IN THE COURT OF APPEALS OF IOWA

No. 7-332 / 96-0596

000435

STATE OF IOWA,

Plaintiff-Appellee,

vs.

KELVIN DEVELL WILLFORM,

Defendant-Appellant.

FILED
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CLERK SUPREME COURT

Appeal from the Iowa District Court for Johnson County, Lynne E. Brady, Judge.

Defendant appeals from judgment and sentence entered, following a jury trial, for third-degree burglary. **AFFIRMED.**

Patrick E. Ingram of the Mears Law Office, Iowa City, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, J. Patrick White, County Attorney, and Anne Lahey, Assistant County Attorney, for appellee.

Heard by Sackett and Streit, JJ, and Habhab, S.J.*

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

HABHAB, S.J.

I. Statement of the Case. On May 10, 1995, a law enforcement officer arrived at Coraline Willform's home in response to a 911 call. Defendant Kelvin Willform, Coraline's ex-husband, was at the home to remove his belongings. Kelvin and Coraline disputed the ownership of some of the items, including an address book. Coraline appeared upset and told Officer Reynolds, "Don't leave until he's gone." She also stated Kelvin had abused her in the past. Officer Reynolds eventually escorted Kelvin from the home and told him not to return.

Later that evening, Coraline asked her neighbors, Jeffrey Mees and Heather Craddock, whom she had never met, to watch her home while she was gone. At approximately 8:30 or 9:00 p.m., Mees called 911 because they saw two men walking around the house and peering into the windows. Law enforcement officers arrived and found Kelvin and another individual in Coraline's home. A window in the back door had been broken, evidently from the outside, and a screen on the porch had been cut. Apparently, Kelvin had returned to obtain the address book and return the dog. The State charged Kelvin with third-degree burglary.

At trial Officer Reynolds testified, over defense counsel's objections, about Coraline's statement, "Don't leave until he's gone," and her statements that Kelvin had abused her in the past and the address book belonged to her. Mees and Craddock also testified. The court denied Kelvin's motion for directed verdict at the end of the State's case in chief.

Coraline, called as a witness by the defense, testified she gave Kelvin permission to enter the home and the address book belonged to him. Kelvin testified similarly. The court denied his motion for judgment of acquittal. The jury returned a guilty verdict for third-degree burglary. The court denied Kelvin's post-trial motion and sentenced him to an indeterminate five-year term of imprisonment, suspended it, and placed him on probation.

Kelvin appeals. He argues the court erred in admitting hearsay evidence from Officer Reynolds. He also asserts the testimony, even if it was admissible under an exception to the hearsay rule, should have been excluded as unfairly prejudicial. He claims the State, without the disputed evidence, did not present sufficient evidence to support his conviction.

The State argues in part that error was not preserved regarding the statement, "Don't leave until he's gone," because defense counsel did not object until after the evidence was presented, and defense counsel failed to move to strike and request the objection precede the answer. The State also contends defense counsel never argued that the prejudicial effect of the evidence outweighed its probative value and thereby waived that argument.

II. Discussion. We give the trial court broad discretion in evidentiary matters, disturbing its rulings only upon a showing of abuse. *State v. Howard*, 509 N.W.2d 764, 768 (Iowa 1993). We will not reverse a district court's determination regarding admissibility of evidence unless we find a clear abuse of discretion. *State v. Predka*,

555 N.W.2d 202, 204 (Iowa 1996). It is well established that failure to object to evidence or to move to strike it at the time the record is made and when the grounds for objection or motion to strike are first apparent precludes the party from asserting on appeal admitting the evidence was error. *State v. King*, 225 N.W.2d 337, 341 (Iowa 1975); *State v. Farnum*, 554 N.W.2d 716, 719 (Iowa App. 1996). We note counsel's objection to the testimony, "Don't leave until he's gone," was not followed by a motion to strike or a request that the objection precede the answer. *See State v. Brotherton*, 384 N.W.2d 375, 379 (Iowa 1986) (when an objection is late and follows the answer, a motion to strike, coupled with an application to have the objection precede the answer or an excuse for tardiness, must be made). Error which is not preserved is waived. *See State v. Heacock*, 521 N.W.2d 707, 710 (Iowa 1994). We determine Kelvin did not preserve error concerning this testimony and decline to address the issue of its admissibility on appeal.

Concerning the testimony about the ownership of the address book, we note Officer Reynolds testified the address book belonged to Coraline several questions before the specific testimony to which counsel objected, so the evidence already was in the record without objection. The officer offered other testimony concerning Coraline's statements about what belonged to her without objection, except for this last answer giving rise to the objection.

The excited utterance exception to the hearsay rule generally applies to statements made under the influence of the excitement of an incident rather than on

reflection or deliberation. *State v. Mateer*, 383 N.W.2d 533, 535 (Iowa 1986). Excited utterances need to be spontaneous in order to guarantee they are made under the influence of the incident rather than after deliberations. *See Bratton v. Bond*, 408 N.W.2d 39, 45 (Iowa 1987); *State v. Watts*, 441 N.W.2d 395, 398 (Iowa App.1989). A spontaneous statement is prompted by an event. *See Watts*, 441 N.W.2d at 398. Another factor to consider is whether the statement is contemporaneous with the event. *State v. Hy*, 458 N.W.2d 609, 610, (Iowa App. 1990); Iowa R. Evid. 803(2) ("made while the declarant was under the stress of excitement caused by the event or condition").

Officer Reynolds testified Coraline "was definitely upset" when he arrived. She appeared to be fearful. Kelvin was taking personal property, the ownership of which was in dispute. He refused to leave and had to be escorted from the home by Officer Reynolds. The statements made were not in response to questions posed by Officer Reynolds. They were not made after a period of reflection. They were made "under the stress of excitement" caused by Kelvin's presence and actions. The statements would be admissible under the excited utterance exception to the hearsay rule. Consequently, we determine the district court did not abuse its discretion in admitting the statement over defense counsel's objection.

The last testimony to which Kelvin objected concerns Coraline's statements about past domestic abuse. The objection specifically invoked the hearsay rule. The challenge to the court's ruling is limited to the specific ground of objection at trial.

State v. Kidd, 239 N.W.2d 860, 864 (Iowa 1976). If the hearsay rule is inapplicable under any theory, we will uphold the district court's ruling. *State v. Hilleshiem*, 305 N.W.2d 710, 712 (Iowa 1981). The record is clear the statement was offered to indicate why Coraline was so upset, not to prove the truth or falsity of the statement. *See State v. Leonard*, 243 N.W.2d 887, 890-91 (Iowa 1976). The statement also was offered to explain the officer's responsive conduct in remaining in the home and escorting Kelvin from the home. *State v. Coburn*, 315 N.W.2d 742, 746 (Iowa 1982) ("When an out-of-court statement, otherwise hearsay, is admitted, not to show the truth of what was said, but to explain responsive conduct, it is not regarded as hearsay."). Since the statement was not hearsay, the district court did not err in overruling the objection.

Having determined the district court did not abuse its discretion in admitting the testimony to which Kelvin objects, we address Kelvin's claim the evidence should have been excluded as unfairly prejudicial under Iowa Rule of Evidence 403. This rule does not protect against all evidence that is prejudicial or detrimental to a defendant's case, it only protects against evidence that is unfairly prejudicial. *State v. Plaster*, 424 N.W.2d 226, 231 (Iowa 1988); *State v. Howell*, 557 N.W.2d 908, 912 (Iowa App. 1996). Unfairly prejudicial evidence is that which "arouses [a jury's] sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action [causing] a jury to base its decision on something other than the

established propositions in the case." *State v. Hardy*, 492 N.W.2d 230, 234 (Iowa App. 1992); *see State v. Payton*, 481 N.W.2d 325, 327 (Iowa 1988).

In addition, error may not be predicated on a ruling which admits evidence unless a substantial right of the opposing party is affected and a timely objection was made which enunciated the specific grounds of the objection, unless the grounds were otherwise apparent from the record. Iowa R. Evid. 103(a). The objection must generally be specific enough to alert the trial court to the legal question or problem raised, and enable opposing counsel to take any possible corrective action to remedy the defect. *State v. Williams*, 207 N.W.2d 98, 109-10 (Iowa 1973). The objection was for hearsay. Kelvin is limited on appeal to the grounds urged at trial. *State v. Hepperle*, 530 N.W.2d 735, 739 (Iowa 1995); *State v. LeCompte*, 327 N.W.2d 221, 223 (Iowa 1982). Kelvin failed to preserve the issue of unfair prejudice for appeal. Even if Kelvin had preserved this issue, we determine the testimony admitted did not cause the jury to render a verdict on an improper basis instead of based on the evidence adduced at trial.

Kelvin next asserts the evidence in the State's case in chief is insufficient to support his conviction if the evidence complained of is excluded and, therefore, the district court erred in not granting his motion for directed verdict at the close of the State's case. We disagree. In ruling upon a defendant's motion for a directed verdict, the court views the evidence in a light most favorable to the State and accepts reasonable inferences from the evidence which support the verdict. *State v. Serr*, 322

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N.W.2d 96, 100-01 (Iowa App. 1982). If substantial evidence supports each element of the charge, the court must submit the case to the jury for determination. *Id.* at 101. To be substantial, the evidence must raise a fair inference of guilt. *State v. Lewis*, 242 N.W.2d 711, 724 (Iowa 1976). In this case, the jury was instructed that the State had to prove Kelvin Willform broke into the house without permission with the intent to commit theft.

In our review of the evidence, this court views the evidence in the light most favorable to the State regardless of whether it is contradicted and every legitimate inference that may be fairly and reasonably deduced from it must be carried to the aid of the evidence. *Id.* at 724. Even if the testimony complained of were excluded, the record contains substantial evidence, without objection, supporting each element of the charge. The district court correctly denied Kelvin's motion for directed verdict made at the close of the State's case in chief. Since there is substantial evidence in the State's case in chief, and much more evidence was presented during the defense and the rebuttal portions of the trial, the district court correctly denied Kelvin's motion for directed verdict made at the close of all evidence.

Finally, Kelvin argues he was prejudiced by the improper admission of evidence. We disagree. To establish prejudice, Kelvin must demonstrate a reasonable probability that, but for the error, the outcome of the trial would have been different. *State v. Crone*, 545 N.W.2d 267, 270 (Iowa 1996); *State v. Spurgeon*, 533 N.W.2d 218, 220 (Iowa 1995). Since we already have determined substantial evidence exists

in the record to convict Kelvin, even if the testimony objected to is excluded, Kelvin cannot demonstrate a reasonable probability the outcome of the trial would have been different.

For the reasons set forth above, we affirm the decisions of the district court in all respects.

AFFIRMED.

Streit, J., concurs; Sackett, J., specially concurs without opinion.