

IN THE SUPREME COURT OF IOWA
Supreme Court No. 19-0454

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JACOB A. BOOTHBY,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR CLINTON COUNTY
THE HONORABLE NANCY S. TABOR, JUDGE

APPELLEE'S BRIEF

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

I. Trial counsel effectively represented the defendant.

Authorities

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ROUTING STATEMENT

This case can be decided based on existing legal principles. Transfer to the Court of Appeals would be appropriate. Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

Nature of the Case

Jacob Boothby appeals his convictions for assault with a dangerous weapon and third-degree criminal mischief. The Honorable Nancy S. Tabor presided over the trial. The issues in this appeal focus on the effectiveness of trial counsel's representation.

Course of Proceedings

The State accepts the defendant's course of proceedings as adequate and essentially correct. Iowa R. App. P. 6.903(3).

Facts

Shortly before 5 a.m. on the morning of November 14, 2017, Bernadette Chell drove her boyfriend, Steve Duvall, to work in Rock Island. Tr. p. 89, line 13 through p. 91, line 8. The couple, along with their three dogs, left their home in Toronto, Iowa, and headed out on a county road. Tr. p. 88, line 1 through p. 89, line 2. Chell was driving her silver Chevrolet Trailblazer. Tr. p. 89, lines 9-18.

After driving a short distance on the two-lane road, Duvall noticed headlights driving toward them. Tr. p. 91, line 3 through p. 92, line 19. It was unusual to meet traffic on the road at such an early hour. Tr. p. 91, line 3 through p. 92, line 19. Duvall described the approaching vehicle as a silver/gray SUV. Tr. p. 91, lines 9-19. The oncoming SUV passed Chell and Duvall and turned around to follow the Trailblazer. Tr. p. 92, line 13 through p. 93, line 2. The gray SUV sped up and Chell slowed to allow the other SUV to pass. Tr. p. 92, line 13 through p. 93, line 2. The gray SUV did not pass Chell and instead rammed the Trailblazer. Tr. p. 92, line, 13 through 93, line 2. Chell screamed and her dogs went “nuts.” Tr. p. 92, line 13- through p. 93, line 2. Chell’s vehicle was thrust forward from the hit. Tr. p. 93, line 23 through p. 94, line 3. Chell was crying and screaming. Tr. p. 93, line 23 through p.94, line 3. There was a second impact a minute or two later when the gray SUV rammed Chell’s SUV again. Tr. p. 93, line 3 through p. 94, line 11. The second impact was harder. Tr. p. 94, lines 12-20. Chell tried to get away from the gray SUV and maintain control over her own vehicle. Tr. p. 94, line 12 through p. 95, line 5. The gray SUV drove away from the scene. Tr. p. 95, lines 1-10.

Duvall called 911 to report the incident. Tr. p. 112, line 22 through p. 113, line 15. Duvall and Chell were told to stay at the scene and wait for officers to arrive. Tr. p. 113, lines 8-15.

A Clinton County Sheriff's deputy arrived about forty minutes later. Tr. p. 113, line 16 through p. 114, line 10. Neither Duvall nor Chell knew who hit them. Tr. p. 93, lines 17-19, p. 100, line 21 through p. 101, line 1, p. 114, lines 6-11. They could only identify the type of vehicle; a gray SUV. Tr. p. 96, lines 15-17.

After the officer arrived, a neighbor walked up to the scene. Tr. p. 105, line 20 through p. 106, line 1, p. 113, line 25 through p. 114, line 2. The neighbor, Shawn Barten, provided some information to the officer. Tr. p. 125, line 14 through p. 127, line 13. Barten saw the patrol car's flashing lights and thought that something may have happened to his friend, Shalan Miller. Tr. p. 124, line 15 through p. 125, line 10. He thought that Miller had been in an accident and wanted to check on her. Tr. p. 125, line 1 through p. 126, line 10.

Miller borrowed a vehicle from Barten because her car broke down. Tr. p. 121, line 16 through p. 122, line 16. Barten loaned Miller an Oldsmobile Bravada and she was supposed to return to his house but had not. Tr. p. 121, line 16 through p. 124, line 9, 15-19. Miller

had an on again/off again dating relationship with the defendant, Boothby. Tr. p. 120, line 18 through p. 121, line 5. Boothby was upset that Miller was at Barten's house and called or texted them over 150 times between November 13th and November 14th. Tr. p. 122, line 17 through p. 123, line 23, p. 133, line 18 through p. 134, line 10, Exh. 10; Conf. App. 5-26. Boothby told Barten he would "kick his ass." Tr. p. 133, lines 1-4.

Clinton County Sheriff's deputy Jessup Schroeder went to Boothby's residence in late November of 2017 to speak to him. Tr. p. 151, line 11 through p. 152, line 15. Boothby was not home but he saw a silver Chevrolet Blazer in the driveway missing its front bumper. Tr. p. 151, line 23 through p. 152, line 15, 21 through p. 155, line 15, Exhs. 1-2; App. 8-9. Deputy Schroeder met with the defendant at his residence on December 7, 2017, and discussed the incident. Tr. p. 155, line 19 through p. 156, line 22. The deputy asked Boothby if he hit Chell's vehicle. Exh. 13, video 3:55-6:07. Boothby denied any involvement in the crime. Exh. 13, video 14:38-15:50, 17:40-18:20, 22:00-27:50. Boothby, however, gave the officer the broken front bumper from his vehicle. Tr. p. 161, line 11 through p. 163, line 5. Deputy Schroeder also obtained the defendant's cell

phone records from November 13 and 14, 2017. Tr. p. 163, line 23 through p. 164, line 20. These records showed that Boothby's cell phone was near the location at the time an SUV struck Chell's vehicle. Tr. p. 163, line 10 through p. 164, line 20, Exhs. 10-12; Conf. App. 5-31; App. 11. Additional facts will be discussed below as relevant to the State's argument.

ARGUMENT

I. Trial counsel effectively represented the defendant.

Preservation of Error

The State does not contest error preservation. *State v. Ondayog*, 722 N.W.2d 778, 784 (Iowa 2006) (ineffective assistance of counsel claims are not bound by traditional error preservation rules).

Standard of Review

Because ineffective-assistance-of-counsel claims are rooted in the Sixth Amendment, an appellate court reviews them de novo. *State v. Thorndike*, 860 N.W.2d 316, 319 (Iowa 2015).

Merits

Boothby cannot show counsel was ineffective. Boothby contends that counsel was ineffective in failing to object to Deputy Schroeder's testimony regarding Boothby's cell phone site location. He further argues that an expert must testify about cell phone

transmission technology and that the deputy does not qualify as an expert. Finally, Boothby argues that counsel should have objected to the admission of the cellphone records as inadmissible hearsay. All of Boothby's claims must be rejected. He cannot establish either a breach of duty or prejudice from counsel's actions.

“The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686 (1984). A defendant claiming ineffective assistance must prove both that counsel's performance was deficient and that prejudice resulted. *Id.* at 687.

The test for the first element is objective: whether counsel's performance was outside the range of normal competency. *Millam v. State*, 745 N.W.2d 719, 721 (Iowa 2008). Counsel is presumed to have acted competently and within the wide range of reasonable professional assistance. *DeVoss v. State*, 648 N.W.2d 56, 64 (Iowa 2002). To overcome this presumption, the defendant must present an affirmative basis establishing inadequate representation. *Millam*, 745 N.W.2d at 721.

The test for the second element is whether the defendant can prove there is a reasonable probability that, without counsel's errors, the outcome of the proceedings would have been different. *Id.* at 722; *Ledezma v. State*, 626 N.W.2d 134, 143 (Iowa 2001). A reviewing court may dispose of an ineffective-assistance claim if the defendant fails to prove *either* the duty or the prejudice prong. *State v. Lane*, 743 N.W.2d 178, 184 (Iowa 2007).

A. Expert testimony.

In his first challenge, Boothby claims that “an expert is needed to discuss cell phone transmission technology.” Def. Brief at 23. This claim is not supported by the Rules of Evidence or the law.

To be admissible under the Iowa Rules of Evidence, expert evidence need only (1) be relevant, (2) be in the form of “scientific, technical, or other specialized knowledge [that] will assist the trier of fact to understand the evidence or to determine a fact in issue,” and (3) the expert must be qualified by “knowledge, skill, experience, training, or education.” *Leaf v. Goodyear Tire & Rubber Co.*, 590 N.W.2d 525, 532-33 (Iowa 1999); Iowa Rs. Evid. 5.402, 5.702. Regarding qualification, the expert need only be qualified by a showing of one of the five categories: knowledge, skill, experience,

training, or education. *Ranes v. Adams Laboratories, Inc.*, 778 N.W.2d 677, 687 (Iowa 2010). “[A] particular degree or type of education is not needed.” *Id.* (citing *Leaf*, 590 N.W.2d at 535). “[A]n expert does not need to be a specialist in the area of the testimony as long as the testimony is within the general area of expertise of the witness.” *Id.* (citing *Mensink v. Am. Grain*, 564 N.W.2d 376, 379 (Iowa 1997)).

The Iowa Court of Appeals has considered and rejected Boothby’s claim in three prior cases: *State v. Garcia*, No. 17-011, 2018 WL 3913668 (Iowa Ct. App. Aug. 15, 2018), *State v. Benson*, No. 15-1895, 2016 WL 7393891 (Iowa Ct. App. Dec. 21, 2016), and *State v. Rendon*, No. 15-1832, 2016 WL 6270092 (Iowa Ct. App. Oct. 26, 2016). In each of these cases, the defendants argued that the officers who testified about the cell phone technology that placed the defendant near the respective crime scenes was improper because the officers were not experts. *Garcia*, 2018 WL 391668, at *1-2; *Benson*, 2016 WL 7393891, at *3; *Rendon*, 2016 WL6270092, at *4. In each case, the court found that expert testimony was not necessary. *Garcia*, 2018 WL 391668, at *1-2; *Benson*, 2016 WL 7393891, at *3;

Rendon, 2016 WL6270092, at * 4. In light of these cases, Boothby cannot show counsel breached a duty in failing to object.

Boothby must also demonstrate prejudice. To do so, he must establish that had counsel lodged the objection, the district court would have sustained the objection, and the result of the proceeding would have been different. He cannot do so because there is no basis for the court to have sustained the objection given the rules of evidence and the case law. The officer was qualified to testify about the cell phone site location.

B. The officer’s qualifications.

Next, Boothby argues that Deputy Schroeder was not “qualified to testify about Boothby’s location based on the cellphone records.”

Def. Brief at 36. The *Garcia*, *Benson*, and *Rendon* cases support a different conclusion. In *Garcia*, the Court of Appeals stated:

A witness is qualified to assist the jury as an expert to resolve a disputed fact if the witness has adequate ‘knowledge, skill, experience, training, or education’ on the subject matter in question.’

Ranes, 778 N.W2d at 687. The “expert does not need to be a specialist in the area of the testimony as long as the testimony is within the general area of expertise of the witness.” *Benson*, No. 15-1895, 2016 WL 7393891, at * 3 (Iowa Ct. App. Dec. 21, 2016)

(concluding a detective “possessed sufficient knowledge and training to assist the jury in interpreting . . . cell phone records); *State v. Rendon*, No. 15-1832, 2016 WL 6270092, at *4 (Iowa Ct. App. Oct. 26, 2016) (concluding detective had “sufficient knowledge, skill, experience, and training to interpret the cell phone records and to assist the jury in understanding those records”).

In this case, Deputy Schroeder testified he had been at the Clinton County Sheriff’s Office for 24 years. Tr. p. 149, line 13 through p. 150, line 6. Before he worked in Clinton County, he was a law enforcement officer in Jackson County. Tr. p. 149, line 13 through p. 150, line 6. At the time of the offense, Deputy Schroeder was assigned to the detective bureau. Tr. p. 150, lines 11-14. He testified that he received “quite a bit” of specialized training in internet crimes against children, crime scene processing, investigating assaults, and interview techniques. Tr. p. 150, line 14 through p. 151, line 10. During his investigation of this case, Deputy Schroeder sought and obtained a search warrant for Boothby’s cell phone records. Tr. p. 163, lines 6-19. The deputy reviewed the call records from Boothby’s cell phone provider between November 13-14, 2017. Tr. p. 163, line 23 through p. 164, line 20. These records

consisted of 19 pages from US Cellular and included instructions and definitions to aid in explaining the records. Exh. 10; Conf. App. 24.

The exhibit states:

To determine cell tower location, you must first determine whether the call is outgoing or incoming. If the call is outgoing, use the number under Orig Clli, if incoming, use the Term Clli. If the call is incoming and is not answered, (AN=N) the Term Clli will not show location, since there was no connection. You also want to pay attention the to **Call type** L-M, or L-L. If your target routs through a land line trunking it will not show a tower location. When using the Clli code, please drop the last number, ex 6752 is actually 675 Sector Y. The last number is the sector 1=X sector O'N 2=Y sector 120', and 3= Z sector 240'. Compare this number to the Cell Position Number found on the accompanying sheets. Please note the address is for cell towers only, a phone could be within 3 to 5 miles of the tower.

Exh. 10, p. 20; Conf. App. 24 (original emphasis). With the exhibit, the instructions, and exhibit 11, a spreadsheet of the cell phone towers that Boothby's phones used on November 13-14, 2017, Deputy Schroeder "possessed sufficient knowledge and training to assist the jury in interpreting . . . cell phone records." *Benson*, No. 15-1895, 2016 WL 7393891, at * 3. Counsel breached no duty in failing to challenge Deputy Schroeder's qualifications.

Boothby must also establish prejudice. To do so, he must establish that if counsel had objected to the officer's qualifications, the court would have sustained the objection, and the result of the

proceeding would have been different. On this record, he cannot do so. The officer spent nearly a quarter of a century in law enforcement investigating crimes. Tr. p. 149, line 13 through p. 150, line 6. In addition, the cell records provided instructions on how to interpret the communications. Exh. 10, p. 20; Conf. App. 24. The State also introduced exhibit 11, which was the location of the individual towers, and exhibit 12 which was a map of the towers' location and reach and showed Boothby's residence and Shawn Barten's residence. Exhs. 11, 12; Conf. App. 28-31; App. 11. These exhibits provided the jury with sufficient information from which it could see that the defendant's phone was near the location where a gray SUV hit Bernadette Chell, Steve Duvall, and their dogs from behind. Exhs. 10, 11, 12; Conf. App. 5-31; App. 11. Boothby cannot demonstrate prejudice.

C. Hearsay (phone records)

Finally, Boothby claims counsel was ineffective in failing to object to the admission of the cell phone records. Boothby argues that the records were hearsay and not admissible under the business records exception. Def. Brief at 40. Once again, Boothby cannot demonstrate counsel's ineffectiveness.

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. 5.801(c). A “declarant” is defined as “a *person* who makes a statement.” Iowa R. Evid. 5.801(b) (emphasis added). The State submits that the phone records are not hearsay because they had to be generated by a computer when the calls were placed through a cell phone tower. Exh. 10; Conf. App. 5-26. The records were not made by a human declarant. *State v. Reynolds*, 746 N.W.2d 837, 843 (Iowa 2008); *State v. Colwell*, NO. 05-0280, at *1-2, 2006 WL 468732 (Iowa Ct. App. Mar. 1, 2006) (because such records are not the counterpart of a statement by a human declarant, which should ideally be tested by cross-examination of that declarant, they should not be treated as hearsay but rather their admissibility should be determined on the basis of the reliability and accuracy of the process involved). If the phone records were not made by a human declarant, it is not hearsay.

Even if the court finds that the cell phone records constitute hearsay, the business records exception applies. The business records exception allows the admission of records kept in the course of a regularly conducted business activity unless the source of information

or the method or circumstances of preparation indicate lack of trustworthiness. Iowa R. Evid. 803(6). To be admissible under the exception, the records must be (1) made at or near the time of the act, (2) made by, or from information transmitted by, a person with knowledge, (3) kept in the course of regularly conducted business activity, and (4) the regular practice of that business activity was to make a record. *Id.* These requirements must be shown by “the testimony of the custodian or other qualified witness.” *Id.* This exception should be construed liberally to allow introduction of such records. *Graen's Mens Wear, Inc. v. Stille–Pierce Agency*, 329 N.W.2d 295, 298 (Iowa 1983).

Moreover, the cell phone records are self-authenticating. Iowa Rule of Evidence 5.902(11) provides:

Certified domestic records of a regularly conducted activity. The original or a copy of a domestic record that meets the requirements of rule 5.803(6)(A) to (C) as shown by a certification of the custodian or another qualified person that complies with a federal statute, a rule prescribed by the United States Supreme Court, a statute of Iowa or any other state or territory of the United State, or other Iowa Supreme Court rule. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record – and must make the record and certification available for inspection so that the party has a fair opportunity to challenge them.

Iowa R. Evid. 5.902(11).

Exhibit 10, the cell phone records, meet the requirement of Iowa Rule of Evidence 5.803(6). That is, the cell phone records are records of a “regularly conducted business activity.” Iowa R. Evid. 5.803(6). The last page of the exhibit is a “certificate of authenticity.” Exh. 10; Conf. App. 26. The subpoena specialist, Solangia Haddock, certified that:

such records were made, at or near the time of the occurrence of the matters set forth, by (or from information transmitted by) a person with knowledge of those matters;

such records were kept in the course of a regularly conducted business activity;

the business activity made such records as a regular practice;

if such record is not the original, such record is a duplicate of the original.

Exh. 10; Conf. App. 26. The subpoena specialist also “certified under penalty of perjury that the above statements were true and correct.

Exh. 10; Conf. App. 26. Exhibit 10 constitutes a record of “regularly conducted activity” and meets the business record exception to the hearsay rule.

Additionally, the cell phone records are records of a “regularly conducted activity” under rule 5.902(11) and the State provided sufficient notice to the defendant of its intent to offer the exhibit.

According to the online docket, the State filed proposed exhibit 10 on February 22, 2019. *See* online docket. Trial in the matter began on February 25, 2019. Tr. p. 1, lines 1-25. Thus, the State provided the defendant with a copy of the exhibit, sufficient time to review it, and lodge an objection before trial. The cell phone exhibit is a business record and an exception to the hearsay rule. Counsel acted within the range of competence in electing not to object to the exhibit because the objection would have been meritless. *State v. Rice*, 543 N.W.2d 884, 888 (Iowa 1996). If there is no breach of duty, there is also no prejudice. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997) (a court may dispose of an ineffective assistance of counsel claim when the defendant fails to prove either the breach of duty or prejudice prong). Boothby's claims must be rejected.

CONCLUSION

The defendant's convictions must be affirmed.

REQUEST FOR NONORAL SUBMISSION

The case involves routine claims of ineffective assistance of counsel. Oral argument is not necessary to resolve the issues. In the event argument is scheduled, the State requests to be heard.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **3,465** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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