IN THE COURT OF APPEALS OF IOWA

No. 22-1485
Filed March 27, 2024

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JAMES ANDREW HOLS,
Defendant-Appellant.

Appeal from the Iowa District Court for Mahaska County, Myron Gookin, Judge.

A defendant appeals his conviction for domestic abuse assault. **AFFIRMED.**

Denise M. Gonyea of McKelvie Law Office, Grinnell, for appellant.

Brenna Bird, Attorney General, and Joshua A. Duden, Assistant Attorney General, for appellee.

Considered by Bower, C.J., and Greer and Chicchelly, JJ. Buller, J., takes no part.

CHICCHELLY, Judge.

James Andrew Hols appeals his conviction for domestic abuse assault, contending the district court's finding of forfeiture by wrongdoing violated his constitutional rights. Because we conclude Hols forfeited his right to confront the victim, we affirm.

I. Background Facts and Proceedings.

In the early morning hours of March 1, 2022, Hols and his wife, R.H., were engaged in an argument when R.H. retreated. She left their trailer, went outside, and entered her vehicle, and Hols followed her. Hols fought his way into the vehicle on the opposite side, and after a brief struggle, he overpowered R.H. and dragged her from the car by her hair, throwing her onto the ground. He then threw her onto the ramp leading up to the trailer's door, slamming the car door behind him. Hols next led R.H. back inside and pulled her over the threshold by her waist. R.H. called the police a few hours later and notified them that the altercation was recorded on a Digital Video Recorder (DVR) camera. Police executed a search warrant and obtained the DVR footage. Hols was charged with domestic abuse assault, third or subsequent offense.

To prepare for trial, the State scheduled depositions and served R.H. with a subpoena to appear at the county attorney's office on June 9. R.H. arrived early for the deposition, but she dropped off a handwritten letter and left. She did not return for the deposition. A warrant was issued for R.H. based on her failure to comply with the subpoena, and law enforcement tried to locate her. Even after calling R.H., driving by her residence around twelve or thirteen times, and knocking on the door, authorities could not reach her. While her car was parked outside the

trailer, one officer testified he was not sure anyone was home. Officers also tried to serve R.H. at her mother-in-law's home but did not succeed. Likewise, despite at least four attempts to serve R.H. before the trial, the State was unable to locate R.H. in order to subpoena her for trial.

Prior to trial, the State moved to admit hearsay evidence[1] against Hols based on alleged forfeiture by wrongdoing, citing R.H.'s noncompliance with the deposition subpoena, its multiple failed attempts to secure her presence at trial, and Hols's recorded jail interactions with his mother and an unknown caller[2] suggesting that it would help him if R.H. was not able to be served. In one such phone call, Hols stated to the unknown caller:

> As of right now, we could do depositions, but if they can't find her to serve her or whatever, that might help. But the county attorney is insisting on trying to send me to prison on this, and I would do twenty percent to one hundred percent of the time because of—they changed the laws and rules and stuff on domestic cases recently, or whatever. And supposedly got a no contact hearing like the 30th of this month, or whatever. But—if she don't show up to court or whatever, or—or if she don't show up for the depositions or for court, it would look good on my behalf. And possibly because they wouldn't really have nothing, they might not be able to do the security camera footage, which shows me pulling her hair, but it don't show—it shows her and me getting in the van. So they just kind of—"well, this is what he did, and he was the aggressor, so we're going to hit him for that" and all that sort of shit.

[1] At this time, the State moved to include hearsay evidence in the form of the handwritten letter R.H. dropped off to the county attorney's office. But the State believed the letter was likely written by P.H. and only signed by R.H., so it focused its efforts instead on admitting officer testimony describing R.H.'s report to law enforcement and the existence of the DVR. This testimony would lay the proper foundation to admit the DVR footage as evidence at trial.

[2] The identity of the other caller was never confirmed but believed to be female. Because her identity is immaterial to our analysis, we refer to her only as an unknown caller.

Before the deposition, Hols and his mother, P.H., had a visit at the jail, and this exchange took place:

> P.H.: I went to [R.H.'s] and talked to her for a little while last night. And she said that she just—she showed me a paper that she had been subpoenaed to do a—um—
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> HOLS: Deposition.
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> P.H.: Deposition. And it's like I told her—both of you, do not lie about anything that happened because—
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> HOLS: That's the thing is—that's the thing, if she don't show up, then—
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> P.H.: [inaudible] Or shouldn't she go? Don't go? Okay.
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> HOLS: And if she don't show up for court on the 14th, then it's basically whatever the county attorney can try to prove, but can't really prove nothing.
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> . . . .
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> HOLS: That's the thing. If she gets a hold of the county attorney, which she should have done off the git, anyway, and went and told 'em to drop the charges, drop the no contact order because we don't want it, whatever.
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> . . . .
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> P.H.: I talked to [R.H.], and I, you know—[my other son,] when I talked to [my other son] about the subpoena, he said she shouldn't go, but it was up to her. And you're telling me the same thing. So I will tell her, "Just don't go."
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> HOLS: Yup.
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> . . . .
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> P.H.: Yeah, and we'll see what the decision is, I guess. But I will tell her not to go if you—if that's what you say, she should not go—then I will tell her that.
>
> HOLS: She should get a hold of the county attorney and say, "Here, I was pressured in by these people to do this. I wanted it dropped." Whatever, and—
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> P.H.: Alright.
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> . . . .
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> (Hols instructs P.H. to have R.H. draft a letter to the county attorney stating that they are going to counseling and don't want charges or a no contact order, and P.H. agrees to help her draft the letter.)
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> P.H.: Okay. Yeah, anything. But—but, "Don't go to the subpoena." I will tell her that. I thought—you know, they make sure they gave it to her in hand. The cop—"are you home?"—and it says right at the top "subpoena." I'll say you don't have to go if you don't want to. Okay. Uh, well, she and I will spend some time together and write letters.

The district court heard the State's motion in advance of trial. Based on Hols's statements to P.H., the court determined that "[R.H.] is unavailable, that the State has made efforts to obtain her presence here today, that these efforts were reasonable, perhaps even beyond reasonable, in order to try and procure her attendance at the deposition and here today" and granted the motion conditional on R.H. not appearing for trial. When R.H. ultimately did not show up at trial, the State offered the hearsay evidence and admitted the DVR footage without objection.

A bifurcated trial was held. After the first phase, the jury found Hols guilty of domestic abuse assault. The trial then progressed to the second phase concerning Hols's prior convictions, and the jury found that Hols has three prior convictions for domestic abuse assault. The district court sentenced Hols to a term of incarceration not to exceed fifteen years as an habitual offender. He appeals.

II. Review.

Because forfeiture-by-wrongdoing claims implicate a constitutional right, our review is de novo. *State v. Hallum*, 606 N.W.2d 351, 354 (Iowa 2000). "[W]e give weight to the district court's findings of fact because that court had the opportunity to personally assess the credibility of the witnesses." *Id.*

III. Discussion.

Hols contends the district court incorrectly applied the forfeiture-by-wrongdoing exception and allowed hearsay testimony, thereby violating his confrontational right. Hearsay is a statement made outside the current trial or hearing "to prove the truth of the matter asserted" and is generally inadmissible. Iowa Rs. Evid. 5.801(c), .802. While R.H.'s hearsay statements laid

the foundation for the DVR footage, Hols neglected to object to the admission of the footage at trial. We therefore need only consider whether his confrontational right was violated, not the admissibility of the evidence itself. *Cf. State v. Campbell*, No. 10-0117, 2013 WL 4011071, at *6 (Iowa Ct. App. Aug. 7, 2013) (considering the admissibility of substantive evidence admitted over the defendant's objections as part of the forfeiture analysis).

Defendants in criminal trials are generally entitled "to be confronted with the witnesses against him." U.S. Const. amend. VI; Iowa Const. art. I, § 10. But "[w]hen a court finds that a defendant has procured a witness's unavailability, the defendant is precluded from asserting his constitutional right to confront the witnesses against him" and preventing third-party hearsay statements from being admitted against him. *Hallum*, 606 N.W.2d at 356. We consider "the defendant's wrongful conduct" to determine whether "the defendant has wrongfully procured the witness's unavailability." *Id.* at 355–56. Overt threats and intimidation are unnecessary to establish forfeiture, but wrongful conduct may include persuasion and control. *Id.* at 356. We have previously held that the combination of "vague mentions" that others have had charges dropped when witnesses refused to testify with related requests and instructions to the witness are sufficient evidence to establish forfeiture. *See State v. Gordon*, No. 15-1841, 2016 WL 6636792, at *2 (Iowa Ct. App. Nov. 9, 2016).

The parties do not dispute that R.H. was unavailable because she did not appear at either the deposition or trial. They also do not contest that the statements made were "testimonial" and therefore subject to cross-examination and the Confrontation Clause. *See State v. Harper*, 770 N.W.2d 316, 321

(Iowa 2009) (differentiating testimonial and non-testimonial statements based on the "primary purpose" of the statements and determining that "testimonial statements from unavailable witnesses are not admissible unless the defendant had a prior opportunity for cross-examination" (citation omitted)). Instead, Hols alleges the State failed to meet its burden in establishing he "intended to prevent [the victim] from testifying." *Campbell*, 2013 WL 4011071, at *6 (citation omitted).

Upon our own review, we find that Hols prevented R.H. from testifying. While Hols claims that he "made no suggestion that [others] should attempt to procure R.H.'s unavailability," this is incorrect. The court concluded that Hols "encouraged and influenced [R.H.] through third parties not to appear for her deposition or for trial," and we agree. Hols's recorded conversations show his attempts to persuade the unknown caller and his mother to prevent R.H. from appearing. Hols stated, "If she don't show up for the depositions or for the court it'd look good on my behalf," and he later instructed P.H. to share the information with R.H. He conveyed his desire for R.H. to speak with the county attorney to "drop the charges, drop the no contact order because we don't want it." Hols also stated that without R.H.'s testimony, the evidence left would be "basically whatever the county attorney can try to prove, but can't really prove nothing." P.H. in turn expressed her willingness to participate, relay the messages to R.H., and even to help handwrite a letter. In fact, after comparing the handwriting from the letter purportedly signed by R.H. with P.H.'s letter, we find both were likely written by P.H., not R.H. Hols contends that R.H. had her own personal reasons for refusing to appear, and that may be true. But our focus is Hols's intent, and the record supports a finding that Hols intended to discourage R.H. from testifying. *See id.*

The circumstantial evidence establishes that based on the communicated instructions she received from Hols through P.H., R.H. did not appear. In fact, she avoided being summoned despite repeated attempts by the State to serve her. Her avoidance was so successful that the State even failed to serve her with a subpoena to appear for trial. We therefore conclude that Hols forfeited his right to confront R.H. by wrongfully procuring her unavailability.

IV. Disposition.

Because Hols forfeited his right to confront the victim, we affirm his conviction of domestic abuse assault.

AFFIRMED.