IN THE COURT OF APPEALS OF IOWA

No. 6-471 / 95-1667

FILED
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CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

WILLIAM LEE SIRES, JR.,

Appellant.

Appeal from the Iowa District Court for Black Hawk County, Walter W. Rothschild, Judge.

William Sires appeals the judgment and sentence entered upon his conviction of domestic abuse assault while displaying a weapon. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Kevin Cmelik, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Renee Sneitzer, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Huitink and Streit, JJ., but decided en banc.

HUITINK, J.

Defendant William Lee Sires, Jr. appeals his conviction and sentence for domestic abuse assault while displaying a weapon in violation of Iowa Code section 708.2A(2)(c) following a jury trial. On appeal, Sires contends the court erred in admitting hearsay testimony of an investigating officer. We affirm.

Sires was convicted based on allegations he assaulted his girlfriend Joyce Meyer with a knife. The record indicates that Jeremy Mangrich, Joyce Meyer's neighbor, stopped by the Meyer home on June 29, 1994. Meyer's two daughters answered the door crying and upset. Mangrich testified that the girls told him Sires had a knife and was going to kill their mother. He further testified Sires came to the door with a knife in his hand and then slammed the door in his face. Mangrich called the police.

Officer Robert Hewitt testified that when he arrived at the Meyer home, Joyce Meyer answered the door and told him that she was having an argument with her boyfriend who was in the basement. Officer James O'Hara testified that he found a knife in the basement rolled up in a sheet on a bed. At trial, Joyce and one of her daughters testified Sires held a knife during the incident but denied that he threatened Joyce with it.

The record also includes Officer James O'Hara's testimony concerning investigatory conversations he had with Joyce Meyer and her daughters. O'Hara was initially asked:

Q: And what did you learn what happened as part of your investigation?

The court sustained Sires' hearsay objection and advised the State, "[i]f you want to ask the officer what he did then, go ahead," to which the State responded, "I'm asking him what he did and why he did it. The court replied, "Well, I'll allow you to ask him what he did."

The State proceeded to ask the officer what he did after speaking with both girls and Joyce Meyer. The officer answered, "Ultimately we arrested William Sires." The State then rephrased the original question:

Q: And what was the basis for that arrest?

The court overruled defense counsel's hearsay objection and the officer continued his testimony:

> A. Through the course of the investigation in talking with the two young girls, they told me that their mother Joyce and William Sires had been in an argument. They told me that Sires was very intoxicated and that while holding a knife, told Joyce Meyer that he was going to kill her before the night was through. In talking with Joyce Meyer, she said that yeah, she was in an argument with William Sires and yes, he was holding a knife but that he did not mean to threaten her.

The court admonished the jury "to accept that evidence to explain what the officer did, not to prove the truth of the matter asserted."

Sires was found guilty of domestic abuse assault while displaying a dangerous weapon and was sentenced to two years imprisonment with all but sixty days suspended.

Sires appeals the trial court's admission of Officer O'Hara's testimony relating the facts he uncovered from his conversations with the Meyer family. He argues that the testimony was inadmissible hearsay.

Our scope of review is for the correction of errors of law. Iowa R. App. P. 4. The resolution of evidentiary matters is generally within the trial court's discretion. *State v. Hubka*, 480 N.W.2d 867, 868 (Iowa 1992). The trial court's decision will not be overturned absent an abuse of discretion. *Id.*

A statement is hearsay if it is made by an out-of-court declarant and is offered to prove the truth of the matter asserted. Iowa R. Evid. 801(c). When an out-of-court statement is offered, not to show the truth of the matter asserted but to explain subsequent conduct, it is not hearsay. *State v. Mitchell*, 450 N.W.2d 828, 832 (Iowa 1990). For a statement to be admissible as responsive conduct, however, it must not only tend to explain the responsive conduct but the conduct itself must be relevant to some aspect of the State's case. *Id.* The court must decide whether the statement is relevant to the purpose for which it is being offered, or if the statement is simply an attempt to introduce otherwise inadmissible evidence. *Id.* An investigating officer is generally permitted to explain his actions by testifying as to what information he had and its source regarding the crime and the criminal. *State v. Lewis*, 391 N.W.2d 726, (Iowa App. 1986). *See State v. Mann*, 512 N.W.2d 528, 536 (Iowa 1994). However,

the scope of such evidence is limited. *State v. Doughty*, 359 N.W.2d 439, 442 (Iowa 1984):

> In criminal cases, the arresting or investigating officer will often explain his going to the scene of the crime or his interview with the defendant or a search or seizure, by stating that he did so "upon information received" and this of course will not be objectionable as hearsay, but if he becomes more specific by repeating definite complaints of a particular crime by the accused, this is so likely to be misused by the jury as evidence of the fact asserted that it should be excluded as hearsay.

Id. at 442 *(quoting C. McCormick's Handbook on the Law of Evidence* § 248, at 587 (2d ed. E. Cleary 1972)). If the investigating officer specifically repeats a victim's complaint of a particular crime, it is likely that the testimony will be construed by the jury as evidence of the facts asserted. *Id.*

We find O'Hara's testimony went "beyond the point of merely explaining why certain responsive actions were taken by the officers." *Doughty*, 359 N.W.2d at 442; *State v. Mount*, 422 N.W.2d 497, 502. The State's assertion that O'Hara's testimony was offered solely for the purpose of explaining subsequent conduct is belied by the express terms of the State's initial question posed to him. We find that this testimony was intended to introduce otherwise inadmissible hearsay statements of Joyce Meyer and her children. The fact that the State subsequently rephrased the question, does not in our view, alter their original intentions.

The State also argues that even if O'Hara's testimony was inadmissible hearsay, it was not sufficiently prejudicial to warrant a new trial. The general rule is that error

in the admission of hearsay is presumed prejudicial unless the contrary is affirmatively established. *State v. McKettrick*, 480 N.W.2d 52, 60 (Iowa 1992) (citations omitted). However, there is no prejudice if the record contains substantially the same evidence. *Id.*

Here, substantially the same evidence as that provided by Officer O'Hara was admitted through the testimony of Jeremy Mangrich. He testified that the Meyer girls told him Sires had a knife and was threatening to kill their mother. The court overruled Sires' objection and admitted the evidence under the excited utterance exception to the hearsay rule. *See* Iowa R. Evid. 803(2). Sires has not challenged this ruling on appeal. Furthermore, Joyce Meyer and one of her daughters testified without objection that Sires was holding a knife during the argument that night. We conclude that Sires was not prejudiced by the erroneous admission of O'Hara's testimony because it was merely cumulative to other witnesses' testimony.

We accordingly affirm Sires' conviction.

AFFIRMED.

All judges concur except Streit and Sackett, JJ., who dissent.

STREIT, J. (dissenting)

I respectfully dissent.

This is an assault case in the realm of the domestic arena where the victim and the victim's children refuse to testify at trial analogous to their past statements made to the police at the time of the incident. In this case Joyce Meyer and her two children at trial denied any threatening actions by the defendant, leaving the State to try and prove their case by the excited utterance exception to the hearsay rule and other hearsay that is otherwise inadmissible.

At trial a neighborhood friend testified he went to the Meyer home on the day of the alleged assault. The victim's children answered the door crying and exclaimed that "Bill had a knife and . . . he was going to kill their mom." This is clearly an excited utterance and falls within an exception to the hearsay rule. Iowa R. Evid. 803(2). The children did not provide the same testimony at trial. Joyce Meyer, the victim, similarly denied any threatening actions. The excited utterance alone may have been sufficient to prove defendant committed a criminal act.

The State then offered testimony from the officer who was called to the Meyer home. The officer testified, over a hearsay objection,[1] that the children told him that "Sires was very intoxicated and that while holding a knife, told Joyce Meyer that he was going to kill her before the night was through." The cogent analysis of the

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[1] The court admonished the jury to accept that evidence "to explain what the officer did and not to prove the truth of the statements themselves."

majority properly recognizes this testimony as hearsay. The majority finds the erroneous admission did not prejudice Sires in the trial because substantially the same evidence was admitted through the testimony by the neighbor as an excited utterance.

To say there was no prejudice in admitting the officer's testimony is inappropriate. Sires was convicted of Domestic Abuse Assault by Use or Display of a Dangerous Weapon. The court instructed the jury that the State was required to prove Sires assaulted[2] Joyce Ann Meyer, that they were cohabiting, and he used a dangerous weapon. It cannot sensibly be concluded that because the children's excited utterance was admitted the police officer's hearsay testimony about similar but more incriminating statements is not prejudicial. The police officer's testimony established the elements of an assault with a dangerous weapon -- intentionally threatening another with a dangerous weapon. *See* Iowa Code § 708.1(3) (1995). The excited utterance by the children that Bill was going to kill their mom may, at best, be sufficient evidence that an assault took place.

Prejudice is presumed if hearsay is admitted, unless the contrary is affirmatively established. *State v. Sowder*, 394 N.W.2d 368, 372 (Iowa 1986) (citing *State v. Horn*, 282 N.W.2d 717, 724); *State v. Johnson*, 272 N.W.2d 480, 482 (Iowa 1978); *State v. Menke*, 227 N.W.2d 184, 188 (Iowa 1975). But where substantially the same evidence

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[2] "1. On or about the 29th day of June, 1994, the defendant did an act which was meant to cause pain or injury or result in physical contact which was insulting or offensive or place Joyce Ann Meyer in fear of an immediate physical contact which would have been painful, injurious, insulting or offensive to her."

is in the record, erroneously admitted evidence will not be considered prejudicial. *State v. Gilmore*, 259 N.W.2d 846, 858 (Iowa 1977); *accord Horn*, 282 N.W.2d at 724 (harmless error if there is a "multiplicity of the substantially same evidence introduced"). The cases determining that erroneous evidentiary rulings are harmless, however, do so only after an analysis concludes that there is overwhelming evidence of guilt that outweighs any prejudice. *State v. Holland*, 485 N.W.2d 652, 656 (Iowa 1992).

In *State v. Sowder*, 394 N.W.2d 368, 372 (Iowa 1986), the Iowa Supreme Court refused to find harmless error in the admission of double hearsay (testimony from a girlfriend that her boyfriend told her the defendant stated he committed a robbery with a knife) when the statement was obviously needed to make the State's case. The court concluded, "the error must be harmless beyond a reasonable doubt *and* the state must show it did not contribute to the conviction." *Id.* (citing *State v. Ware*, 205 N.W.2d 700, 704 (Iowa 1973)).

The case at bar does not have overwhelming evidence of guilt, strong evidence, or multiplicative evidence. It was a conclusionary excited utterance that Bill was going to kill mom. It cannot be said, with the victim and children denying any assault, that the officer testifying further that the children later claimed Bill had a knife and he was going to kill her that night is not prejudicial. The "[g]overnment's case was not a strong one." *See United States v. Harman*, 349 F.2d 316, 319 (4th Cir.1965). The hearsay

statement by the officer made it stronger. It was prejudicial. The error of admitting the hearsay should require a new trial.

Sackett, C.J., joins in this dissent.