IN THE COURT OF APPEALS OF IOWA

No. 3-170 / 92-350

FILED
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CLERK SUPREME COURT

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STATE OF IOWA,

Appellee,

vs.

RONALD BEARD, JR.,

Appellant.

Appeal from the Iowa District Court for Polk County, Ray A. Fenton, Judge.

Beard appeals his conviction, following a jury trial, of second-degree burglary and assault causing bodily injury. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Ahmet S. Gonlubol, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Chris Odell, Assistant Attorney General, John P. Sarcone, County Attorney, and James Ramey, Assistant County Attorney, for appellee.

Heard by Schlegel, P.J., and Hayden and Sackett, JJ.

HAYDEN, J. 000352

The State charged Ronald Beard, Jr., with first-degree burglary and attempted murder for his alleged participation in the stabbing of Shawn Gibbons. The charges arose from a fight that occurred on September 27, 1991.

At trial, Richard Luna testified he and Santos Giron had a fight at Giron's house after a party. He indicated Giron pulled a knife and threatened to continue the fight later. Luna returned home and told his roommate, Gibbons, about the fight. Shortly thereafter, Giron entered Luna's house. Giron and Luna resumed fighting. Giron eventually chased Luna out of the house with a knife. Luna alerted his neighbors who called the police.

Giron then reentered Luna's house. Luna maintained he could see Giron and Beard fighting with Gibbons. Luna ran to a neighbor's house in an attempt to find a weapon. When Luna returned to his house, he noticed Giron and Beard running to a nearby car. Gibbons staggered out of the house bleeding profusely.

Gibbons also testified about Luna's second fight with Giron. He became involved when Beard allegedly hit Luna over the head with a bottle. He stated he remembered seeing Giron with the knife but did not remember being stabbed. The next thing Gibbons remembered was waking up in the hospital. He "sort of remembered" writing a note explaining what had happened in response to an officer's

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question. A nurse read the note as he wrote it because he could not see it. Gibbons was unable to read the note at trial.

Beard objected to introduction of the note. He asserted the note was hearsay because it was not a recorded recollection. Following a hearing, the district court overruled the objection and allowed questioning about the note. The court, however, required a proper foundation be established before the note was introduced.

Officer Rahn Bjornson testified he interviewed Gibbons at Methodist Hospital in the presence of a staff nurse. The interview occurred shortly after Gibbons emerged from surgery. He stated Gibbons motioned for a pen and paper during questioning. Over Beard's objection, the district court allowed Bjornson to read the note to the jury. The officer indicated Gibbons had written, "They were both on me at the same time, one knife, they both had it at differen(t) (times)."

The district court submitted second-degree burglary and criminal trespass as lesser-included offenses of first-degree burglary, and assault with intent to inflict serious injury and assault causing bodily injury as lesser-included offenses of attempted murder.

The jury found Beard guilty of second-degree burglary and assault causing bodily injury. The district court entered judgment and sentenced Beard to concurrent prison terms of up to ten years and one year. Beard appeals.

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A district court's ruling on admissibility of evidence is discretionary. State v. Alvey, 458 N.W.2d 850, 852 (Iowa 1990). We review for an abuse of discretion.

I. Recorded Recollection Evidence. Beard contends the district court abused its discretion in admitting the contents of a note written by the victim, Shawn Gibbons, as a recorded recollection under Iowa Rule of Evidence 803(5).

Over defendant's hearsay objection, the court permitted Officer Bjornson to read into the record the following note: "They were both on me at the same time. One knife, they both had it at diffren [sic] . . . ." Officer Bjornson went on to testify the nurse asked Gibbons if he meant "different times" and Gibbons nodded his head in acknowledgment. The note, which was labeled State's exhibit 22, was admitted through the testimony of Officer Bjornson because Gibbons was unable to read it.

The district court admitted the note under an exception to hearsay, Iowa Rule of Evidence 803(5). This exception for a recorded recollection provides:

> The following are not excluded by the hearsay rule [Iowa Rule of Evidence 802], even though the declarant is available as a witness:
>
> A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly.

Iowa R. Evid. 803(5). The rule establishes several requirements which must be satisfied in order for the

exception to apply. We apply rule 803(5) to the facts of this case to determine if the district court abused its discretion in invoking the hearsay exception.

Rule 803(5) requires the existence of a memorandum or record concerning a matter about which Gibbons once had knowledge but at trial has insufficient recollection so as to impair his ability to testify fully. The handwritten note involved in the instant case constitutes a memorandum concerning the stabbing incident. Gibbons clearly had knowledge of the incident; however, at trial his memory was insufficient to allow him to testify fully and accurately about the stabbing incident. On cross-examination defense counsel asked the following question:

> Q. To the best of your recollection now, Mr. Gibbons, you do not know how you got stabbed or who stabbed you? A. To the best of my recollection, no. I don't remember who did it.

Gibbons testified he recalled writing a note regarding what had happened. He also stated the nurse had read aloud the contents of the note as he had written it.

> Q. So you wrote, and the nurse read aloud what you wrote? A. Yes.
> Q. That way you knew what you'd written, I guess? A. Yes.

The rule also mandates proof the memorandum was made or adopted by Gibbons. Testimony from Officer Bjornson shows Gibbons authored the note. The officer witnessed Gibbons writing the note shortly after the victim returned from surgery.

> Q. Did he [Gibbons] give you any indication that he wanted to write? A. Yes, he did.

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Q. How did he do that? A. When I was asking him questions, he started to hold his hand up in that kind of a manner. It was the nurse who said, "I think you wants to write something down."

Q. All right. Now, for the written record here, you were holding your hand, your right hand up and moving it up and down, sort of from the wrist, like somebody writing; is that correct? A. That's correct.

Q. Was anything provided for him so that he could write? A. Yes, the nurse had some papers with her. And she supplied a blue piece of paper for him to write on.

Q. Did you observe him writing on that paper? A. Yes, I did.

Q. Hand you what's marked on this side as State's Exhibit No. 22, ask you to identify that item? A. Yes. That was the blue sheet of paper that was supplied for Mr. Gibbons to write on.

* * *

Q. Officer Bjornson, would you please carefully, just word by word precisely what Shawn Gibbons wrote, just read that to us, please. A. "They were both on me at the same time. One knife, they both had it at" -- And then the spelling of the last word is d-i-f-f-r-e-n. And that end there.

This evidence shows the memorandum was made by Gibbons.

Rule 803(5) requires a showing of the "freshness" of Gibbons's recollection of the event at the time of recordation. State v. Thompson, 397 N.W.2d 679, 683 (Iowa 1986). Gibbons wrote the note shortly after surgery. The interval between the statement and the recordation satisfies this "freshness" requirement.

Finally, evidence must show the memorandum accurately reflected Gibbons's knowledge of the incident at the time it was recorded. Gibbons testified he believed the note accurately reflected his recollection of the stabbing incident at the time it was made.

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> Q. Would that have been -- When you wrote that [note], were you -- what were you attempting to do? What were you attempting to tell the police when you wrote it? A. What had happened.
> Q. As accurately as possible? A. Yes.

The requirements of rule 803(5) have been satisfied. The hearsay exception applies in this case. We determine the district court did not abuse its discretion in allowing the contents of the note to be read into evidence pursuant to Iowa Rule of Evidence 803(5). We affirm the district court on this issue.

II. Ineffective Assistance of Counsel. Beard contends his trial counsel rendered ineffective assistance by failing to request jury instructions on simple assault and assault causing bodily injury as lesser-included offenses of first-degree burglary.

Generally, ineffective assistance of counsel claims are preserved for postconviction relief proceedings to allow trial counsel an opportunity to defend the charge. State v. Mulder, 313 N.W.2d 885, 890 (Iowa 1981), cert. denied, 459 U.S. 841 (1982); State v. Nebinger, 412 N.W.2d 180, 191-92 (Iowa App. 1992). Where the record is inadequate to permit us to resolve the claim, we preserve the claim in order to provide the allegedly ineffective attorney the opportunity to explain his or her conduct. State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978). The record is not sufficient for us to resolve this issue. Defendant's ineffective assistance claim is preserved for possible postconviction proceedings.

AFFIRMED.