

IN THE COURT OF APPEALS OF IOWA

No. 8-483 / 97-1870

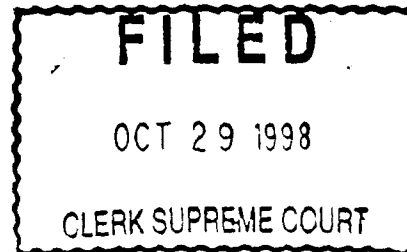
STATE OF IOWA,

Plaintiff-Appellee,

vs.

PETER MARTINEZ,

Defendant-Appellant.



Appeal from the Iowa District Court for Muscatine County, Patrick J. Madden and David J. Sohr, Judges.

Defendant appeals from judgment and sentence entered for enhanced domestic abuse assault. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Martha J. Lucey, Assistant State Appellate Defender, and Lori Loftsgard, Student Intern, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, Richard R. Phillips, County Attorney, and Christine Dalton, Assistant County Attorney, for appellee.

Heard by Sackett, P.J., and Huitink and Vogel, JJ.

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SACKETT, P.J.

Defendant-appellant Peter Martinez appeals following his conviction for enhanced domestic abuse assault. Defendant contends his conviction should be reversed because the district court improperly admitted hearsay evidence. We affirm.

Police came to where defendant was allegedly assaulting Jamie Tompkins. After the incident, Tompkins went to the police station where she gave an interview implicating defendant. Later, Tompkins recanted her statement in certain respects and said she lied in the initial interview to get defendant and his family out of her life.

The State did not call Tompkins as a witness, though she was available and could have been called. The State did, however, introduce a tape recording of Tompkins' interview at the police station. The district court admitted it under the residual hearsay exception.

Defendant contends the district court abused its discretion in admitting the tape recording. We generally review a question of the admissibility of evidence for an abuse of discretion. *State v. Rojas*, 524 N.W.2d 659, 662 (Iowa 1994). To the extent a constitutional issue is involved, we make an independent evaluation based on the totality of the circumstances, which amounts to a de novo review. *Id.*; see also *Idaho v. Wright*, 497 U.S. 805, 819, 110 S. Ct. 3139, 3148, 111 L. Ed. 2d 638, 654-55 (1990).

Hearsay is generally inadmissible. However, some hearsay statements are admitted, as they are considered more reliable. Iowa Rule of Evidence 803(24)

provides an exception for admission of hearsay, even when the declarant is available as a witness. That section provides:

(24) Other Exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Iowa R. Evid. 803(24).

The requirements for admissibility under this rule are five-fold: trustworthiness, materiality, necessity, service of the interests of justice, and notice. *Rojas*, 524 N.W.2d at 662-63; *State v. Kone*, 557 N.W.2d 97, 100 (Iowa App. 1996). The residual exception is to be used "very rarely, and only in exceptional circumstances" to justify the admission of hearsay evidence. *State v. Weaver*, 554 N.W.2d 240, 247 (Iowa 1996); *State v. Brown*, 341 N.W.2d 10, 14 (Iowa 1983).

Defendant contends the trial court does not do the weighing and the balancing. Defendant further claims the district court judge did not listen to the tape recording or read the deposition given by Tompkins which contradicted the statement she gave on the tape recording. Defendant further advances the district court relied only on the representation of the prosecutor that the statement was reliable.

In *Ohio v. Roberts*, 448 U.S. 56, 65, 100 S. Ct. 2531, 2538, 65 L. Ed. 2d 597, 607-08 (1980), the Supreme Court set forth a general approach for determining the admissibility of statements under an exception to the hearsay rule which also squares with the confrontation clause: (1) the prosecution must either produce, or demonstrate the unavailability of the declarant (sometimes referred to as a rule of necessity); and (2) once that is shown, only hearsay marked with such "indica of reliability" so as not to defeat the general purpose underlying the general rule is admissible. Reliability can be inferred if the hearsay evidence falls within a "firmly" rooted hearsay exception. *Id.* at 66, 100 S. Ct. at 2539, 65 L. Ed. 2d at 608. In other cases, the evidence must be excluded unless a showing is made the statement carries particularized guarantees of trustworthiness. *Id.*

Defendant first contends a statement to a police officer does not carry an indica of reliability. Defendant advances the statement was made at the police station in response to questions of the interviewing police officer, which negates against the State's position. The police officer taking Tompkins' statement did not testify nor did the district court listen to the tape recording or review Tompkins' later deposition. We agree with defendant the State did not overcome the presumptive unreliability of Tompkins' statement as there was little evidence to establish circumstantial evidence of its trustworthiness. *See State v. Nance*, 533 N.W.2d 557, 560-61 (Iowa 1995).

Our inquiry does not end here. The State also contends the statement was admissible under the excited utterance exception.

Iowa Rule of Evidence 803 provides, in part:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

....

(2) Excited Utterance. 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.

Iowa R. Evid. 803(2).

Excited utterances "must meet a requirement of spontaneity in order to possess a circumstantial guarantee of trustworthiness for admissibility." *State v. Watts*, 441 N.W.2d 395, 398 (Iowa App. 1989).

The following factors are considered when judging spontaneity: the nature of the startling event, whether the use of questions led to statements which otherwise would not have been made, the age and condition of the declarant, the subject matter of the statements, and the lapse in time between the event and the statements. *State v. Hy*, 458 N.W.2d 609, 611 (Iowa App. 1990).

The recording was made under questioning about forty-five minutes after the incident. The time lapse does not foreclose the admission of the evidence if the other requirements for admission are satisfied. *See State v. Augustine*, 458 N.W.2d 859, 861 (Iowa App. 1990). The district court did not have the benefit of the testimony of the officer taking the statement nor was the tape recording played before ruling on the motion. The absence of such testimony negates against a finding the statements were an excited utterance.

The State next advances the error, if any, was not prejudicial and we agree. Tompkins testified as a witness for defendant. Therefore, defendant had an opportunity to confront and examine Tompkins regarding the recording. Thus, the essential purpose of the confrontation clause to secure the witness for cross-examination by defendant was met. See *State v. Kramer*, 231 N.W.2d 874, 880 (Iowa 1975).

Defendant has not advanced the State's case would not have been supported by substantial evidence had the statement been stricken. Defendant did not make a motion to dismiss at the close of the State's evidence. There was substantial evidence to support the conviction even if Tompkins' tape recorded statement had not been admitted. Defendant has failed to show any prejudice.

We affirm.

AFFIRMED.