

IN THE COURT OF APPEALS OF IOWA

No. 5-489 / 94-1887

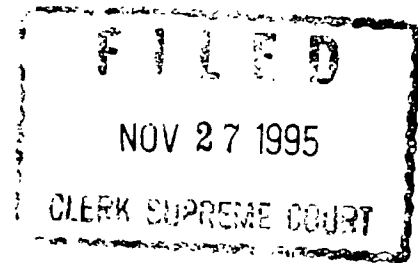
STATE OF IOWA,

Appellee.

vs.

STACEY LORENE WOODSMALL,

Appellant.



Appeal from the Iowa District Court for Wapello County, E. Richard Meadows, Jr., District Associate, Judge.

Stacey Woodsmall appeals from her conviction, following a jury trial, of fourth-degree theft, in violation of Iowa Code sections 714.1 and 714.2(4) (1993).

AFFIRMED.

Linda Del Gallo, State Appellate Defender, and John F. Fatino, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, and Victoria Siegel, County Attorney, for appellee.

Considered by Sackett, P.J., Habhab, and McCartney, S.J.*

*Senior judge from the 2nd Judicial District serving on this court by order of the Iowa Supreme Court.

McCARTNEY, S.J.

The defendant, Stacey Lorene Woodsmall, appeals a judgment and sentence imposed upon her for violation of Iowa Code sections 714.1 and 714.2(4), theft in the fourth degree.

The defendant raises several issues on her appeal. She asserts that the trial court erred in allowing into evidence certain of her nonverbal conduct. She further claims that the trial court erred in permitting certain testimony from a witness for the State as being without the scope of the minutes of testimony.

We affirm.

The defendant accompanied Ms. Connie Seamans to the emergency room of the Ottumwa Hospital one evening in February of 1994. Ms. Seamans' son had been suddenly taken ill. Deal Keasling also accompanied Seamans and the defendant and together with Seamans testified to the presence of the defendant at the hospital.

A tympanic thermometer, whose value was approximately \$380, was located in the examination room at the hospital. Ms. Seamans had to leave the room for a short period of time asking the defendant to stay with the little boy. When Ms. Seamans returned to the examination room, the thermometer was gone. She assumed that hospital personnel had taken it away during her absence.

Ms. Seamans and her child then returned to their home, and when her husband, James Seamans, arrived home, he went to the diaper bag and discovered the tympanic thermometer. At about that time, the defendant entered the Seamans home and stated

that the thermometer was hers. Mr. Seamans testified that the defendant said "why buy it when you can steal it."

The defendant denied being at the hospital with Ms. Seamans and denied going back to the Seaman's home for the thermometer. Keasling, however, contradicted these denials.

During the forepart of March 1994, the defendant suffered a fire at her residence. David Thomas, a volunteer firefighter, was called to the fire. He was also an emergency medical technician at the Ottumwa hospital. He testified he noticed the thermometer in the home of the defendant and recognized it as a tympanic thermometer which belonged to the hospital and particularly the emergency room. It was appropriately identified with initials.

After visiting with an ambulance attendant who was at the scene of the fire, Thomas further testified that he then returned to the Woodsmall home and questioned the husband of the defendant about the presence of the thermometer in the Woodsmall home. Woodsmall told Thomas that it had been left there by a home health care person for the Woodsmalls to use. During this conversation, the defendant was standing behind her husband and indicated agreement with what her husband was telling Thomas by nodding her head in agreement. Thomas then told the defendant and her husband that he, Thomas, was going to return the thermometer to the emergency room at the Ottumwa Hospital and if the community health nurse had any

problems with that for her to contact the hospital. Again, the defendant concurred in the same manner with her husband in allowing Thomas to take the thermometer.

At the trial, the defendant testified that she had received the thermometer from a woman who was baby-sitting Ms. Seamans' children--that the thermometer had been in the Seamans home and while there the defendant was given the thermometer by the baby-sitter.

Upon review, we determine whether or not the trial court abused its discretion in permitting purported hearsay over objection. *State v. Williams*, 305 N.W.2d 428, 432 (Iowa 1981). Error, if any, was preserved by the defendant.

Rule 801(d)(2)(B) of the Iowa Rules of Evidence provides that an admission by a party opponent is not hearsay although made out of court. An admission may be made by a person if that person has manifested his/her adoption or belief in its truth or the subject.

Here, the defendant, standing by her husband, nodded in agreement on several occasions with his statements to Thomas as to how the thermometer was acquired. Similarly, she concurred in Thomas' request to take the thermometer back to the Ottumwa Hospital, all according to Thomas's testimony. It is noteworthy that there was no objection made by the defendant to the removal of the thermometer from her home. This also supports the theory of her concurrence. Thomas sought permission from both the defendant and her husband for the taking of the thermometer by him, and she manifested her agreement in the same fashion by which she agreed with her

husband's statements to Thomas as to how they came into possession of the thermometer.

The defendant relies upon *State v. Beckett*, 383 N.W.2d 66, 69 (Iowa App. 1985), in which it was held that a mere nod of the head was not enough to indicate adoption of another's statement as an admission. In *Beckett*, however, the court determined that the head movement was equivocal--the testimony in *Beckett* did not indicate whether the nod was "affirmative or negative in character aggressive or slight." *Id.* Here, the testimony reflects that the head movements indicated an agreement with the statements made by the husband of the defendant--and using the same head movement, she concurred in the removal of the thermometer from her home.

Under these circumstances, we do not believe the trial court abused its discretion. There is no hard and fast rule determining what such manifestation, adoption, or belief in the truth is necessary. It depends upon all of the extant circumstances. *State v. Hamilton*, 236 N.W.2d 325, 330 (Iowa 1976). Although *Hamilton* was decided before the adoption of our rules of evidence, there is nothing in rule 801(b)(2)(B) to indicate that the "totality of circumstances" as used in *Hamilton* has been circumscribed. We are considering one of a myriad of ways in which adoption of a statement can be manifested. The rule does not reach further than this.

There was sufficient testimony to support the admission of this testimony and we therefore find that the trial court did not abuse its discretion in its admission.

At trial, Mr. Seamans testified that subsequent to taking of the thermometer by the defendant from the witness's home as testified to by him, the defendant called him by telephone. Over objection from the defendant, the witness stated that defendant called him and said she had "gotten in trouble over [the thermometer]," but that the matter had been taken care of.

The minutes of testimony stated that Seamans would testify to the matters contained in an attached statement which was incorporated and as to other facts and circumstances relevant to the cause. The attached statement, in part, said that Seamans would testify as to the discovery of the thermometer in the diaper bag, the entry of the defendant into his home and her taking the thermometer, and her statement that it was "cheaper to steal it than to buy one."

While the minutes are not explicit as to the substance of the later phone call, the defendant was alerted to the fact that there was other and further evidence and testimony to be proffered by this witness. For some unexplained reason, the deposition of this witness to be taken at public expense was canceled.

Our rule of criminal procedure 5(3) provides that the minutes contain a "full and fair statement" of expected evidence and testimony. However, this has not been interpreted to mean verbatim accounting of all testimony--the State must, however,

alert the defendant generally of the source and type of evidence the State proposes to use. *State v. Musso*, 398 N.W.2d 866, 868 (Iowa 1987).

Thus, the defendant was alerted to other and further testimony, and the defendant had an opportunity to depose witness Seamans. While the minutes are indeed sparse, they were sufficient to alert defendant to the fact that Seamans would testify to other and further aspects of this affair.

We further note that Ms. Seamans testified without objection that defendant had told her that the police knew about the theft and that it was being taken care of. Thus this testimony in similar form was before the jury.

Again, our review is an inquiry into whether or not the trial court abused its discretion in allowing this testimony. *State v. Bennett*, 503 N.W.2d 42, 46 (Iowa App. 1993).

Under these circumstances, we do not find that the trial court abused its discretion in this regard.

Accordingly, the conviction and judgment and the sentence imposed thereon are hereby affirmed.

AFFIRMED.

Habhab, J., concurs; Sackett, P.J. specially concurs without opinion.