IN THE COURT OF APPEALS OF IOWA

No. 6-1028 / 06-0344
Filed February 28, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BRIAN REYNOLDS,
Defendant-Appellant.

Appeal from the Iowa District Court for Muscatine County, Nancy S. Tabor, Judge.

Defendant appeals his convictions for theft in the first degree and six counts of forgery. **AFFIRMED.**

Patricia Reynolds, Acting Appellate Defender, and Greta Truman, Assistant Appellate Defender, for appellant.

Brian Reynolds, Muscatine, pro se.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Gary Allison, County Attorney, and Kerrie L. Snyder, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Baker, J., and Robinson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

ROBINSON, S.J.

I. Background Facts & Proceedings

On December 17, 2004, Brian Reynolds brought six postal money orders, each for $950, to U.S. Bank in Muscatine. A bank employee, Paige Bales, was suspicious of the money orders because they were for large amounts, and told Reynolds the bank would have to put a hold on them. Bales explained the postal money orders might be part of a scam. About an hour later, Reynolds returned and asked for the money orders back. U.S. Bank complied. Reynolds then went to Central State Bank, where he was able to redeem the postal money orders. He paid $100 on his truck loan and received the remaining $5600 in cash.

On December 20, Reynolds deposited $2000 in his bank account at U.S. Bank. While at the bank, he told Bales somebody he met on-line had mailed him the money orders. Reynolds stated he was supposed to cash them, keep some of the money, and mail the rest to the person. Bales told him that it was a scam. She testified Reynolds seemed surprised, but not overly concerned.

On December 30, Reynolds returned to Central State Bank and cashed postal money orders in the total amount of $4800. On January 31, 2005, Reynolds cashed two Traveler's Express money orders issued by Hy-Vee, each in the amount of $3000 at Central State Bank.

In February 2005, Central State Bank received notification from the Federal Reserve Bank that the money orders Reynolds cashed were counterfeit. Reynolds told investigators he had an on-line relationship with someone going by the name "tessy4love00," who stated she was a model in Africa and needed

money to come to the United States. He stated "tessy4love00" had sent him the money orders, he was supposed to cash them, and send the money to her. E-mails received by Reynolds indicate "tessy4love00" did not receive any money back from Reynolds.

Reynolds was charged with theft in the first degree, in violation of Iowa Code sections 714.1(1), 714.1(3), and 714.2(1) (2003), and six counts of forgery, in violation of section 715A.2. After a bench trial, the district court found defendant had obtained the transfer or possession of property from Central State Bank by deception. Reynolds was found guilty of first-degree theft and six counts of forgery. He was sentenced to a term of imprisonment not to exceed ten years on the theft charge, and a term of imprisonment not to exceed five years on each of the forgery charges, all to be served concurrently. Reynolds appeals.

II. Hearsay Evidence

We review hearsay claims for the correction of errors at law. *State v. Musser*, 721 N.W.2d 734, 751 (Iowa 2006). Hearsay evidence is not admissible, unless it comes within a hearsay exception. *State v. Buenaventura*, 660 N.W.2d 38, 51 (Iowa 2003). "Subject to the requirement of relevance, the district court has no discretion to deny the admission of hearsay if it falls within an exception, or to admit it in the absence of a provision providing for admission." *State v. Newell*, 710 N.W.2d 6, 18 (Iowa 2006).

A. Reynolds objected to the admission of exhibits 1 through 6, and exhibits 8 to 11 on the basis of hearsay. Exhibits 1 to 6 related to the

transactions of December 17, 2004, and each exhibit was a packet containing a bank transaction ticket, a cash out statement, a postal money order, an e-mail from the Federal Reserve, and an error report from the Federal Reserve that the money order was counterfeit. Exhibits 8 to 11 related to the transactions of December 30, 2004, and contained similar information about the postal money orders cashed that day. Reynolds objected on hearsay grounds to the last two pages of each of these exhibits, which had been received from the Federal Reserve.

Stella Best, a proof operator for Central State Bank, testified she received e-mail notifications and error reports from the Federal Reserve in the normal course of her business. The State argued that although the reports were generated by the Federal Reserve, they were received by Central State Bank in the normal course of its business, and were commonly relied upon by the bank. The district court admitted the exhibits. On appeal, Reynolds claims the district court erred in overruling his hearsay objection to the Federal Reserve reports.

Iowa Rule of Evidence 5.803(6) provides an exception to the hearsay rule for records of regularly conducted activity. The exception includes records "kept in the course of a regularly conducted business activity, and the regular practice of that business activity was to make" the record "as shown by the testimony of the custodian or other qualified witness . . . ." Iowa R. Evid. 5.803(6). The admissibility of evidence under rule 5.803(6) is based on the guarantees of reliability and trustworthiness usually associated with business records. *State v. Propps*, 376 N.W.2d 619, 621 (Iowa 1985).

We find no error in the district court's conclusion that the evidence was admissible under the business records exception in rule 5.803(6). An employee of Central State Bank testified the e-mails and error reports were received by the bank from the Federal Reserve in the normal course of its business. The bank customarily kept these reports and relied upon them as part of its business. *See In re Receivership of Mt. Pleasant Bank & Trust*, 526 N.W.2d 549, 554 (Iowa 1995) (finding an FDIC report was admissible under the business records exception to the hearsay rule).

B. Charity Harmon, the head teller at Central State Bank, testified that after the bank was notified the postal money orders were counterfeit, it attempted to verify the legitimacy of the two Traveler's Express money orders which Reynolds had cashed. She testified that in the normal course of business, to check on a Traveler's Express money order, she would call a telephone number provided by Traveler's Express. She stated the bank commonly relied upon the information received from calling the telephone number to determine the validity of a money order.

Reynolds objected to Harmon's testimony regarding what she learned when she called the Traveler's Express telephone number. The district court overruled the objection. Harmon then testified one of the money orders had no value and the other had been previously cashed. She stated she did not talk to a person, but when she put in the money order numbers she received a computerized recording giving her information about the money orders.

It is questionable whether the computerized recording Harmon heard could be considered hearsay because it was not made by a human declarant. *See* Iowa R. Evid. 5.801(*b*) (stating a declarant is a person); 2 Kenneth S. Broun, *McComick on Evidence* § 294, at 326 (6th ed. 2006) (noting computer-generated records are not a statement by a human declarant, which could be tested by cross-examination, and should not be treated as hearsay).

Even assuming such evidence was hearsay, however, we determine the evidence would be admissible under the business records exception found in rule 5.803(6). Harmon testified that in the normal course of business the bank relied upon the information about the validity of money orders which it received from the Traveler's Express telephone number. We find no error in the district court's decision to overrule Reynolds's hearsay objection.

III. Ineffective Assistance

Our review of claims regarding ineffective assistance of counsel is de novo. *Berryhill v. State*, 603 N.W.2d 243, 244-45 (Iowa 1999). To establish a claim of ineffective assistance of counsel, a defendant must show (1) the attorney failed to perform an essential duty, and (2) prejudice resulted to the extent it denied defendant a fair trial. *State v. Shanahan*, 712 N.W.2d 121, 136 (Iowa 2006). We presume that counsel is competent and that the attorney's conduct falls within the wide range of reasonable professional assistance. *State v. Hepperle*, 530 N.W.2d 735, 739 (Iowa 1995).

A. Reynolds contends he received ineffective assistance of counsel because his attorney did not object to Best's testimony that she received e-mails

from the Federal Reserve indicating the postal money orders were counterfeit. Defense counsel only objected to the admissibility of those e-mails as exhibits. Also, Harmon and Frannie Schmidt, the branch manager at Central State Bank, testified Best had told them the postal money orders were counterfeit.

We determine Reynolds has failed to show he received ineffective assistance due to counsel's failure to object on hearsay grounds to testimony about the e-mails received from the Federal Reserve. We have already determined the e-mails and error reports received by Central State Bank from the Federal Reserve came within the business records exception of rule 5.803(6). Defense counsel did not have a duty to object on hearsay grounds to Best's testimony about the e-mails. *See State v. Hochmuth*, 585 N.W.2d 234, 238 (Iowa 1998) (noting trial counsel does not have a duty to raise a meritless claim).

B. Reynolds also asserts he received ineffective assistance because his defense counsel did not object to Best's testimony based on his Sixth Amendment right to confrontation. He asserts he should have had the opportunity to cross-examine someone from the Federal Reserve who made the determination that the postal money orders were counterfeit.

Under the Sixth Amendment to the United States Constitution, a defendant has the right to be confronted with the witnesses against him. *State v. Richardson*, 442 N.W.2d 91, 93 (Iowa 1989). Under the confrontation clause, testimonial statements are admissible only if the declarant is unavailable and the defendant had a prior opportunity for cross-examination. *Newell*, 710 N.W.2d at 24 (citing *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 1374, 158

L. Ed. 2d 177, 203 (2004)). On the other hand, statements which are non-testimonial in nature are not subject to scrutiny under the Confrontation Clause. *Musser*, 721 N.W.2d at 753 (citing *Davis v. Washington*, 547 U.S. ___, ___, 126 S. Ct. 2266, 2273, 165 L. Ed. 2d 224, 236 (2006)).

Our supreme court has determined laboratory reports are non-testimonial because they were not created with the primary purpose of being used in a criminal trial. *Id.* at 754. We conclude the business records here are also non-testimonial. Defense counsel did not have an obligation to object based on the Confrontation Clause. *Id.* (noting that with regard to non-testimonial statements, an objection under the Confrontation Clause would have no merit).

We conclude Reynolds has failed to show he received ineffective assistance of counsel.

IV. Pro Se Issues

Iowa Rule of Appellate Procedure 6.13(2) provides:

> Any criminal defendant or applicant for postconviction relief who wishes to file a pro se supplemental brief or designate additional parts of the district court record for inclusion in the appendix may do so within 15 days of service of the proof brief filed by their counsel. Any pro se supplemental brief or designation filed beyond this period by a properly served defendant or applicant will not be considered by the court and no response by the State will be required or allowed.

In the present case, appellate counsel for defendant filed the proof brief on May 22, 2006. The inside portion of defendant's pro se supplemental brief is filed stamped June 12, 2006, by the clerk of the Iowa Supreme Court, while the outside cover is file stamped October 17, 2006. Additionally, defendant submitted a revised pro se brief on January 2, 2007. Defendant's pro se brief

and revised pro se brief were not filed within fifteen days after appellate counsel filed the proof brief. We conclude defendant's pro se briefs may not be considered by this court. *See* Iowa R. App. P. 6.13(2).

We affirm defendant's convictions.

AFFIRMED.