Benjamin, whose story differed from the rest of the family's. Benjamin told Castelline that when he woke up that morning, he saw Elliott and Alexis on the couch in the living room. He said Alexis's "head didn't look right." Elliott told him to go upstairs and get Kristina. Benjamin did so, and then saw Elliott bring Alexis upstairs to Kristina's room. Benjamin said Elliott left the house after that. Castelline's investigation, which had been focused on Kristina up to that point, changed.

After returning to the house from the hospital, Kristina told her mother she was going to tell the truth at the police station. Later in the day, Officer Castelline re-interviewed Kristina, Jean, and Gilbert "in an aggressive manner" at the police station. Castelline tried to emphasize to Jean, Kristina and Gilbert,

> the fact that we knew at that point—we felt we were not getting the truth from the individuals [Jean, Kristina, and Gilbert] as far as what happened, where it happened and people that were at the house; that we had other information that was different than what they had previously provided.
>
> I tried to emphasize a point that they needed to tell us the truth at this point and not worry about other concerns that they had about . . . themselves and other members of the household.

Kristina eventually told him that Alexis had been sleeping on the couch with Elliott, and not in bed with her, as she originally claimed. Jean and Gilbert confirmed her story.

Elliott was arrested that evening and charged by trial information with first-degree murder and child endangerment resulting in death. He pleaded not guilty, and the case against him proceeded to a jury trial in January 2009. Prior to the trial, the State filed a motion in limine, which the district court granted, to exclude a child abuse investigation of Matthew from 2003.

At trial, Elliott presented a general denial defense, arguing that Kristina was responsible for Alexis's death based on the story she, Jean, and Gilbert originally told the officials investigating the case. The State attempted to counter that defense by questioning Benjamin via a closed-circuit television, outside the presence of the defendant and jury. Benjamin would not respond to the State's questions, claiming he did not remember what he had said to the police and in a recent deposition. The State then tried to use several different hearsay exceptions to admit the deposition into evidence, all of which were denied by the district court. The court did, however, agree to allow the State to recall Benjamin later on during the trial after it attempted to refresh his memory by having him watch the videotaped deposition. The State tried to recall Benjamin after it finished questioning Officer Castelline. Elliott resisted, arguing it was an abuse of the court's discretion "to allow the witness to be recalled because the State failed to lay the proper foundation the first time they had the opportunity." The court agreed, reversing its earlier ruling, and would not let the State recall Benjamin.

At that point, the State changed tactics and asked to recall Castelline to "repeat what he learned from [Benjamin] in order to explain how his investigative style and techniques changed." Following an offer of proof, the district court allowed the State to recall Castelline for that limited purpose. In Instruction No. 20, the jury was instructed:

> You have heard evidence claiming [Benjamin], a minor child, made statements to Detective Castelline before this trial, which were not under oath. You must only consider these statements to determine whether the course of the investigation changed as a result of [Benjamin]'s statements. You are not to consider this evidence to support a fact in issue in this case.

While deliberating, the jury sent the court a note asking, "Can we consider the final testimony of Detective Castelline about what [Benjamin] told the Detective to be evidence in support of a fact in this case. We are aware of Instruction # 20." After conferring with the parties, on the record and in Elliott's presence, the court replied, "Please read the instructions."

The jury returned a verdict finding Elliott guilty of the lesser-included offense of willful injury causing serious injury and child endangerment causing death. Elliott appeals. He claims the district court erred in (1) allowing Castelline to testify about what Benjamin told him happened the morning that Alexis died; (2) excluding evidence of a 2003 child abuse investigation involving Gilbert; and (3) its response to the jury's question regarding Instruction No. 20. Finally, he claims his trial attorneys were ineffective in failing to challenge the marshalling instruction for willful injury causing serious injury.

II. Scope and Standards of Review.

We review hearsay rulings for the correction of errors at law. *State v. Jordan*, 663 N.W.2d 877, 879 (Iowa 2003). Other evidentiary rulings are reviewed for an abuse of discretion. *Id.* A trial court's response to a question from the jury is also reviewed for an abuse of discretion. *State v. McCall*, 754 N.W.2d 868, 871 (Iowa Ct. App. 2008). Ineffective-assistance-of-counsel claims are reviewed de novo. *State v. Lyman*, 776 N.W.2d 865, 877 (Iowa 2010).

III. Discussion.

A. Officer Castelline's Testimony.

When Castelline was first called by the State, he simply testified that after he interviewed Benjamin, he discovered discrepancies in the stories Kristina, Jean, and Gilbert had given about Alexis sleeping with Kristina the night before she died. Additionally, he was asked about his second interview with Benjamin:

> Q. At that point when you talk to Ben on the 22nd, is his story consistent or now still inconsistent with what you've learned in your interviews of Matthew [Gilbert], Jean and Kristina the afternoon and night before? A. He was consistent with his initial statement the day before, and he was consistent with what we were getting the second time around from other people involved.

When the State learned it would be unable to recall Benjamin, it recalled Castelline "to demonstrate why the officer changed the course of the investigation" from Kristina to Elliott. Castelline testified as follows:

> Q. Detective Castelline, based upon what [Benjamin] . . . told you at the house on January 21, 2008, did your investigation and the focus of it change? A. Yes, it did.
> Q. What did [Benjamin] . . . tell you . . . that caused your investigation to change?
> MS. WILSON: Objection for reasons previously stated.
> THE COURT: Overruled. Go ahead.

> A. [Benjamin] described that morning, described how he had been sleeping in the upstairs bedroom, getting up that morning.
>
> He described coming down the stairs, and when he went past the room that he described as . . . [the] two-couch room, which is the living room . . . . he saw Elliott and Alexis in that room.
>
> Q. Did he tell you what Alexis was doing? A. He said Alexis's—he made the comment specifically "her head didn't look right."
>
> Q. Did he tell you what he did when he went in that room? A. He had a conversation with Elliott. He had been instructed by Elliott to go . . . . upstairs and get Alexis's mother. He described going up the stairs, waking her up, staying upstairs in the bedroom for a period of time, described Elliott bringing Alexis up to the bedroom to her mother, described Krissy going out of the room briefly, Matt coming back with Krissy, and then shortly thereafter Elliott leaving the house by what he termed the back door where the cars were parked.
>
> Q. As a result of [Benjamin] telling you that on January 21, 2008, how did you then approach Kristina . . . , Jean . . . or Matt . . . in the interviews that you did . . . ? A. They were re-interviewed in an aggressive manner. The focus being why wasn't this other individual that had been at the house divulged to us initially . . . .
>
> Q. Then was [Benjamin] . . . interviewed formally on videotape on January 22nd at the West Des Moines Police Department? A. He was.
>
> Q. And at that time did [Benjamin] add something to your investigation that you had not know from him or that changed the focus of you investigation a bit more? A. Yes. The crime scene, from what [Benjamin] told us, had shifted from the upstairs bedroom to the room that he saw Alexis and Elliott in and that would be the downstairs living room.

Elliott argues this testimony is inadmissible hearsay, not subject to any applicable exception. The State counters that Castelline's testimony was not offered for the truth of the matter asserted and thus, is not hearsay. In the alternative, the State advances several harmless error possibilities for us to consider.

1. Hearsay. Under our rules of evidence, hearsay is defined as "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*). When an out-of-court statement is offered, not to show the truth of the matter asserted but instead to explain responsive conduct, it is not regarded as hearsay. *State v. Mitchell*, 450 N.W.2d 828, 832 (Iowa 1990). For example, an investigating officer usually "may explain his actions by testifying as to what information he had and its source regarding the crime and the criminal." *State v. Reynolds*, 250 N.W.2d 434, 440 (Iowa 1977).

In order for a statement to be admissible as showing responsive conduct, it must not only tend to explain the responsive conduct, but the conduct itself must be relevant to some aspect of the State's case. *Mitchell*, 450 N.W.2d at 832. We do not "blindly accept as controlling the purpose urged by the State." *State v. Hollins*, 397 N.W.2d 701, 705 (Iowa 1986). Instead, we look at the record "to determine if the purpose voiced by the State can reasonably be found to be the real purpose for which the challenged testimony was offered." *Id.* "In essence, the court must determine whether the statement is truly relevant to the purpose for which it is being offered, or whether the statement is merely an attempt to put before the fact finder inadmissible evidence." *Mitchell*, 450 N.W.2d at 832. We conclude Castelline's testimony falls within the latter category.

At trial, the State argued:

> It's not about the truth of the matter asserted. It's about how this detective learned something from [Benjamin] that alters the way his interviews with the three grownups in the house go.
>
> So it's the State's position that the detective should be allowed to say what he did learn from [Benjamin] in order to explain his subsequent course of conduct.

The problem with this argument is that the State had already called Castelline and asked him, "Q. And is the information that [Benjamin] gave you comparable to what you now know either through your conversations or through your colleague['s] conversations with Kristina, Jean and Matt? A. No, there's discrepancies." The State only sought to have Castelline expound on these discrepancies when it failed in its attempt to recall Benjamin. It thus seems clear the State's "real purpose" in offering Castelline's testimony was "to put before the fact finder inadmissible evidence." *Id*. This conclusion is bolstered by the content of the testimony, which went beyond the steps the officer took during the investigation. *See State v. Doughty*, 359 N.W.2d 439, 442 (Iowa 1984) (finding evidence approached line of inadmissibility "because it went beyond the point of merely explaining why certain responsive actions were taken by the officers").

As the court in *Doughty* stated, the scope of responsive-conduct evidence must be carefully limited because if an officer "'becomes more specific by repeating definite complaints of a particular crime by the accused, this is so likely to be misused by the jury as evidence of the fact asserted that it should be excluded as hearsay.'" *Id.* (quoting Edward W. Cleary, *McCormick's Handbook on the Law of Evidence* § 248, at 587 (2d ed. 1972)); *accord State v. Mount*, 422 N.W.2d 497, 502 (Iowa 1988) ("If the investigating officer specifically repeats a victim's complaint of a particular crime, it is likely that the testimony will be construed by the jury as evidence of the facts asserted."), *overruled on other grounds by State v. Royer*, 436 N.W.2d 637 (Iowa 1989). We conclude Castelline's testimony was hearsay, as it was offered not to explain the officer's subsequent conduct, but to prove the truth of the matter asserted. Our analysis

does not end there, however, as the State argues admission of the testimony was harmless error.

2. Harmless Error. Prejudice is presumed if hearsay is admitted, unless the contrary is affirmatively established by the State. *State v. Sowder*, 394 N.W.2d 368, 372 (Iowa 1986). "We have held that where substantially the same evidence is in the record, erroneously admitted evidence will not be considered prejudicial." *Id.*; *see also State v. Hildreth*, 582 N.W.2d 167, 170 (Iowa 1998) ("[W]e will not find prejudice if the admitted hearsay is merely cumulative.").

The information related by Castelline was repeated by other witnesses. Kristina testified that, as happened on a nightly basis, Alexis slept with Elliott on the living room couch the night before she died. She stated Benjamin woke her up the next morning. She then heard Elliott running up the stairs with Alexis in his arms, saying, "You got to help me. She's not breathing." Kristina observed that Alexis's chest was not moving and the left side of her face was bruised. Although Jean did not actually see Alexis with Elliott on the couch before she left for work that morning, she testified Alexis usually slept downstairs with him. She also thought she heard Alexis cooing when she was in the kitchen. Gilbert testified that when he went to bed at about 1:00 a.m., Alexis was sleeping on the couch with Elliott. Gilbert woke up around 3:00 a.m. when he heard Alexis "whining, crying." He went to check on her and saw she was still with Elliott on the couch. Gilbert asked Elliott if she had had a nightmare, and Elliott said yes. Gilbert went to the kitchen to get a drink of water. On his way back to bed, he

stopped in the living room, gave Alexis a kiss, and told her to calm down. He said she looked up at him and stopped crying.

Although some of this testimony was impeached by the defense, the jury "is free to believe or disbelieve any testimony as it chooses." *State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993). *But see State v. Williams*, 427 N.W.2d 469, 473 (Iowa 1988) (finding admission of challenged hearsay statements was "sufficiently prejudicial to require reversal of defendant's conviction" where witnesses offering other similar testimony were impeached to some extent).

After a thorough review, we conclude no prejudice resulted from the erroneous admission of Castelline's testimony, given the substantially similar testimony related above. *See, e.g.*, *State v. Thomas*, 766 N.W.2d 263, 272 (Iowa Ct. App. 2009) (finding no prejudice resulted from officer's testimony that a conversation with defendant's mother led him to determine a child had been left alone by the defendant when other evidence intimated the same). We thus need not and do not address the State's other harmless error arguments.

B. 2003 Child Abuse Investigation.

Elliott next claims the district court erred in excluding evidence regarding a 2003 child abuse investigation regarding Gilbert. In several offers of proof, Elliott established that when Gilbert was fourteen years old, his mother allowed him to watch a three or four-month-old baby. Gilbert left the baby on the top mattress of a bunk bed. She rolled off the bed, hitting her head on a dresser and then the floor. The baby suffered a skull fracture, which she eventually recovered from. A child abuse investigation was initiated by the Iowa Department of Human Services, resulting in a founded report of abuse.

The court excluded that evidence in a pretrial ruling on the State's motion in limine, reasoning

> the allegations concerning Matthew Gilbert from the year 2003 although possibly having some relevance are made irrelevant by their remoteness in time to the events regarding the present offense charged against Matthew Elliott so as to negate all rational or logical connection between the facts sought to be proved and the remote evidence offered to be proved.

Elliott argues the court erred in excluding the evidence because it was relevant, although he does not explain what it was relevant to show. *See* Iowa Rs. Evid. 5.401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."), 5.402 ("All relevant evidence is admissible."). "The remoteness of evidence generally affects the weight rather than admissibility of the remote evidence." *State v. Casady*, 491 N.W.2d 782, 785 (Iowa 1992). Remoteness may nevertheless "render evidence irrelevant where the elapsed time is so great as to negate all rational or logical connection between the fact sought to be proved and the remote evidence offered to prove that fact." *Id.* An assessment of remoteness, which involves no particular timetable or limit, "rests in the sound discretion of the trial court." *State v. Buenaventura*, 660 N.W.2d 38, 50-51 (Iowa 2003).

We decline to engage in an analysis of the relevancy of this evidence or balance its probative value against its prejudicial effect because we think that even if the evidence was improperly excluded, such exclusion was harmless error. Reversal is not required for the erroneous admission or exclusion of

evidence unless prejudice results. *See State v. Rodriquez*, 636 N.W.2d 234, 244 (Iowa 2001); *see also* Iowa R. Evid. 5.103(*a*) ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . . ."). To determine whether a substantial right of a party has been affected when a nonconstitutional error occurs, we ask: Does it sufficiently appear that the rights of the complaining party have been injuriously affected by the error or that he or she has suffered a miscarriage of justice? *State v. Parades*, 775 N.W.2d 554, 571 (Iowa 2009). As with our hearsay analysis, we presume prejudice and reverse unless the record affirmatively establishes otherwise. *Id.*

We think the State showed the exclusion of the 2003 child abuse investigation of Gilbert was harmless given Elliott's theory of defense. He claimed throughout the trial that he did not harm Alexis. Instead, he pointed the finger at Kristina, based on her and her family's initial statements that Alexis had slept with her the night she died. As Elliott's attorney argued to the jury in closing arguments:

> And so the big fight here, as you know, is whoever had [Alexis] is the one that would have caused her death. You know that's the issue here. . . . Who had her? The State wants you to believe Matthew Elliott had her, but we can show you evidence that Kristina Gilbert had her. And Kristina Gilbert killed her own child.

We do not see how excluding evidence of the 2003 child abuse investigation involving Kristina's brother, Gilbert, prejudiced Elliott in light of that defense, as Elliott never argued it was Gilbert who harmed Alexis. Indeed, we agree with the State that evidence most likely would have confused or misled the jury. *See,*

e.g., Iowa R. Evid. 5.403. We accordingly find no abuse of discretion in the court's decision excluding the evidence.

C. Response to Jury Question.

During deliberations, the jury sent the district court a written note asking, "Can we consider the final testimony of Detective Castelline about what [Benjamin] told the Detective to be evidence in support of fact in this case. We are aware of Instruction # 20." Instruction No. 20 cautioned the jury, "You must only consider these statements to determine whether the course of the investigation changed as a result of [Benjamin's] statements. You are not to consider this evidence to support a fact in issue in this case." After conferring with the parties, the district court told the jury, "Please read the instructions." Elliott now argues the court should have told the jury they "could not consider Detective Castelline's testimony regarding [Benjamin's] statements as evidence in support of a fact in issue."

"'Generally, the decision to give a supplemental instruction, or to refrain from doing so, rests within the sound discretion of the trial justice . . . .'" *State v. Watkins*, 463 N.W.2d 15, 18 (Iowa 1990) (citation omitted). A discretionary ruling is presumptively correct and will be overturned on appeal only where an abuse of discretion has been demonstrated. *Id.* We find no such abuse here.

The trial court has a duty to instruct the jury as to the law on all material issues supported by the evidence. *State v. McCall*, 754 N.W.2d 868, 872 (Iowa Ct. App. 2008). "Beyond the duty of instructing the jury, the trial court also has the duty to ensure the jury understands both the issues and the law it must apply." *Id*. If the jury expresses confusion or lack of understanding of a

significant element, the court may have a duty to give an additional instruction. *State v. Martens*, 569 N.W.2d 482, 485 (Iowa 1997).

The jury did not express confusion or misunderstanding regarding the use which it could make of Castelline's testimony, as indicated by its statement, "We are aware of Instruction #20." The court's additional instruction directing the jury to read the instructions accomplished the same purpose as Elliott's desired response, which merely repeats the language of Instruction No. 20. Elliott has not shown the court exercised its discretion in instructing the jury "on grounds or for reasons clearly unreasonable." *Watkins*, 463 N.W.2d at 18. We accordingly reject this assignment of error as well and turn to the last claim raised by Elliott.

D. Ineffective Assistance of Counsel.

Elliott asserts his trial attorneys were ineffective for failing to challenge the marshalling instruction for the lesser-included offense of willful injury causing serious injury—Instruction No. 32. That instruction provided:

> The State must prove all of the following elements of Willful Injury Causing Serious Injury:
>
> 1. On or about January 21, 2008, the defendant struck and/or slammed Alexis Gilbert without justification.
> 2. The defendant specifically intended to cause a serious injury to Alexis Gilbert.
> 3. Alexis Gilbert *sustained* a serious injury.

(Emphasis added.)

Our supreme court recently disapproved of a similarly worded jury instruction in *State v. Schuler*, 774 N.W.2d 294 (Iowa 2009), which was filed in September 2009, several months after Elliott's jury trial. Counsel is not required to be clairvoyant. *See Snethen v. State*, 308 N.W.2d 11, 16 (Iowa 1981)

("Counsel need not be a crystal gazer; it is not necessary to know what the law will become in the future to provide effective assistance of counsel.").

The court in *Schuler* reasoned the instruction was not a correct statement of the law because it did not follow the statutory elements of the crime set forth in Iowa Code section 708.4(1) (2007). 774 N.W.2d at 298. Under that statute, a person commits willful injury causing serious injury when the person "does an act which is not justified and which is intended to cause serious injury to another . . . [and] the person *causes* serious injury to another." Iowa Code § 708.4(1) (emphasis added). The court stated the "difference between the statutory elements and the instruction for willful injury is not stylistic, it is substantive. The challenged words—sustained and caused—are two different words with two different meanings." *Schuler*, 774 N.W.2d at 298.

Elliott argues we must presume prejudice from the error in the instruction under *Schuler*. That argument ignores the procedural posture of *Schuler*, which involved a properly preserved challenge to the jury instruction on direct appeal. Here, Elliott is challenging the instruction under an ineffective-assistance-of-counsel rubric, as his attorneys did not object to the instruction at trial. *See State v. Fountain*, 786 N.W.2d 260, 262-63 (Iowa 2010) (stating that generally an objection must be made to jury instructions in order to preserve the issue for appeal, although ineffective-assistance-of-counsel claims are an exception to that rule).

Our supreme court has "made it clear that ineffective-assistance-of-counsel claims based on failure to preserve error are not to be reviewed on the basis of whether the claimed error would have required reversal if it had been

preserved at trial." *State v. Maxwell*, 743 N.W.2d 185, 196 (Iowa 2008). "Rather a defendant must demonstrate a breach of an essential duty and prejudice." *Id.* In ineffective-assistance-of-counsel claims, the instruction complained of must be of such a nature that the resulting conviction violates due process. *Id.* Finding the record adequate to address the claim on direct appeal, *see State v. Johnson*, 784 N.W.2d 192, 198 (Iowa 2010), we conclude Elliott has not made the requisite showing.

The court in *Schuler* recognized the State's argument—"that a logical reading of the instruction requires the prosecution to prove causation" because each of the elements of the instruction builds on the one preceding it—was plausible. 774 N.W.2d at 298. It ultimately rejected that argument, however, because it was "not the *only* reasonable inference of the instruction as given, especially under the factual scenario presented here."[1] *Id.* The same is not true here.

As the State points out, unlike the victim in *Schuler*, who was attacked by multiple assailants, "Alexis was forcefully struck or slammed by just one person." Thus, the State's plausible interpretation of the challenged jury instruction in *Schuler* was the only reasonable inference of the instruction under the facts of this case. Moreover, we may presume the jury made the required causation finding, as it found Elliott guilty of child endangerment causing death. *Cf. id.* at

[1] The victim in *Schuler* was attacked by numerous assailants, including the defendant, all of whom actively participated in the assault. 774 N.W.2d at 295-96. There were conflicting witness statements as to which assailant struck the victim and in what manner. *Id.* at 298. The court accordingly reasoned, "It is therefore plausible that the jury could find that although [the defendant] assaulted [the victim], his assault did not *cause* the victim's bodily injury." *Id.* at 298-99.

299 (declining to assume the jury necessarily made an implicit finding on the causation issue where defendant was convicted of only willful injury causing serious injury). That charge obligated the jury to find Elliot's "acts resulted in the death of Alexis Gilbert."

For the foregoing reasons, we conclude Elliott has not shown there was a "reasonable probability that, but for counsel's failure to object to the instruction, the result of the proceedings would have been different." *Maxwell*, 743 N.W.2d at 197. We accordingly reject his ineffective-assistance-of-counsel claim. *Id.* at 196 ("[I]f the claim lacks the necessary prejudice, we can decide the case on the prejudice prong of the test without deciding whether the attorney performed deficiently.").

IV. Conclusion.

In sum, we find no error prejudicial to Elliott in the district court's evidentiary rulings. Nor do we find any abuse of the court's discretion in its response to a question from the jury during deliberations. Finally, we conclude Elliott failed to establish the prejudice prong of his ineffective-assistance-of-counsel claim. Elliott's convictions and sentences for willful injury causing serious injury and child endangerment resulting in death are affirmed.

AFFIRMED.

Vogel, P.J., concurs; Mansfield, J., dissents.

MANSFIELD, J. (dissenting)

I respectfully dissent. I agree with parts A.1, B, C, and D of my colleagues' opinion, but I cannot find the admission of the hearsay was harmless error.

Alexis died a horrible death, and the evidence points toward Matthew Elliott having been responsible for that death. But without Benjamin's report of what happened, the State's case was not overwhelming. Rather, it was a case dependent upon the problematic testimony of Kristina, Gilbert, and Jean.

On the morning of Alexis's death, Kristina repeatedly told the medical personnel, the DHS, and the police over a period of several hours that Alexis had gone to sleep with *her* that night. "I went to bed that night and she was with me, and I woke up and she was like that." Kristina even performed a reenactment, purporting to show how Alexis had gone to sleep with her.

Gilbert also told the authorities originally that Alexis had gone to bed with Kristina and that he saw Alexis and Kristina on a couch together at 2 a.m.

Jean likewise made statements incriminating her daughter Kristina. She said that before leaving the house at 5:15 a.m., she heard baby noises coming from the upstairs bedroom where Kristina slept.

Later in the day, Detective Castelline called Kristina, Gilbert, and their mother Jean to the police station for further questioning, telling them their stories were not consistent. The three of them drove together in one car to the station. At the station, the stories changed. Each of them disclosed Elliott's presence in the house and stated that Alexis had gone to sleep with Elliott that night. Kristina also stated that Elliott had carried Alexis's body upstairs in the morning and said,

"You got to help me. She's not breathing." Gilbert described calling 911 with Elliott's assistance.

Kristina, Gilbert, and Jean explained at trial that they initially kept quiet regarding Elliott's involvement because they were concerned about having a fugitive in the house. Defense counsel argued, on the other hand, that the original version as to who had gone to bed with Alexis was correct and the family was fabricating a story to protect Kristina. Defense counsel also argued it was improbable that Kristina would have told a false story over and over again, effectively assuming responsibility for her own child's death, if the baby had not actually been with her.

This was not all that defense counsel had to work with. Even at the time of trial, Gilbert described Elliott as calm, mellow, and very caring and careful with Alexis. He stated that Kristina, on the other hand, had a temper, and would give Alexis a "swat" at times. Like Gilbert, Jean characterized Elliott as "kind," "calm," and "quiet," as someone who never displayed a temper, never got physical, and always got along with everyone. By contrast, Jean characterized her own daughter as a person with a temper, who was "like a little hothead," who called her a "bitch" all the time, and who had to be reprimanded for being rough with Alexis. Both Gilbert and Jean described Kristina as frequently frustrated with and resentful of parenting duties. Jean essentially admitted that her first suspicions were directed at her own daughter. Upon learning of Alexis's plight, she had confronted her daughter and asked, "Did you do this to your child? Do you know anything? Are you saying anything?"

There is no Confrontation Clause issue in this case. Benjamin did testify, and was determined to be "available" by the district court. Defense counsel had an opportunity to cross-examine him. This means the State does not have to establish that admission of the hearsay was "harmless beyond a reasonable doubt." *State v. Wells*, 738 N.W.2d 214, 218 (Iowa 2007). Still, to prevail on its harmless error argument, where the State bears the burden, the State must show that admission of the evidence did not "injuriously affect" Elliott's rights. *State v. Newell*, 710 N.W.2d 6, 19 (Iowa 2006). I cannot so find.

When Officer Castelline was allowed to testify as to what Benjamin had told him, the jury learned that Benjamin apparently woke up that terrible morning, came down the stairs, and saw Elliott and Alexis together. According to Benjamin, Alexis's "head didn't look right." Benjamin went upstairs to get Alexis's mother, and then Elliott brought Alexis's body upstairs with him.

While I agree that some of this information also was related by other trial witnesses, we need to remember who those other witnesses were: the other family members. Initially, and repeatedly, they had told the authorities Alexis had been with *Kristina*. Thus, their trial testimony was potentially vulnerable to a defense claim that it was cooked up after the fact to protect Kristina—precisely the theory Elliott's lawyers advanced. Benjamin's report as related by Officer Castelline, however, plugged this hole in the prosecution's case.

Furthermore, we have a good idea of the importance of Officer Castelline's testimony from the jury question discussed in part C of my colleagues' opinion. Three hours into their deliberations, which ended up lasting over two days, the jury sent a note to the judge, "Can we consider the final

testimony of Detective Castelline about what [Benjamin] told the detective to be evidence in support of fact[s] in this case? We are aware of Instruction No. 20 [the limiting instruction]." The district court told the jury to "read the instructions." I have difficulty viewing Officer Castelline's testimony about Benjamin's statements as merely cumulative, when the jury specifically wrote a note asking the district court if they could consider it as substantive evidence.

This case was well tried by the district court, the county attorney's office, and the public defender's office. Regrettably, I believe the erroneous admission of hearsay necessitates a new trial.