

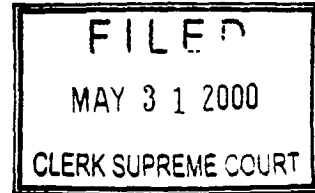
IN THE COURT OF APPEALS OF IOWA

No. 0-223 / 99-0521
May 31, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TORY O'SHAWN BROWN,
Defendant-Appellant.



Appeal from the Iowa District Court for Linn County, Nancy A. Baumgartner, District Associate Judge.

Tory Brown appeals his conviction and sentence, following a jury trial, for assault causing bodily injury. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Stephan J. Japuntich, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, Denver D. Dillard, County Attorney, and Teresa Seeberger, Assistant County Attorney, for appellee.

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

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MAHAN, J.

Tory Brown appeals his conviction and sentence, following a jury trial, for assault causing bodily injury. He contends (1) the district court erred in overruling his hearsay objections to witness testimony, and (2) his trial counsel was ineffective in failing to object to hearsay testimony at trial. We affirm.

Around 1:45 a.m. on April 9, 1998, patrons left Confetti's bar at closing time. Several players for the Cedar Rapids Kernels baseball team, including Steve Fish, were among the crowd leaving the establishment. Upon leaving the bar, Fish noticed people yelling and screaming in the parking lot. Two of Fish's teammates, Brad Brewer and Duane Dobson, were waiting for their teammates in a rental car. Brewer called for one of the coaches and gestured for the team to come to the car. Someone yelled, "[w]hat's going on? Do we have a problem here? What's going on?" Brown came around to the passenger side of the car and punched Dobson through the window.

Brewer and Dobson exited the vehicle. Brown approached Dobson again. Brown then hit Brewer in the jaw. A Confetti's bouncer, Steve Meeker, grabbed Brown and then let him go. Brown again approached Dobson. Fish noticed Brown was wearing a two-piece brass knuckle, so he grabbed Dobson and told him they should leave before someone was seriously injured. Fish pushed Dobson into the car and Brown came around to his right side and hit him on the face with the brass knuckle.

Someone called the police and gave a description of the suspect, vehicle, and license plate number after Brown left the scene. Officer Robert Boyer with

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the Cedar Rapids Police Department arrived at the scene. A bouncer told him there had been a fight.

Approximately ten to fifteen minutes after officer Boyer arrived at Confetti's, a Marion officer stopped a vehicle which matched the description at the Handimart about five blocks from Confetti's. Officer Boyer proceeded to the Handimart and arrested Brown. Several of the Kernels players approached him and identified Brown as the person who assaulted Fish. Steve Meeker also came to the Handimart and identified Brown.

Fish was transported to the hospital. He was treated and released. Fish's nose was broken and required reconstructive surgery to repair a crushed septum. The first surgery was not entirely successful and he required additional surgery to repair the damage.

The State charged Brown with assault causing bodily injury, in violation of Iowa Code sections 708.1, and 708.2(2) (1997). The matter proceeded to trial on January 25, 1999. The following day, the jury returned a guilty verdict. The court sentenced Brown to 117 days, and gave him credit for the 117 days he served before trial. He was fined \$250 plus surcharge and court costs. In addition, he was ordered to make victim restitution and pay \$100 for court appointed fees. Brown appeals.

I. Hearsay Challenges.

A. Standard of Review. Our review regarding the admissibility of hearsay evidence is for errors of law. *State v. Tomquist*, 600 N.W.2d 301, 303 (Iowa 1999).

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B. Preservation of Error. Brown contends the district court erred in overruling his hearsay objections to officer Boyer's testimony of statements made by the *Kernels* players and by Meeker. While the State agrees Brown has preserved error with respect to the players' statements, he has not with respect to Meeker's. At trial, defense counsel did not object to officer Boyer's testimony regarding Meeker's identification of Brown. We find Brown failed to preserve error on this issue, therefore we have nothing to review. See *State v. Kinkead*, 570 N.W.2d 97, 102 (Iowa 1997).

C. The Excited Utterance. The district court allowed officer Boyer to testify over Brown's objection regarding the players' identification of Brown at the Handimart. "Hearsay' is 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 inadmissible unless provided by the Iowa Constitution, statute, rules of evidence, or other rules of the Iowa Supreme Court. Iowa R. Evid. 802. At trial, officer Boyer testified the unnamed members of the Cedar Rapids *Kernels* stated "the individual who was placed in the back of our squad car was the subject that hit their friend out at Confetti's." This testimony was offered by the State to prove the truth of the matter asserted, by someone other than the players. Therefore, we must determine whether the testimony is admissible as an exception to the hearsay rule.

Iowa Rule of Evidence 803(2) provides an exception to the hearsay rule for an excited utterance, which 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." This exception is generally applicable to spontaneous statements made under the excitement of an event or condition, rather than upon deliberation or reflection. *State v. Shortridge*, 589 N.W.2d 76, 82 (Iowa App. 1998).

The application of the [exception] lies largely within the discretion of the trial court, which 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. Atwood, 602 N.W.2d 775, 782 (Iowa 1999) (quoting *State v. Mateer*, 383 N.W.2d 533, 535 (Iowa 1986)).

Officer Boyer had been provided with a description of the person involved in the fight, the vehicle he was riding in, and the license plate number of that vehicle. Said vehicle was stopped by a Marion police officer approximately five blocks from the scene of the fight. Brown was detained and officer Boyer proceeded to the area of the stop to investigate. Several members of the Cedar Rapids Kernels approached the police squad car during Boyer's investigation. They were "upset" and "agitated." Without any prompting or questioning by Boyer, the players identified Brown as the person who assaulted Fish.

We conclude this identification of Brown by the Kernels players qualifies as an exception to the hearsay rule. Specifically, we conclude the identification was an excited utterance. Iowa R. of Evid. 803(2); *Atwood*, 602 N.W.2d at 782; *Shortridge*, 589 N.W.2d at 82; *Mateer*, 383 N.W.2d at 535. First, the statements were made within one-half hour after the assault. *Mateer*, (statement made one

hour after the incident); *see also State v. Galvan*, 297 N.W.2d 344, 346 (Iowa 1980); *State v. Paulsen*, 265 N.W.2d 581, 586 (Iowa 1978). Second, officer Boyer testified in an offer of proof he did not question the players or attempt to elicit the statements. Instead, the players approached the squad car and the statements were volunteered. Third, the players were “upset” and “agitated” and speaking in loud voices. Lastly, the players identified Brown as the individual who had assaulted Fish.

We have carefully reviewed this matter and conclude the district court did not err in allowing the testimony pursuant to Iowa Rule of Evidence 803(2).

II. Ineffective Assistance of Counsel. Brown next contends his trial counsel was ineffective for failing to object to officer Boyer’s testimony Meeker identified Brown as the individual who assaulted Fish at Confetti’s.

We review a claim of ineffective assistance of counsel *de novo*. *State v. Carter*, 602 N.W.2d 818, 820 (Iowa 1999). Although we generally preserve such claims for postconviction relief, we will resolve them on direct appeal when the record sufficiently addresses the issues. *State v. Martin*, 587 N.W.2d 606, 609 (Iowa App. 1998).

To prevail on a claim of ineffective assistance of counsel, Brown must prove (1) his trial counsel breached an essential duty, and (2) he was prejudiced as a result. *State v. Homess*, 600 N.W.2d 294, 298 (Iowa 1999). If Brown fails to prove either element, we may affirm. *State v. Query*, 594 N.W.2d 438, 445 (Iowa App. 1999). Brown “must state the specific ways in which counsel’s performance was inadequate and identify how competent representation

probably would have changed the outcome." *State v. Astello*, 602 N.W.1d 190, 198 (Iowa App. 1999) (citing *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994)).

To prove his counsel breached an essential duty, Brown must prove his counsel's performance fell outside the spectrum of normal competency. *State v. Greene*, 592 N.W.2d 24, 29 (Iowa 1999). We presume counsel provided reasonable representation. *Wemark v. State*, 602 N.W.2d 810, 814 (Iowa 1999). "Improvident trial strategy, miscalculated tactics, and mistakes in judgment do not necessarily constitute ineffective assistance of counsel." *Id.* (citing *State v. Aldape*, 307 N.W.2d 32, 42 (Iowa 1981)). We will not find counsel's assistance ineffective when counsel makes decisions pursuant to a reasonable trial strategy. *State v. Johnson*, 604 N.W.2d 669, 673 (Iowa App. 1999). Moreover, "[c]ounsel is not ineffective when the issue counsel failed to raise has no merit." *State v. Westeen*, 591 N.W.2d 203, 207 (Iowa 1999) (citing *State v. Ceaser*, 585 N.W.2d 192, 195 (Iowa 1998)).

During the trial, the following exchange took place during the direct examination of Officer Boyer:

Q. At some point did one or more of the bouncers, or security, also come to the scene by the Handimart general location?

A. Yes.

Q. I think you talked about Steven Meeker?

A. The bouncer? Yes, that's correct.

Q. Did he identify -- well, did he have a chance to see Tory Brown?

A. Yes.

Q. Did he also identify him as the person that had committed the assault?

A. Yes.

Brown's counsel did not object to this testimony.

We must determine whether this evidence is hearsay. A prior statement by a witness is not hearsay if "[t]he declarant testifies at trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . one of identification of a person made after perceiving him." Iowa R. Evid. 801(d)(1)(C).¹ In his trial testimony, Meeker stated he identified Brown at the Handimart as the person who assaulted Fish. He was subject to cross-examination. Because Meeker testified to the identification and was subject to cross-examination, Officer Boyer's testimony is not hearsay pursuant to Iowa Rule of Evidence 801(d)(1)(C). We conclude Brown's counsel acted reasonably when he chose not to object to its admission. Therefore, he did not breach an essential duty.

Even if we were to find Brown's counsel breached an essential duty by failing to object to Officer Boyer's testimony, we find the evidence is merely cumulative. See *State v. McGuire*, 572 N.W.2d 545, 547-48 (Iowa 1997) (holding

¹ McCormick's learned treatise lends further support for this proposition:

(C) *Statements of identification.* When A testifies that on a prior occasion B pointed to the accused and said, "That's the man who robbed me," the testimony is clearly hearsay. If, however, B is present in court, testifies to the prior identification, and is available for cross-examination, the case fits within the present section. Admissibility of the prior identifications has long-standing case law support, often in the older cases without recognition of the hearsay problem.

² *McCormick on Evidence* § 251, at 119-21 (5th Ed. 1999).

a court will not find a statement prejudicial when substantially the same evidence comes into the record without objection); see also *State v. Holmes*, 325 N.W.2d 114, 116 (Iowa 1982) (deeming officer identification testimony merely cumulative where victim testified to identification at trial and was subject to cross-examination in a proceeding prior to adoption of Iowa Rule of Evidence 801(d)(1)(C)). Accordingly, we conclude Brown was not prejudiced by counsel's failure to object to the testimony.

AFFIRMED.

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