IN THE COURT OF APPEALS OF IOWA

No. 2-662 / 11-1330
Filed September 6, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JONATHAN LEE BREWER JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Robert E. Hutchison, Judge.

Jonathan Brewer Jr. appeals from the judgment and sentence entered following his conviction for burglary in the first degree. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, Shellie L. Knipfer, Assistant State Appellate Defender, and Tyler J. Buller, Student Intern, for appellant.

Thomas J. Miller, Attorney General, Martha E. Trout, Assistant Attorney General, John Sarcone, County Attorney, and Mike Hunter, Assistant County Attorney, for appellee.

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

TABOR, J.

Darshelle Moore dated both defendant Jonathan Brewer and State's witness Henry Palmer. A jury convicted Brewer of breaking into Moore's apartment and throwing gasoline on Palmer's grandson. Moore did not testify at trial, but her out-of-court statements form the basis for Brewer's claims on appeal from his first-degree burglary conviction.

We decline to reverse based on Brewer's claims of hearsay and ineffective assistance of counsel. To the extent that Moore's statements were hearsay, Brewer cannot show their admission was prejudicial given the other strong evidence of his guilt. We also find the district court properly exercised its discretion in denying Brewer's motion for new trial. The defense could have discovered Moore's evidence earlier in the exercise of due diligence, and Brewer cannot show her testimony probably would have changed the outcome of the trial. Accordingly, we affirm.

I. Background Facts and Proceedings.

Around midnight on February 13, 2011, Renee Thompson was driving to her cousin's apartment in her white Oldsmobile Aurora. Tyrone Cameron was in the passenger seat and Thompson's young son was in the backseat. While on the freeway, a large, older-model, blue truck came up behind her vehicle. The truck's driver, who Thompson identified as Brewer,[1] yelled at her to stop. Thompson continued driving, but when she exited the freeway, the truck hit her

[1] Cameron testified that he did not see the driver of the truck. He saw "a tall black male" wearing a jacket with a hood. He testified it was dark and he did not get a good look at the driver.

car. Frightened, Thompson stopped. Brewer approached the car and broke the passenger window, trying to reach Cameron. Thompson heard Brewer yelling that he was going to kill Cameron.

Thompson drove away, headed to Moore's apartment on 24th Street. Thompson, her son, and Cameron entered the apartment, which was occupied by Moore and Palmer, who is Cameron's grandfather. They locked the door, and Moore wedged a knife in the door frame to prevent the door from being opened. Moore and Palmer retreated to the bedroom while Thompson, her son, and Cameron stayed on the living room couch.

When Thompson heard someone trying to enter, she took her son and ran to the bathroom. Thompson told Moore "he" was at the door. After hearing a loud banging noise, Palmer ran out of the bedroom and saw an intruder pour gasoline onto Cameron, who was asleep on the couch. The individual threw the gas can at Palmer and then fled the apartment. Palmer described the intruder as a "big dude" who was African American and wearing a hood.

Moore called 911. Police officers arrived at the apartment and interviewed Thompson, Cameron, Palmer, and Moore. The door frame was splintered, consistent with someone ramming the door. Officers found a gasoline can on the floor inside the apartment and detected the strong odor of gasoline. The police also observed blue paint scuffs and broken windows on Thompson's vehicle.

Police radioed an alert for Brewer and his blue Chevy Tahoe, and patrol officers glimpsed a vehicle matching the description in a nearby QuikTrip parking lot. The truck appeared to have broken down or run out of gas as it was

approaching the gas pump. Officers identified Brewer inside the convenience store and arrested him. The arresting officer noticed a "very strong odor of gas emanating from his person."

Officers transported Brewer to Broadlawns Hospital for treatment of a scratch on his hand. While waiting, one of the officers asked Brewer about what appeared to be a "fresh" bullet hole in driver's side of his vehicle. Brewer said "the person who lives on 24th Street was upset with him because he was sleeping with his woman, so he sent his grandsons out to shoot him." When asked why he did not report the shooting to the police, Brewer responded "he thought he could take care of it himself."

On March 9, 2011, the State charged Brewer with burglary in the first degree. Brewer filed a motion in limine seeking to exclude, among other things, Moore's hearsay statements. The court reserved final ruling on Brewer's hearsay objections.

A jury trial began on May 16, 2011. On May 19, 2011, the jury returned a guilty verdict. Brewer filed a timely motion for new trial, alleging he had discovered new evidence material and favorable to his defense. Specifically, he presented an affidavit in which Moore swore she "never stated to anyone involved in the trial that Jonathan L. Brewer was [at the residence of 1000 24th Street Apt. 13] or had anything to do with that crime." The district court denied the new trial motion and sentenced Brewer to an indeterminate twenty-five year prison sentence.

II. Hearsay.

Brewer contends the district court erred in allowing several of Moore's hearsay statements into evidence. Brewer claims he preserved error by moving in limine and renewing his objections at trial. But the record shows counsel only lodged and received a ruling on one objection at trial. If a limine ruling fails to definitively determine the admissibility of challenged evidence, error is waived unless counsel makes a timely objection when the evidence is offered at trial. *State v. Schaer*, 757 N.W.2d 630, 634 (Iowa 2008). Here, the court reserved final ruling until trial. While Brewer preserved error with regard to one instance of hearsay, he did not preserve error on his other hearsay claims. At Brewer's request, we will consider the instances where counsel failed to object under the rubric of ineffective assistance of counsel.

We review hearsay rulings for correction of errors at law. *State v. Elliott*, 806 N.W.2d 660, 667 (Iowa 2011). The admission of hearsay is presumed prejudicial to the non-offering party unless the contrary is shown. *Id.*

Hearsay is a statement made by someone other than the declarant while testifying at trial, which is offered to prove the truth of the matter asserted. Iowa R. Evid. 5.801(c). An out-of-court statement not offered to show the truth of the matter asserted, but rather to explain responsive conduct, is not regarded as hearsay. *Elliott*, 806 N.W.2d at 667.

The following exchange occurred during Palmer's direct examination:

> Q. All right. I want to direct your attention, then, to February 13th, 2011. Do you remember the night that there was an incident with somebody in the house? A. Yes.

> Q. Tell us what you were doing and what happened. A. [Moore] had called and said she want to come over and talk to me. She came over and apologized to me about the things she was doing and stuff like that. And she kept saying somebody is coming—
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> [DEFENSE COUNSEL]: Objection. Hearsay. And I'd ask that my answer precede his response or my objection.
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> . . . .
>
> THE COURT: Well, thus far, I'm going to overrule the objection but tell the jury that this is not being admitted for the truth of the matter asserted but simply to let you know what was said to this gentleman and the events that transpired.
>
> . . . .
>
> Q. Okay. And was there a concern that someone was coming over? A. Yeah. She kept saying that.

Brewer argues Moore's statement that "someone" was coming was hearsay because the State offered it to prove the truth of the matter asserted. He cites the prosecutor's closing argument in support of his position. In summation, the prosecutor argued Moore was "concerned about [Brewer] coming back" and pointed to her out-of-court statement to police identifying Brewer:

> So let's begin with the fact, you know, this is not—this case didn't even start as a case of Shelly reporting, oh, my God, somebody is breaking in, there's a person breaking in, you know, I don't know who. They all know who, and she knows who. And she gives them the name right off the bat. So there's no question about who it is.

We cannot conclude the district court erred in overruling counsel's objection to Palmer's testimony regarding Moore's statement that "someone" was coming to the apartment. The challenged hearsay did not identify Brewer. If the statement constituted inadmissible hearsay when considered in tandem with later testimony or arguments, it was incumbent on trial counsel to object at those points in the trial. *See Schaer*, 757 N.W.2d at 635 (finding claim that hearsay

evidence was improperly admitted was waived when counsel did not renew objection).

Brewer contends additional testimony from Palmer referring to Moore's identification of Brewer constitutes inadmissible hearsay. Brewer also claims Moore's statements to the 911 dispatcher and to an officer at the scene should have been excluded under the hearsay rules. We next consider whether counsel rendered ineffective assistance in failing to object to this testimony.[2]

We review ineffective-assistance-of-counsel claims de novo. *Everett v. State*, 789 N.W.2d 151, 158 (Iowa 2010). To succeed, Brewer must show his attorney failed to perform an essential duty by not objecting to the hearsay, and he was prejudiced as a result. *See id.* Unlike those claims where the complaining party has preserved error and the court presumes prejudice, it is Brewer's burden here to demonstrate a reasonable probability of a different result. *See State v. Reynolds*, 746 N.W.2d 837, 845 (Iowa 2008).

Brewer challenges Palmer's testimony that Moore told him Brewer committed the burglary. At trial, Palmer told the jury: "Well, we kind of knew who it was . . . ." When questioned, Palmer explained:

> Q. You knew who it was? A. Oh, yeah. We knew who it was. [Moore] did. She's the one that told me.
> Q. Who did you think it was? A. Who [Moore] said it was.

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[2] Generally, we will preserve claims of ineffective assistance of counsel for postconviction relief actions. *State v. Cromer*, 765 N.W.2d 1, 7 (Iowa 2009). But "we will consider such claims on direct appeal where the record is adequate." *Id.* We find the trial record adequate to reject Brewer's challenge to counsel's performance in this direct appeal.

> Q. Well who was that? A. [Brewer.][3]

On cross-examination, Brewer's counsel explored this testimony:

> Q. Mr. Palmer, let's be clear. You can't identify that person who was in your apartment, can you? A. Yes, I can.
> Q. You didn't see his face, did you? A. It was him.
> Q. But you know—you believe you know— A. When he threw the can—
> THE COURT: Excuse me, Mr. Palmer. Take your turns here. Let her finish her question and then you can finish your answer.
> THE WITNESS: Good.
> Q. You testified that you knew who it was because someone else told you; isn't that correct? A. Uh-huh. That happened.
> Q. Because you did not see that person's face; isn't that true? A. No, it's not.
> Q. I'm sorry. You did see his face? A. When he threw the can, I saw his face because he had a hood on.
> . . . .
> Q. Okay. So just to finish up, Mr. Palmer, so that I understand. It's your testimony today that this person that you saw had a hood on; is that correct? A. That's correct.
> Q. And that you could see this person's face? A. When he turned to look at me and threw the can, I saw his face, yes.

Brewer's counsel then questioned Palmer about the deposition he'd given two weeks earlier; when asked then if he saw who broke into the apartment, Brewer had stated, "I'm saying what [Moore] said." On redirect examination, the prosecutor asked Palmer, "[I]f I understand your testimony, at least today you're saying when he turned and threw the can at you, you did see his face?" Palmer replied, "I saw his face, yes."

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[3] Brewer's trial counsel objected, but the trial court never ruled on the objection and, therefore, it was not preserved. *See State v. Mitchell*, 757 N.W.2d 431, 435 (Iowa 2008) (holding the defendant failed to preserve error on issue raised to the district court but not ruled upon).

Palmer's testimony that he believed the intruder was "who [Moore] said it was . . . . Brewer" constitutes hearsay.[4] But when read in its entirety, Palmer's testimony established an independent basis for his belief that Brewer was the burglar. Palmer testified that he had seen Brewer "two or three times" before. Palmer's responses were at times imprecise. But the jurors reasonably could have gleaned from his testimony that although the intruder was wearing a hood, when he turned to throw the gas can, Palmer was able to see his face and identify him. Although Palmer's statement that Moore identified Brewer as the intruder was inadmissible hearsay, it was cumulative to Palmer's independent identification of Brewer. Brewer cannot show he was prejudiced by counsel's performance. *See Schaer*, 757 N.W.2d at 639 (finding the defendant not prejudiced by counsel's failure to object to hearsay statements that were cumulative of properly admitted evidence).

Brewer next complains about the 911 call and information relayed by dispatch to the responding officers. Officer Aaron Cawthorn testified as follows:

> Q. And did you have any preliminary information prior to arriving? A. Dispatch gave suspect information as Mr. Brewer. First name would be Jonathan Brewer. That's what dispatch gave over the air to me.
>
> Q. And upon your arrival at that location, who or what did you see? A. I responded, and the first person I talked to was Henry Palmer, who said he resides in apartment number 1. And then Shelly Moore was the caller that called police.

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[4] The State argues this statement was not hearsay under Iowa Rule of Evidence 5.801(d)(1). We do not find that rule applies here because the declarant, Moore, did not testify at trial and was not subject to cross examination concerning the statement identifying Brewer as the burglar. *See Elliott*, 806 N.W.2d at 673 (noting that for a prior inconsistent statement to be admissible, the declarant must testify at trial and be subject to cross-examination).

Although Brewer concedes the out-of-court statements may be admissible to show responsive conduct, he argues the State used the evidence for the truth of the matter asserted during closing argument when the prosecutor asserted Moore gave Brewer's name "right off the bat."

The officer's testimony repeating information from the 911 call—without considering the State's closing argument—was admissible to explain his subsequent course of conduct. Any objection lodged at trial would have been overruled. *See State v. Mitchell*, 450 N.W.2d 828, 832 (Iowa 1990). Even if counsel had objected to the prosecutor's statement during closing argument and it had been struck, we find no reasonable probability the outcome of trial would have changed given the independent evidence of Brewer's guilt.

Finally, Brewer contends Moore's statement to Officer Cawthorn during his investigation was inadmissible hearsay. At trial, the officer testified:

> Q. And so did you speak to each of the folks that were present? A. Yes, sir.
>
> Q. And just for the record, you spoke to Mr. Palmer. You spoke to Tyrone Cameron and Shelly—did you speak to Shelly Moore? A. Very briefly. She left very quickly.
>
> Q. But you also then spoke with Renee Thompson? A. Yes, sir.
>
> Q. And I'm guessing that you didn't speak to the young child? A. No, sir.
>
> Q. All right. And can you describe for us when you spoke with them how that took place? Were they all in a group talking, kind of, or did you have them separate? How did that take place? A. When I first arrived they were all in the apartment together. At that point I tried to get as much suspect information as I could at that time so I could broadcast it over the radio, which I did. After talking—
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> Q. I'm sorry to interrupt you. So initially you're getting suspect description and information, kind of, from the group? A. Yes, sir.

> Q. Was there more than one person talking? A. Well, it was Mrs. Thompson and Henry Palmer were the main people that were giving me the information at the time.
>
> Q. And you said you did broadcast a description. What was that? A. It was the Jonathan Brewer. I also gave the truck information as well over the radio.

Although Brewer concedes Moore's exact statement was not put into the record, he claims "the statement asserted Brewer's involvement and this time provided additional descriptive information, including Brewer's vehicle and model."

Counsel had no duty to object to the quoted portion of Officer Cawthorn's testimony. The record does not indicate the identification of Brewer or the description of his vehicle came from Moore. Officer Cawthorn stated he interviewed all four witnesses as a group. In their trial testimony, Palmer identified Brewer as the person inside the apartment, and Thompson identified Brewer as the person who threatened Cameron earlier that same night. Thompson and Cameron were both able to describe the truck that rammed Thompson's car on the night in question. To the extent the disputed testimony could be considered an out-of-court statement by Moore, it was cumulative to other evidence properly in the record and admissible to explain the officers' responsive conduct.

Because the trial court properly admitted into evidence Moore's statement regarding "someone" coming to the apartment, and because Brewer cannot show counsel was ineffective in failing to object to other alleged hearsay statements, we affirm his conviction for first-degree burglary.

III. New Trial.

Brewer also contends the trial court erred in denying his motion for new trial based on newly discovered evidence. The motion included an affidavit from Moore, who did not testify at trial or appear for her deposition. The affidavit stated Brewer was never at the apartment and Moore would deny stating the contrary to anyone involved in the trial. At the motion hearing, Moore testified she never told anyone Brewer was coming to the apartment on February 13, 2011, and she was in the locked bedroom when the burglary occurred.

We review motions for new trial based on newly discovered evidence for an abuse of discretion. *State v. Smith*, 573 N.W.2d 14, 17 (Iowa 1997). Such motions should be granted if the evidence in question "(1) was discovered *after* the verdict, (2) could not have been discovered earlier in the exercise of due diligence, (3) is material to the issues in the case and not merely cumulative, and (4) probably would have changed the result of trial." *Id.* at 21.

In denying the motion, the district court found Brewer failed to establish three of the four requirements. The court questioned whether the evidence qualified as "newly discovered" when Moore was listed as a witness in the trial information and voluntarily provided Brewer with an affidavit after the verdict. Given that Brewer was able to serve Moore with a subpoena after receiving the affidavit, the court found it "difficult to understand" why Brewer could not have discovered Moore's testimony earlier.

Even assuming the evidence qualified as "newly discovered," the court found it was not material because the trial did not include testimony that Moore

had seen Brewer in the apartment during the burglary. The testimony at trial established that Moore had called 911 and told the dispatcher that Brewer had broken into the apartment. At the motion hearing, Moore confirmed she "might have" called 911 and would not have any reason to disagree with witnesses who stated she had. Moore also agreed if the dispatch told officers Brewer was the suspect's name, "that would have come from whoever called."

The court also found it was not probable that Moore's testimony would have changed the outcome of the trial because the evidence against Brewer was "overwhelming." The court cited the following evidence: Thompson's identification of Brewer as the driver of the truck that rammed her car and his threats to kill Cameron; Palmer's identification of Brewer when he threw the gas can; Brewer's close proximity to the apartment thirty minutes after the burglary, while smelling of gasoline; and the discovery of a bullet hole in Brewer's vehicle along with his statement about taking care of the problem himself.

Given the strong evidence that Brewer was the person who broke into the apartment and doused Cameron with gasoline, we agree with the district court's assessment that Moore's affidavit was not newly discovered material evidence that would have changed the outcome of the trial. The court did not abuse its discretion in denying the motion. We affirm Brewer's conviction for first-degree burglary.

AFFIRMED.