IN THE COURT OF APPEALS OF IOWA

No. 1-175 / 90-645

STATE OF IOWA,

Appellee,

vs.

EDWARD ANTHONY RONE,

Appellant.

FILED
MAY 29 1991
CLERK SUPREME COURT

Appeal from the Iowa District Court for Pottawattamie County, J.C. Irvin, Judge.

Rone appeals from his convictions, following a jury trial, for first-degree murder and first-degree burglary. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Sarah J. Coats, Assistant Attorney General, E.A. Westfall, County Attorney, and Drew Kouris and James Sinek, Assistant County Attorneys, for appellee.

Considered by Oxberger, C.J., and Sackett and Habhab, JJ.

OXBERGER, C.J.

Edward Anthony Rone was accused of breaking into the home of his former girlfriend, Deborah Hubbard, and stabbing her to death. A jury found him guilty of first-degree murder and first-degree burglary. He has appealed the resulting convictions.

Rone contends the trial court erred by admitting hearsay testimony from Judith Dugan, a co-worker of Hubbard. Rone also contends his trial attorney rendered ineffective assistance in various respects.

Hubbard, the victim, received a telephone call at work a few weeks before her death. Dugan answered the telephone and recognized Rone's voice when he requested to speak with Hubbard. Hubbard took the telephone call at Dugan's desk. Dugan remained about at her desk during Hubbard's conversation. While speaking on the telephone Hubbard became very upset and agitated. At Rone's trial, Dugan reported when the telephone call concluded Hubbard was shaking badly, had turned gray and was weak in the knees. Dugan testified she then assisted Hubbard to the coffee room so she could calm down. Dugan further testified that as they were walking down the hall to the coffee room "Debbie [Hubbard] told me that Anthony [Rone] was going to -- he will kill her before her next birthday, that she would never see her next birthday."

Rone made a timely objection to the last statement, claiming it was inadmissible hearsay. The trial court summarily overruled the objection. On appeal, the State contends the statement was admissible because it was an excited utterance, or in the alternative was nonprejudicial because the other evidence against Rone was overwhelming.

For hearsay to be admissible as an excited utterance, the declarant's statement must be made under the influence of the excitement caused by the event. State v. Mateer, 383 N.W.2d 533, 535 (Iowa 1986). The lapse of time between the event and the statement may be lengthy, so long as the declarant remained in a state of excitement resulting from the event. Id. (authorities omitted). We review issues relating to the foundational requirements for admission of hearsay statements for abuse of discretion. State v. Watts, 441 N.W.2d 395, 398 (Iowa App. 1989).

The statement in dispute was clearly an excited utterance and therefore, admissible. See Iowa R. Evid. 803(2). Hubbard remained visibly agitated from the telephone call when she made the statement. Further, the statement was spontaneous, not the result of Dugan questioning Hubbard about the contents of the telephone conversation. Consequently, the trial court properly overruled Rone's objection to the statement.

Rone also contends he received ineffective assistance from his trial attorney in various respects. He complains

the attorney did not move for a change of venue, did not challenge the exclusion of blacks from the jury panel, and did not adequately cross-examine the State's witnesses. Rone asks that his complaints of ineffective assistance be preserved for a future postconviction proceeding. The State agrees the issue should be preserved for postconviction proceedings.

Generally, ineffective assistance of counsel claims are preserved for postconviction to allow trial counsel an opportunity to defend the charge. State v. Nebinger, 412 N.W.2d 180, 191-92 (Iowa App. 1987)(citation omitted). The record is inadequate for us to evaluate Rone's attorney's performance. Consequently, we preserve Rone's claim of ineffective assistance of trial counsel for postconviction proceedings.

AFFIRMED.