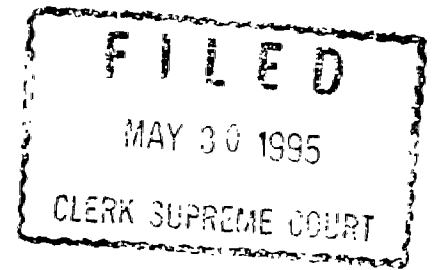


IN THE COURT OF APPEALS OF IOWA

No. 5-153 / 94-0645



STATE OF IOWA,

Appellee,

vs.

GARY LEE PRIMMER,

Appellant.

Appeal from the Iowa District Court for Black Hawk County, James L. Beeghly,
Judge.

Primmer appeals from judgment and sentence, following a jury trial, entered
upon his conviction of child endangerment causing serious injury. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Kevin Cmelik, Assistant State
Appellate Defender, 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.

Heard by Donielson, C.J., and Hayden and Sackett, JJ.

HAYDEN, J.

At about 10 a.m. on January 18, 1993, Gary Lee Primmer was lying in bed. His son and his girlfriend's son, R.R., were jumping on the bed. Primmer told the boys to stop. Moments later, Primmer called R.R.'s mother into the room. R.R. was lying on the bed with a twisted leg. Primmer stated he heard a popping sound just before the leg twisted.

R.R. was taken to the emergency room where it was discovered he had a spiral fracture to his right femur. R.R.'s mother told personnel R.R. had been jumping on the bed. Primmer relayed the same story.

Officer Scott Lake asked R.R. how he hurt his leg. R.R. said something to the effect of "big Gary did it" and "I was jumping on the bed." Officer Lake later interviewed Primmer, who eventually stated he was holding R.R.'s ankle at the time he heard the popping sound. He denied twisting R.R.'s leg.

Primmer was charged with child endangerment causing serious injury. At trial, Primmer objected to Officer Lake's testimony about R.R.'s statements. The trial court overruled the objections, presumably as excited utterances. The State offered rebuttal testimony of Janet Ash, the mother of R.R.'s hospital roommate. Ash was allowed to testify, over Primmer's hearsay objections, she overheard R.R. respond to his father's question of how he hurt his leg with "big Gary did it." She also testified she overheard R.R. whining in his sleep, "Don't hurt me, Gary, don't hurt me."

Primmer was convicted as charged and now appeals. Primmer argues (1) the trial court admitted impermissible hearsay; and (2) he received ineffective assistance of counsel.

I. Hearsay Evidence.

Defendant claims the trial court admitted impermissible hearsay testimony from two witnesses. We will discuss each witness's testimony in turn.

A. Officer Lake's Testimony.

The first instance of alleged error is the statement the victim made to Officer Lake. Officer Lake spoke to the victim about twenty-four hours after the incident in question. Upon seeing the boy's cast, the officer asked the victim "how he hurt his leg." According to the officer's testimony, the victim replied, "something to the effect that big Gary did it" when the victim had been jumping on a bed.

The State argues the testimony was hearsay, but was admissible under the "excited utterance" exception to the hearsay rule. "Hearsay is admissible as an excited utterance if the statement relates to a startling event or condition and was made while the declarant was under the stress of excitement created by that event or condition." *State v. Murphy*, 462 N.W.2d 715, 717 (Iowa App. 1990) (citation omitted); Iowa R. Evid. 803(2). The trial court has discretion to decide if the hearsay comes within the excited utterance exception. *Murphy*, 462 N.W.2d at 717 (citation omitted).

Defendant argues the statement at issue cannot be considered to be a spontaneous or impulsive reaction to the incident at issue, because approximately twenty-four hours elapsed between the incident at issue and the hearsay statement. However, our supreme court has allowed admission of excited utterances in situations with comparable lapses of time. *See, e.g., State v. Galvan*, 297 N.W.2d 344, 347 (Iowa 1980) (two days); *State v. Stafford*, 237 Iowa 780, 785-87, 23 N.W.2d 832, 835-36 (1946) (fourteen hours). Moreover, lapse of time is only one of several relevant factors the trial court should consider in determining the spontaneity of declarants' out-of-court statements. *State v. Mateer*, 383 N.W.2d 533, 535 (Iowa 1986); *State v. Paulsen*, 265 N.W.2d 581, 586 (Iowa 1978). Other factors properly to be considered include the extent to which questioning elicited statements that otherwise would not have been volunteered, the age and condition of the declarant, the characteristics of the event being described, and the subject matter of the statements. *Mateer*, 383 N.W.2d at 535 (citing *United States v. Iron Shell*, 633 F.2d 77, 85-86 (8th Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981)).

We apply these factors to the instant case. The statement was not volunteered, but instead was a direct result of questioning by the officer. In fact, being questioned by the police may itself be a startling event in the mind of a small child. Further, at the time the statement was made the victim was three-years-old and in the hospital with a broken leg. Certainly, breaking one's leg is a startling event, and this is especially true

for a young child. Considering the shocking nature of the assault and the age of the declarant, we believe the hearsay statement had sufficient indicia of reliability. *See Galvan*, 297 N.W.2d at 346-47 (although two days had passed from the time of the event, child was only two-years-old and it was "close enough to the transaction so that the trial court could have believed any presumption of fabrication was excluded"); *State v. Kiehn*, 199 N.W.2d 594, 596 (S.D. 1972) (lapse of time is much less significant when child-declarant is so young as "to render improbable that [his or] or her utterance was deliberate and its effect premeditated") (internal quotation omitted); *State v. Teynor*, 414 N.W.2d 76, 86 (Wis. Ct. App. 1987) ("Young children produce declarations 'free of conscious fabrication' for a longer period after the incident than do adults. [citation] It is unlikely that a young child will review an incident and calculate the effect of his or her statement."). Under this record, we cannot say the trial court abused its discretion in allowing the testimony. We therefore affirm the trial court on this issue.

B. Janet Ash's Testimony.

Defendant also challenges the testimony of Janet Ash, the mother of R.R.'s hospital roommate. Ash was allowed to testify, over Primmer's hearsay objections, she overheard R.R. respond to his father's question of how he hurt his leg with "big Gary did it." She also testified she overheard R.R. whining in his sleep, "Don't hurt me, Gary, don't hurt me."

Once again, the State urges us to apply the excited utterance exception to the hearsay rule. We address each statement separately.

In the case of the statement from the victim to his father, we decline to apply the excited utterance exception. Although we find it is a close question, we are concerned with the reliability of the testimony. In this situation the child's father had been sitting with the child all night. The animosity between the child's father and defendant is well-established in the record. It is possible he could have had an influence on what the victim said.

We also decline to apply the excited utterance exception to the murmurs of the victim in his sleep. There is Iowa precedent concerning the admission of so-called "dream" testimony. Our supreme court disapproved of the admission of identification testimony which was fortified by the victim's dreams rather than his actual observations of the assailant. *State v. Wells*, 437 N.W.2d 575, 577-78 (Iowa 1989). Again, we are concerned with the reliability of the child's statements. The statements were made during sleep, after confrontations between his father and his mother's boyfriend, and after questioning by police, doctors, nurses, and social workers.

Our decision Ash's testimony contained inadmissible hearsay does not end our analysis. We must further decide if admission of this testimony prejudiced defendant. *See State v. Anderson*, 517 N.W.2d 208, 214 (Iowa 1994) ("Absent any showing of prejudice, there is no basis upon which to predicate a reversal of the conviction.")

It is well-established the admission of hearsay evidence over a proper objection is presumed to be prejudicial error unless the contrary is affirmatively established. *State v. Sowder*, 394 N.W.2d 368, 372 (Iowa 1986) (citations omitted); *State v. Brown*, 341 N.W.2d 10, 15 (Iowa 1983) (citations omitted). The contrary is established when the record shows the challenged evidence did not impact on the jury's finding of guilt. *See State v. Nims*, 357 N.W.2d 608, 609 (Iowa 1984). The record here easily qualifies.

Defendant admitted he had grabbed the victim's ankle as the victim jumped on the bed, right before the victim fell. The State's medical evidence reflected defendant had twisted the victim's leg with great force, thereby breaking the leg. The intentional and knowing nature of defendant's action in breaking the victim's leg was established beyond a reasonable doubt.

Because no prejudice resulted from admission of the hearsay testimony, we affirm the trial court on this issue.

II. Ineffective Assistance of Counsel.

Defendant also alleges he received ineffective assistance of counsel. Where the record on direct appeal is not adequate to permit us to resolve the issue, we preserve the defendant's claim for postconviction proceedings so the facts may be so developed. *State v. Koenighain*, 356 N.W.2d 237, 238 (Iowa App. 1984). This also gives the allegedly-ineffective attorney the opportunity to explain his or her conduct. *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978). We conclude there is an inadequate record

for us to adjudicate defendant's claim without counsel's explanation for his/her conduct.

We preserve defendant's ineffective assistance of counsel claim for a later proceeding.

We affirm defendant's conviction.

AFFIRMED.