**IN THE COURT OF APPEALS OF IOWA**

No. 9-453 / 08-1732
Filed August 6, 2009

**STATE OF IOWA,**
Plaintiff-Appellee,

**vs.**

**JOEL ALAN BESSLER,**
Defendant-Appellant.

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Appeal from the Iowa District Court for Scott County, Christine Dalton, District Associate Judge.

Defendant appeals his conviction for operating a motor vehicle while intoxicated. **REVERSED AND REMANDED.**

Steven Hanna, Moline, Illinois, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, Michael J. Walton, County Attorney, and Alan Havercamp, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Vogel, J., and Miller, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

**SACKETT, C.J.**

Defendant, Joel Alan Bessler, appeals his conviction for operating a motor vehicle while intoxicated in violation of Iowa Code section 321J.2(2)(a) (2007). He contends, among other things, that the court erred in denying his motion in limine to the extent it allowed the admission of hearsay evidence and testimony that violated his right to confront witnesses against him. We find the court's admission of certain testimony violated the defendant's fundamental right to confront witnesses against him and therefore reverse and remand for a new trial.

**I. BACKGROUND.** On May 17, 2008, a Scott County deputy and an Iowa State trooper were dispatched to a truck stop on the report of an accident. Upon their arrival, a truck driver, Julian Atanasoaie, told the Scott County deputy that his semi-truck had been struck by the defendant's semi-truck. When the officers approached the defendant's truck, they saw him asleep and slouched over the steering wheel. They woke up the defendant and noticed signs of intoxication. He denied hitting Atanasoaie's truck. He was arrested for operating while intoxicated.

Prior to trial, the defendant stipulated that he was intoxicated so the only issue in dispute was whether he had operated a motor vehicle during his intoxication. The defendant filed a motion in limine on the morning of trial seeking to exclude "admission of any hearsay statement surrounding the call indicating prior property damage in the . . . parking lot," and requesting "that an evidentiary hearing be held to determine the admissibility of [other] proposed hearsay evidence." The defendant also contended the admission of out-of-court

statements made by Atanasoaie would violate his right to confront witnesses against him if Atanasoaie did not testify at the trial.

Responding to these arguments the court stated in part,

> What Mr. [Atanasoaie] . . . says to the officers is coming in and what the officers say to [the defendant] and what [the defendant's] reactions and statements are in response to these questions are going to come in.

The defendant also contended a police video should not be admitted at trial on various grounds, including that he had not had an opportunity to view it. The court granted the defendant's counsel fifteen minutes to view the video between the selection of the jury and the beginning of the trial, and allowed it to be admitted during the trial.

Atanasoaie did not testify at trial but officers related his statements to them at trial. A jury found the defendant guilty of operating while intoxicated. On appeal, the defendant challenges the officers' repeating of Antanasoaie's statements to them as violating his right to confront witnesses against him. The State argues the defendant waived these claims by not objecting to the testimony at trial. Alternatively, the State contends the testimony is not hearsay because it was not offered for the truth of the matter asserted. Rather, the testimony was offered to show only that the statements were in fact made, and to explain the circumstances of the officers' investigation of the matter.

**II. SCOPE OF REVIEW.** We review issues concerning a defendant's constitutional right to confront witnesses against him de novo. *State v. Castaneda*, 621 N.W.2d 435, 443 (Iowa 2001); *State v. Liggins*, 557 N.W.2d 263, 268 (Iowa 1996). When met with a confrontation clause challenge, the

government bears the burden of proving by a preponderance of the evidence that the challenged statements are admissible. *State v. Bentley*, 739 N.W.2d 296, 298 (Iowa 2007).

**III. ERROR PRESERVATION.** We first address the State's argument that the defendant's failure to object to the specific testimony at trial resulted in waiver of any error. "The preservation of error doctrine is grounded in the idea that a specific objection to the admission of evidence be made known, and the trial court be given an opportunity to pass upon the objection and correct any error." *State v. Brown*, 656 N.W.2d 355, 361 (Iowa 2003). In general, obtaining a ruling on a motion in limine does not preserve error. *State v. Harlow*, 325 N.W.2d 90, 91 (Iowa 1982); *State v. Edgerly*, 571 N.W.2d 25, 29 (Iowa Ct. App. 1997). Instead, when the matter is addressed at trial, an objection should be made to preserve any error. *Harlow*, 325 N.W.2d at 91. There is an exception to this rule however and the defendant does not need to renew the objection at trial "if the prior ruling amounts to an unequivocal holding concerning the issue raised." *Id.*; *see also State v. Tangie*, 616 N.W.2d 564, 568-69 (Iowa 2000).

The court was alerted to the defendant's objections through the defendant's motion in limine and during the hearing on the issue prior to trial. The court's ruling stating that it would allow the testimony was unequivocal and a final ruling. *See State v. Schaer*, 757 N.W.2d 630, 634 (Iowa 2008) (finding the court's decision on a motion in limine was a final ruling that did not require objection at trial to preserve error on the defendant's hearsay and confrontation clause claims when the judge stated the motion in limine was overruled as to

testimony from certain witnesses). The defendant did not need to object to the specific statements at trial to no avail when the court had already ruled that any statements made by Atanasoaie, the officers, and the defendant were admissible.

**IV. CONFRONTATION CLAUSE.** "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI; *Schaer*, 757 N.W.2d at 635. The Fourteenth Amendment makes this right applicable to the states. *State v. Brodene*, 493 N.W.2d 793, 795 (Iowa 1992); *State v. Losee*, 354 N.W.2d 239, 241 (Iowa 1984). The clause is designed to implement the policies of a preference for face-to-face confrontation and cross-examination of witnesses against a defendant at trial. *State v. Newell*, 710 N.W.2d 6, 24 (Iowa 2006). The confrontation clause encompasses three rights: testimony under oath, cross-examination by the defendant's counsel, and the opportunity for the jury to observe the witness's demeanor. *State v. Shearon*, 660 N.W.2d 52, 55 (Iowa 2003). Pursuant to this fundamental right, "[t]estimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Crawford v. Washington*, 541 U.S. 36, 59-60, 124 S. Ct. 1354, 1369, 158 L. Ed. 2d 177, 197 (2004); *Schaer*, 757 N.W.2d at 635; *State v. Musser*, 721 N.W.2d 734, 753 (Iowa 2006).

Nontestimonial statements are not subject to confrontation clause scrutiny. *Davis v. Washington*, 547 U.S. 813, 821, 126 S. Ct. 2266, 2273, 165 L. Ed. 2d

224, 236 (2006); *Musser*, 721 N.W.2d at 753. At a minimum, there are four types of evidence that are testimonial in nature: (1) grand jury testimony, (2) preliminary hearing testimony, (3) former trial testimony, and (4) statements made during police interrogations. *Crawford*, 541 U.S. at 68, 124 S. Ct. at 1374, 158 L. Ed. 2d at 203; *State v. Shipley*, 757 N.W.2d 228, 235 (Iowa 2008). In *Davis v. Washington*, 547 U.S. 813, 817, 126 S. Ct. 2266, 2270, 165 L. Ed. 2d 224, 234 (2006), the Supreme Court considered the issue of when statements made to police at a crime scene are "testimonial" under the confrontation clause. The court held,

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

*Id.* at 822, 126 S. Ct. at 2273-74, 165 L. Ed. 2d at 237. It further explained that the product of

> interrogations solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator . . . whether reduced to a writing signed by the declarant or embedded in the memory (and perhaps notes) of the interrogating officer, is testimonial.

*Davis*, 547 U.S. at 826, 126 S. Ct. at 2276, 165 L. Ed. 2d at 240. The court placed emphasis on whether the declarant was describing past or present events, whether the declarant, at the time the statements were made, was facing an ongoing emergency, and the formality of the interview. *Id.*

Antanasoaie's statements to the officers investigating the incident, and repeated by the officers at trial, were testimonial. The circumstances objectively indicate the statements initially were made during police interrogation and described past events. Specificially, the statements expressed that Antanasoaie believed his truck had been hit by another and identified the defendant as a perpetrator. No ongoing emergency was taking place. Although the statements were not made in the formal setting of a police station, it is not required. *See id.* at 830, 126 S. Ct. at 2278, 165 L. Ed. 2d at 242. What is essential is that the statements were made "in response to police questioning, [describing] how potentially criminal past events began and progressed . . . [a]nd . . . took place some time after the events described were over." *Id.* "Such statements under official interrogation are an obvious substitute for live testimony, because they do precisely *what a witness does* on direct examination; they are inherently testimonial." *Id.*

Testimonial statements still may be admitted for purposes besides establishing the substantive truth of the statements. *Crawford*, 541 U.S. at 59 n.9, 124 S. Ct. at 1369 n.9, 158 L. Ed. 2d at 198 n.9; *Newell,* 710 N.W.2d at 24. The State contends Antanasoaie's statements were only offered to show that the statements were in fact made and to explain the circumstances of the officers' investigation of the matter. We are not convinced by this argument. It was already in evidence that the officers were dispatched due to the report of an accident and were investigating such a report. Antanasoaie's statements were not necessary to establish the circumstances of the investigation. The

statements were introduced for their truth, specifically to identify the defendant as the driver of a truck that hit Antanasoaie's semi.

Allowing the officers to repeat Antanasoaie's statements at trial violated the defendant's right to confront witnesses against him. We therefore reverse the defendant's conviction and remand for a new trial. We need not and do not consider the defendant's remaining claims concerning hearsay and the admission of the police video. On retrial the defendant may make hearsay objections to allow the district court to rule on individual statements or specific evidence.

**REVERSED AND REMANDED.**