IN THE COURT OF APPEALS OF IOWA

No. 3-354 / 12-1066
Filed May 30, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CHARLES DAVID BROWN,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Todd A. Geer, Judge.

The defendant appeals his convictions, arguing the trial court erred in failing to exclude evidence. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Elisabeth Reynoldson, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Jowl Dalrymple, Assistant County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Potterfield and Tabor, JJ.

EISENHAUER, C.J.

Charles David Brown appeals from his convictions for possession of a firearm as a felon and carrying weapons.[1] He argues the court erred in allowing witnesses to testify to a statement made by a bystander to the police officer.[2] We affirm.

I. Background Facts and Proceedings.

On the night of January 10, 2012, Officer Wittmayer was called to the scene of a street fight. He observed fifteen to twenty-five people in the area. Two people were in the street—Brown and his brother, Tawain Cox. As Officer Wittmayer exited his car, a woman in the crowd pointed to Brown and made a statement to the officer. At Brown's trial, the prosecutor asked the officer what the woman said. Defense counsel objected and requested a conference. Outside the presence of the jury, the prosecutor argued:

> [The woman's statement, "That motherfucker there has got a gun," is] not offered for the truth of the matter asserted. We're offering it to explain the officer's behavior, the effect on the listener and the officer's behavior in that it's the identification of that person, subsequent [Brown] running away, that the officer pursues him. [Brown's] leaving the scene is not illegal . . . . The officer's pursuit of him isn't justified simply because [Brown] decides to [go] away from this scene. It's in the context that he's been identified as the person with the gun that the officer pursues him. So it is the effect on the officer, but I think also it's relevant to the effect on [Brown] . . . . It's [Brown] and solely [Brown] who runs in response to that statement, subsequently followed by his brother who

[1] The jury also convicted Brown of interference with official acts and he has not appealed that conviction.

[2] Brown also raises a "notice" argument on appeal and we conclude he did not preserve error on this claim. Outside the presence of the jury, Brown argued officer Wittmayer's testimony regarding the woman's statement was improper because the State did not list the woman as a witness. However, the trial court did not rule on this objection, and Brown did not request a ruling. When Keshawn Outlaw subsequently testified to the woman's statement, Brown made a hearsay objection, but he did not object on the grounds the State failed to list the woman as a witness.

> recognizes [Brown] is running. So it's the effect on the listener of the officer as well as the effect on the listener of the defendant . . . . [I]t's not even an exception, it's just not hearsay.

After defense counsel conducted a voir dire examination of Officer Wittmayer, he argued the testimony is hearsay and also argued admitting the testimony would be a violation of Brown's right of confrontation. The trial court overruled these objections. Defense counsel next argued there is no foundation to establish the statement's admissibility as a present sense impression. The court ruled: "[T]hat's not why I'm going to admit it, because the State's not even requesting that it be admitted for that purpose, and so I'm not doing it." Finally, defense counsel asserted the prejudicial effect of the evidence outweighs any relevance to a material issue. The court overruled this objection. After the jury returned to the courtroom, Officer Wittmayer testified:

> Q. As you then exit your vehicle, what is said to you . . . ?
> THE COURT: Before he gives his answer, ladies and gentlemen, let me instruct you that you shall not consider the statement made for the truth of the matter but may only consider the statement for the effect the statement may have had on listeners and to explain why officers did what they did after the statement was made. You may continue.
> . . . .
> A. Okay. She pointed to [Brown] and stated, "That motherfucker there has got a gun."
> Q. Based upon that statement, what did you do? A. I looked towards [Brown] and made a motion for him to come over, and I think I started to say, "Hey come here."
> Q. And what did he do? A. Looked back at me and took off running.
> . . . .
> Q. What happens next? A. [Cox] looks at [Brown], looks back at me, and then he, in turn, takes off running as well, and I, in turn, take off running after both of them.

Officer Wittmayer radioed for help as he chased Brown and Cox. When Brown and Cox were stopped by other officers, Brown was wearing two pairs of

sweatpants, with the interior pair held up with a belt. Officers searched Brown's route and found a loaded handgun laying in the front yard of a home Brown had run past.

Keshawn Outlaw was on the front porch of his home as the crowd gathered and the fight began. Keshawn saw Brown pull a black handgun from the waist of his pants, cock the gun, and yell for the crowd to get back. This led Keshawn and his mother to call 911. Keshawn testified, over Brown's hearsay objection and after the court admonished the jury of the limited purpose of the testimony: "My mother said, 'That's the mother F-er right there who had the gun,' so the officer took off running after [Brown]." Keshawn followed Brown, Cox, and Officer Wittmayer and caught up with them. Keshawn identified Brown as the person with the gun at the scene, after a photo lineup, and at trial.

The court instructed the jury: "As you were previously instructed, you may consider the statement of the woman at the scene to Officer Wittmayer only to explain officers' course of conduct or the effect of such statement on others."

Brown argues the court erred in overruling his objections and allowing Officer Wittmayer and witness Keshawn to testify to the statement.

II. Hearsay.

Brown first argues the court erred in allowing the statement because the testimony is inadmissible hearsay. We review hearsay rulings for correction of errors at law. *State v. Ross*, 573 N.W.2d 906, 910 (Iowa 1998).

Hearsay is "a statement, other than one made by the declarant testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Iowa R. Evid. 5.801(c). However, "[s]tatements that otherwise would

be considered hearsay, offered not for the purpose of proving the truth of the statements but rather offered to help explain relevant conduct taken in response to them, are not hearsay and are not excludable as such." *State v. Hollins*, 397 N.W.2d 701, 705 (Iowa 1986).

We conclude the challenged testimony is not hearsay. The testimony describing the woman's statement to Officer Wittmayer was offered to explain the effect on Officer Wittmayer and on Brown, and to explain why Brown ran and why Officer Wittmayer chased him. The jury was told and retold of the limited use they could make of this testimony. Accordingly, we find no error.[3]

III. Confrontation Clause.

Brown argues the district court erred in overruling his Sixth-Amendment-right-of-confrontation objection to Officer Wittmayer's testimony. Under the Confrontation Clause: "Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." C*rawford v. Washington*, 541 U.S. 36, 59 (2004). Brown argues the woman's statement is testimonial "as it was gathered by Wittmayer pursuant to his investigation by a witness who wanted Wittmayer to act upon the information."

We review de novo. *State v. Bentley*, 739 N.W2d 296, 297 (Iowa 2007). We need not decide whether or not the woman bystander's statement is testimonial because the Confrontation Clause, like the hearsay rule, "also does not bar the use of testimonial statements for purposes other than establishing the

[3] Based on our resolution of this issue, we need not address Brown's additional argument the testimony is not admissible as a present sense exception to the hearsay rule. *See* Iowa R. Evid. 5.803(1).

truth of the matter asserted." *Crawford*, 541 U.S. at 59 n.9. Accordingly, even if we *assume* the unsolicited statement by the woman bystander is testimonial, because the statement was not offered at trial for the truth of the matter asserted, the Confrontation Clause is not implicated. *See id*.

IV. Unduly Prejudicial.

Brown argues the district court erred in overruling his objection the testimony is not relevant and any probative value is substantially outweighed by undue prejudice. Brown argues undue prejudice is shown "because of the foundational deficiencies and because she was not produced for trial and subject to cross-examination." *See* Iowa R. Evid. 5.403.

We review claims of error regarding admission of evidence for abuse of discretion. *Scott v. Dutton-Lainson Co*., 774 N.W.2d 501, 503 (Iowa 2009). The trial court ruled: "[I]t's not being offered for the truth of the matter, so that reduces the danger of unfair prejudice to the defendant. And, also, the State has already alluded to the purposes for which it is relevant and material to this case." Finding no abuse of discretion, we agree with and adopt the trial court's ruling.

AFFIRMED.