STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0087

State of Minnesota,
Respondent,

vs.

Emmanuel Zekpegee James,
Appellant.

Filed December 10, 2012
Affirmed
Rodenberg, Judge

Hennepin County District Court
File No. 27CR1121281

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

Susan L. Segal, Minneapolis City Attorney, Dawn M. Knutson, Assistant City Attorney, Minneapolis, Minnesota (for respondent)

William M. Ward, Chief Hennepin County Public Defender, Paul J. Maravigli, Assistant Public Defender, Minneapolis, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Rodenberg, Judge; and Hooten, Judge.

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

RODENBERG, Judge

On appeal from his conviction of fourth-degree DWI and careless driving, appellant argues that the district court abused its discretion in denying appellant's hearsay

objection to admission of police-officer testimony regarding the statements of an unknown caller to police dispatch. We affirm because the district court did not admit the statements for a hearsay purpose, but rather to permit the state to explain why police officers initially focused their attention on appellant's vehicle.

FACTS

Appellant Emmanuel Zekpegee James appeals his conviction, following a jury trial, of one count of fourth-degree driving while impaired (DWI) in violation of Minn. Stat. § 169A.27, subd. 1 (2010) and one count of careless driving in violation of Minn. Stat. § 169.13, subd. 2 (2010).

In the early morning hours of July 15, 2011, a Minneapolis police dispatcher received a telephone report from an unknown person that an apparently unconscious man was seated behind the steering wheel of a vehicle stopped at an intersection in Minneapolis. Two Minneapolis police officers were dispatched to the location, where they found the vehicle described in the phone call. They stopped their squad car behind the vehicle and approached on foot, finding appellant seated behind the steering wheel and apparently unconscious. Appellant's vehicle was running, the transmission was in drive, and appellant's foot was on the brake. The officers roused appellant, had him shift the vehicle into park, and conducted a series of field sobriety tests after which they arrested him on suspicion of DWI. A sample of appellant's blood was obtained, the testing of which indicated an alcohol concentration of .07.

At trial, appellant objected strenuously and repeatedly to the admission of officer testimony related to the statements of the unknown caller to the unidentified Minneapolis

dispatcher on the grounds that the statements were inadmissible hearsay. Outside of the presence of the jury, the district court stated that it admitted evidence of the statements of the unknown caller because the state was "entitled to show the jury without going into great detail how the police came upon the situation that became the incident that we're in court for."

D E C I S I O N

The only issue before this court is whether the district court erroneously admitted the statements of the unknown caller who notified the dispatcher of the person the police-officer witnesses described as a "slumper."

I.

Evidentiary issues lie within the sound discretion of the district court, and the district court's rulings on such issues will not be reversed absent a clear abuse of discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). The burden is on the appellant to demonstrate (1) that the district court abused its discretion by admitting the evidence, and (2) that the appellant was prejudiced by the admission of the evidence. *State v. Sanders*, 775 N.W.2d 883, 887 (Minn. 2009). The district court "abuses its discretion when it acts arbitrarily, without justification, or in contravention of the law." *State v. Mix*, 646 N.W.2d 247, 250 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002).

If the abuse of discretion implicates a constitutional right, then the appellant is prejudiced and the conviction must be reversed unless the state can show that the error was harmless beyond a reasonable doubt. *Sanders*, 775 N.W.2d at 887. An error is

harmless beyond a reasonable doubt when the verdict rendered is "surely unattributable" to the error. *State v. Jones*, 556 N.W.2d 903, 910 (Minn. 1996).

If a constitutional right is not implicated, the appellant is prejudiced and a new trial will be awarded only if "the error substantially influenced the jury's verdict." *Sanders*, 775 N.W.2d at 887.

The erroneous admission of *testimonial* hearsay in a criminal case implicates constitutional concerns. *State v. Litzau*, 650 N.W.2d 177, 182–83 (Minn. 2002) (stating that hearsay testimony deprives a defendant of his constitutional right to cross-examine the declarant). *But see State v. Usee*, 800 N.W.2d 192, 197–98 (Minn. App. 2011) (stating that present law distinguishes between testimonial and nontestimonial hearsay, and that only testimonial hearsay implicates Confrontation Clause), *review denied* (Minn. Aug. 24, 2011). However, the admission of *nontestimonial* hearsay is restricted only by the rules of evidence, and does not implicate constitutional concerns. *Usee*, 800 N.W.2d at 197.

Statements obtained by police questioning are "testimonial" where "the circumstances objectively indicate . . . that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis v. Washington*, 547 U.S. 813, 822, 126 S. Ct. 2266, 2273–74 (2006). Statements are "nontestimonial" when police questioning is conducted "under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Id.* at 822, 126 S. Ct. at 2273.

In the present case, the challenged out-of-court statement was made by an unknown caller who reported to the police dispatcher that an apparently unconscious man was seated in the driver's seat of a vehicle located at a particular intersection. The caller provided a description of the vehicle and a license-plate number. The statement did not address past events. There was no police questioning of anyone. By all appearances, the unknown caller was providing authorities with information concerning a situation warranting police investigation. Thus, the objective circumstances indicate that the statement was nontestimonial. *See id.* (defining "nontestimonial" testimony).

Because the statement was nontestimonial, its admission into evidence did not implicate appellant's constitutional rights. Therefore, a new trial is only warranted if the district court abused its discretion by admitting the statement and if the statement substantially influenced the verdict.

II.

Hearsay is the out-of-court statement of a declarant that is "offered in evidence to prove the truth of the matter asserted." Minn. R. Evid. 801(c). When evidence of a tip is offered to explain why the police directed their attention to a particular person or place, that evidence is not hearsay. *State v. Ford*, 322 N.W.2d 611, 615 (Minn. 1982). The evidence in such a case is not being used "as substantive evidence of defendant's guilt"—i.e., to prove the truth of the matter asserted—but rather for the purpose of "explaining the police conduct." *Id.* However, where it is "not necessary for the jury to hear the *contents* of the tip" and where there is significant risk that the jury will "consider the

contents as substantive evidence of defendant's guilt," then the district court should "limit[] the admission of the evidence accordingly." *Id.* (emphases added).

In this case, the record indicates that the district court admitted the statement of the unknown caller for the limited purpose of explaining why the attention of the police officers was drawn to appellant and his vehicle. When Officer Lynch twice testified as to the contents of the statement, rather than the general nature of the statement, the district court first sustained appellant's objection, then called a bench conference after which it instructed the state to "[r]ephrase." The state then specifically limited its questioning, instructing the officer not to give "specifics" about the contents of the call.

When later making a record concerning this bench conference, the district court explained that the state was "entitled to show the jury without going into great detail how the police came upon the situation that became the incident that we're in court for."

The record thus demonstrates that the district court admitted the statement for a permissible purpose and limited the testimony admitted to serve that purpose.[1] The district court did not abuse its discretion in permitting the limited out-of-court statement into evidence.

[1] Nor was the district court required, on its own motion, to provide a limiting jury instruction. When evidence is admissible for a limited purpose, the district court, upon request, shall provide the jury with a limiting instruction. Minn. R. Evid. 105. The burden is on the party opposing the introduction of the evidence to request such an instruction. *See State v. Johnson*, 616 N.W.2d 720, 729 (Minn. 2000) (stating that it is difficult to find that an appellant's fair trial right is denied where appellant fails to request a limiting instruction). In this case, appellant did not request such an instruction.

Although the prosecutor arguably used the statement for a hearsay purpose during closing arguments, this does not change the fact that the district court's initial decision to admit the evidence was not an abuse of discretion. Furthermore, appellant's ultimate concern with the state's summation appears to be that the prosecutor's repeated use of the word "slumper" was inflammatory. However, the record does not establish that the term "slumper" was used by the unknown caller. Instead, the term seems to be the police characterization of the type of call received. Moreover, appellant raised no objection to the use of the term during closing arguments, requested no curative instruction following closing arguments, and has neither raised nor briefed the issue of prosecutorial misconduct on appeal. This court will generally not consider matters not argued to and considered by the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). Any issue relating to the use of the term "slumper" has been waived.

Affirmed.