

IN THE COURT OF APPEALS OF IOWA

No. 6-1014 / 05-2082
Filed January 31, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MERLE ANDREW SHANK,
Defendant-Appellant.

Appeal from the Iowa District Court for Linn County, William L. Thomas,
Judge.

Merle Andrew Shank appeals his conviction and sentence for two counts
of vehicular homicide as an habitual offender and nonconsensual termination of a
human pregnancy. **AFFIRMED.**

Patricia Reynolds, Acting State Appellate Defender, and Theresa Wilson,
Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean Pettinger, Assistant Attorney
General, Harold Denton, County Attorney, and Jerry Vandersanden, Assistant
County Attorney, for appellee.

Heard by Mahan, P.J., and Vaitheswaran and Eisenhauer, JJ.

MAHAN, P.J.

Merle Andrew Shank appeals his conviction and sentence for two counts of vehicular homicide as an habitual offender, enhanced class C felonies in violation of Iowa Code sections 707.6A(2)(a)-(b) and 902.8 (2003), and nonconsensual termination of a human pregnancy in violation of section 707.8(2). He argues the district court erred in admitting hearsay evidence. He also argues his attorney rendered ineffective assistance. We affirm his convictions and sentences and preserve his ineffective assistance claims for possible postconviction relief proceedings.

I. Background Facts and Proceedings

Around 3 a.m. on April 9, 2005, Linn County Deputy Douglas Riniker passed a pick-up truck just outside Cedar Rapids. Riniker believed he smelled ether coming from the truck, and decided to follow.¹ The truck accelerated to seventy-five to eighty miles per hour. He activated his lights and siren, but the truck did not stop. Instead, the truck engaged Riniker in a chase reaching ninety-five miles per hour. When the driver attempted to make a right turn at an intersection, the truck rolled into the ditch.

The truck was lying on its top when officers approached. Shank's lower body was trapped underneath the cab on the driver's side. On the other side of the truck, Kirby Truesdell was lying on his back in the grass. Deputies found Mark Loesel on his stomach in the cab of the truck. Finally, Katrina Nelson was pinned under the truck with her arms and legs sticking out. In one hand, she was clutching a lighter. She had no pulse.

¹ No source of the smell was found on the truck.

At the scene, officers questioned Truesdell about the number of passengers in the truck. He responded, "What truck?" and denied being in the truck. Loesel, who was lying inside the cab, told officers he was fine and asked permission to get out of the truck. He was handcuffed and eventually placed in the back of a patrol car. Sometime later, Loesel waved Deputy Chad Colston over to the patrol car to ask when he could leave. Colston asked Loesel if he could help officers identify the driver. According to Colston, Loesel stated he was not a "snitch" but the person trapped under the truck was the driver. Loesel told another officer, Sergeant Pete Wilson, that the driver was pinned under the truck. When asked if the female was the driver, Loesel stated the driver was not the female but the other person trapped under the truck. Loesel reportedly told another officer, Captain Brian Gardner, that the driver had shorter hair than Gardner, who was balding. He also stated the driver was the husband of the female passenger and the father of her unborn child.

At the hospital, Truesdell told an officer the passengers were seated in the following order: the driver, the female passenger, Truesdell, and another male passenger. Shank, however, maintained Nelson was the driver. He initially told officers Nelson was driving, with Truesdell, Shank, and Loesel sitting in that order. Later, he stated he sat next to Nelson as she drove.

Shank was charged with vehicular homicide as an habitual offender on May 13, 2005. The State amended the charge on August 31, 2005, to add counts of vehicular homicide as an habitual offender (count II) and nonconsensual termination of a human pregnancy (count III). Prior to trial, Shank filed a motion in limine to exclude as hearsay the statements Loesel and

Truesdell made shortly after the accident. The district court ruled that the statements qualified as “excited utterances” and would be allowed at trial.

At trial, both Truesdell and Loesel testified Nelson was driving the truck during the chase. Shank’s family members testified only Nelson drove the truck and they never saw Shank driving it. Due to the court’s ruling on the motion in limine, police officers testified to the statements Truesdell and Loesel made after the accident. The State’s accident reconstruction expert testified he determined Shank was the driver. He based his conclusion on bruises Shank sustained that were consistent with hitting the steering wheel and driver’s door. The State’s expert also determined Nelson was sitting somewhere in the middle of the cab. He found injuries on her knees that were consistent with hitting the sharp edge of an ash tray. Further, DNA evidence taken from the exterior of the driver’s side door, the driver’s side visor, and from glass found on the seat matched a sample taken from Shank. The defense’s accident reconstruction expert, however, testified the State’s evidence did not identify where the occupants of the vehicle were located and that it would be difficult to make a driver-only determination without also knowing when and how the other occupants were ejected. He concluded the evidence did not support any conclusive determination of the driver’s identity.

The jury found Shank guilty of the unenhanced charges. Shank stipulated to two prior felony convictions for the purposes of the habitual offender sentencing enhancement. The district court sentenced Shank to an indeterminate term of imprisonment not to exceed fifteen years with a three-year

mandatory minimum on counts I and II.² On Count III, the court sentenced Shank to an indeterminate term not to exceed ten years with a \$1000 fine. The sentences are to run consecutively. Finally, the court ordered Shank to pay \$150,000 toward Nelson's estate. Shank appeals.

II. Standard of Review

We review rulings on the admission of evidence for an abuse of discretion. *State v. Dullard*, 668 N.W.2d 585, 589 (Iowa 2003). We review allegations of ineffective assistance of counsel de novo. *State v. Martin*, 704 N.W.2d 665, 668 (Iowa 2005).

III. Merits

A. Hearsay Evidence

Shank argues the district court erroneously admitted the statements Loesel made shortly after the accident. According to Iowa Rule of Evidence 5.803(2), 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.” Such a statement is an exception to the hearsay rule. The rationale behind the exception is that a person is unlikely to be deceptive if his or her statements are made under stress or in excitement. *State v. Tejada*, 677 N.W.2d 744, 753 (Iowa 2004). Hearsay incorrectly admitted is *per se* prejudicial to the nonoffering party unless otherwise established. *Dullard*, 668 N.W.2d at 589. However, “erroneously admitted hearsay will not be considered

² Counts I and II were treated and merged as the same offense for the purposes of sentencing.

prejudicial if substantially the same evidence is properly in the record.” *State v. Newell*, 710 N.W.2d 6, 19 (Iowa 2006).

In this case, the evidence identifying Shank as the driver is not only properly in the record, but also overwhelming. First, Riniker, the deputy who first engaged the truck in the chase, observed that the driver was balding with possibly some hair on the lower part of his head. He never wavered in his identification of Shank as the driver. Second, Shank was found outside the driver’s side door, and his injuries matched the damage to the driver’s side door, the driver’s side window, and the steering wheel. Third, an accident reconstruction expert concluded Shank was the driver. Fourth, DNA found on the driver’s side door and the driver’s side visor matched Shank’s DNA. Finally, the fact that Nelson was found clutching a lighter is inconsistent with driving a vehicle during a protracted high speed chase. Therefore, we conclude the statements following the accident were not prejudicial to Shank.

B. Ineffective Assistance of Counsel

In order to establish ineffective assistance of counsel, Shank must show both that his counsel breached a duty and that the breach prejudiced his defense. *Strickland v. Washington*, 433 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). Generally, we preserve ineffective assistance of counsel claims for postconviction relief actions. *State v. Tate*, 710 N.W.2d 237, 240-41 (Iowa 2006). This practice ensures both that an adequate record of the claim is developed and that the attorney charged with ineffectiveness has an opportunity to respond. *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002). We

conclude the record here is inadequate to address Shank's claims. We therefore preserve his claims for possible postconviction relief proceedings.

Shank's convictions and sentences are affirmed.

AFFIRMED.