IN THE COURT OF APPEALS OF IOWA

No. 1-337 / 00-0724
Filed July 31, 2001

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MARLANDO AKHITITO HOOSMAN,
Defendant-Appellant.

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CLERK SUPREME COURT

Appeal from the Iowa District Court for Black Hawk County, Todd A. Geer, Judge.

Marlando Hoosman appeals from his convictions and sentences for willful injury, terrorism with intent, and going armed with intent in violation of Iowa Code sections 708.4, 708.6 and 708.8 (1997). **AFFIRMED.**

Richard R. Hollis, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and D. Raymond Walton, Assistant County Attorney, for appellee.

Considered by Mahan, P.J., and Miller and Vaitheswaran, JJ.

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MILLER, J.

Marlando Akhitito Hoosman appeals his convictions and sentences for willful injury, terrorism with intent, and going armed with intent. He contends the trial court abused its discretion in (1) admitting evidence he was involved in a different, earlier shooting, and (2) allowing hearsay testimony that identified him as the shooter in the incident underlying the charges in this case. Hoosman further contends his trial counsel was ineffective in failing to (1) object to the admission of evidence concerning the other shooting incident, (2) properly object to the testimony concerning his alleged possession of a .40 caliber Glock, and (3) object to certain hearsay statements on the basis the testimony violated Iowa Rule of Evidence 403. We affirm.

I. BACKGROUND FACTS

Hoosman was a patron of The New World Lounge (Lounge) bar in Waterloo, Iowa during the early morning hours of October 11, 1998. At some point a fight erupted inside the Lounge. The fight eventually spilled out onto the street in front of the Lounge and the bar's patrons made their way outside. Included among the Lounge's patrons that evening was Margaret VanArsdale. As the fight continued outside the Lounge several people apparently drew guns. Bystanders heard a series of shots from what sounded like a small caliber firearm. The crowd of bystanders began to run as a second series of shots, which sounded like they were from a much larger caliber weapon, were fired. Margaret VanArsdale was struck in the back with a bullet during this second round of gunfire. VanArsdale did not see who shot her, but it was later

determined she had been hit by a .40 caliber bullet. She was left paralyzed by her injury.

Hoosman was subsequently charged for his participation in the Lounge shooting with willful injury, terrorism with intent, and going armed with intent in violation of Iowa Code sections 708.4, 708.6, and 708.8 (1997) respectively. Hoosman had earlier been charged for involvement in another shooting at Club Thirty-Something (the Club), also in Waterloo, which occurred in June 1998. At the Lounge trial the State introduced evidence regarding the Club shooting which also involved a .40 caliber firearm. The State's ballistic expert testified that the five .40-caliber cartridges cases found at the site of the Lounge shooting and the seven .40 caliber cartridge cases found at the site of the Club shooting had all been fired from one firearm and one firearm only.

Prior to trial Hoosman filed a motion which sought an order in limine concerning various items of potential evidence. Hearing was held on the motion and the court sustained it as to certain items of evidence, denied it as to two items, and reserved ruling until an appropriate time during trial as to two other items.

The jury found Hoosman guilty on all charges and the court sentenced him to terms of imprisonment. Hoosman went to trial on the Club shooting two weeks after his conviction in this case and was also found guilty at the second trial. In that second trial regarding the Club shooting, evidence of Hoosman's participation in the Lounge shooting was introduced by the State. Hoosman appealed that case alleging the court should not have allowed the Lounge evidence to be presented. We affirmed Hoosman's conviction in the Club

shootings in *State v. Hoosman*, No. 00-961 (Iowa Ct. App. Feb. 28, 2001) finding that the evidence of Hoosman's involvement in the Lounge shooting fell within the "other purposes" exception found in Iowa Rule of Evidence 404(b).

II. MERITS

Hoosman appeals his convictions and sentences contending the trial court abused its discretion in admitting evidence of allegations he was involved in the Club shooting and in allowing hearsay testimony identifying him as the shooter at the Lounge. Hoosman further contends his trial counsel was ineffective in failing to object, and failing to properly object, to certain evidence.

A. Other Crimes Evidence

Hoosman argues the trial court abused its discretion in allowing evidence at trial relating to his alleged participation in the Club shooting in violation of Iowa Rules of Evidence 404(b) and 404(a). We review this evidentiary issue for abuse of discretion. *State v. Sallis*, 574 N.W.2d 15,16 (Iowa 1998).

> In reviewing the court's ruling, we reverse only if we find a clear abuse of discretion. We find the district court has abused its discretion only when the district court has exercised its discretion on grounds or for reasons clearly untenable, or to an extent clearly unreasonable.

State v. Bayles, 551 N.W.2d 600, 604 (Iowa 1996) (citations omitted).

> Iowa Rule of Evidence 404(b) reads as follows:
>
> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

In determining whether challenged evidence of a defendant's other crimes, wrongs or acts fall within the rule's "other purposes" exception we must employ a

two-step analysis. *State v. Castaneda,* 621 N.W. 2d 435, 440 (Iowa 2001); *State v. Plaster*, 424 N.W.2d 226, 229 (Iowa 1988). We first determine whether the evidence is relevant for a purpose other than to show the defendant acted in conformity with a propensity to commit the wrongful act. *State v. Brown*, 569 N.W.2d 113, 116 (Iowa 1997). There is a presupposition that relevant evidence is admissible. Iowa R. Evid. 402; *State v. Anderson*, 565 N.W.2d 340, 342 (Iowa 1997). If it is determined the evidence is relevant for a legitimate purpose, we move to the second step and decide whether the evidence's probative value is substantially outweighed by the danger of unfair prejudice. Iowa R. Evid. 403; *Castaneda,* 621 N.W.2d at 440; *Plaster*, 424 N.W.2d at 229. An affirmative finding on this second prong "precludes admissibility of even relevant evidence." *Plaster*, 424 N.W.2d at 231.

We find the evidence regarding Hoosman's involvement in the Club shooting falls within rule 404(b)'s "other purposes" exception. Evidence that Hoosman was the shooter in the Club incident, together with evidence the same gun was used in both shootings, makes it more probable that Hoosman was the shooter in the Lounge incident as well and is thus relevant on the issue of the identity of the shooter in the Lounge incident. See Iowa R. Evid. 401 (relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence . . . more probable . . . than it would be without the evidence.").

Hoosman argues that even if the evidence of the shooting at the Club was relevant, its probative value was outweighed by the danger of unfair prejudice. Hoosman urges in support of this contention that the State failed to provide "clear

proof" he was the shooter at the Club, as is required in order for evidence of prior bad acts to be admissible.[1] *See Brown,* 569 N.W.2d at 117; *State v. Jones*, 464 N.W.2d 241, 243 (Iowa 1990); *State v. Spargo*, 364 N.W.2d 203, 209 (Iowa 1985).

Commission of prior bad acts need not be established beyond a reasonable doubt. *Brown*, 569 N.W.2d at 117. All that is required under the "clear proof" rule is that the evidence is sufficient to "prevent the jury from engaging in speculation or drawing inferences based on mere suspicion." *Spargo*, 364 N.W.2d at 209. The clear proof rule does not preclude admission of the evidence of the shooting at the Club. The State introduced eyewitness testimony that Hoosman was the shooter in that incident, as well as testimony that Hoosman had someone purchase a .40 caliber Glock for him two months before the incident at the Club. A .40 caliber was used in that shooting. This was sufficient evidence to allow the jury to find Hoosman was involved in the other shooting without resorting to inferences or mere speculation.

Finally, any danger of unfair prejudice was sufficiently removed by the cautionary instruction the jury received, both during trial and upon submission of the case, as to the limited purposes for which they could use the evidence of the other shooting. Generally, issuance of a limiting instruction is sufficient to remove the danger of unfair prejudice. *State v. Conner*, 314 N.W.2d 427, 429 (Iowa 1982); *State v. Coen*, 382 N.W.2d 703, 708 (Iowa Ct. App. 1985). It is only in extreme cases that such instructions are insufficient to nullify danger of unfair

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[1] As noted above, Hoosman was also tried and convicted for involvement in the Club shooting. However, his trial on the Club shooting took place after his trial and conviction in the Lounge shooting involved in this case.

prejudice. *Conner,* 314 N.W.2d at 429. This is not such an extraordinary case. Furthermore, we presume the jury followed the court's instructions. *See State v. Proctor*, 585 N.W.2d 841, 845 (Iowa 1998). The trial court made adequate efforts to avoid any possible danger of unfair prejudice. We conclude the evidence of Hoosman's involvement in the other shooting was admissible under rule 404(b) and thus the trial court did not abuse its discretion in allowing such evidence.

Hoosman also asserts the evidence of the other shooting constitutes improper character evidence under Iowa Rule of Evidence 404(a). The State argues this claim is waived because Hoosman did not raise this objection below. Assuming without deciding that the general objection Hoosman made to the admission of the evidence was sufficient to preserve error on this issue, we determine rule 404(a) has no application when the evidence has been found to be properly admissible under one of the exceptions found in 404(b).

> The primary thrust of subsection (b) of rule 404 is to illustrate some but not all situations in which evidence relevant to establish some legitimate issue in the case is not rendered inadmissible because it also reveals character or traits of character otherwise precluded by subsection (a) of the rule.

State v. Barrett, 401 N.W.2d 184, 187 (Iowa 1987). As we have determined the evidence was admissible under rule 404(b) to establish the legitimate issue of the shooter's identity, which was at issue in this case, it is not rendered inadmissible simply because it may also reveal character or traits of character. Therefore, Hoosman's argument the trial court abused its discretion in admitting this evidence in violation of Iowa Rule of Evidence 404(a) must fail.

B. Hearsay Evidence

Hoosman argues the trial court abused its discretion in admitting the hearsay testimony of Mary Outlaw, which identified him as the shooter at the Lounge, in violation of Iowa Rule of Evidence 802. We review rulings on hearsay evidence for correction of errors at law.[2]

Mary Outlaw testified that shortly after the shooting incident outside the Lounge she met up with two of her friends, Karla and Nicole, who were coming out of the crowd of people where the shots had been fired, they were "scared, nervous, shaking a lot," and they stated to her that "Lans [Hoosman] did it and Karla was saying Trese [Montrese Wilson] did it." Hoosman objected to this testimony and the trial court overruled the objection and allowed the testimony under the excited utterance exception to the hearsay rule.[3]

It appears undisputed that the above testimony by Outlaw concerning what her friends told her constitutes hearsay as defined in Iowa Rule of Evidence 801(c). It is a statement, other than one made by those friends while testifying, that was offered into evidence to prove the truth of the matter asserted in the statement, that Hoosman was the shooter on the evening in question. Therefore, the testimony would be inadmissible hearsay unless it comes within one of the exceptions to the hearsay rule.

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[2] Hoosman asserts the standard of review on this issue is for abuse of discretion and the State agrees. While generally evidentiary issues are reviewed for an abuse of discretion, hearsay issues are reviewed for errors at law. *See State v. Tangie*, 616 N.W.2d 564, 568 (Iowa 2000); *State v. Ross*, 573 N.W.2d 906, 910 (Iowa 1998).

[3] The trial court also believed the testimony might be admissible under the present sense impression exception. However, as the State concedes the record fails to adequately establish a requisite for the application of this exception and the trial court relied most heavily on the excited utterance exception we deal only with the excited utterance exception and do not determine whether the present sense impression exception applies.

The trial court found the testimony was admissible under the excited utterance exception to the hearsay rule found in Iowa Rule of Evidence 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," and is not excluded by the hearsay rule even though the declarant is available as a witness. Iowa R. Evid. 803(2).

> The admission of hearsay under this exception lies largely within the discretion of the trial court, which must initially determine whether the out-of-court statements were induced by the excitement caused by the startling event which is being described.

State v. Mateer, 383 N.W.2d 533, 535 (Iowa 1986).

Factors to be considered by the trial court in making this determination include the passage of time between the event and the statement, the extent to which questioning elicited the statements, the age and condition of the declarant, the characteristics of the event being described, and the subject matter of the statements. *State v. Atwood,* 602 N.W.2d 775, 782 (Iowa 1999). Here the statements were made to Outlaw within minutes of the shooting, there is no evidence any questions were asked to elicit the statements, it appears Outlaw's friends were adults, and the characteristics and subject matter of the event being described were startling.

Hoosman suggests there may be "at least two layers of hearsay" involved here because it is unclear from the testimony whether Outlaw's friends were merely repeating something they had heard or had personal knowledge of the incident. However, testimony can be admitted under the excited utterance exception even in the absence of conclusive evidence the declarant had personal knowledge of the event in question because a declarant's personal knowledge of

the facts may be inferred from the utterance itself. *State v. Rawlings*, 402 N.W.2d 406, 409 (Iowa 1987). The trial court therefore could, as it implicitly did in admitting Outlaw's testimony concerning her friends' statements, find the evidence would support an inference that the friends had personal knowledge. Hoosman's "double hearsay" assertion lacks merit.

We believe the circumstances under which the statements in question were made sufficiently establish the application of the excited utterance exception to the hearsay rule. Any questions that remained as to the weight to be given these statements were for the jury. *Id.* at 410. The trial court did not err in admitting Outlaw's testimony regarding the identification of Hoosman as the shooter at the Lounge based on the excited utterance exception to the hearsay rule in Iowa Rule of Evidence 803(2).

C. Ineffective Assistance Claims

Hoosman asserts his trial counsel was ineffective for (1) not objecting to the admission of the evidence regarding Hoosman's involvement in the shooting at the Club, (2) failing to properly object to the testimony of Rodney Berry concerning the alleged possession by Hoosman of a .40 caliber Glock prior to the date of the shooting at the Lounge, and (3) for failing to object to Outlaw's hearsay statements concerning what her friends told her regarding the identification of Hoosman as the shooter on the basis that the testimony violated Iowa Rule of Evidence 403.

A defendant is entitled to the assistance of counsel under the Sixth Amendment of the United States Constitution and Article 1, section 10 of the Iowa Constitution. The right to counsel is a right to effective assistance of

counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063, 80 L. Ed. 2d 674, 692 (1984). Because a claim of ineffective assistance of counsel implicates constitutional rights, we review de novo the totality of the circumstances surrounding counsel's representation of the defendant. *See State v. Carter*, 602 N.W.2d 818, 820 (Iowa 1999); *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987).

To establish an ineffective assistance of counsel claim, the defendant must show "(1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom." *Wenmark v. State*, 602 N.W.2d 810, 814 (Iowa 1999). A reviewing court may look to either prong to dispose of an ineffective assistance claim. *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984). The test of ineffective assistance of counsel focuses on whether the performance by counsel was reasonably effective. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693. The defendant must show that performance fell below an objective standard of reasonableness so that counsel failed to fulfill the role in the adversary process that the Sixth Amendment envisions. *Id.* at 688, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693. A strong presumption exists that counsel's performance falls within the wide range of reasonable professional assistance. *Wenmark*, 602 N.W.2d at 814. The defendant has the burden of proving by a preponderance of the evidence both of the two elements of a claim of ineffective assistance. *State v. Shumpert*, 554 N.W.2d 250, 254 (Iowa 1996); *Brewer v. State*, 444 N.W.2d 77, 83 (Iowa 1989).

"Improvident trial strategy, miscalculated tactics, mistake, carelessness or inexperience do not necessarily amount to ineffective counsel." *State v. Aldape*,

"Improvident trial strategy, miscalculated tactics, mistake, carelessness or inexperience do not necessarily amount to ineffective counsel." *State v. Aldape*, 307 N.W.2d 32, 42 (Iowa 1981) (quoting *Parsons v. Brewer*, 202 N.W.2d 49, 54 (Iowa 1972)); *see also Wenmark*, 602 N.W.2d at 814. A defendant is not entitled to perfect representation, but rather only that which is within the range of normal competency. *State v. Artzer,* 609 N.W.2d 526, 531 (Iowa 2000); *Cuevas v. State,* 415 N.W.2d 630, 632 (Iowa 1987).

While we often preserve ineffective assistance claims for possible postconviction proceedings, we consider such claims on direct appeal if the record is sufficient. *State v. Casady*, 597 N.W.2d 801, 807 (Iowa 1999). Neither party suggests we should preserve Hoosman's ineffective assistance claims for postconviction proceedings and we believe the record is adequate to address his claims.

An ineffective-assistance-of-counsel claim may be disposed of if the defendant fails to prove either of the two prongs of such claim. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997). Therefore, we need not determine whether counsel's performance is deficient before undertaking the prejudice determination. *State v. Wissing*, 528 N.W.2d 561, 564 (Iowa 1995). In order to prove prejudice the defendant must show a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2069, 80 L. Ed. 2d at 698. "A 'reasonable probability is a probability sufficient to undermine confidence in the outcome' of the defendant's trial." *State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997) (quoting *State v. Kraus*, 397 N.W.2d 671, 673 (Iowa 1986)).

Hoosman's first claim of ineffective assistance asserts trial counsel was ineffective for failing to object at trial to the testimony of Jamal Holmes, Percy Bruce, Todd Keller, and Robert Harvey concerning Hoosman's involvement in the Club shooting. Initially, we note there was a prior ruling by the trial court on Hoosman's motion in limine which unequivocally held paragraphs six and seven of his motion were denied. These paragraphs attempted to keep out "[a]ny testimony regarding this Defendant's alleged involvement in firing shots at the 30 Something Bar on or about June 5, 1999"[4] and preclude the testimony of Robert Harvey, the State's ballistics expert, regarding the "comparison of shell casings found at the 30 Something Bar with shell casing which were found at the New World Lounge." The trial court held a hearing and counsel presented legal arguments. The trial court made a detailed ruling on the record in which it considered relevance, the clear proof requirement, and probative value versus the danger of unfair prejudice. It found the evidence in question met these requirements for admission and denied the motion as to paragraphs six and seven. Its ruling thus amounted to an unequivocal holding that the evidence was admissible. Under such circumstances counsel did not need to renew objections at trial. *State v. Harlow*, 325 N.W.2d 90, 91-92 (Iowa 1982); *State v. Delaney*, 526 N.W.2d 170, 177 (Iowa Ct. App. 1994). Thus, there would have been no breach of duty on the part of trial counsel if he had not further objected to this testimony at the time of trial.

More importantly, however, at appropriate times during trial Hoosman's counsel did in fact request, and was allowed to have, standing objections to the

[4] We assume this was a typographical error as the Club shooting took place in June 1998, not 1999.

testimony in question of all four of these witnesses. Thus, Hoosman is mistaken in asserting that his trial counsel failed to object at the time these four individuals testified regarding the Club shooting. Because counsel in fact objected there was no breach of duty and thus no ineffective assistance on the basis asserted.

In addition, we earlier determined that the evidence of the prior shooting was relevant and admissible under Iowa Rule of Evidence 404(b). Therefore, because any objection to the testimony relating to the Club shooting would have been meritless, defense counsel had no duty to object to such testimony. *State v. Greene*, 592 N.W.2d 24, 29 (Iowa 1999); *State v. Rice*, 543 N.W.2d 884, 888 (Iowa 1996).

Hoosman's second claim of ineffective assistance relates to the testimony of Rodney Berry concerning Hoosman's possession of a .40 caliber Glock prior to the date of the Lounge shooting. Hoosman argues counsel was ineffective for failing to object to this testimony at the time of trial on hearsay grounds in violation of Iowa Rule of Evidence 802 and he was prejudiced by this failure. The portion of Berry's testimony challenged as hearsay by Hoosman is as follows:

> Q. Did you tell the police that you knew Marlando Hoosman to have a .40 caliber Glock? A. I didn't know - - I heard that.
> Q. But you knew personally, didn't you? A. No.

On redirect examination Berry acknowledged that he had stated in a prior sworn statement that Hoosman had told him he had a .40 caliber Glock, and that Hoosman may have done so.

The court had sustained paragraph three of Hoosman's motion in limine, which concerned, "Any hearsay statements by any witness that this Defendant possessed a .40 caliber Glock semi-automatic handgun and/or laser sight prior to

October 11, 1998." Based on the definition of hearsay found in Iowa Rule of Evidence 801(c) it appears Berry's testimony that he *heard* Hoosman had a .40 caliber Glock was arguably hearsay. Such testimony would then be in violation of the previously granted motion in limine. The erroneous admission of hearsay is presumed to be prejudicial unless the contrary is established affirmatively. *State v. Hildreth*, 582 N.W.2d 167, 170 (Iowa 1998). "However, we will not find prejudice if the admitted hearsay is merely cumulative." *Id.*; *see also State v. Moeller*, 589 N.W.2d 53, 54 (Iowa 1999) (same).

Assuming without deciding that Berry's testimony was impermissible hearsay and should have been objected to by defense counsel, we find Hoosman was not prejudiced by this breach of duty on the part of counsel. There were other prosecution witnesses, including Moriano Keys and Vonetta Holmes, who also testified that Hoosman possessed a .40 caliber Glock with a laser sight prior to the shooting at the Lounge. Further, Aldreias Campbell testified that Hoosman had a gun with a laser on a date prior to the shooting at the Lounge. Berry's testimony regarding the firearm was therefore merely cumulative and not prejudicial. *See id.* This claim of ineffective assistance fails for lack of a showing of prejudice.

Hoosman's last ineffective assistance claim relates to the testimony of Mary Outlaw. Hoosman alleges his trial counsel was ineffective for failing to object to her hearsay testimony on the basis that the admission of such testimony violated Iowa Rule of Evidence 403. As discussed above in detail, Outlaw testified regarding statements made to her by two of her friends shortly after the shooting that "Lans did it," meaning that Hoosman had done the

shooting. Trial counsel objected to Outlaw's testimony on hearsay grounds and the court allowed the testimony under the excited utterance exception to the hearsay rule. Hoosman argues counsel was ineffective for not also objecting to the evidence under rule 403 which allows for exclusion of relevant evidence when its probative value is substantially outweighed by the danger of unfair prejudice.

While "relevancy" is the tendency of evidence to make a consequential fact more or less probable, "probative value" gauges the strength and force of that tendency. *State v. Plaster*, 424 N.W.2d 226, 231 (Iowa 1988). "Unfair prejudice" is an undue tendency to suggest decisions by the fact finder on an improper basis, often an emotional one. *State v. Brown*, 569 N.W.2d 113, 117 (Iowa 1997); *Plaster*, 424 N.W.2d at 231. The evidence in question goes to the identity of the person doing the shooting at the Lounge. Nothing indicates it has an undue tendency to suggest a decision concerning identity or guilt on any improper basis, emotional or otherwise. The evidence was certainly prejudicial to Hoosman. However, rule 403 does not provide protection against all evidence that is prejudicial or detrimental to a party's case; it only provides protection against unfairly prejudicial evidence. *Plaster*, 424 N.W.2d at 231. Because the evidence in question was not unfairly prejudicial counsel had no duty to object to it on the ground its probative value was substantially outweighed by the danger of unfair prejudice. Hoosman's claim that counsel was ineffective for failing to raise such an objection is without merit.

III. CONCLUSION

We agree with the evidentiary determinations of the trial court and conclude it did not abuse its discretion in allowing evidence of the Club shooting under Iowa Rule of Evidence 404(b), nor did it err in admitting testimony under the excited utterance exception to the hearsay rule. Furthermore, we find Hoosman was not denied effective assistance of counsel. We have considered all other issues and claims raised by Hoosman, whether specifically discussed herein or not, including the claims of denial of due process of law which he appends to each of his brief points, and find them either not preserved, without merit, or both. We affirm the convictions and sentences.

AFFIRMED.

Vaitheswaran, J. concurs specially.

VAITHESWARAN, J. (specially concurring)

I specially concur. I write separately to address the standard for analyzing the prejudice prong of ineffective-assistance-of-counsel claims. As the majority points out, the Iowa Supreme Court recently reaffirmed that a defendant must prove prejudice by a preponderance-of-the-evidence standard. *See Ledezma v. State,* 626 N.W.2d 134, 145 (Iowa 2001): I agree this standard has not been satisfied. I would only note that our courts' articulation of the applicable standard may diverge from federal law. *See Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 1519, 146 L. Ed.2d 389 (2000); *Skaggs v. Parker*, 235 F.3d 261, 271 (6th Cir. 2000); *Mask v. McGinnis*, 233 F.3d 132, 140 (2d Cir. 2000); *Chu Young Yi v. Gearinger*, 139 F. Supp. 2d 1393, 1397 (2001).