FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	306
vs.	)	
MICHAEL DEAN WOLLESON,	)	9-170 88-1025
Defendant-Appellant.		

Appeal from the Iowa District Court for Sac County (CR 2890), Louie F. Beisser, Judge.

Defendant appeals from his conviction and sentence for the crime of perjury, in violation of Iowa Code section 720.2. **REVERSED.**

Lon R. Tullar, Sac City, for defendant-appellant.

Thomas J. Miller, Attorney General; Julie A. Halligan, Assistant Attorney General; and David P. Jennett, County Attorney, for plaintiff-appellee.

Heard by Donielson, P.J., and Hayden and Sackett, JJ. Habhab, J., takes no part.

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SACKETT, J.

The sole question on appeal is whether there is substantial evidence to support a finding defendant was guilty of perjury where he testified as a State's witness in a burglary trial. Iowa Code section 720.2 (1987) Perjury, contradictory statements, provides:

> A person who, while under oath or affirmation in any proceeding or other matter in which statements under oath or affirmation are required or authorized by law, knowingly makes a false statement or material facts or who falsely denies knowledge of material facts, commits a class "D" felony. Where, while under oath or affirmation, in the same proceeding or different proceedings where oath or affirmation is required, a person has made contradictory statements, the indictment will be sufficient if it states that one or the other of the contradictory statements was false, to the knowledge of such person, and it shall be sufficient proof of perjury that one of the statements must be false, and that the person making the statements knew that one of them was false when the person made the statement, provided that both statements have been made within the period prescribed by the applicable statute of limitations. No person shall be guilty of perjury if the person retracts the false statement in the course of the proceedings where it was made before the false statement has substantially affected the proceeding.

The alleged perjury came from statements made by defendant while testifying under oath in a trial in Sac County where the State had charged Kelly Mann of burglary in the second degree. Mann was to have broken into a trailer home and stolen a VCR. It is conceded the statements were made under oath in a proceeding requiring statements be made under oath.

Defendant was charged with falsely denying of material facts in that he falsely denied knowledge of a February 1986 burglary when he testified in October 1987.

The question is, is there substantial evidence he knowingly falsely denied knowledge? This issue is an extremely close question as to whether defendant was merely an unprepared reluctant witness for the State or whether he knowingly and falsely denied material facts. Defendant does not deny the statements were made regarding a material fact. Materiality is an element necessary to convict. See State v. Gartin, 271 N.W.2d 902, 908 (Iowa 1978); State v. Deets, 195 N.W.2d 118, 122 (Iowa 1972).

We consider all the evidence in the light most favorable to the State. See State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980); State v. Jones, 271 N.W.2d 761, 763 (Iowa 1978); State v. Overstreet, 243 N.W.2d 880, 883 (Iowa 1976). The question is whether there is substantial evidence to support the charge. State v. York, 256 N.W.2d 922, 927 (Iowa 1977). The evidence introduced by the State shows after being subpoenaed but without preparation, the county attorney called defendant as a State's witness in Mann's trial.

The State introduced a portion of defendant's testimony at that trial. We set out the relevant portions:

> Q. When you stopped the vehicle, did anyone get out of your car? A. Well, he got out to knock on the door is all I know.
>
> Q. Who did? A. I don't remember -- Kelly, I believe it was; and we all got out.

Q. Did you watch him knock on the door? A. Yeah.

Q. Did anyone answer the door? A. I'm not sure; I don't know.

* * *

Q. What happened next? A. Well, I turned around -- we turned around to leave.

* * *

Q. How did he get the door open? A. I don't know for sure.

Q. You saw him go in the door? A. Not exactly.

Q. Kelly kicked the door in and went inside? A. According to right there; I don't know for sure; I don't remember.

Q. Did he have anything with him at that time that he didn't have when he went into the trailer house? Just the VCR according to what this -- was written. I don't remember anything -- I don't remember all that occurred right now.

* * *

Q. You don't recall today how he gained entrance to the trailer home? A. No.

Q. And State's Exhibit 1, your Statement, does that refresh your recollection at all as to what occurred during February 1986? A. Somewhat.

Q. And as to the rest of it, you cannot recall without reading from the paper? A. No

Keith Flink was called as a witness for the State. Flink testified on September 29, 1986, he had a telephone conversation with defendant. Flink testified to the substance of the conversation:

FLINK: Wooleson proceeded to talk about what he knew about the burglary. . . .

* * *

They (defendant, Kelly and Kennebeck) went out to the trailer. Kelly got out. Mike said that Kelly kicked in the door to the trailer, went in and took out a V.C.R., came out back to the vehicle with it.

* * *

Larry Wolfe testified weeks after:

> Defendant told us he had transported Kelly Mann and Luann [Kennebeck] out to the Lindell Tjaden residence. . . . and they got out and went to the door. And he said that when they came back, they had a V.C.R. and a pistol with them, and he said that they had kicked the door in and come out with the merchandise. . . . Wolfe assumed defendant was referring to Kelly Mann and Luann.

The State also introduced a written statement defendant gave on October 6, 1986, which provided in relevant part:

> We went out to the trailer. Kelly got out and knocked on the door and nobody answered. So he kicked the door in and went inside. . . . We turned around to leave and Kelly came out with a VCR then he got into the car with the VCR. . . .

While a lapse of memory play can form the basis for a perjury charge, see State v. Fisher, 282 N.W.2d 684, 687 (Iowa 1979), not every memory loss necessarily forms the basis for a perjury charge. Defendant said he could not recall the events without reading his statement. The burglary happened in February 1986 and the alleged perjured testimony was given in October 1987. The alleged perjured testimony was given when defendant was questioned without preparation and without having been given the benefit of reviewing his prior statement. Defendant indicated he could remember his prior statement after reviewing his prior statement but was not given an opportunity to so testify. There is not substantial evidence to support the conviction. We reverse.

REVERSED.

Hayden, J., concurs; Donielson, P.J., dissents.

DONIELSON, P.J. (dissenting)

I would affirm. The issue here is whether there is substantial evidence defendant knowingly and falsely denied knowledge of material facts under oath. The trial transcript clearly demonstrates defendant denied knowledge of the circumstances which gave rise to a burglary charge against Kelly Mann. Defendant repeatedly responded, "I don't know" to the questions posed by the State in Kelly Mann's trial. Defendant does not deny these were material facts.

The State's evidence that defendant knowingly and falsely denied knowledge of those events consisted of an oral statement made by defendant to Officer Flink in September 1986, seven months after the alleged burglary, which set out in detail what defendant knew about the burglary; a written statement made a week later which set out in detail what transpired on the night of the burglary; an oral statement made to Larry Wolfe weeks after the burglary, the details of which were consistent with defendant's statement to Officer Flink; and a partial transcript of defendant's testimony at the Mann trial. The majority relies on the time lapse between the statements made and defendant's testimony at trial and holds that defendant's memory loss does not provide substantial evidence to support the conviction. However, this is not merely a case where defendant suffered a memory loss.

Defendant testified he didn't know about the events which transpired at the Tjaden trailer in February 1986. I find the State introduced substantial evidence that defendant did know about those events, recounted those events in detail seven months later, and then falsely denied knowledge of those events under oath at Kelly Mann's trial.