IN THE COURT OF APPEALS OF IOWA

No. 7-033 / 96-0478

FEB 26 1997
CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

000442

vs.

JACK LEWIS GOOD,
Defendant-Appellant.

Appeal from the Iowa District Court for Cass County, James M. Richardson, Judge.

Defendant appeals from judgment and sentences entered, following jury trial, for attempted murder, in violation of Iowa Code section 707.11 (1993), and second-degree burglary, in violation of Iowa Code section 713.6A. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Kevin Cmelik, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, Jeffrey L. Larson, County Attorney, and Susan Larson Christensen, Assistant County Attorney, for appellee.

Heard by Sackett, P.J., and Cady and Streit, JJ.

STREIT, J.

Defendant appeals from judgment and sentences entered, following jury trial, for attempted murder and second-degree burglary. He appeals the attempted murder conviction arguing the trial court erred in refusing him the opportunity to elicit testimony from a witness to impeach his accomplice that testified against him at trial.

Jack and Jason Good, brothers from Waterloo, broke into Keith and Marilyn Anderson's farm home in Shelby County on June 21, 1995. The Anderson's son, Robert, stopped to check on the house while his parents were away, when he noticed an unfamiliar Ford Escort in the driveway. Anderson entered the home, saw Jason Good carrying his grandmother's wallet, and asked him what he was doing. Jason yelled for his brother. Anderson ran out of the home, took the keys from the ignition of Goods' car, and ran to his pickup truck. As he drove away, he saw a handgun pointing directly at him, ducked down, and continued to drive. He heard a gun shot, and later discovered a bullet passed through his vehicle's steering column.

The Good team was apprehended in Waterloo by police officers. Jack was charged with attempted murder and first-degree burglary. At trial, Jason testified Jack fired the shot at Anderson. Jason denied he was offered any deals or any threats were made against him to testify. He stated he agreed to testify because he "wanted to do the right thing."

Prior to the testimony of Sherry Good, the brothers' sister, the court sustained the State's motion in limine to exclude any testimony about Jason telling Sherry that

the prosecutor made threats or promises to him. Defense counsel asserted Jason's conversations with Sherry were "an exception to the hearsay rule," specifically for impeachment testimony against Jason. The court concluded the statements were hearsay.

The jury returned verdicts of guilty of attempted murder and second-degree burglary. Jack Good was sentenced to indeterminate terms not to exceed twenty-five and ten years on each respective charge. The court ordered the sentences to run concurrently, and also ordered Good to serve a mandatory minimum five years on the attempted murder charge.

Jack Good appeals.

Evidentiary matters are generally within trial court's discretion. The court reviews for errors of law. The trial court's decision will not be overturned unless there has been an abuse of discretion. *State v. Hubka*, 480 N.W.2d 867, 868 (Iowa 1992).

Good argues the proffered testimony was not hearsay because it was offered to impeach Jason. Good's attorney did not make an offer of proof to further examine this issue on appeal. We are unable to determine whether Good was offering Sherry's testimony to show: (1) the prosecutor threatened Jason he would appear at every one of Jason's parole hearings if he did not testify against Jack--in which case, it would be hearsay, Iowa R. Evid. 801(c); (2) how some threat was perceived by Jason, in other words the effect the threat had on Jason explaining why he testified against Jack--which

would qualify as an exception to the hearsay rule, Iowa R. Evid. 803(3); or (3) that Jason is telling people the prosecutor threatened him, or he thinks he is being threatened, yet he testified no one threatened him--thus, he is changing his story every time he tells it and we do not know what to believe--a tougher call whether it qualifies for impeachment. Iowa R. Evid. 613(b).[1]

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Iowa R. Evid. 801(c); *State v. Deases*, 518 N.W.2d 784, 791 (Iowa 1994). Hearsay is generally inadmissible. Iowa R. Evid. 802.

"Courts must be cautious to consider the true purpose of offered testimony in ruling on its admissibility. This is especially critical when considering the admission of apparent hearsay statements not offered for the truth of the matter asserted." *State v. Wells*, 522 N.W.2d 304, 308 (Iowa App.1994) (citation omitted). We do not blindly accept as controlling the purpose urged by the offering party. Rather, we review the relevant record to determine if the purpose voiced by the party can reasonably be found to be the real purpose for which the challenged testimony was

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[1] "A witness may generally be impeached by evidence of a statement made on a prior occasion inconsistent with material testimony given at trial. Iowa R.Evid. 613; *State v. Frommelt*, 159 N.W.2d 532, 535 (Iowa 1968). The prior inconsistent statement constitutes hearsay, and is admissible only for impeachment. Id. It is admitted not to prove its truth, but to demonstrate the witness is not reliable. Id. If the statement is not admitted or specifically denied, however, extrinsic evidence of the statement is necessary to impeach. In this situation, the witness must also be given an opportunity to explain or deny the statement. Iowa R.Evid. 613(b)." *State v. Berry*, 549 N.W.2d 316, 319 (Iowa App. 1996).

offered. *State v. Hollins*, 397 N.W.2d 701, 705 (Iowa 1986) (citations omitted). An objective test based on all the circumstances is used. *State v. Sowder*, 394 N.W.2d 368, 371 (Iowa 1986); *State v. Summage*, 532 N.W.2d 485, 487 (Iowa App. 1995).

Offers of proof are so important that we require them to preserve error. *State v. Harrington*, 349 N.W.2d 758, 760 (Iowa 1984). We will not presume prejudice when the answer to the question is not obvious and the proponent made no offer of proof. *State v. Windsor*, 316 N.W.2d 684, 688 (Iowa 1982) (citation omitted).

In this case, with the complex nature of the impeachment being offered, the defense's failure to make an offer of proof has left us unable to address defendant's claimed error. *See id.* We find that as defendant has not adequately preserved error for our review with regard to this issue, we need not consider it further. *Hegtvedt v. Prybil*, 223 N.W.2d 186,189 (Iowa 1974) (citing *Busker v. Sokolowski*, 203 N.W.2d 301, 303 (Iowa 1972)).

Furthermore, we are unable to find Good suffered prejudice by the trial court's ruling. *See Bauer v. Cole*, 467 N.W.2d 221, 225 (Iowa 1991) (no prejudice in trial court's ruling prohibiting the admission of exhibit containing alleged inconsistent statements); *State v. Berry*, 549 N.W.2d 316, 319 (Iowa App. 1996). We believe the jury was well aware of any possible motivation for Jason to testify against his brother and the trial court did not abuse its discretion in sustaining the objection. Sherry testified at trial Jason told her if he did not testify he would get a longer prison

sentence. She also stated Jason told her he was given a deal or there were threats made against him, and that any contrary testimony was untrue. Jack testified Jason fired the shot. He also stated on cross-examination that Sherry told him that the prosecutor told Jason that if he would not testify against Jack, the prosecutor would attend every one of Jason's parole hearings to insure Jason would remain in prison for three years. Jack testified Sherry also told him Jason would receive only a ninety-day shock prison term if he testified.

We are convinced the jury's verdict would not have been different even if Sherry were allowed to testify what Jason said the prosecutor allegedly told him.

AFFIRMED.