

**IN THE COURT OF APPEALS OF IOWA**

No. 3-631 / 10-0117  
Filed August 7, 2013

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**ROBERT CAMPBELL,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Black Hawk County, James D. Coil,  
District Associate Judge.

Robert Campbell appeals from his convictions for domestic abuse assault  
using a dangerous weapon, domestic abuse assault causing bodily injury, and  
driving while barred. **AFFIRMED.**

Eric D. Tindal of Nidey Erdahl Tindal & Fisher, P.L.C., Williamsburg, for  
appellant.

Thomas J. Miller, Attorney General, Tyler J. Buller, Assistant Attorney  
General, Thomas J. Ferguson, County Attorney, and Brian Williams, Assistant  
County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Potterfield and Tabor, JJ.

**POTTERFIELD, J.**

Robert Campbell appeals from his convictions after jury trial for domestic abuse assault using a dangerous weapon, domestic abuse assault causing bodily injury, and driving while barred. He argues the district court erred in admitting into evidence recorded out-of-court statements including: recordings of phone conversations between A.S. (the alleged victim) and Campbell while Campbell was in the jail pending trial, an officer's body-microphone recording of his interaction with A.S., and a recording of a 911 call made by A.S. Because his counsel failed to object to the admission of the 911 call, he argues that failure constitutes ineffective assistance. He also argues the court improperly found he forfeited his right to confront A.S. and the court improperly denied his motion for judgment of acquittal as insufficient evidence exists to support his convictions. We affirm, finding the district court properly held the jail call recordings showing Campbell procured A.S.'s absence and thus forfeited his right to confront her, properly admitted the jail call recordings as evidence of Campbell's consciousness of guilt, and properly admitted the body-microphone recording. We also find Campbell was not provided with ineffective assistance when his counsel failed to object to the admission of the 911 call, and sufficient evidence existed to support the convictions.

**I. Facts and proceedings.**

Campbell and A.S. had been involved in a relationship for three years. They had one child together, who was less than two years old at the time of the incident. In the afternoon of June 29, 2009, A.S. called 911 crying that Campbell had hit her with her own car and drove away. Later that night, she called again.

This time, she reported Campbell had punched her between four and seven times that day, and was still nearby. Several times during the call she yelled at Campbell to stay away from her. She stayed on the phone with the 911 dispatcher until officers arrived. She reported to the responding officer, who was wearing a body microphone, that she had called multiple times; that she didn't know where she was bleeding from; that Campbell had hit her on the face and burnt her ear on the radiator of a car; and that he grabbed her face, pulled her hair, and knocked her glasses off before attempting to run her over. Campbell was arrested and charged with domestic abuse assault by using a dangerous weapon (the car), two counts of domestic abuse assault causing bodily injury,<sup>1</sup> and driving while barred. The court ordered no-contact between Campbell and A.S., but cancelled the order two months later on a request by A.S.

Campbell and A.S. spoke on the telephone hundreds of times while he was in jail awaiting trial. These calls were recorded. During some of these calls, Campbell told A.S. to leave her apartment and hide elsewhere to avoid being subpoenaed. He told her police would try to force her to testify, that by not leaving police could find her and she could go to jail. Campbell told A.S. the worst that could happen if she did not appear at trial is she could be held in contempt, which Campbell said was nothing.

A jury trial was held November 24, 2009. A.S. did not appear to testify, despite being subpoenaed, and a warrant for her arrest for contempt was issued but not successfully executed. After jury selection and opening statements but

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<sup>1</sup> One of these counts was not prosecuted and was ultimately dismissed due to A.S.'s absence.

prior to the presentation of evidence, both counsel and the court met outside the presence of the jury to discuss the State's offer of proof of the jail phone call recordings. The court listened to the four recordings, which included Campbell's repeated requests that A.S. run away and avoid being subpoenaed, and concluded:

So I do find, under the theory of forfeiture by wrongdoing, that statements which might normally be inadmissible as a violation of the defendant's right to confront the witness, and for that reason solely, will be admissible in trial and may be offered by the State in its case in chief. Now counsel, do you wish to address the issue of the admissibility of the statements that you've played here before the jury?

The court then ruled the substance of the tapes could be played before the jury on the grounds that the statements were admissions and evidence of consciousness of guilt. Campbell did object to the evidence as showing a history of past crimes but when the court offered to redact the offending statements, Campbell's counsel stated they wished for the entirety of the calls, rather than a redacted version, to be played before the jury. Campbell also objected to the recording on relevance grounds.

Recordings of the two 911 calls made by A.S., the body-microphone recording of A.S.'s statements to the officer responding to the second call, and four jail telephone call recordings were admitted into evidence and played at trial for the jury. Campbell objected to the body-microphone recording on hearsay and confrontation grounds, and was overruled on both grounds. The jury found Campbell guilty of domestic abuse assault by using a dangerous weapon, one count of domestic abuse assault causing bodily injury, and driving while barred. Further facts will be discussed as relevant below.

## II. Scope and Standard of Review.

“We review the trial court’s admission of hearsay evidence for correction of errors of law. However, to the extent constitutional issues are raised, our review is de novo.” *State v. Heuser*, 661 N.W.2d 157, 162 (Iowa 2003). Similarly, we review claims of ineffective assistance of counsel de novo. *Id.* at 166. Claims regarding the sufficiency of evidence to convict are reviewed for the correction of errors at law. *State v. Meyers*, 799 N.W.2d 132, 138 (Iowa 2011).

## III. Analysis.

Campbell appeals the admission into evidence of several recordings: four recordings of Campbell’s conversations with A.S. from the jail, the body-microphone recording of the responding officer, and A.S.’s first 911 call.

The district court admitted the jail call recordings over Campbell’s objection they were irrelevant, and that they were prior bad acts and inadmissible pursuant to Rule 5.404 of the Iowa Rules of Evidence. It found the statements demonstrated forfeiture by wrongdoing and substantively showed Campbell’s consciousness of guilt. He now argues the statements should not have been admitted. Although this argument implicates the hearsay rule, it does not involve Campbell’s right to confront witnesses, nor the distinction between testimonial and non-testimonial statements. However, he also argues the statements do not show an effort on his part to prevent A.S. from testifying at trial and therefore the court erred in ruling he forfeited his objections to the evidence under our forfeiture-by-wrongdoing rules.

Next, the court overruled Campbell’s hearsay and Confrontation Clause objection to the body-microphone recording at trial. Campbell argues on appeal

that this ruling was in error, and we review that ruling under hearsay and Confrontation Clause analysis. A.S.'s statements to police were hearsay and her absence from trial made the admission of the statements a potential violation of Campbell's rights of confrontation.

Finally, the 911 recordings were admitted without objection; the district court had no opportunity to consider either hearsay or confrontation with respect to those recordings. Campbell argues on appeal that the statements made by A.S. during the first 911 call were hearsay and, even if considered to be excited utterances (as an exception to the hearsay rule), they were testimonial and their admission into evidence violated Campbell's Sixth Amendment right to confrontation. Because Campbell failed to object to the admission of the 911 calls at trial, and concedes on appeal that the second call was admissible, he raises his argument as to the first call in the context of ineffective assistance of counsel.

We begin with an overview of our law regarding hearsay, the Confrontation Clause, and forfeiture by wrongdoing. Hearsay is defined in our rules of evidence as "a statement, other than the 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). One exception to our hearsay rule is an "excited utterance."

An excited utterance is 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(2). "The rationale behind the exception is that statements 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 determining whether a statement qualifies as an excited utterance, the trial court 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.

*State v. Harper*, 770 N.W.2d 316, 319 (Iowa 2009) (quoting *State v. Atwood*, 602 N.W.2d 775, 782 (Iowa 1999)).

Even if a statement is excepted from the hearsay rule as an excited utterance or under another hearsay exception, we still must analyze whether the statement was testimonial and therefore violates the accused's Sixth Amendment right to confront the witnesses against him. See *Giles v. California*, 554 United States 353, 358 (2008). The Sixth Amendment to the United States Constitution guarantees that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. Amend. VI. The U.S. Supreme Court has held that "testimonial" out-of-court statements, even if admissible under an exception to the hearsay rules, are not admissible under the Confrontation Clause unless the defendant has the opportunity to confront and cross-examine the witness. See *Giles*, 554 U.S. at 358; *Davis v. Washington*, 547 U.S. 813, 822 (2006). However, it has rejected a narrow construction of the Confrontation Clause that would prevent remarks by any person not present at trial from being admitted into evidence. *Davis*, 547 U.S. at 835. Instead, we are to evaluate whether a statement is testimonial or nontestimonial. *Id.*

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

*Id.* at 822. The court in *Davis* concluded a 911 call reporting domestic violence was not testimonial; however, the victim's handwritten statement for police was testimonial. *See id.*

The Court also recognized that a defendant's objection to the statements of a complaining witness on grounds of hearsay and violation of confrontation rights can be forfeited by the defendant in the unique circumstances of domestic disputes:

Respondents . . . contend that the nature of the offenses charged in these two cases—domestic violence—requires greater flexibility in the use of testimonial evidence. This particular type of crime is notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial. When this occurs, the Confrontation Clause gives the criminal a windfall. We may not, however, vitiate constitutional guarantees when they have the effect of allowing the guilty to go free. But when defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. While defendants have no duty to assist the State in proving their guilt, they do have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system. We reiterate . . . that the rule of forfeiture by wrongdoing extinguishes confrontation claims on essentially equitable grounds. That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.

*Id.* at 832–33 (internal citations and quotation marks omitted).

Two years later, the Court further clarified the forfeiture by wrongdoing exception to the confrontation clause in *Giles*, 554 U.S. at 358. The accused in



*Giles* had shot his former girlfriend claiming he acted in self-defense. 554 U.S. at 358. The Supreme Court declined to apply forfeiture by wrongdoing as the shooting was not an action designed to prevent the witness from testifying. *Id.* at 369. However, it noted that a forfeiture rule is necessary where a defendant's actions are deliberately *designed* to keep a witness from testifying. *Id.* at 365. "The absence of a forfeiture rule covering this sort of conduct would create an intolerable incentive for defendants to bribe, intimidate, or even kill witnesses against them." *Id.* It used as an example *Reynolds v. United States*, 98 U.S. 145 (1879), where the court admitted statements made by the defendant's wife at a prior trial where the defendant "kept his wife away from home so that she could not be subpoenaed to testify." *Id.* at 366.

The Iowa Supreme Court has reiterated this rule: "When a court finds that a defendant has procured a witness's unavailability, the defendant is precluded from asserting his constitutional right to confront the witnesses against him as a basis to prevent the admission of prior statements given by the witness. Hearsay objections are also forfeited." *State v. Hallum*, 606 N.W.2d 351, 357 (Iowa 2000). In *Hallum*, the defendant instructed his brother not to testify or speak with police. *Id.* at 357. When the brother did not appear for trial, Hallum argued the videotaped testimony given by the brother to police could not be used against him as it violated his Sixth Amendment rights. *Id.* at 353. Even though the brother testified at an evidentiary hearing that his absence from trial was his own decision, the district court ruled Hallum had procured the unavailability of his brother. *Id.* at 354. Our supreme court agreed, reviewing the communication between Hallum and his brother and finding Hallum had coerced his brother into

not testifying. *Id.* at 358. The court concluded, “This forfeiture encompassed any hearsay objections as well as objections based on the defendant’s confrontation rights.” *Id.*

With this background in mind, we turn to the substance of Campbell’s arguments.

*A. Admission of recordings of jail phone conversations.*

Campbell argues the district court improperly found recordings of his conversations with A.S. from jail were evidence of forfeiture by wrongdoing and improperly admitted them as substantive evidence as they were irrelevant.<sup>2</sup> At trial, the district court concluded the jail calls were not only evidence of “forfeiture by wrongdoing,” but also admissible as substantive evidence as admissions by Campbell evincing consciousness of guilt. We consider each use of this evidence in turn.

*1. Forfeiture by wrongdoing.*

Under our rules of evidence, “[a] statement offered against a party who has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness” is not excluded by the hearsay rule if the declarant is unavailable. Iowa R. Evid. 5.804(b)(6). Such a statement is also an exception to our Confrontation Clause rule excluding testimonial statements:

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<sup>2</sup> Campbell also appears to argue various other grounds for inadmissibility, including prejudice, and prior bad acts evidence. Campbell raised the prior bad acts issue before the trial court. However, the court offered to redact the statements that related to Campbell’s prior bad acts, but Campbell requested the entirety of the recording be admitted. He received no ruling on the other grounds for objection. We do not address them for the first time on appeal. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) (“It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.”).

If a statement is testimonial, it still may nonetheless be admissible if it falls under one of two exceptions, dying declaration or forfeiture by wrongdoing. [*Giles v. California*, 554 U.S. 353, 357 (2008)]. Although the United States Supreme Court has not elaborated on the dying declaration exception, it has recently defined the forfeiture-by-wrongdoing exception. *Id.* Unconfronted testimony can only be admitted under the forfeiture-by-wrongdoing exception if “the defendant intended to prevent a witness from testifying.” [*Id.* at 361]. A mere showing that the defendant caused the person to be absent is not sufficient. *Id.*

*State v. Harper*, 770 N.W.2d 316, 321–22 (Iowa 2009). The determination of whether Campbell procured A.S.’s unavailability at trial must be made in an evidentiary hearing in the absence of the jury, which took place before the presentation of evidence here. *See Hallum*, at 355–56. We agree with the district court that the statements on the recording demonstrate Campbell intended to prevent A.S. from testifying.

The comments include Campbell instructing A.S. to flee to a friend’s house to avoid being subpoenaed, telling her she would be arrested and jailed if she did not flee, and instructing her that she should not testify and that if she was found in contempt of court that was nothing to worry about. He tells her to tell prosecutors she didn’t want anything to do with the case. He tells her she should not have spoken with police. In the end, A.S. was served with a subpoena but did not appear in court. Clearly Campbell intended for her not to testify.

However, the recorded phone conversations were also offered, admitted, and played to the jury over Campbell’s relevance and hearsay objections. Therefore we must decide if the recordings were admissible as substantive evidence.

2. *Substantive evidence.*

Unlike the 911 recordings and the officer's body-microphone recording, Campbell's objection to the jail conversations is to the admission of his statements to A.S., not her statements about the events leading to the charges against him. Where a party's own statement is offered against them, the statement is not hearsay. Iowa R. Evid. 5.801(d)(2). Because these statements were made by Campbell himself, we need not evaluate whether their admission violated his right to confront witnesses against him.

All evidence, hearsay or otherwise, is still subject to exclusion if it is not relevant. Iowa R. Evid. 5.401. Relevant evidence is defined in our rules as "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." *Id.* The district court found the following regarding the relevance of this evidence:

Well, based upon the contents of the tape and the fact that the defendant is certainly attempting to dissuade the victim from appearing in court, from being subpoenaed, wants to know what her story is going to be in court, you know, circumventing the formal procedures of taking depositions and the whole tone of the tape, I do find that there is—that these do amount to or are in the nature of admissions and that—a consciousness of guilt.

Certainly, . . . it could be analogized to the situation where evidence of a defendant's flight is offered into evidence as a consciousness of guilt and certainly dissuading a witness not to appear in court, I think, lends itself to the same consciousness of guilt and admission of that type of evidence, and so I will grant the State the opportunity to admit before the jury the four recordings which have been . . . played for the court.

"Admissions may be implied by the conduct of the defendant subsequent to a crime, including fabrication, when such conduct indicates a consciousness of

guilt.” *State v. Cox*, 500 N.W.2d 23, 26 (Iowa 1993); see also *State v. Langlet*, 283 N.W.2d 330, 334 (Iowa 1979) (finding spoliation of evidence implies a consciousness of guilt). We agree with the district court that the recordings were admissible as substantive evidence of Campbell’s consciousness of guilt.

*B. Admission of responding officer’s recording.*

Campbell argues the body-microphone recording made when the officer responded to A.S.’s second 911 call was inadmissible hearsay and testimonial, violating his Confrontation Clause rights. The State responds that the body-microphone recording was an excited utterance and nontestimonial, and that Campbell waived his Sixth Amendment argument by procuring A.S.’s absence.

In our analysis of whether a statement is an excited utterance, we consider the time between the event and statement, the extent to which questioning elicited the statements, the declarant’s age and condition, the characteristics of the event the declarant is describing, and the subject matter of the statement. *Harper*, 770 N.W.2d at 319.

The body-microphone recording began immediately following the second 911 call.<sup>3</sup> The officer was responding to A.S.’s call that she needed someone to intervene and stop Campbell immediately. A.S. is audibly upset and is heard crying, sobbing, screaming, and complaining of pain. The officer’s questions are open-ended, largely checking on the welfare of A.S. including: “[A]re you hurt anywhere?”, “Where is it sore at?”, and “[H]e hit you on the side there?” The subject matter of the exchange was her injuries and the ongoing emergency of

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<sup>3</sup> Campbell concedes, however, that the statements made by A.S. during the second 911 call were admissible as non-testimonial excited utterances.

the assault. While at times she briefly regains her composure, she loses it again, dissolving into shouting and tears. During one of these incidents the officer informs her he is going to press charges and requests she come to the station to give a statement. While after this statement she continues to detail the events of the day, she is still highly upset, and the entire interaction is less than twenty minutes. We find the recording falls under the excited utterance exception to the hearsay rule. *See id.*

Regarding Campbell's Sixth Amendment argument, we have previously found he procured A.S.'s absence. He is therefore precluded from asserting this objection regarding her statements. *See Hallum*, 606 N.W.2d at 357 ("When a court finds that a defendant has procured a witness's unavailability, the defendant is precluded from asserting his constitutional right to confront the witnesses against him as a basis to prevent the admission of prior statements given by the witness").

The body-microphone recording was properly admitted.

*C. Admission of recording of first 911 call.*

Campbell and the State agree error was not preserved regarding the admissibility of the recording of the first 911 phone call as no objection was made at trial. We therefore consider this claim in the context of an ineffective-assistance-of-counsel claim.

To establish a claim of ineffective assistance of counsel, Campbell must show his counsel failed to perform an essential duty and prejudice resulted. *See State v. Shaer*, 757 N.W.2d 630, 637 (Iowa 2008). We begin with the prejudice prong, because, if Campbell cannot show prejudice, we need not determine if his

counsel breached an essential duty. See *id.* We find that even if the first 911 call was inadmissible hearsay violating the Confrontation Clause, his objection should have been rejected as he procured A.S.'s absence. Our forfeiture-by-wrongdoing rule applies both to Sixth Amendment arguments and hearsay. *Hallum*, 606 N.W.2d at 357; see also Iowa Rule Evid. 5.804(b)(6) (excepting from hearsay rules “[a] statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness”). Campbell’s ineffective-assistance-of-counsel claim is without merit.

*D. Sufficiency of the evidence.*

Finally, Campbell argues the evidence presented was insufficient to support his conviction. He claims sufficient evidence does not exist to support his convictions for domestic abuse assault with a dangerous weapon and for driving while barred with regard to the element of operating a motor vehicle. He argues the only evidence supporting his operation of a motor vehicle that day is the recorded testimony of A.S.

The trial court’s findings of guilt are binding on appeal if supported by substantial evidence. The evidence is substantial if a rational fact finder could find the defendant guilty beyond a reasonable doubt. We view the evidence in the light most favorable to the State, including legitimate inferences and presumptions that may fairly and reasonably be deduced from the evidence in the record.

*State v. Lane*, 743 N.W.2d 178, 181 (Iowa 2007) (citations and internal quotation marks omitted). Campbell asserts that the recordings only support a finding that Campbell bumped A.S. with a car and that she only suggested Campbell was driving. However, during the recording of the first 911 call, A.S. says, “He ran me

over with my own car!” And when asked who hit her with her car, she responds “Robert Campbell.” In the second call she states “I got out of my car earlier and he ran me over with my car.” During the body-microphone recording, she detailed how Campbell hit her with her car and that two children saw the altercation so he “drove off.”

Campbell argues A.S. is not credible. As part of the recording of the jail calls, A.S. says “I lied,” Campbell responds, “I know that,” and A.S. says “[E]verybody does.” However, the officers also testified to speaking with her and reiterated her story, and the jury heard her statements at the time of the incident when she was not being persuaded to recant and not appear at trial. Viewing the evidence in the light most favorable to the State, we find sufficient evidence supports Campbell’s convictions for driving while barred and assault with a dangerous weapon.

**AFFIRMED.**