IN THE COURT OF APPEALS OF IOWA

No. 2-831 / 11-1670
Filed January 9, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ROLANDO NELSON JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, John D. Telleen, Judge.

A defendant contends that the district court erred in determining the State lacked the burden of proving that he was not authorized to possess an offensive weapon. He also contends insufficient evidence supported the jury's finding of guilt, and that he received ineffective assistance of counsel. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Stephan J. Japuntich, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Michael J. Walton, County Attorney, and Jay Sommers, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Bower, JJ.

VAITHESWARAN, P.J.

A jury found Rolando Nelson guilty of possession of an offensive weapon. *See* Iowa Code § 724.3 (2009). On appeal, Nelson raises three issues: (A) whether the State had to prove he lacked authorization to possess an offensive weapon, (B) whether sufficient evidence supported the jury's finding of guilt, and (C) whether his trial attorney was ineffective in failing to object to the admission of certain evidence.

I. Background Facts and Proceedings

Terrida Atwater was sitting outside her Davenport home when five of her son's acquaintances, including Nelson, walked up to the house. Nelson asked Atwater's son to step off the porch. When he did not, Nelson lifted his shirt and revealed the butt of a gun. Atwater told Nelson to leave and immediately reported the incident to police.

A Davenport police officer dispatched to the scene saw Nelson emerging from an alley. Upon searching the alley, the officer found a sawed-off rifle.

The State charged Nelson with (1) possession of an offensive weapon and (2) being a felon in possession of a firearm. At Nelson's first trial, Atwater initially refused to acknowledge that Nelson displayed a weapon. Following a break in the trial during which the prosecutor informed Atwater about the crime of perjury, Atwater returned to the stand and reaffirmed her pretrial rendition of events.

Nelson's first trial ended in a mistrial on the possession of an offensive weapon count and a dismissal of the felon in possession count. On retrial of the mis-tried count, Atwater identified Nelson as the person who displayed a weapon. When questioned about her inconsistent stories during the first trial,

she intimated that she initially lied because Nelson's cohorts threatened her family's safety if she identified Nelson.

A jury found Nelson guilty of possessing an offensive weapon. This appeal followed.

II. Analysis

A. Jury Instruction

Iowa Code section 724.3 states: "Any person, *other than a person authorized herein*, who knowingly possesses an offensive weapon commits a class 'D' felony." (Emphasis added.) The district court proffered a jury instruction that did not include a reference to authorization. Nelson objected, claiming the statute required the State to prove he lacked authorization to possess the weapon. After considering arguments and legal authority, the court concluded lack of authorization was not an element the State had to prove in its case in chief. The court instructed the jury as follows:

> The State must prove the following elements of Possession of an Offensive Weapon:
> 1. On or about the 23rd day of September, 2010, the defendant possessed an offensive weapon.
> 2. The defendant knew he possessed an offensive weapon.
> 3. The gun was an offensive weapon.

"Our review is to determine whether the challenged instruction accurately states the law and is supported by substantial evidence." *State v. Spates*, 779 N.W.2d 770, 775 (Iowa 2010).

Although the Iowa Supreme Court has not addressed the precise question raised here—whether the statutory phrase "other than a person authorized" is an

element of the crime of possession of an offensive weapon—the court confronted a similar question in *State v. Leisinger*, 364 N.W.2d 200 (Iowa 1985). There, the language at issue was the definition of "offensive weapon" as used in section 724.3. *Leisinger*, 364 N.W.2d at 201–02; *see* Iowa Code § 724.1 (defining "offensive weapon" and enumerating exceptions to the definition). Leisinger contended the State bore the burden of establishing a negative—that the exceptions to the definition of "offensive weapon" did not apply. *Leisinger*, 364 N.W.2d at 202. The court rejected the argument, stating, "[W]e have consistently held that such statutory exceptions are affirmative defenses." *Id.* The court continued, "The State need not negate the exception unless substantial evidence is produced from some source that the exception applies." *Id.*

The same holds true here. Iowa Code section 724.2 enumerates nine categories of individuals authorized to possess offensive weapons. If we were to accept Nelson's argument, the State, in all cases, would be required to prove that a defendant does *not* fall into any of the nine categories. We find this is an untenable reading of the statute, because the defendant, rather than the State, possesses personal knowledge of whether an exception may apply. *See State v. Bowdry*, 337 N.W.2d 216, 218 (Iowa 1983) (stating that "the Assembly intended to place the onus on" the defendant to invoke one of eight exceptions to a criminal statute). We conclude the State did not have to prove, as an element of its case in chief, that Nelson lacked authorization to possess the weapon. The jury instruction as given accurately conveyed the law.

Nelson raises several additional contentions in support of his argument that the burden rested with the State to establish the absence of authorization.

No useful purpose would be served by recounting or analyzing them, other than to state that these contentions do not militate in favor of a different conclusion.

B. Sufficiency of the Evidence

This brings us to Nelson's challenge to the sufficiency of the evidence supporting his finding of guilt. Nelson does not dispute the evidence establishing that he possessed an offensive weapon; his sufficiency-of-the-evidence challenge is grounded exclusively on the absence of proof that he lacked authorization to carry the weapon. As this was not an element that had to be proven in the State's case in chief, Nelson's challenge necessarily fails.[1]

C. Ineffective Assistance of Counsel

Nelson contends his trial attorney was ineffective in failing to object to Atwater's testimony concerning her reason for initially refusing to identify him. He maintains her assertion that she was threatened by Nelson's friends was inadmissible hearsay evidence and violated the confrontation clauses of the Sixth Amendment to the United States Constitution and Article I section 10 of the Iowa Constitution. To prevail, Nelson must show that counsel breached an essential duty and that prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

1. Hearsay. Iowa Rule of Evidence 5.801(c) defines hearsay as "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." Atwater's

---

[1] Nelson raises a challenge to the weight of the evidence supporting the finding of guilt. The weight of the evidence standard entitles a trial court to weigh the evidence and consider its weight in determining whether a new trial should be granted. *State v. Maxwell*, 743 N.W.2d 185, 192 (Iowa 2008). The issue here is one of law; the weight of the evidence is not implicated.

testimony concerning the threat she received was not hearsay because it was not offered to prove the truth of what was said, but was offered to explain her initial contradictory testimony. *See Beckman v. Carson*, 372 N.W.2d 203, 209 (Iowa 1985) (concluding testimony was not hearsay where "the purpose of the questions was to elicit an explanation why [the defendant] had decided not to proceed with the contracts with plaintiffs"); *State v. Rush*, 242 N.W.2d 313, 319 (Iowa 1976) (distinguishing between statements offered to prove the truth of the matter asserted and statements offered to prove "their effect on subsequent actions of the hearer").

2. Confrontation Clause. A defendant has a constitutional right to confront witnesses against him. U.S. Const. Amends. VI, XIV; Iowa Const. art. I, § 10. A declarant is considered a "witness" within the meaning of the Confrontation Clause when the declarant makes a testimonial statement. *See Davis v. Washington*, 547 U.S. 813, 821 (2006). Some statements, such as statements elicited during "interrogations solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator" are clearly testimonial. *Id.* at 826. Others, such as statements "to enable police assistance to meet an ongoing emergency" are clearly non-testimonial. *Id.* at 828.

In this case, the statement was a threat made by an unidentified cohort of Nelson, which caused Atwater to retract her pretrial identification of Nelson. At the outset, we are not convinced the unidentified cohort was a witness "against" Nelson. But, even if he was, the threat was not made at the behest of law enforcement authorities, was not made in a formal setting, and was not a

narrative of a past crime, all circumstances that would render statements testimonial. *See id.* at 827–28. We conclude the statement was non-testimonial and the confrontation clauses were not implicated.

We affirm Nelson's judgment and sentence for possession of an offensive weapon.

AFFIRMED.