

FILED

DEC 27 1983

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA**STATE OF IOWA,**

)

Plaintiff-Appellee,

)

Filed December 27, 1983

vs.

)

HOWARD RUSSELL SWITZER,

)

3-285
69423

Defendant-Appellant.

),

Appeal from Marshall District Court - Carl D. Baker, Judge.

Defendant appeals his conviction of burglary in the second degree in violation of Iowa Code sections 713.1, .3 (1981). **REVERSED.**

Charles Harrington, Appellate Defender, and LuAnn White, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Joseph P. Weeg, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Snell and Hayden, JJ.

HAYDEN, J.

The defendant appeals his conviction of burglary in the second degree in violation of Iowa Code sections 713.1 and 713.3 (1981). We reverse.

The defendant was charged on the basis of the alleged burglary of the Jerry Denbow residence on February 17, 1982. On that date, Denbow and his wife observed the defendant's car sitting in their driveway as they approached their home and also observed the defendant's car pulling out of the driveway. Denbow's wife also observed the defendant sitting in his car. After they arrived home, the Denbows discovered mud in their kitchen. A television set was missing from their house.

On April 9, 1982 the Denbows received an unsigned letter threatening to implicate them in a homosexual rape charge if they refused to drop the burglary charge against the defendant and promising that if they would drop the charges they would receive a new television set. On April 26, 1982, the State amended its minutes of evidence to include the unsigned letter. On April 27, 1982, the defendant filed a motion in limine seeking to preclude the State from using evidence of an alleged homosexual rape by the defendant previously referred to in the minutes of evidence. The court sustained the motion.

Prior to the trial, the letter was examined by Jerry Brown, a criminalist and document examiner for the Iowa Division of Criminal Investigation. Before conducting laboratory tests on the letter, he took photographs of each page of the questioned document. During the course of the laboratory tests on the document, Brown placed the document in a solution which caused the original document to be illegible.

In a motion in limine the defendant sought on the basis of the best evidence rule to preclude the State from presenting the photographs of the letter. The court overruled the defendant's motion.

The State had Brown, a handwriting expert, compare the letter received by the Denbows with two fingerprint and palm print cards that had the defendant's signature on them, and three letters sent to Wanda Lepley from the defendant. At the trial, Wanda Lepley testified that she believed the letters in question were written to her by the defendant on the basis of other letters received from the defendant and by the contents of the letters which referred to personal incidents between Lepley and the defendant. The defendant objected, in part, to the admission of copies of the letters on the basis that the State did not prove them to be genuine writings made by the defendant as required by Iowa Code section 622.25 and thus, that they could not be used for comparison purposes with the letter sent to the Denbows. The trial court overruled the objections made by the defendant to the letters and admitted them as exhibits.

During the trial, Brown used copies of the Lepley letters and the letter sent to the Denbows in giving expert testimony concerning his comparison of the documents to identify who wrote the letter sent to the Denbows. After Brown had presented the transparency of the first page of the letter to the Denbows, which was the only one which made reference to a rape charge, he went on to the second page. After Brown had almost finished the comparison of the second page, defendant moved for a mistrial on the basis that the presentation of this material was in violation of the pretrial order on defendant's motion in limine prohibiting the State from introducing evidence regarding the alleged homosexual rape. The trial court overruled the motion for mistrial on the ground that the order granting the motion in limine was not violated. The trial court did not preclude further display of the portion of the transparency to which the defendant made his objection.

On the basis of his comparison of the letter sent to the Denbows with the Lepley letters and fingerprint and palm print cards, Brown stated that the defendant wrote the letter to the Denbows. The defendant objected to the

submission of the copy of the letter received by the Denbows on the basis that it was not the best evidence. The defendant claimed that the original letter was destroyed through the negligence of a state agent. The trial court overruled the objection and admitted a copy of the letter as an exhibit.

A jury found the defendant guilty as charged. The defendant filed a motion for new trial, raising the issues asserted on appeal. On August 25, 1982, the trial court overruled the motion for new trial and sentenced the defendant. On September 21, 1982, the defendant filed a notice of appeal.

Our scope of review in a criminal appeal is on assigned error. State v. Cullison, 227 N.W.2d 121, 126-27 (Iowa 1975).

I. Best Evidence. Switzer contends the trial court erred in admitting the photographs of an original letter because they were not the best evidence. This rule of evidence is that the original of a document by which proof of a material fact is to be made must be introduced unless satisfactory explanation for its absence is made. State v. Fingert, 298 N.W.2d 249, 254 (Iowa 1980). Only then may secondary evidence, which is frequently a copy of the same document, be admissible. State v. Moline, 164 N.W.2d 151, 156 (Iowa 1969). Secondary evidence is inadmissible if the original documents were intentionally destroyed or destroyed under circumstances indicating fraud. Shinrone, Inc. v. Tasco, Inc., 283 N.W.2d 280, 287 (Iowa 1979). There is no dispute that the State did not intentionally or fraudulently destroy the letter. The expert explained how the letter was accidentally dipped into the wrong solution. Furthermore, the expert testified that the photographs could be examined for handwriting purposes as effectively as the original.

We find that the explanation of destruction was satisfactory and the admission of the secondary evidence proper.

II. Genuine Writing. Switzer contends the trial court erred in admitting into evidence and allowing expert testimony based upon a handwriting exemplar that was not sufficiently identified as a genuine writing of the person who purportedly wrote it.

Iowa Code section 622.25 provides: Evidence respecting handwriting may be given by experts, by comparison, or by comparison by the jury, with writings of the same person that are proved to be genuine. The genuineness of the writing made the basis of comparison, sometimes called the "standard" writing, should be proven by direct or positive evidence. Winch v. Norman, 65 Iowa 186, 188, 189, 21 N.W.511, 512 (Iowa 1884). Two obvious methods of proving the standard writing are: testimony of a witness who saw the party write it; and secondly, by the party's admission. State v. Streit, 248 Iowa 260, 263, 80 N.W.2d 318, 320 (Iowa 1957). Neither method was used here. However, there are other acceptable methods of proving standards. Streit at 263, 80 N.W.2d at 320. We find that one of those other methods was used here.

The State used three letters written to Wanda Lepley as the "standard" for comparison. The letters were allegedly sent to her by the defendant. The evidence is as follows: Ms. Lepley had known defendant for about eight months and during that time she corresponded with him by letter; Lepley testified she recognized Switzer's handwriting in those three letters based on other letters she had received from him; the letters have Switzer's return address on them and are signed "Howie" and "Howard"; the letters made mention of incidents that Lepley and Switzer had previously discussed, made requests of Lepley and responded to questions asked by Lepley. Furthermore, the handwriting expert testified that the same person signed the letters written to Wanda Lepley and the fingerprint and palmprint card. The palmprint card was a known writing of Switzer.

We find this evidence provides sufficient basis to support the trial court's decision to admit the exemplars as genuine writings and establish a "standard" for comparison.

III. Mistrial. The State contends that we should not consider this issue because defense counsel's motion for mistrial, based on the appearance of the words "rape charge" on the transparency of the Denbow letter, was untimely. We do not agree.

Before the handwriting expert turned on the overhead projector, defense counsel made the following objection:

At this point, Your Honor, I am going to interpose an objection as to any testimony regarding either the questioned document or the known documents for all of the reasons that I previously urged in my objection to the known documents and in my motions in limine.

The court overruled the objection and allowed the witness to proceed with the display of the transparencies. While the witness was still testifying counsel made his motion for mistrial. State v. Cornelius, 293 N.W.2d 267, 269 (Iowa 1980), is distinguishable. In that case the prosecutor asked an objectionable question of a witness. Defense counsel cross-examined the witness, allowed another State's witness to testify, and only moved for mistrial after the State rested its case. Counsel in the present case was not nearly so dilatory. The motion was timely made and preserved error.

The defendant's motion in limine which was sustained sought to exclude any evidence regarding an alleged homosexual rape committed by defendant. The motion was filed after the State gave notice of amended minutes of testimony and had knowledge of the letter in question. In fact, a copy of the letter was attached to the amendment to the minutes of testimony. It is clear that the broad language of the motion in limine covers the reference to a rape charge in the letter. It is true that the court later ruled the letter could be used for handwriting analysis and was admissible into evidence. However, in light of the court's favorable ruling on defendant's motion in limine, it is clear that the words "rape charge" should have been excised from the letter before it was so used.

The State also argues that there was no prejudice in showing the jury the transparency of the letter since a photograph of the same letter was admitted into evidence. This argument assumes that error was not preserved in the admission of the photograph. The photograph was not admitted until after the transparency had been shown. Defense counsel did not specifically object to the letter's reference to the rape at that time. However, counsel had already objected to that exact same language when it appeared on the transparency. His objection was overruled and motion for mistrial was denied. Counsel is not required to repeat an objection to the same evidence once the issue is fairly presented to the trial court and a ruling is secured. Fothergill v. Fothergill, 120 Iowa 93, 99, 105 N.W. 377, 380 (1905).

The trial court was sufficiently alerted to defendant's objection at trial and the grounds therefor as defendant's motion in limine and the court's ruling thereon were before the trial court. We acknowledge, however, a ruling on a motion in limine is not binding at trial and objections made at trial must be ruled upon by the presiding judge. Defendant's objection was good and should have been sustained, and the terms "rape charge" should have been obliterated or excised both from the transparency and later the photograph of the letter used by the State and admitted into evidence.

It was error for the trial court to overrule defendant's timely motion for mistrial in this case and defendant was prejudiced thereby. We reverse on this issue on appeal.

REVERSED.

Snell, J., concurs; Oxberger, C.J., dissents.

OXBERGER, C.J., (dissenting).

I dissent from the majority's holding in division III mistrial. The State offered evidence of transparencies of a letter containing a reference to an alleged homosexual rape.

On August 3, 1982, in overruling the defendant's motion in limine to exclude this letter, the trial court said: "and with the objectionable portions of the three letters excised, it seems to me that they can be utilized by the State and its expert in testimony concerning analysis of the handwriting of the defendant.

Both counsel stated that they had agreed to the specific portions of the letters to be excised. However, in making the transparencies, the prosecutor did not excise the objectionable material. Defense counsel did not check the transparencies before they were shown to the jury and waited until the second page was shown to object.

I would hold that defense counsel was jointly responsible with the prosecutor in complying with the previous agreement to excise the objectionable matter. I would hold the trial court did not abuse its discretion in denying the motion for mistrial.