FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-436 / 88-1373

STATE OF IOWA,

Appellee,

vs.

MICHAEL GORDON BOWMAN,

Appellant.

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Appeal from the Iowa District Court for Des Moines County, Thomas R. Brown, District Associate, Judge.

Defendant appeals his conviction, following a jury trial, for assault with intent to commit serious injury. **REVERSED AND REMANDED FOR A NEW TRIAL.**

Raymond E. Rogers, State Appellate Defender, and James F. Whalen, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney General, and William L. Dowell, County Attorney, for appellee.

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

OXBERGER, C.J.

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Michael Gordon Bowman (Bowman) appeals from his conviction, following a jury trial, for assault with intent to commit serious injury. He challenges several evidentiary rulings. He also contends his trial attorney rendered ineffective assistance by failing to make a timely objection to certain improper questions. We reverse and remand for a new trial.

Michael Bowman and a friend, Gary Boyles, allegedly administered a beating to Lonn Crear in retaliation for an earlier incident in which Crear had broken Bowman's nose in a fight. Bowman denied any involvement in the beating; he claimed that Boyles was solely responsible and that he had tried to stop Boyles. The beating was witnessed by Raymond Roberts, a friend of Bowman.

Bowman was charged with assault with intent to commit serious injury. At his jury trial on that charge, eyewitness Raymond Roberts confirmed Bowman's claim that Boyles was solely responsible for the beating. The State, however, introduced evidence that Roberts had made a prior inconsistent statement implicating Bowman.

A jury found Bowman guilty of the crime charged, assault with intent to commit serious injury. Bowman has appealed from the resulting conviction and sentence.

Bowman contends the district court abused its discretion by admitting Raymond Roberts' prior inconsistent statement without any limiting instruction. Mr. Roberts

gave the prior inconsistent statement in the form of a written statement to the police on May 6, 1987. This statement differed considerably from Roberts' trial testimony. Specifically, in this written statement Roberts stated that Bowman told him that he intended to get even with Lonn Crear for breaking his nose. He also stated that Bowman showed him the nose brace he wore to protect his broken nose, and stated that he was "going to stuff the nose brace in Lonn's mouth." The statement also states that Bowman kicked Crear and got on top of him and hit him several times with his fists.

At trial the prosecutor confronted Roberts with the details of his pretrial statement and asked the district court to admit it into evidence. The exchange between counsel and the court went as follows:

> MS. BROWN [PROSECUTOR]: Your Honor, I'd ask to introduce into evidence State's Exhibit No. 5.
> MR. HUTCHESON [DEFENSE COUNSEL]: I'm going to object to the statement, Your Honor, as not relevant to these proceedings. And, again, it's impeaching their own witness. They're trying to make out their own witness a liar.
> THE COURT: Miss Brown?
> MS. BROWN [PROSECUTOR]: Your Honor, it's clear that the State can impeach their own witness just as the defense can impeach their own witness. It's clearly impeachment process he's denied making previous statements. Foundation has been laid through Detective Gaddis.
> MR. HUTCHESON [DEFENSE COUNSEL]: I want it clearly understood that this document is admitted solely for impeaching this person and not as evidence against my client.
> THE COURT: The exhibit is admitted pursuant to Rule 607 and also pursuant to Rule 801(d) -- Excuse me, 206(13)(a). And it's accepted without any limitations.

The State asserts that this exchange shows that the prosecutor offered the pretrial statement for both impeachment and substantive purposes.

The issue here is whether Bowman's defense counsel's statement is a request for a limiting instruction. The State argues that since Bowman did not lodge any hearsay objection he has waived any error in the admission of Roberts' written statement. We note that a prior inconsistent out-of-court statement, offered for impeachment purposes, does not come within the definition of hearsay. See State v. Hill , 243 N.W.2d 567, 570 (Iowa 1976).

> "It is generally held a witness may be impeached by showing his testimony upon a material matter is inconsistent with a prior statement made by [the witness] . . . . The impeaching testimony is not admissible to prove its truth, but solely to demonstrate the witness is not reliable because what he says now is contrary to what he said at some previous time. . . . Since both statements cannot be true, the jury is entitled to weigh one against the other to decide if such a fickle witness is worthy of belief."

Id. (quoting State v. Frommelt, 159 N.W.2d 532, 535 (Iowa 1968)). The State asserts the prosecutor offered the pretrial statement for both impeachment and substantive purposes. Our review of the record reveals that the State offered the written statement only for impeachment purposes. We further find Bowman's defense counsel's statement to be an adequate request for a limiting

instruction. We find the district court's failure to comply with State v. Hill's requirement of a limiting instruction for impeaching evidence to be an abuse of discretion and reversible error. See Hill, 243 N.W.2d at 570.

We believe the district court's admission of the pretrial statement without a limiting instruction was prejudicial error. Bowman asserts prejudice in that the pretrial statement corroborated Greg Boyles version of the events that he assaulted Crear at the request of Bowman. Additionally, Bowman claims prejudice because the statement indicates he actually struck Crear contrary to other evidence and that the jury would tend to give this written statement more weight than other evidence in the case. We agree. Consequently, we reverse Bowman's conviction.

Bowman also contends his trial attorney rendered ineffective assistance and that the district court abused its discretion by permitting the prosecutor to ask eyewitness Raymond Roberts if he was Bowman's homosexual lover. Because we have reversed Bowman's conviction on other grounds, we find it unnecessary to address these issues.

REVERSED AND REMANDED FOR A NEW TRIAL.