IN THE COURT OF APPEALS OF IOWA

No. 2-906 / 12-0377
Filed January 9, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MARUION KEITH MCDOWELL,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Thomas H. Preacher, District Associate Judge.

A defendant appeals his conviction for assault causing bodily injury, asserting the court abused its discretion during trial and at sentencing and his counsel rendered ineffective assistance. **SENTENCE VACATED AND CASE REMANDED.**

Mark C. Smith, State Appellate Defender, and Rachel C. Regenold, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney General, Michael J. Walton, County Attorney, and Melissa Zaehringer, Assistant County Attorney, for appellee.

Considered by Doyle, P.J., and Mullins and Bower, JJ.

MULLINS, J.

The defendant, Maruion McDowell, appeals from his conviction for assault causing bodily injury, in violation of Iowa Code sections 708.1 and 708.2(2) (2011). He contends the district court abused its discretion in two ways: (1) considering uncharged conduct in rendering its sentence and (2) preventing him from presenting his alibi defense. He also asserts his trial counsel rendered ineffective assistance in failing to object to testimony from the victim and a police officer, which he claims constituted inadmissible hearsay and violated the Confrontation Clause. As we find the district court abused its discretion in considering uncharged conduct in sentencing McDowell, we vacate his sentence and remand for resentencing. We affirm on all other claims.

I. BACKGROUND FACTS AND PROCEEDINGS.

The victim, Brett Bowkey, decided to go out to the clubs with his co-worker, Nekisha Phillips, and her friend, Winter. Bowkey rode his bicycle over to Phillips's house where he waited for Phillips and Winter to finish getting ready. While there, he met Phillips's boyfriend, McDowell. McDowell was planning to go out to the clubs with his friends and cousins, while Bowkey, Phillips, and Winter left separately. The two groups eventually ended up at the same bar, and Phillips became angry when she believed she saw McDowell flirting with another girl.

Bowkey, Phillips, and Winter were hungry when they finally left the bar, so Bowkey offered to make them food at his home. Phillips continued her argument with McDowell over the phone while at Bowkey's house. After eating, Bowkey,

Winter, and Phillips drove back to Philips's house to retrieve Bowkey's bicycle. When they arrived, Bowkey noticed his bicycle was in ruins. The rims were bent, the tires were ruined, and his seat was cut up. Bowkey decided to confront McDowell, who was inside Phillips's house, about the condition of his bicycle. But before he could knock on the door, both Winter and Phillips yelled out of the car to not confront McDowell because he might "have something." Bowkey, remembering that his bike seat had been cut, decided not to confront McDowell but instead to load the bicycle in the trunk of Winter's car and leave.

Bowkey was able to get the bicycle in the trunk when Phillips and Winter yelled at him to get in the car because McDowell was coming. McDowell began accusing Bowkey of sleeping with Phillips and punched Bowkey in the left side of his jaw, knocking him to the ground. Bowkey got up only to be punched again in the temple and the throat. Bowkey decided to stay down, and McDowell then ran off.

The police were called, and Officers Hatfield and Bowers reported to the scene. Phillips did not stay around to talk to the police because she had a warrant for her arrest. However, she did speak with Officer Bowers over the phone. Bowkey refused medical treatment and did not permit the police to take pictures of his injuries. Bowkey had a swollen jaw for two or three days.

A trial information was filed on October 5, 2011, charging McDowell with assault causing bodily injury. McDowell pleaded not guilty, and the case proceeded to trial on December 19, 2011. The morning of trial defense counsel alerted the court and the State for the first time that he intended to call two

witnesses to present an alibi defense. The State objected due to the late notice, and the court found there was no good cause to justify the late notice of the alibi defense. The court permitted McDowell to testify as to his whereabouts at the time of the crime but precluded him from presenting witnesses to corroborate his testimony.

After hearing the testimony of Bowkey, Officer Hatfield, and McDowell, the jury returned a verdict of guilty as charged. On January 27, 2012, the court sentenced McDowell to serve 120 days in jail, with all but fifteen suspended. McDowell was placed on unsupervised probation for up to one year, ordered to pay a $315 fine plus costs and applicable surcharges, and ordered to reimburse the State for court-appointed attorney fees not to exceed $462. The sentencing hearing was unrecorded, but in the sentencing order, the court wrote out the "reasons for this sentence," which included boilerplate, type-written language and the following handwritten addition: "Defendant has 1996 gang participation conviction and [possession of a controlled substance] with intent conviction in 1996; facts of case show unprovoked assault and (uncharged) destruction of property." From this sentence, McDowell appeals.

II. SENTENCING.

McDowell first asserts the district court erred in considering uncharged conduct—destruction of property—in rendering its sentencing decision, and therefore, his case must be remanded for resentencing. We agree.[1]

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[1] The State asserts McDowell failed to preserve error on this issue because he waived transcription of the sentencing and failed to supplement the record under Iowa Rule of Appellate Procedure 6.806—Proceedings When Transcript Unavailable—or Iowa Rule of

We review a district court's sentence for correction of errors at law. *State v. Sailer*, 587 N.W.2d 756, 758 (Iowa 1998). The sentence will only be disturbed if the defendant demonstrates the trial court abused its discretion or there is a defect in the sentencing procedure, such as the consideration of an impermissible factor. *Id*. at 759. Because a sentence within statutory limits enjoys a strong presumption in its favor, there must be an affirmative showing the district court relied on improper evidence. *State v. Jose*, 636 N.W.2d 38, 41 (Iowa 2001). "A court may not consider an unproven or unprosecuted offense when sentencing a defendant unless (1) the facts before the court show the accused committed the offense, or (2) the defendant admits it." *Gonzalez*, 582 N.W.2d at 516. The issue presented to us is one of the sufficiency of the record

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Criminal Procedure 2.25—Bill of Exceptions. The State claims that while the sentencing order has a note that indicates the court considered "(uncharged) destruction of property," there is no indication what weight if any the court assigned to this factor. Because it asserts the record is incomplete, the State asks us to find the issue not preserved for our review. In support of its claim, the State cites, *State v. Mudra*, 532 N.W.2d 765, 766 (Iowa 1995), where the defendant appealed the sentence imposed following a guilty plea, asserting the court abused its discretion in sentencing him by failing to state the reasons for the sentence imposed. The supreme court found error was waived by the defendant because he failed to provide an adequate record affirmatively disclosing the error relied upon. *Mudra*, 532 N.W.2d at 767. The court advised the district court that the better practice is for the court to state sufficient reasons for the sentence imposed in the sentencing order where there is no transcription of the proceedings. *Id*. This is precisely what the district court did in the case before us.

Because there was no transcript of the proceedings, the district court handwrote the specific reasons for the sentence imposed on the sentencing order itself. It is one of those articulated reasons, "(uncharged) destruction of property," that McDowell asserts was in error. Even if we had a transcript or a statement of the proceeding, we cannot speculate about the weight a sentencing court assigned to an improper consideration. *See State v. Gonzalez*, 582 N.W.2d 515, 517 (Iowa 1998). Because there is sufficient record to assess the error complained of, we will not find the alleged error waived or not preserved in this case. *See State v. Alloway*, 707 N.W.2d 582, 585 (Iowa 2006) (stating the court can either orally state the reasons for the sentence in a reported sentencing hearing or place the reasons for the sentence in a written sentencing order), *overruled on other grounds by State v. Johnson*, 784 N.W.2d 192 (Iowa 2010).

to establish the matters relied on. *State v. Grandberry*, 619 N.W.2d 399, 401 (Iowa 2000). "The standard of proof during the sentencing stage is lower than the standard used during trial." *Id*. But if the court relies on any improper consideration, even if it is a secondary consideration, resentencing is required. *Id*.

Here, among other factors considered at sentencing, the court stated one of the reasons for imposing the sentence was "(uncharged) destruction of property." At trial there was testimony that Bowkey's bicycle was damaged before he arrived back at Phillips's house to retrieve it. Bowkey confronted McDowell about the damage to the bicycle during or just prior to the assault. McDowell never admitted to damaging or even seeing the bicycle that night. There was no other evidence offered regarding the cause of the damage to the bicycle or its condition before or after the assault. Under the facts of the case, we find there was insufficient evidence to find McDowell was the one who damaged the bicycle. As the offense was unprosecuted and unproven, it was an abuse of discretion for the trial court to consider it in sentencing. McDowell's sentence must be vacated, and the case remanded for resentencing.

III. ALIBI DEFENSE.

Next, McDowell asserts the district court abused its discretion in refusing to allow him to present an alibi defense through two witnesses.[2] At the beginning

[2] The State again asserts McDowell failed to preserve error on this claim because he failed to make an offer of proof detailing the testimony of these two witnesses. We note that the reason these two witnesses were prevented from testifying was not based on the substance of their testimony, but on the failure of the defendant to give notice within the prescribed time that he would present an alibi defense. An offer of proof is ordinarily

of trial, defense counsel for the first time indicated that he intended to assert an alibi defense that McDowell was in Muscatine at the time of the incident, and counsel stated two witnesses would testify to that effect. The court asked for an explanation for the late notice. Counsel stated the alibi defense was just brought to his attention that morning. Counsel explained the preceding Friday he and McDowell were to meet to discuss trial preparation, and they were also to meet these two witnesses. McDowell and the witnesses did not show for the meeting, so counsel was not aware of the alibi defense until the morning of trial. Counsel also asserted it was his belief that McDowell was unaware of the date of the offense until the final pretrial conference, which occurred the Thursday before trial. Counsel explained McDowell was apparently not receiving the mail that was sent to him.

The court noted for the record that McDowell would have been given a copy of the complaint and affidavit at the initial appearance, which would have included the date of the offense. It found there was no good cause for the delay in giving notice and precluded McDowell from presenting witnesses on the alibi defense. McDowell was not precluded from offering his own testimony as to his

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necessary to provide us with an adequate record to review a district court's ruling. *State v. Schutz*, 579 N.W.2d 317, 318 (Iowa 1998). However, in this case, the substantive detail of these witnesses' testimony is not needed for us to review the district court's exercise of discretion on whether to permit McDowell to present an alibi defense. The record adequately demonstrates the issue raised on appeal, and an offer of proof as to the proposed testimony of each of these witnesses would have been frivolous. *Id*. at 319; s*ee also State v. Lange*, 531 N.W.2d 108, 114 (Iowa 1995) (stating normally we will not consider error preserved without an offer of proof, unless the whole record makes apparent what is sought to be proven). The trial court clearly understood the issue raised and made adequate inquiry of defense counsel as to the justification for the late notice. We find the issue preserved for our review.

whereabouts on the night in question. McDowell asserts the court abused its discretion in not carefully weighing his interests and not considering factors other than the adequacy of his reason for the untimely notice. He also asserts the court abused its discretion in not considering other alternative sanctions such as continuing the trial.

Iowa Rule of Criminal Procedure 2.11(11) provides, in part:

> a. *Alibi.* A defendant who intends to offer evidence of an alibi defense shall, within the time provided for the making of pretrial motions or at such later time as the court shall direct, file written notice of such intention. The notice shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names of the witnesses upon whom the defendant intends to rely to establish such alibi. . . .
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> d. *Failure to comply*. If either party fails to abide by the time periods heretofore described, such party may not offer evidence on the issue of alibi, . . . without leave of court for good cause shown. In granting leave, the court may impose terms and conditions including a delay or continuance of trial. The right of a defendant to give evidence of alibi, . . . in the defendant's own testimony is not limited by this rule.

The time for making a pretrial motion is no later than forty days after arraignment. Iowa R. Crim. P. 2.11(4). Under the rule, a defendant who fails to give proper notice of his alibi defense is precluded from offering such evidence, excluding his own testimony, except with the court's permission for good cause shown. *State v. Christensen*, 323 N.W.2d 219, 222 (Iowa 1982). Whether good cause has been shown is discretionary, and we will reverse the district court's decision only upon a showing of an abuse of discretion. *Id*. at 223. The notice rule is in place to protect the State from an "eleventh hour defense" because an alibi can easily be fabricated, and the State needs adequate time to investigate

the veracity of the witnesses' testimony. *Id*. The rule is also meant to prevent trial delays while the surprised party investigates the last-minute defense. *Id*.

We find no abuse of discretion in this case. McDowell waited until the morning of trial to assert the alibi defense, preventing the State from investigating the testimony of the new witnesses. The explanation that McDowell did not know the date of the offense until the final pretrial conference was not credible in light of the fact that McDowell would have received a copy of the complaint and affidavit at his initial appearance. McDowell knew or should have known of the identity of these witnesses from the time he was charged. McDowell was present for a pretrial conference on November 9, 2011, more than a month before trial, and asserted no alibi defense would be presented. The trial court did not abuse its discretion in finding there was no good cause for the delay in giving notice of the alibi defense, and the sanction imposed was not clearly untenable or unreasonable. *Id*. at 224.

IV. INEFFECTIVE ASSISTANCE.

McDowell's final claims assert his counsel rendered ineffective assistance at trial by failing to object to testimony offered by Bowkey and Officer Hatfield that McDowell asserts constitutes hearsay and violates the Confrontation Clause. To demonstrate ineffective assistance of counsel, McDowell must prove (1) counsel failed to perform an essential duty and (2) prejudice resulted from that failure. *State v. Schaer*, 757 N.W.2d 630, 637 (Iowa 2008). Our review of ineffective-assistance-of-counsel claims is de novo. *Ennenga v. State*, 812 N.W.2d 696, 701 (Iowa 2012). Because counsel has no duty to raise a meritless motion,

Schaer, 757 N.W.2d at 637, we will first examine the merits of McDowell's claims that the testimony in question was inadmissible hearsay and violated the Confrontation Clause.

A. Hearsay. McDowell first claims Bowkey's statements relaying what Phillips and Winter said to him when they arrived back at Phillips's house to retrieve the bicycle were inadmissible hearsay. During trial Bowkey testified:

> I got all the way to the porch and I was getting ready to knock on the front door and *[Phillips] and Winter had yelled out of the car, no, don't do it, Brett, because he might have something* and then I remembered that the bike seat was cut so I thought maybe it's not a good idea to do anything about knocking on the door or anything, so then I went to gather my bike and put it into the trunk of Winter's car.

(Emphasis added.) In addition, Bowkey later testified:

> I got my bike into the trunk of Winter's car and *then they yelled out of the window, Brett, get in the car because Marvin*[3] *is coming* and they drove off with my bicycle in the trunk of the car and me and Marvin are standing outside and he started accusing me of sleeping with [Phillips], and I was trying to ask him if he had known anything about my bike and while I was asking him, he punched me on my left side of the jaw and I fell down.

(Emphasis added.) McDowell asserts his counsel breached an essential duty by failing to object to Bowkey's recitation of the statements of Winter and Phillips, which McDowell asserts were hearsay.

Hearsay is a statement other than one made by the declarant while testifying at trial offered to prove the truth of the matter asserted. Iowa R. Evid. 5.801(c). Hearsay is not admissible, unless it fits within one of the recognized exceptions. Iowa R. Evid. 5.802.

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[3] McDowell's nickname is Marvin.

We find the first of Bowkey's statements does not fit within the hearsay definition. The statement, "don't do it, Brett, because he might have something," was not offered to prove the truth of the matter asserted—that McDowell had some sort of weapon—but offered to explain Bowkey's subsequent action—"I thought maybe it's not a good idea to do anything about knocking on the door or anything, so then I went to gather my bike and put it into the trunk of Winter's car." When a statement is offered to "explain responsive conduct, it is not regarded as hearsay." *State v. Mitchell*, 450 N.W.2d 828, 832 (Iowa 1990). This conduct was relevant to show Bowkey did not initiate a confrontation with McDowell but was assaulted after he decided to take his damaged bicycle and leave. *See id.* (stating the responsive conduct must be relevant to some aspect of the State's case). As this statement was not hearsay, counsel had no duty to object to the statement.

Next, the State asserts and we agree that Bowkey's testimony that Winter and Phillips yelled at him to "get in the car because Marvin is coming" fits within two hearsay exceptions: (1) present sense impression and (2) excited utterance. *See* Iowa Rs. Evid. 5.803(1), 5.803(2). The single statement attributable to both Winter and Phillips described an event—McDowell approaching Bowkey—made while the declarants were perceiving the event, as needed to qualify for the present-sense-impression exception. It was also a statement relating to a startling event—Winter and Phillips yelled the warning to Bowkey—while the declarants were under the stress of excitement caused by the event, as needed to qualify for the excited utterance exception. As the statement clearly falls within

two hearsay exceptions, counsel had no duty to object to the admission of this evidence.

McDowell also asserts a statement made by Officer Hatfield was hearsay and counsel breached an essential duty by failing to object to it. The statement in question occurred when the State asked whether McDowell's name was "confirmed with [Phillips]." Hatfield responded affirmatively. While not reciting precisely what Phillips said, the officer was able to convey that the non-testifying witness (Phillips) confirmed McDowell's identity as the perpetrator. McDowell asserts this statement constitutes hearsay, and his counsel should have objected. *See State v. Judkins*, 242 N.W.2d 266, 268–69 (Iowa 1976) (reversing the conviction of a defendant based on the wrongful admission of hearsay when a handwriting expert for the State asserted that his opinions had been confirmed by the defendant's expert).

Even assuming Officer Hatfield's affirmative response was hearsay and assuming counsel should have objected, McDowell cannot prove he was prejudiced by counsel's failure. The same information was already in the record and therefore merely cumulative to other admissible evidence. As stated above, Bowkey testified Winter and Phillips identified McDowell as the attacker while Bowkey was attempting to put his bicycle in Winter's vehicle. This evidence was properly admitted as it fit within two exceptions to the hearsay rule. Bowkey also independently identified McDowell as his attacker. Because Phillips's confirmation of McDowell's identity to police was merely cumulative to other admissible evidence already in the record, McDowell cannot establish the

prejudice prong of his ineffective-assistance-of-counsel claim. *See Schaer*, 757 N.W.2d at 638 (finding the defendant failed to prove prejudice when the inadmissible hearsay was cumulative to other admissible testimony).

B. Confrontation Clause. Finally, McDowell asserts that Officer Hatfield's testimony regarding Phillips's confirmation of his identity as the perpetrator also violated the Confrontation Clause. The Sixth Amendment to the United States Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. "An out-of-court statement by a witness that is testimonial in nature is barred under the Confrontation Clause unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness." *State v. Musser*, 721 N.W.2d 734, 753 (Iowa 2006).

Again, assuming without deciding that Officer Hatfield's affirmative response violated the Confrontation Clause, McDowell cannot prove he was prejudiced by the admission of this testimony. McDowell's identity as the assailant was established through Bowkey's testimony. *See Schaer*, 757 N.W.2d at 638. Because McDowell cannot prove the result of the trial would have been different if counsel had objected to Officer Hatfield's testimony, McDowell's ineffective-assistance claim must fail.

V. CONCLUSION.

McDowell's claim that the court abused its discretion when it prevented him from presenting an alibi defense and his claim that his counsel rendered ineffective assistance by failing to object to certain testimony are denied.

However, we conclude the court did abuse its discretion in sentencing McDowell when it considered unprosecuted and unproven conduct. We therefore vacate McDowell's sentence and remand for resentencing.

SENTENCE VACATED AND CASE REMANDED.