

IN THE COURT OF APPEALS OF IOWA

No. 7-055 / 06-0051
Filed March 28, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BRADLEY DALE SHIPLEY,
Defendant-Appellant.

Appeal from the Iowa District Court for Des Moines County, Michael Dieterich, District Associate Judge.

Defendant appeals from the denial of his motion in limine and subsequent conviction and sentence of driving under revocation. **REVERSED AND REMANDED.**

Richard A. Bartolomei of Bartolomei & Lange, P.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Patrick C. Jackson, County Attorney, and Heidi D. Van Winkle and Tyron Rogers, Assistant County Attorneys, for appellee.

Heard by Sackett, C.J., and Mahan and Miller, JJ.

SACKETT, C.J.

Defendant-appellant, Bradley Shipley, appeals from the denial of his motion in limine and subsequent conviction and sentence of driving under revocation. He contends the court erred in denying his motion in limine and admitting a certified abstract of his driving record because the certified abstract of his driving record (1) is evidence outside the minutes of testimony, (2) does not comply with rules of evidence, and (3) violates his right of confrontation. He also contends the State's "preemptive" construction of Iowa Code section 321A.3 (2003) renders section 321.10 meaningless. We reverse and remand.

Background Facts

In December of 2004 a police officer saw the defendant driving a Shipley Construction pickup truck. He checked on the status of the defendant's driver's license and was informed it was revoked for an operating-while-intoxicated test failure. The officer followed the defendant to a construction site and stopped him. The defendant stated he had a work permit and proof of insurance at his office. The officer again checked the status of the defendant's license and was informed the work permit had expired in June of 2004. The officer arrested the defendant for driving under revocation and failure to show proof of insurance.

District Court Proceedings

In January of 2005 the State filed the trial information and minutes of testimony. The minutes listed the police officer and Terry Dillinger, the director of the Office of Driver Services of the Iowa Department of Transportation as witnesses. The minutes provided that Mr. Dillinger would testify concerning the defendant's driving record and various records kept by the department relating to the

defendant's driving record. The minutes also contained notice of the State's intent to introduce "a copy of the defendant's certified driving record" from the department.

The defendant filed a motion in limine seeking to exclude the certified driving record because a copy was not attached to the minutes or otherwise disclosed and because it does not satisfy the rules of evidence for admission. The district court denied the motion. The defendant waived a jury trial.

At trial, the defendant raised objections to the admission of the exhibit on the same bases as raised in the motion in limine, incorporating by reference the grounds raised in the motion. The court overruled the objections and admitted the exhibit. The court found the defendant operated a motor vehicle while his driving privileges were under revocation. The court imposed a jail sentence, fine, and probation.

Scope and Standards of Review

The parties disagree on our scope of review. The defendant contends our review of a trial court's ruling on a motion in limine, because it raises constitutional questions, is de novo. See *State v. Otto*, 566 N.W.2d 509, 510 (Iowa 1997) (stating review of constitutional issues raised by a *motion to suppress* is de novo). The State frames the issue as review of an evidentiary ruling, which generally is for an abuse of discretion. See *State v. Tejeda*, 677 N.W.2d 744, 753 (Iowa 2004). Concerning motions in limine and for pretrial determination of admissibility under Iowa Rule of Evidence 5.104, our review is for correction of errors of law and not for an abuse of discretion. See *State v. Long*, 628 N.W.2d 440, 445 (Iowa 2001). We give deference to the findings of the district court and "uphold such findings if they are supported by substantial evidence." *Id.* at 447. "Reversible error cannot be

predicated on an order overruling a motion in limine. It must be predicated on a record made during trial when the evidence is offered.” *State v. Judkins*, 242 N.W.2d 266, 269 (Iowa 1976). Concerning the evidentiary rulings at trial, with the exception those raising hearsay objections, our review is for an abuse of discretion. *State v. Frazier*, 559 N.W.2d 34, 38 (Iowa Ct. App. 1996). We review hearsay claims for errors of law. *State v. Newell*, 710 N.W.2d 6, 18 (Iowa 2006). Both parties agree issues of statutory interpretation or construction are reviewed for correction of errors at law. Iowa R. App. P. 6.4; *State v. Carpenter*, 616 N.W.2d 540, 542 (Iowa 2000).

Claims on Appeal

1. Exhibit 1. The defendant first contends the district court erred in admitting the State’s Exhibit 1, a certified abstract of the defendant’s driving record. He asserts the exhibit is evidence outside the minutes of evidence, in violation of Iowa Rule of Criminal Procedure 2.5(3). He further asserts the exhibit is inadmissible because it contains hearsay and because it does not comply with foundational rules of evidence. Finally, he asserts that admitting the exhibit violates his constitutional right of confrontation.

A. Evidence Outside the Minutes of Evidence. The minutes listed Terry Dillinger as a witness from the Department of Transportation who would testify to the information contained in the defendant’s driving record maintained by the department. It also contained this notice:

****NOTE****

The State of Iowa intends to introduce into evidence at trial a copy of the defendant’s certified driving record obtained from the Iowa Department of Transportation and any other relevant state.

A copy of the proposed exhibit was not attached to the minutes of evidence. The police reports prepared by the officer who stopped the defendant were attached to the minutes. The police reports contained information that the defendant's license had been revoked for two years in June of 2004 for an OWI test failure.

Iowa Rule of Criminal Procedure 2.5(3) requires, in addition to basic information about each witness, "a full and fair statement of the witness' expected testimony."

The defendant argues no foundation for the admissibility of the exhibit was laid because Terry Dillinger did not testify and the document itself is outside the minutes of evidence because a copy was not attached.

The minutes informed the defendant that the State planned to introduce evidence from his driving record and that record would include information his license had been revoked for two years in June of 2004 for an OWI test failure. We conclude the minutes provided "a full and fair statement" of the evidence the State expected to offer so that the defendant could prepare a defense.

B. Admissibility of the Exhibit Itself. The defendant raised a multi-faceted challenge to the exhibit from his driving record in the motion in limine:

Notwithstanding that a copy of certified record is not attached to the trial information or otherwise disclosed, the defendant anticipates that the certified copy will bear a red-stamped endorsement without any human signature, which does not meet the requirements of section 4.1(28), (39) and 321.10, as well as Iowa Rules of Evidence 5.104, 5.201, 5.401, 5.403, 5.802, 5.902, and 5.1005 and 5.1008.

He raised and argued the same challenges at trial.

His argument revolves around his interpretation of Iowa Code section 321.10, which provides:

The director and officers of the department designated by the director are authorized to prepare under the seal of the department and provide upon request a certified copy of any record of the department, charging a fee of fifty cents for each document so authenticated, and every such certified copy shall be admissible in any proceeding in any court in like manner as the original and shall be considered to be true and accurate unless shown otherwise by an objecting party.

Any records or certified copies of records prepared pursuant to this section and any certified abstract, or a copy of a certified abstract, of the operating record of a driver or a motor vehicle owner prepared pursuant to this chapter, chapter 321A, or chapter 321J, shall be received in evidence if determined to be relevant, in any court, preliminary hearing, grand jury proceeding, civil proceeding, administrative hearing, or forfeiture proceeding in the same manner and with the same force and effect as if the director or the director's designee had testified in person.

He argues the exhibit is inadmissible because no foundation was laid by the “director” or that Terry Dillinger was an “officer[] of the department” or “designated by the director” as “authorized to prepare” the exhibit “under the seal of the department” as a “certified copy.” He provided evidence that the department has no official seal. He argued the red stamp on the exhibit does not contain a “human signature” and that the State offered no proof Terry Dillinger is disabled or otherwise authorized to use a facsimile signature. See Iowa Code § 4.1(39) (detailing requirements for use of a facsimile signature).

The State argues the exhibit was prepared under section 321A.3. The red stamp provides:

IN COMPLIANCE WITH SECTION 321A.3, (IOWA CODE) IT IS HEREBY CERTIFIED THAT THIS IS A TRUE AND CORRECT ABSTRACT OF THE OPERATING RECORD ON FILE IN THE DEPARTMENT OF TRANSPORTATION. IN WITNESS WHEREOF, I HAVE HEREUNTO SET MY HAND AND AFFIXED THE SEAL OF SAID DEPARTMENT AT DES MOINES, IOWA, THIS DATE:

The stamp also contains a date and a stamped version of a handwritten “Terry L. Dillinger” over the designation “Office of Driver Services.” Through the stamped language is an illegible raised circular impression in the paper.

Section 321A.3(1) provides, in part:

The department shall upon request furnish any person a certified abstract of the operating record of a person subject to chapter 321, 321J, or this chapter. The abstract shall also fully designate the motor vehicles, if any, registered in the name of the person. If there is no record of a conviction of the person having violated any law relating to the operation of a motor vehicle or of any injury or damage caused by the person, the department shall so certify.

The defendant argues chapter 321A does not set forth how certification is to be made and only section 321.10 provides the requirements for certification, which he asserts are not met by the red-stamped notice on the exhibit. His arguments are based on the language of the first paragraph of section 321.10 quoted above, which pertains to certified copies of records prepared pursuant to that section. The certified abstract in question, however, was prepared under section 321A.3, not 321.10.

The defendant points to Iowa Rule of Evidence 5.902 concerning self-authentication of documents and argues the exhibit does not comply with the requirements for “domestic public documents under seal,” see rule 5.902(1), “domestic public documents not under seal,” see rule 5.902(2), or “certified copies of public records,” see rule 5.902(4).

The language of the second paragraph, however, allows for admissibility of documents prepared under chapter 321A, such as this certified abstract prepared under section 321A.3. Section 321.10 provides that such certified abstract

shall be received in evidence if determined to be relevant, in any court, preliminary hearing, grand jury proceeding, civil proceeding,

administrative hearing, or forfeiture proceeding *in the same manner and with the same force and effect as if the director or the director's designee had testified in person.*

(Emphasis added). This language takes the abstract out of the requirements of rule 5.902 for self-authenticating documents and makes it subject to the requirements for authentication and identification of rule 5.901. That rule provides, in relevant part:

a. General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

b. Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication conforming with the requirements of this rule:

(1) *Testimony of witness with knowledge.* Testimony that a matter is what it is claimed to be.

. . . .

(7) *Public records or reports.* Evidence that . . . a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

Because section 321.10 provides the abstract be admissible “as if the director . . . had testified in person,” it clearly matches the illustration of “testimony that a matter is what it is claimed to be.” In addition, the red stamp on the abstract matches the illustration for “public records or reports.” Because the abstract contains information on the status of the defendant’s driver’s license, a necessary element of the offense charged, it is relevant. See Iowa R. Crim. P. 5.401 (defining relevance). The court did not err in overruling the defendant’s challenge to the exhibit on this ground.

The defendant also contends the abstract contains impermissible hearsay and hearsay within hearsay and was inadmissible under rule 5.802 because it does not fall within the exception for public records in rule 5.803(8). The rule exempts “records, reports, statements, or data compilations” of a “public office or agency” from exclusion as hearsay. Iowa R. Crim. P. 5.803(8)(A). Paragraph (B) of the rule

provides exceptions to the exemption. The rule further provides that the exceptions in paragraph (B) “shall not supersede specific statutory provisions regarding the admissibility of particular public records and reports.” *Id.* 5.803(8) (final unnumbered paragraph). Iowa Code section 321.10 specifically provides for the admissibility of certified abstracts. The exhibit, therefore, falls within the exception to hearsay for public records and the court did not err in overruling the defendant’s challenge on this ground.

At trial, the officer testified, over hearsay objections, that he was informed the defendant’s driver’s license, including his work permit, had been revoked the preceding June for OWI test failure. The court overruled the hearsay objections because the testimony was offered to show why the officer stopped and arrested the defendant, not to show the truth of the status of the defendant’ driver’s license. We review the admission of hearsay evidence for errors at law. *State v. Tangie*, 616 N.W.2d 564, 568 (Iowa 2000). A statement is not hearsay if it is not “offered in evidence to prove the truth of the matter asserted.” Iowa R. Crim. P. 5.801(c). “Testimony is not hearsay if it is ‘received as relevant circumstantial evidence reasonably necessary to complete the whole story of the crime charged.’” *State v. Summage*, 532 N.W.2d 485, 488 (Iowa Ct. App. 1995) (quoting *State v. Leonard*, 243 N.W.2d 887, 890 (Iowa 1976)). “Generally, an investigating officer may explain his actions by testifying as to what information he had and its source regarding the crime and the criminal.” *State v. Reynolds*, 250 N.W.2d 434, 440 (Iowa 1977). Such testimony is not hearsay because it is not used to prove the truth asserted, but is offered without reference to truth or falsity in it. *Leonard*, 243 N.W.2d at 891.

We conclude the district court did not abuse its discretion in admitting the officer's challenged testimony.

C. Right of Confrontation. The defendant asserts admission of the exhibit “without producing a custodian of the driving records to cross-examine” violates his constitutional right of confrontation. We review de novo the constitutional claim that the Confrontation Clause was violated. *Newell*, 710 N.W.2d at 23.

The Confrontation Clause is only implicated when considering testimonial evidence. *Davis v. Washington*, ___ U.S. ___, ___, 126 S. Ct. 2266, 2273, 165 L. Ed. 2d 224, ___ (2006).

Various formulations of [the] core class of “testimonial” statements exist: “ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially”; “extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions”; “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.”

Crawford v. Washington, 541 U.S. 36, 51-52, 124 S. Ct. 1354, 1364, 158 L. Ed. 2d 177, 193 (2004). The question before us is whether the abstract of the defendant's driving record is testimonial in nature. In *State v. Musser*, 721 N.W.2d 734, 753-54 (Iowa 2006), the lab tests at issue were not testimonial. However, one factor considered was whether the test report was prepared “solely for” or “wholly in anticipation” of litigation. *Id.* at 754 (citations omitted); see *State v. Newell*, 710 N.W.2d 6, 24 (Iowa 2006) (discussing analysis of admissibility in a Confrontation Clause challenge).

Although records concerning the status of a driver's license are kept in the day-to-day operation of the Department of Transportation, the abstract of

defendant's operating record clearly was prepared at the State's request for use in the criminal prosecution. The purpose of the abstract is to summarize defendant's operating record, showing the status of his driver's license at any given time. Unlike the two-year-old lab reports at issue in *Musser*, we conclude the abstract admitted as exhibit 1 in this case was testimonial in nature—akin to an affidavit. Its admission without the opportunity to confront the evidence it contains violated defendant's rights under the Confrontation Clause. See *Crawford*, 541 U.S. at 52, 124 S. Ct. at 1364, 158 L. Ed. 2d at 193; *Musser*, 721 N.W.2d at 753-54. The abstract should have been excluded.

2. *Statutory Construction.* The defendant also contends the “preemptive” construction of Iowa Code section 321A.3 renders section 321.10 meaningless. We do not resort to principles of statutory construction or interpretation unless the language of a statute is ambiguous. *State v. Wiederien*, 709 N.W.2d 538, 541 (Iowa 2006). We do not interpret statutes so as to render any portion meaningless. See *State v. Ahitow*, 544 N.W.2d 270, 273 (Iowa 1996). The defendant argues the specific certification requirements set forth in section 321.10 are independent of and more specific than the absence of any such defining language in chapter 321A, so to read 321A.3 to allow “certification” of a driving abstract without following the specific requirements in section 321.10 renders 321.10 meaningless.

The certification requirements in section 321.10 apply to copies of records prepared under that section. The second paragraph expressly indicates records such as an abstract of the operating record of a driver may be prepared under other chapters and provides for their admissibility apart from being prepared pursuant to

section 321.10. We find no merit in the defendant's challenge and need not resort to principles of statutory interpretation or construction.

Conclusion

Although the district court did not err in overruling the defendant's challenges to the admissibility of the exhibit based on statutory and rules-of-evidence grounds, the testimonial nature of the exhibit violated the defendant's rights under the Confrontation Clause. Accordingly, we reverse the defendant's conviction and remand this matter to the district court.

REVERSED AND REMANDED.