

IN THE COURT OF APPEALS OF IOWA

No. 2-017 / 11-0466
Filed February 15, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

COREY DAMONE CRAWLEY,
Defendant-Appellant.

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

Defendant appeals his convictions for second-degree robbery, first-degree
burglary, and possession of marijuana with intent to deliver. **AFFIRMED.**

Robert P. Montgomery of Parrish Kruidenier Dunn Boles Gribble Parrish
Gentry & Fisher, L.L.P., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney
General, Thomas J. Ferguson, County Attorney, and Joel Dalrymple, Assistant
County Attorney, for appellee.

Considered by Vogel, P.J., and Potterfield and Doyle, JJ.

DOYLE, J.

Corey Crawley appeals his convictions for second-degree robbery, first-degree burglary, and possession of marijuana with intent to deliver. He claims the district court erred by permitting the State to present hearsay evidence consisting of videotaped out-of-court statements by a witness. We affirm.

I. Background Facts & Proceedings.

The following facts were presented during the jury trial: On November 18, 2009, Shanaivia Hughes was at her home in Waterloo, Iowa, along with her brother, Marquavias Hughes, and their cousin, Jatoyia Wilder, when someone knocked at the door. Marquavias went to the door and asked who was there. The person replied “Jack,” and Marquavias opened the door. He was immediately attacked. One of the attackers had a gun.

Marquavias testified he could not see the attackers’ faces because their hoods were drawn tight. He stated they were wearing dark-colored hoodies. The attackers asked him, “where is the money?” Shanaivia testified two men came in and a third one was out on the porch. She also stated she could not see their faces because their hoods were pulled all the way down. Shanaivia stated one of the men had on a white hoodie, but she could not remember if this was one of the men who came in the house or if he had a gun. Wilder testified one of the men who came in the house was wearing a bright orange shirt and he was the one who had a gun. She testified the other man who came in the house was wearing a gray sweater. Wilder testified the man who waited on the porch was in a white sweater. She stated you could not see their faces because their hoods were pulled tight.

While Marquavias was being attacked, Shanaivia and Wilder ran out the front door, and each went a different direction. Shanaivia ran to a friend's house and called 911. Wilder saw a police car nearby and ran over to alert the officer. The three men ran out of the back of the house. Crawley, who was wearing an orange shirt, was captured nearby. Rashadd Wright, who was wearing a white hoodie, was also captured.

That same day, Wilder was interviewed by an officer at the police station, and the interview was videotaped. Her deposition was taken on February 26, 2010. On cross-examination at trial, defense counsel questioned Wilder extensively regarding inconsistencies between her statements at the trial and those during her deposition.¹

On redirect examination, the State proposed to introduce the videotape of the interview with Wilder on November 18, 2009, under Iowa Rule of Evidence 5.801(d)(1)(B), permitting prior consistent statements that are offered to rebut a charge of recent fabrication. Crawley objected on hearsay grounds, stating "we're also not really, for the most part, claiming recent fabrication. We're claiming initial fabrication from the moment she ran out of the house. So it's not recent fabrication." The district court ruled that only those portions of the

¹ Defense counsel questioned Wilder about discrepancies between her trial testimony and her testimony during a deposition on February 26, 2010, on the following matters: (1) her reasons for going to Shanaivia's house; (2) when and where she had gotten Marquavias's telephone number; (3) whether she had telephone conversations with other people while she was waiting for the police interview, and the substance of those conversations; (4) whether Marquavias told her he was living at Shanaivia's house on November 18, 2009; (5) whether she heard the people at the door giving the name "Jack"; (6) whether she could see the face of the person who was waiting out on the porch; (7) whether Crawley had the same build as the person she saw on the porch; (8) whether the person on the porch was the shortest of the three men; and (9) whether Wright was a friend of Shanaivia's boyfriend.

videotape which actually contained prior consistent statements could be presented to the jury. The court noted the jury would not be able to consider the videotape substantively, but could consider it in assessing the credibility of the witnesses.

The excerpts from Wilder's videotaped police interview that were presented to the jury totaled less than five minutes in length. The clips shown contained statements that the person outside identified himself as "Jack," the person in orange was the first to come inside the house and that person had a gun, the people wearing orange and gray beat Marquavias, all three men had their faces covered, the person in the white sweatshirt stayed on the porch, and a sweatshirt shown to her by police officers had been worn by the person on the porch.

The jury found Crawley guilty of second-degree robbery, first-degree burglary, and possession of marijuana with intent to deliver. Crawley filed a motion for new trial, claiming he was denied a fair trial because the district court permitted the State to present hearsay. The district court denied the motion.

Crawley then filed a motion to enlarge, asking for a more detailed ruling on his claim Wilder's videotaped statements were inadmissible because they were not presented in response to a claim of recent fabrication. The court ruled from the bench:

I did give that careful consideration and did take a look at motivation to lie at the time of making the statements. I know that the defense's theory is that Ms. Wilder and some of the other witnesses were lying from the beginning. One thing that we did discuss during the course of the trial was the extent to which issues that the defense wanted to get into in cross-examining the witnesses was collateral, and after a side bar I allowed even

examination into collateral matters. Some of these areas that were inquired into by the defense, perhaps there was a motivation to fabricate at the time the statements were made, but for the nature of the testimony that was introduced in the form of the prior consistent statements, I'm finding that there was not the same motivation to lie. The areas that the State was inquiring into or the State was demonstrating to the jury with the prior consistent statements were areas associated with identification of perpetrators, what they're wearing, things like that. And we carefully went through and made a determination as to which relevant and material issues, relevant and material to the principal issues involved in the case were being displayed to the jury. For those issues, I made a determination that there was not the same motivation to lie at the time of the making of the statement.

In addition, I will point out that this case is a little bit different than the situation presented in *Tome v. United States*. That dealt principally with the motivation issue and not the recent fabrication issue which was presented in this case. The witness, Wilder, was confronted repeatedly with prior statements made during deposition, which was made obviously before the trial, and she was discredited because of some statements that she made during depositions which were inconsistent with statements made during the trial. The jury at that time did not know that she made statements immediately after the incident which were entirely consistent with her testimony here. The thrust of the defense was that she's lying. That is one of the defense's theories from the very beginning, she's lying. She testified here, she was confronted with prior statements, and it—the obvious import of that is that her testimony here was a recent fabrication, and the State wanted to introduce testimony of—or not testimony, but evidence of a prior consistent statement in an effort to rebut that.

The court sentenced Crawley to a term of imprisonment not to exceed ten years on the charge of second-degree robbery, a term not to exceed twenty-five years on the charge of first-degree burglary, and a term not to exceed five years on the charge of possession of marijuana with intent to deliver. All of the sentences are to be served concurrently. Crawley appeals his convictions,

claiming he was denied a fair trial based on the court's ruling permitting the State to present Wilder's videotaped statements.²

II. Standard of Review.

Generally, we review a district court's decision to admit or exclude evidence for an abuse of discretion. *State v. Paredes*, 775 N.W.2d 554, 560 (Iowa 2009). Claims of hearsay, however, are reviewed for the correction of errors at law. *Id.* "This standard of review extends to determining whether statements come within an exception to the general prohibition on hearsay evidence." *Id.*

III. Merits.

Under Iowa Rule of Evidence 5.802, hearsay evidence is generally not admissible. "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).

Rule 5.801 defines hearsay, and specifically provides that certain statements are not hearsay. The rule provides:

The following statements are not hearsay:

(1) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.

² On appeal, Crawley also raises a claim under the Confrontation Clause. This issue was not raised before the district court, however, and the court did not rule on it. We conclude this issue has not been preserved for our review. See *State v. Mitchell*, 757 N.W.2d 431, 435 (Iowa 2008) (noting we do not consider an issue raised for the first time on appeal, even if it is of a constitutional dimension).

Iowa R. Evid. 5.801(d)(1)(B). Thus, statements that come within rule 5.801(d) are not hearsay and are not subject to the prohibition against the admissibility of hearsay found in rule 5.802. See *State v. Elliott*, 806 N.W.2d 660, 673 (Iowa 2011) (“Rule 5.801(d)(1)(A) provides that prior statements made by a witness are not hearsay and are admissible as substantive evidence.”).

The United States Supreme Court has determined that federal Rule of Evidence 801(d)(1)(B) “permits the introduction of a declarant’s consistent out-of-court statements to rebut a charge of recent fabrication or improper influence or motive only when those statements were made before the charged recent fabrication or improper influence or motive.” *Tome v. United States*, 513 U.S. 150, 167, 115 S. Ct. 696, 705, 130 L. Ed. 2d 574, 588 (1995). The Iowa Supreme Court adopted this interpretation for Iowa Rule of Evidence 5.801(d)(1)(B) in *State v. Johnson*, 539 N.W.2d 160, 164-65 (Iowa 1995). Now a witness’s prior consistent statement is admissible to rebut a charge of recent fabrication only if the statement was made before the alleged improper motive to fabricate arose. *Johnson*, 539 N.W.2d at 165.

Crawley claims Wilder had an improper motive to fabricate at the time of the videotaped statements on November 18, 2009. He asserts Wilder was friends with Wright and this was the reason for her testimony that he was the one who stayed out on the porch during the incident.³ He also claims Wilder had a

³ At the trial, Wilder admitted Wright was her friend. She testified she thought she told officers she knew him. Wright’s brother was a boyfriend of a cousin Wilder was close to, and she and Wright were Facebook friends. When specifically asked, however, whether she would prefer that Wright not get into trouble, she replied “I prefer any of them not get in trouble.”

motive to fabricate concerning drug use at Shanaivia's house. He asserts the district court erred by finding the videotaped statements were admissible because the statements were not made prior to the time Wilder's improper motive to fabricate arose.

The district court found the defense had attempted to discredit Wilder because some of her statements in her deposition were inconsistent with statements she made during the trial. By highlighting these discrepancies, the defense was raising an implied claim of recent fabrication. Under these circumstances, the State could present evidence "consistent with the declarant's testimony and offered to rebut an express or implied charge against the declarant of recent fabrication." See Iowa R. Evid. 5.801(d)(1)(B).

We find the present situation is distinguishable from the situation found in *Johnson*, 539 N.W.2d at 163-65. In *Johnson*, the State conceded the alleged motive to fabricate arose prior to the victim's interview with a police officer. 539 N.W.2d at 163. There, the alleged motivation to fabricate arose before the victim ever reported the crime. *Id.* at 161 (finding defendant claimed the victim fabricated her statement that he improperly touched her because he threatened to send her to a group home prior to the time she reported the improper touching). In *Johnson*, the witness had not made a prior inconsistent statement; her credibility was challenged only on the basis of the claimed motive to fabricate. *Id.* at 163. Because her pre-trial videotaped statement was consistent with her trial testimony and was given after the alleged motive to fabricate, it was not relevant to rebut the claim of fabrication. *Id.* Therefore, the witness's prior consistent statement was not admissible under rule 5.801(d)(1)(B). *Id.* at 165.

We find this case is governed not by *Johnson*, but by *State v. Capper*, 539 N.W.2d 361, 366 (Iowa 1995) (overruled on other grounds by *State v. Hawk*, 616 N.W.2d 527, 530 (Iowa 2000)). *Capper* was decided the same day as *Johnson* and involved prior inconsistent statements by witnesses, similar to *Crawley's* case. There, the child victims of sexual abuse gave statements to an officer prior to January 25, 1993. *Capper*, 539 N.W.2d at 366. In *Capper*, the witnesses were extensively cross-examined and challenged concerning discrepancies between their trial testimony and their pre-trial deposition testimony. *Id.* The district court allowed the State to introduce an officer's testimony recounting statements made by one of the witnesses before her deposition testimony which was consistent with her trial testimony. *Id.* The Iowa Supreme Court held,

[b]ecause the prior consistent statements involved in this case were made prior to the impeaching deposition statements made in July of 1993, the adoption of the bright-line rule in *Johnson* does not prevent the court from allowing the prior statement.

Id. The court concluded the district court had not erred in permitting the prior consistent statements pursuant to rule 5.801(d)(1)(B). *Id.*

Like in *Capper*, the prior consistent statements presented by the State were made prior to the deposition statements defense counsel used to impeach Wilder during the trial. As the district court found, the clear implication of the defendant's use of the deposition testimony was to attempt to show Wilder was fabricating her statements at the trial. The consistent statements were made before the allegedly inconsistent statements found in Wilder's deposition; the earlier consistent statements the court allowed related to the inconsistencies with which Wilder was impeached. Although *Crawley* insisted that Wilder's motive to

fabricate dated from before her deposition, he impeached her based on her inconsistent deposition testimony, and the State was permitted to rehabilitate her with her prior consistent statement.

Crawley claims that Wilder had a motive to lie to protect one of the participants in the crime and that she deliberately switched Crawley's less culpable role with the role of another defendant. The inconsistent statements made by Wilder did not include this claimed role switch, however. Crawley's claim of an earlier motive to fabricate does not preclude the State from rehabilitating with prior consistent statements which correlated with her inconsistent deposition testimony. We find no error in the court's conclusion the prior consistent statements were admissible under rule 5.801(d)(1)(B).

IV. Harmless Error.

The State raises an additional claim that even if the district court erred in ruling on the admissibility of Wilder's videotaped statements, any error was harmless because the evidence was cumulative to other evidence in the record. *See State v. Hildreth*, 582 N.W.2d 167, 170 (Iowa 1998) (finding there was no prejudice if admitted hearsay evidence was merely cumulative). "If the record contains cumulative evidence in the form of testimony, the hearsay testimony's trustworthiness must overcome the presumption of prejudice." *Elliott*, 806 N.W.2d at 669. The trustworthiness of hearsay testimony is determined based on the trustworthiness of corroborating testimony. *Id.*

Because we have found the district court did not err in finding Wilder's videotaped statements were admissible under Iowa Rule of Evidence

5.801(d)(1)(B), we do not need to address the question of whether the admission of the evidence was harmless error.

We affirm Crawley's convictions for second-degree robbery, first-degree burglary, and possession of marijuana with intent to deliver.

AFFIRMED.