IN THE COURT OF APPEALS OF IOWA

No. 2-397 / 10-1536
Filed June 27, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KEVIN MICHAEL MEYERS,
Defendant-Appellant.

Appeal from the Iowa District Court for Lee County, Gary R. Noneman, District Associate Judge.

Kevin Michael Meyers appeals the judgment and conviction entered following a jury trial and guilty verdict for assault causing bodily injury. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and David Arthur Adams, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Daniel Burstein, Assistant Attorney General, and Michael P. Short, County Attorney, for appellee.

Considered by Vogel, P.J., and Tabor and Bower, JJ.

TABOR, J.

Kevin Michael Meyers appeals his assault conviction, alleging the district court erred in allowing the jury to consider out-of-court statements made by his confederate in a bar fight. Because the court correctly overruled Meyers's hearsay objections and because the record shows he was not prejudiced by admission of the statements, we affirm.

I. Background Facts and Proceedings

On the night of August 24, 2009, Bill Goldie and Renee Rose[1] sat talking at the bar in the Tee Pee Lounge in Keokuk, Iowa. Two men ran into the bar from separate entrances, knocked Goldie from his bar stool, and repeatedly punched and kicked him while he was on the ground. The bartender called 911 to report the fight. The attackers then fled the bar. Goldie suffered multiple injuries, including three facial bone fractures, requiring surgery and hospitalization.

Goldie and Renee Rose identified the attackers as Kevin Meyers and Terry Hackaday. Goldie was not familiar with the men, but Renee Rose had known Meyers for nearly thirty years and was acquainted with Hackaday.

The State charged Meyers with assault causing bodily injury in violation of Iowa Code section 708.2(2) (2009). His trial started on July 8, 2010. Bill Goldie and Renee Rose both testified for the State. The prosecutor also called Katie Rose, who was Hackaday's girlfriend. Over Meyers's hearsay objections, the court allowed her to share two different conversations she had with Hackaday.

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[1] Due to identical last names of individuals in this opinion, Renee Rose will be referred to as "Renee Rose" and Katie Rose as "Rose."

First, she recounted Hackaday receiving a telephone call the night of August 24, 2009, after which he told her that his friend Kevin Meyers "was going to be in a fight or was in a fight at the Tee Pee" and needed his help. Second, she testified that when Hackaday returned about thirty minutes later, he started scrubbing what appeared to be blood from his tennis shoes and told her she should leave because the police would probably be coming to arrest him.

A jury returned a guilty verdict on July 13, 2010. On September 16, 2010, the district court sentenced Meyers to serve one year in the county jail, suspended 180 days of the sentence, and ordered Meyers to pay a fine and surcharge, costs, attorney fees, and restitution. Meyers filed a notice of appeal on the same date.

II. Scope and Standard of Review

We review the admissibility of hearsay evidence for errors at law. *State v. Dullard*, 668 N.W.2d 585, 589 (Iowa 2003). We give deference to the factual findings of the district court. *State v. Long*, 628 N.W.2d 440, 445 (Iowa 2001). "If a court's factual findings with respect to application of the hearsay rule are not 'clearly erroneous' or without substantial evidence to support them, they are binding on appeal." *Id.* (citation omitted).

III. Analysis

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Iowa R. Evid. 5.801(c). Meyers alleges the district erred in overruling his hearsay objections to Rose's testimony relaying two statements

made by Hackaday: (1) after receiving a telephone call, Hackaday told her that Meyers "was going to be in a fight or was in a fight" at the Tee Pee Lounge and Hackaday was going to join him; and (2) after returning about thirty minutes later and while cleaning blood off his shoes, Hackaday told Rose he had just been in a fight, the police were probably on their way, and Rose should leave his apartment. We address each statement in turn.

A. Post-Telephone Call Statement

The challenged testimony from Rose is as follows:

> [PROSECUTOR]: What did Mr. Hackaday do following that phone call? KATIE ROSE: He proceeded to tell me that he needed to leave to go to the Tee Pee, that there was a fight. I don't know if it was in progress or going to happen, but he needed to leave to go assist his friend Kevin Meyers.
> [PROSECUTOR]: And he specifically referenced Kevin Meyers? KATIE ROSE: Yes. "Kevin is in a fight. I need to leave."
> [PROSECUTOR]: And did he in fact leave? KATIE ROSE: He did.

The district court determined this hearsay statement fell within the exception for present sense impression. The present sense impression exception requires three elements: subject matter, perception, and time. *See* Iowa R. Evid. 5.803(1) (defining the exception as "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter."). "The doctrine proceeds on the theory that under appropriate circumstances, an otherwise hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to favor admissibility." *State v. Flesher*, 286 N.W.2d 218, 220 (Iowa Ct. App. 1979). The present sense impression exception "is based upon the theory that the

substantial contemporaneity of event and statement negative the likelihood of misrepresentation." *Id.*

Meyers claims the circumstances surrounding the telephone call and Hackaday's statement are not sufficient to show the guarantees of trustworthiness needed for the present sense impression hearsay exception. Meyers argues: "People have lied about phone calls all of the time, since the invention of the instrument." While it would have been possible for Hackaday to lie about the phone call from Meyers, generally a person would fabricate a story to put himself into a better position. Here, it is difficult to see why Hackaday would have formulated the potentially self-incriminating lie that he planned to join Meyers in a bar fight. *Cf.* Iowa R. Evid. 5.804(b)(3) (providing hearsay exception based on belief that a reasonable person would not make statement against interest unless believing it to be true).

The district court determined Hackaday's statement met the requirements of the present sense impression exception because the statement described an event he perceived—his telephone conversation with Meyers—immediately after it occurred. While no Iowa case addresses this precise situation, the Fourth Circuit faced a similar circumstance in *United States v. Portsmouth Paving Corp.*, 694 F.2d 312, 323 (4th Cir. 1982), where a witness testified to a business associate's description of a just-completed telephone conversation. The court found the associate's statement fulfilled the present sense impression hearsay exception in Federal Rule of Evidence 803(1), upon which the Iowa rule is based, for three reasons: (1) the statement's subject matter described the phone

conversation, which the court determined was "certainly 'an event'"; (2) the associate perceived the conversation by hearing the words exchanged during the telephone call; and (3) the associate made the statement seconds after the witness saw him hang up the telephone, which eliminated any concerns about inaccurate memory and "greatly reduced any likelihood of fabrication." *Id.* Persuaded by the Fourth Circuit's analysis, we affirm the district court's ruling that Hackaday's statement after his telephone call is admissible under the present sense impression exception to the hearsay rule. His description of the telephone conversation satisfies the requirements of subject matter, perception, and time.

B. Statement While Cleaning Shoes

Meyers also argues the district court erred in admitting the statement made by Hackaday to Rose in his bathroom after he returned. Rose testified that while cleaning what appeared to be blood from his shoes with bleach, Hackaday "told me I needed to leave, that the police would probably be coming to his apartment to arrest him."

The district court admitted Hackaday's statement under the coconspirator exclusion from the hearsay definition and alternatively under the present sense impression and excited utterance hearsay exceptions. A statement is not hearsay if "[t]he statement is offered against a party and is . . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." Iowa R. Evid. 5.801(d)(2).

> [T]he trial court must make a preliminary finding, by a preponderance of evidence, that there was a conspiracy, that both

> the declarant and the party against whom the statement is offered were members of the conspiracy, and that the statements were made in the course and in furtherance of the conspiracy.

State v. Tonelli, 749 N.W.2d 689, 694 (Iowa 2008); *see* Iowa R. Evid. 5.104(a) ("Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court."). A conspiracy, and therefore the hearsay exception to statements made in furtherance of the conspiracy, may extend into the concealment phase. *See State v. Ross*, 573 N.W.2d 906, 915 (Iowa 1998).

Meyers argues that Hackaday told Rose to leave his apartment to shield her from police involvement and Hackaday's intent to protect Rose from the police "would certainly not be beneficial to the conspiracy and any statement to her would not be in furtherance of the goal of hiding evidence." Meyers, therefore, does not contest the existence of a conspiracy between Hackaday and himself, but only whether asking Rose to leave furthered the conspiracy.

The district court determined Hackaday's statement to Rose while cleaning off his shoes immediately following the assault was an attempt to conceal his involvement in the conspiracy by removing Rose, a potential witness, from anticipated interaction with the police at his apartment. Based on the evidence available, the court did not err in determining Hackaday's request Rose leave his apartment was an attempt to remove a potential witness to the conspiracy from police presence and properly admitted his statement under the coconspirator exclusion to the hearsay rule. *Cf. State v. Elam,* 328 N.W.2d 314, 319 (Iowa 1982) (finding coconspirator's threat to a witness, which in part was

effort to conceal defendant from the police, was admissible under the coconspirator exclusion because it was a step in obstructing prosecution). Because the district court properly admitted the statement under the coconspirator exclusion, we will not examine the court's alternative rationale for allowing the statement under the present sense impression or excited utterance exceptions.

Even if the challenged statements were inadmissible hearsay, the record shows that Meyers was not prejudiced by their admission given the strength of the eyewitness testimony from Renee Rose and Goldie identifying Meyers as one of the attackers. *See State v. Newell*, 710 N.W.2d 6, 19 (Iowa 2006) (stating that even if hearsay statements are erroneously admitted, "no prejudice will be found where the evidence in support of the defendant's guilt is overwhelming"). Meyers suggests the eyewitness testimony was biased, mentioning "problematic relations" between the witnesses and his family. The record contained evidence that Renee Rose and Meyers's sister disagreed about how Rose raised a daughter from her marriage to Meyers's brother, including a recent incident in which Goldie interceded. But Meyers offered no evidence that Renee Rose or Goldie harbored any resentment toward him. In fact, Renee Rose testified she and Meyers "always had a good relationship" and she considered him a friend. We find overwhelming evidence of Meyers's guilt—independent of the hearsay statements.

AFFIRMED.