**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A12-1252**

State of Minnesota,
Respondent,

vs.

Mark Angelo Grillo, Jr.,
Appellant.

**Filed July 1, 2013**
**Affirmed**
**Kalitowski, Judge**

Ramsey County District Court
File No. 62-CR-11-10177

Lori Swanson, Attorney General, St. Paul, Minnesota; and

John Choi, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, Justin Erickson (certified student attorney), St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Rochelle R. Winn, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Cleary, Presiding Judge; Kalitowski, Judge; and Hooten, Judge.

**U N P U B L I S H E D  O P I N I O N**

**KALITOWSKI**, Judge

Appellant Mark Angelo Grillo, Jr. challenges his convictions of first-degree aggravated robbery and aiding and abetting first-degree aggravated robbery. Appellant

argues that the district court violated his Sixth Amendment right to confrontation by allowing respondent State of Minnesota to admit into evidence the statements of a nontestifying declarant made in response to questioning by police officers. We affirm.

**D E C I S I O N**

We generally will not reverse a district court's evidentiary rulings absent a clear abuse of discretion. *State v. Flores*, 595 N.W.2d 860, 865 (Minn. 1999). And "[w]e review de novo whether admitted testimony violates a defendant's rights under the Confrontation Clause." *State v. Usee*, 800 N.W.2d 192, 196-97 (Minn. App. 2011), *review denied* (Minn. Aug. 24, 2011).

Hearsay is an out-of-court statement offered as evidence to prove the truth of the matter asserted. Minn. R. Evid. 801(c); *State v. Manthey*, 711 N.W.2d 498, 504 (Minn. 2006). The rules of evidence bar admission of hearsay unless it fits under a recognized exception. *See* Minn. R. Evid. 802 (barring admission of hearsay), 803 (listing exceptions to the hearsay rule), and 804 (same).

But testimony that is offered to show something other than the truth of the matter asserted is not hearsay. *State v. Moua*, 678 N.W.2d 29, 37 (Minn. 2004). Police officers may testify about false statements made to them without implicating the hearsay rule. *State v. Hanley*, 363 N.W.2d 735, 740 (Minn. 1985) (concluding that declarant's false statement to police officers was not hearsay because it was not offered to prove the truth of the matter asserted). Such testimony is "not offered to prove the truth of the matter stated but rather to show that [the declarant] lied to the police." *Id.*

Here, appellant argues that the district court erred by allowing two police officers to testify about two sets of statements that appellant's wife, Birgetta Grillo, made to police officers following the robbery. Ms. Grillo made the first set of statements during a conversation with Officer Shawn Coffey, one of the first officers at the scene. Officer Coffey testified about their conversation:

> PROSECUTING ATTORNEY: How did you go about making contact with [Ms. Grillo]?
>
> OFFICER: I walked right up to [her], and I don't recall if the window was down all the way or part way, I don't recall, but I asked [her] if she observed anything or seen anything.
>
> PROSECUTING ATTORNEY: What was her response?
>
> DEFENSE ATTORNEY: Objection, hearsay, confrontation.
>
> PROSECUTING ATTORNEY: May we approach?
>
> THE COURT: Yes.
>
> (Discussion had off the record.)
>
> THE COURT: Overruled. You may answer.
>
> . . . .
>
> OFFICER: [Ms. Grillo] said: Some guy just pointed a gun at me and tried to steal my car.
>
> . . . .
>
> PROSECUTING ATTORNEY: What did you ask her next?
>
> OFFICER: I asked her if she could identify the person, and she said all she could tell me was that it was a male. I asked, "How far was this male that tried

> to steal your car, how far was he from your vehicle?" And she said: Right where you are, which is approximately three to four feet. I said, "Could you tell me anything about the race, age, anything about him? She said: No. I also asked if she could tell me anything about the weapon, the gun that was pointed at her when he tried to take her vehicle.

Ms. Grillo made the second set of statements during a conversation with Sergeant Brian Bierdeman, and he testified about their conversation:

> PROSECUTING ATTORNEY: What happened after [Ms. Grillo] was seated in the back of Officer Hawkinson's squad car?
>
> SERGEANT: I asked her who she was talking to on the phone.
>
> PROSECUTING ATTORNEY: Now, at this point had you identified her?
>
> SERGEANT: No.
>
> PROSECUTING ATTORNEY: What did [Ms. Grillo] say when you asked her who she was talking to on the cell phone?
>
> DEFENSE ATTORNEY: Same objections as previously made regarding this kind of testimony.
>
> PROSECUTING ATTORNEY: And same response as previously made.
>
> THE COURT: Overruled. You may answer.
>
> . . . .

PROSECUTING ATTORNEY: I believe you said you asked [Ms. Grillo] who she was talking to?

SERGEANT: Correct.

PROSECUTING ATTORNEY: What was her response?

SERGEANT: She said that she was not talking to anybody on her cell phone.

When Sergeant Bierdeman responded that he had already seen Ms. Grillo on her cell phone, she changed her story:

PROSECUTING ATTORNEY: Did [Ms. Grillo] have any response to that?

SERGEANT: Yes.

PROSECUTING ATTORNEY: What did she say?

SERGEANT: She changed her story a little bit and now stated that she was talking to her husband who is at home in West St. Paul.

. . . .

PROSECUTING ATTORNEY: What's the next thing the two of you talked about?

SERGEANT: [F]irst, I asked her where she was coming from. She said she was coming from a bar down the road called Beer Belly's, and that she was there by herself drinking. I continued to ask her about the cell phone usage and who she was talking to. Her mood changed slightly, became less cooperative. She put her head down and stated that something similar to she just needs to stick to her story, and that's all she knows.

Appellant argues that the district court abused its discretion because the admitted statements are hearsay that (1) do not satisfy the co-conspirator exception, Minn. R. Evid. 801(d)(2)(E), and (2) are testimonial and thus inadmissible because the declarant, Ms. Grillo, was unavailable at trial. We disagree because we conclude that the statements were not hearsay.

The evidence in the record shows that the state did not offer Ms. Grillo's first set of statements to Officer Coffey for the truth of the matter asserted. When appellant's attorney objected to Officer Coffey's testimony about the conversation between Ms. Grillo and him, the state responded that it was not hearsay because (1) Ms. Grillo was lying and (2) it was a statement of a co-conspirator. The district court overruled the objection. To implicate the hearsay rule, the statements would have to be offered to show the truth of the matter asserted by Ms. Grillo. Ms. Grillo asserted that a robber pointed a gun at her and that she could not describe the person or the gun. But the state did not offer these statements as proof that such a robbery occurred. The state offered the statements to show that Ms. Grillo lied to the police to cover up her and appellant's involvement in the robbery of the gas station. Because Ms. Grillo's statements to Officer Coffey were not offered for the truth of the matter asserted, they were not hearsay and the district court did not abuse its discretion.

Likewise, Ms. Grillo's second set of statements to Sergeant Bierdeman was not hearsay. Sergeant Bierdeman testified that Ms. Grillo said she had not recently made any calls using her cell phone. Ms. Grillo subsequently changed her story; she stated that she was talking to appellant, who she asserted was at home. But the evidence in the record

shows that appellant was at a nearby restaurant avoiding police. So again, the state did not offer the statements to show their truth. Nor was Ms. Grillo's statement that she was sticking to her story offered for the truth of the matter asserted. Thus, the record indicates that all the statements were offered to show that Ms. Grillo lied to the police to cover up her and appellant's involvement in the robbery. Therefore, under *Hanley*, such false statements do not implicate the hearsay rule, and we conclude that the district court did not abuse its discretion.

Because we conclude that the admitted statements were not hearsay, we need not address appellant's argument contending that the statements were testimonial and violated the Confrontation Clause. *See Crawford v. Washington*, 541 U.S. 36, 59 n.9, 124 S. Ct. 1354, 1369 n.9 (2004) (explaining that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted").

Finally, we note that even if the district court had erred by admitting Ms. Grillo's statements, we would conclude that any error was harmless. *See State v. Courtney*, 696 N.W.2d 73, 79-80 (Minn. 2005) ("The conviction may stand so long as the erroneous admission of the evidence was harmless beyond a reasonable doubt."). "An error is harmless beyond a reasonable doubt if the guilty verdict actually rendered was 'surely unattributable' to the error." *Id.* at 80. Here, evidence of appellant's guilt was overwhelming: (1) two gas-station attendants identified appellant; (2) appellant's shoes matched the footprints found at the scene; (3) appellant was found with over $200 in cash; (4) a gas-station attendant observed Ms. Grillo parked in the back parking lot

shortly before the robbery; (5) Ms. Grillo was observed talking on her cell phone with appellant; and (6) Ms. Grillo's call records show that she made multiple calls to appellant after he fled the scene. Thus, even if the district court had erred, the guilty verdict would be surely unattributable to the error.

**Affirmed.**