IN THE COURT OF APPEALS OF IOWA

No. 2-987 / 10-0665
Filed February 13, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MICHAEL EARL HILSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Arthur E. Gamble, Judge.

Michael Hilson appeals from convictions of burglary and sexual abuse. **AFFIRMED.**

Roman Vald of LaMarca & Landry, P.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Linda Hines, Assistant Attorney General, John P. Sarcone, County Attorney, and Nan Horvat and Susan Cox, Assistant County Attorneys, for appellee.

Considered by Eisenhauer, C.J., and Vogel and Vaitheswaran, JJ.

EISENHAUER, C.J.

Michael Hilson appeals from his convictions of burglary in the first degree and sexual abuse in the third degree, contending the court erred in admitting statements made to a police officer and a nurse by the complaining witness, who is now deceased. We affirm.

Background. In September 2006 T.B. called 911 to report she had been raped. Officer Bernlohr, who was nearby, responded within a few minutes. She encountered a crying, distraught, and injured T.B. who described the events of the preceding four hours. The officer took T.B. to the hospital, where she was examined by Nurse Williamson, a sexual assault nurse examiner. Williamson spoke with and examined T.B., including preparing a rape kit. The sealed rape kit was taken to the police department, where it remained for about two years. T.B. died in a motor vehicle accident in late 2006.

In May 2008 a detective had the rape kit sent to the Iowa Division of Criminal Investigation for analysis. The DNA analysis led the detective to Hilson, who was charged in December with burglary in the first degree and sexual abuse in the second degree. In September 2009 Hilson filed a motion in limine seeking in part to exclude all statements by T.B. to police officers and nurses as hearsay and a violation of his right of confrontation.

The trial court denied the motion. It determined the statements T.B. made to Officer Bernlohr were admissible under the excited utterance exception to hearsay. Iowa R. Evid. 5.803(2). It also determined the statements to the officer did not violate the Confrontation Clause because they were nontestimonial. The court determined the statements made to Nurse Williamson were admissible

under the exception to hearsay for statements made for purposes of medical diagnosis or treatment. Iowa R. Evid. 5.803(4). It also determined T.B.'s statements to Nurse Williamson were nontestimonial.

At trial, the same objections were made to the testimony of Officer Bernlohr and Nurse Williamson as raised in the motion in limine. The objections were again overruled on the same grounds. The jury found Hilson guilty of burglary in the first degree and sexual abuse in the third degree.

Scope and Standards of Review. "Although we generally review a court's decision to admit or exclude evidence for an abuse of discretion, we review a hearsay claim for correction of errors at law." *State v. Neitzel*, 801 N.W.2d 612, 622 (Iowa Ct. App. 2011). Claims brought under the Confrontation Clause are reviewed de novo. *State v. Rainsong*, 807 N.W.2d 283, 286 (Iowa 2011). "[T]he fighting Confrontation Clause issue with respect to admission of hearsay is whether the underlying statements should be considered 'testimonial' or 'nontestimonial.'" *State v. Shipley*, 757 N.W.2d 228, 236 (Iowa 2008) (citation omitted). "The State bears the burden of proving by a preponderance of the evidence that a challenged hearsay statement is nontestimonial." *State v. Schaer*, 757 N.W.2d 630, 635 (Iowa 2008).

Merits. *Statements to Nurse Williamson.* Hilson contends the court erred in determining all of T.B.'s statements to the nurse were nontestimonial and did not violate his right of confrontation. He argues the nurse's interview of T.B. was "essentially a substitute for police interrogation" because the nurse was a trained sexual assault nurse examiner collecting evidence for the police investigation. *See State v. Bentley*, 739 N.W.2d 296, 299 (Iowa 2007). The trial court

concluded Nurse Williamson's interview of T.B. was not like the interview in *Bentley* because the police were not participating, the nurse was not investigating for the police, there was no recording of the interview given to the police, and the nurse testified her interview was in part to guide her exam and in part to allow T.B. to tell her story and not traumatize her. *See Schaer*, 757 N.W.2d at 637. The court found there was no indication of any relationship between Nurse Williamson and the police to support a finding the interview was a substitute for police interrogation. *See id.* The court concluded T.B.'s statements to the nurse were not testimonial.

We agree with the trial court's assessment T.B.'s statements to the nurse were nontestimonial. They were not "made under circumstances that would lead an objective person to reasonably believe the statements would be available for use at a later trial." *See id.* at 636. The police were not present and did not provide questions for the nurse to ask. *See id.* at 637. The factual details elicited were to guide the nurse's medical examination. *See id.*

Statements to Officer Bernlohr. Hilson contends the court erred in determining T.B.'s statements to Officer Bernlohr were nontestimonial and did not violate his right of confrontation. He contends not all of T.B.'s statements to Officer Bernlohr were nontestimonial because T.B. did not volunteer the information but provided specific descriptions of her assailants and a detailed account of the events in response to questioning by the officer.

The trial court determined the statements were nontestimonial because they were made "as the officer was responding to [T.B.]'s ongoing emergency." *See Davis v. Washington*, 547 U.S. 813, 822 (2006) ("Statements are

nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.").

Although we are inclined to agree T.B.'s statements to the officer were nontestimonial because the officer was responding to an emergency, including obtaining enough information to determine if the officer, T.B., or the public was at risk, we need not decide whether the admission of T.B.'s statements violated Hilson's right of confrontation because their admission, even if erroneous, was harmless. *See State v. Newell*, 710 N.W.2d 6, 25 (Iowa 2006) (noting "admission of evidence in violation of the Confrontation Clause does not mandate reversal: if the State establishes that the error was harmless beyond a reasonable doubt"). In making that assessment, we consider

> the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

State v. Brown, 656 N.W.2d 355, 361-62 (Iowa 2003) (citations omitted).

T.B.'s statements to the officer were not critical to the State's case. The jury had DNA evidence Hilson performed a sex act with T.B. Hilson denied knowing T.B., and T.B.'s daughter and boyfriend did not know of any connection between T.B. and Hilson. This evidence supports findings the sex was non-consensual and Hilson was not authorized to enter T.B.'s apartment. T.B.'s wounds and the cut electrical cords found in her apartment also support a finding the sex was non-consensual and she suffered bodily injury. Hilson's entry into

T.B.'s apartment by cutting the screen and coming in through the window supports a finding Hilson did not enter T.B.'s apartment with her permission. T.B.'s 911 call reporting a rape is evidence the sex was not consensual. The officer's and nurse's testimony concerning their observation of T.B.'s wounds also support findings of bodily injury and non-consensual sex. T.B.'s statements to the nurse corroborate the other evidence of Hilson's guilt. The State's case against Hilson for both third-degree sexual abuse and first-degree burglary was strong. We conclude the admission of T.B.'s statements to the responding officer was harmless beyond a reasonable doubt.

Ineffective Assistance. Although listed as an issue in Hilson's brief, he does not raise any claims on direct appeal, but asserts they "would most effectively be presented during post-conviction relief" proceedings. Under Iowa Code section 814.7 (2011), ineffective-assistance claims "need not be raised on direct appeal from the criminal proceedings in order to preserve [them] for postconviction relief purposes." Because Hilson does not raise any claims on direct appeal, we do not address this issue.

Finding no reversible error, we affirm Hilson's convictions.

AFFIRMED.