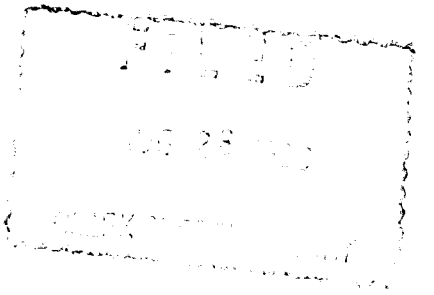
IN THE COURT OF APPEALS OF IOWA

No. 8-422 / 97-1959



STATE OF IOWA,
Appellee,

vs.

WADE AUSTIN TROUTMAN,
Appellant.

Appeal from the Iowa District Court for Van Buren County, Gary R. Noneman, District Associate Judge.

The defendant appeals the judgment and sentence entered for domestic assault causing bodily injury, claiming the trial court erred in admitting hearsay testimony and his trial counsel was ineffective. **AFFIRMED.**

Thomas M. Walter and Kenneth A. Duker of Johnson, Hester, Walter & Breckenridge, L.L.P., Ottumwa, for appellant.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney General, Richard Lytle, County Attorney, and James Dorothy and Crystal Clark, Assistant County Attorneys, for appellee.

Considered by Cady, C.J., and Vogel and Mahan, JJ.

VOGEL, J.

Wade Austin Troutman appeals the judgment and sentence entered for domestic assault causing bodily injury, claiming the trial court erred in admitting hearsay testimony and arguing his trial counsel was ineffective. We find Troutman was not prejudiced by any error of the court or counsel, and therefore affirm.

Background facts. On the afternoon of March 29, 1997, a verbal argument between Troutman and his girlfriend, Sheila Rains, escalated into a physical confrontation. Troutman allegedly struck and choked Rains, following her from room to room. She ultimately escaped to a nearby warehouse where her father worked, and her parents called the police. The sheriff arrived and spoke with Rains about the incident. Observing red marks and scratches, the sheriff advised her to seek medical attention. Rains was examined by a physician that same day and explained to him how the injuries occurred.

Troutman was charged with domestic assault causing bodily injury, in violation of Iowa Code sections 708.1 and 708.2A(2)(b) (1995). At trial, the State, over Troutman's objections, introduced testimony from the sheriff and the physician regarding Rains' statements about the incident. Rains was arrested for disregarding her subpoena and was a hostile witness for the State.

The jury returned a guilty verdict. Troutman was fined $500 by the court and sentenced to thirty-seven days in jail, all but twelve of which were suspended. Troutman appeals.

I. Hearsay evidence. Troutman claims the court erred in allowing the admission of hearsay evidence. The State asserts the evidence was properly admitted under exceptions to the hearsay rule, and alternatively argues Troutman suffered no prejudice from the admission.

The admission of evidence or any other evidentiary matter is reviewed under an abuse of discretion standard. *State v. Summage*, 532 N.W.2d 485, 487 (Iowa App. 1995). 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. 801(c). Hearsay is generally inadmissible unless it falls within one of the enumerated exceptions set forth in the rules. *Id.* at 802-03.

The evidence at issue concerned statements Rains made to the sheriff and emergency room physician indicating that Troutman caused her injuries. The sheriff testified that Rains: "told me that her and Wade [Troutman], her boyfriend, got into a fight and Wade was the one that caused these injuries to her." Referring to his patient history notes, the physician testified, in part:

> My statement was—and this is a dictated note—that this twenty-two-year-old white female [Rains] was seen in the emergency room with complaints of physical abuse from a boyfriend . . . . Initially she was grabbed around the throat and slammed up against the wall. She

> states she was then beaten with fists about the right eye and left temporal area. She also suffered contusions and squeezing of the upper arms bilaterally.

The trial court ruled the sheriff's testimony admissible under Iowa Rule of Evidence 803(2), which provides an exception for statements "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." The trial court further ruled the physician's testimony admissible under Iowa Rule of Evidence 803(4), which provides an exception for statements "made for the purpose of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."

Troutman contends that insufficient foundation was laid for the admission of Rains' statement to the sheriff because there was no showing of the time that elapsed between the event and her conversation with the sheriff. He further argues that there was a lack of foundation for admission of the physician's testimony because there was no showing of the necessity for treatment. We disagree. Testimony established that the police were called from a location one block away from the scene of the assault, and that the sheriff arrived within fifteen minutes after receiving the call. The sheriff further testified that Rains was crying and distraught. We find that sufficient foundation was laid for the excited utterance exception.

We further find that the trial court properly allowed the admission of the physician's testimony. The physician testified that an explanation as to how Rains' injuries occurred was necessary for him to make a proper diagnosis. The fact that Rains did not ultimately need or receive treatment is irrelevant. *See* Iowa R. Evid. 803(4) (statements made for purposes of medical diagnosis *or* treatment) (emphasis added); *see also United States v. Iron Thunder*, 714 F.2d 765, 772-73 (8th Cir. 1983) (lack of treatment rendered did not preclude application of Fed. R. Evid. 803(4)).

Moreover, even if we found either statement to be inadmissible hearsay, we find that Troutman suffered no prejudice from its admission. Defense counsel conceded a physical altercation occurred between Troutman and Rains. In his closing statement, defense counsel stated that the victim's bruises were:

> consistent with the grabbing, the pushing, the shoving that went on that day between these two people . . . . I'm not going to minimize that, but I think an argument took place, emotions got out of control, people responded improperly. But I don't think there was an intent to cause her bodily injury.

We will not find prejudice if the admitted hearsay is merely cumulative. *See State v. Hildreth*, No. 174/97-1313, 1998 WL 426319, at *3 (Iowa July 29, 1998); *State v. Gilmore*, 259 N.W.2d 846, 858 (Iowa 1977).

II. Ineffective assistance of counsel claims. Troutman also claims his trial counsel was ineffective in failing to advise him of his right to testify; file a notice of self-defense; conduct discovery; file a motion in limine; and move for a directed

verdict at the close of the evidence. The State argues these claims have not been properly presented for disposition on direct appeal because Troutman fails to demonstrate how he has been prejudiced by counsel's actions. We review claims of ineffective assistance of counsel de novo. *State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997). To prevail on an ineffective assistance of counsel claim the defendant must show by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *State v. Pearson*, 547 N.W.2d 236, 240 (Iowa App. 1996). In evaluating counsel's performance, we presume counsel acted competently. *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987).

Generally, ineffective assistance of counsel claims are preserved for postconviction to allow trial counsel an opportunity to defend the charge. *Pearson*, 547 N.W.2d at 241. However, such claims may be decided on direct appeal if the defendant fails to show one of the two prongs. *See State v. Welch*, 507 N.W.2d 580, 584 (Iowa 1993); *State v. Walker*, 538 N.W.2d 316, 322 (Iowa App. 1995). If it is more efficient to dispose of an ineffective assistance claim by looking first to the question of prejudice, we will do so. *State v. Hildebrant*, 405 N.W.2d 839, 841 (Iowa 1987); *Gering v. State*, 382 N.W.2d 151, 154 (Iowa 1986).

We have already determined that the hearsay statements were properly admitted and non-prejudicial, therefore we find Troutman was not prejudiced by counsel's failure to file a motion in limine to exclude the statements. Troutman further

suffered no prejudice by counsel's failure to make a second motion for a directed verdict at the close of all evidence when counsel's previous motion at the close of the State's case had been denied. We also find that defense counsel presented a theory of self-defense to the jury through Rains' testimony and the court gave an instruction on the related defense of justification. Therefore, we find Troutman was not prejudiced by counsel's failure to file a notice of self-defense.

Troutman's complaint in regard to counsel's failure to conduct discovery is too general in nature to allow us to address the allegations or preserve it for postconviction. *See Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994). He fails to state with specificity how discovery would have probably changed the outcome. *See Id.* We find the same lack of specificity dooms Troutman's claim that defense counsel failed to inform him of his right to testify. Although this is a fundamental right that all criminal defendants must be given the opportunity to assert, Troutman does not claim that he would have testified, nor does he explain how his doing so would have changed the outcome of his trial. We therefore reject all of Troutman's ineffective assistance of counsel claims on this direct appeal.

Having considered all issues properly before us on appeal, we affirm Troutman's conviction and sentence.

AFFIRMED.