IN THE COURT OF APPEALS OF IOWA

No. 1-668 / 00-2043
Filed December 12, 2001

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CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

IAN THOMAS STEVENSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Wright County, Ronald H. Schechtman, Judge.

Ian Stevenson appeals from his conviction and sentence for third-degree burglary in violation of Iowa Code section 713.6A (1999). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and James G. Tomka, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, and Michael E. Houser, County Attorney, for appellee.

Considered by Huitink, P.J., and Zimmer and Vaitheswaran, JJ.

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ZIMMER, J.

Ian Stevenson appeals from his conviction and sentence for third-degree burglary in violation of Iowa Code section 713.6A (1999). He contends the trial court erred in allowing a witness to read to the jury directly from a statement the witness made to police prior to trial. We affirm.

I. Background Facts and Proceedings

On February 27, 2000, Myron Amdahl learned there had been a break-in at his cabin near Goldfield. He discovered his gun cabinet had been drilled open and that guns, ammunition, and other items of personal property were missing. Law enforcement officers began an investigation.

During early March, Deputy Sheriff Paul Schultz received information indicating Christopher Reyna and Kory Burger were involved in the break-in. Deputy Schultz questioned Reyna on March 14 and March 16, 2000. On both occasions, Reyna provided the deputy with a written statement detailing what he knew about the burglary. Later, Burger admitted that he burglarized the Amdahl cabin on three separate occasions on February 27, 2000, with the assistance of several friends.

On May 9, 2000, the State charged Ian Stevenson with third degree burglary. At Stevenson's trial in August of 2000, Burger described the role he and others played in the break-ins. Brad Gardner accompanied Burger on the first break-in. Burger testified Reyna and Nick Molitor joined him on the second trip to the cabin. After Reyna went to work, Stevenson joined Burger and participated in the third break-in at the cabin.

Reyna also testified at Stevenson's trial. He admitted he broke into the Amdahl cabin on February 27 with Burger and Molitor. After returning home from the cabin, Reyna went to work at his job at a group home around midnight. He testified that when he returned home from work the following morning, he saw four guns on the floor and observed Stevenson and Burger sitting on a couch. Reyna asked Stevenson and Burger several questions about where the guns came from and learned they were taken from the cabin.

When questioned about details of this conversation at trial, Reyna could not recall whether Stevenson or Burger answered his questions about the guns. Consequently, the prosecutor sought to have a portion of one of Reyna's prior written statements to the deputy sheriff read aloud to the jury. Over the defendant's objections based on hearsay and lack of foundation, the trial court allowed Reyna to read a portion of his March 16 statement to the jury. The document itself was not admitted as evidence. The written statement revealed that Stevenson described to Reyna the process of "drilling out" a safe containing the guns at the Amdahl cabin. Stevenson also stated he took a stereo receiver from upstairs at the cabin. The defendant was found guilty as charged. Stevenson appeals.

II. Scope of Review

The court reviews the district court's evidentiary rulings for correction of errors at law. *State v. Tangie*, 616 N.W.2d 564, 568 (Iowa 2000).

III. Evidentiary Issue

On appeal, Stevenson contends the trial court erred in allowing Reyna to read directly from the statement he made to police on March 16, 2000. He argues the State failed to establish the necessary foundation to admit Reyna's "refreshed" testimony under Iowa Rule of Evidence 612. The State responds by contending the defendant misinterpreted the trial judge's theory of admissibility. The State claims the testimony was admitted under the hearsay exception for recorded recollection recognized under Iowa Rule of Evidence 803(5), rather than as writing used to refresh memory under Rule 612 as suggested by Stevenson. Rule 803(5) provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (5) *Recorded recollection*. 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. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

Upon review of the record, it is clear that the trial court relied on rule 803(5) to allow the witness to read from his previous statement to police. Accordingly, we address admissibility of the statement under rule 803(5).

In order to invoke rule 803(5), a witness must be shown to have an incomplete recollection. *State v. Thompson*, 397 N.W.2d 679, 682-83 (Iowa 1986). At trial, Reyna was questioned in detail about the conversation he had with Stevenson and Burger regarding the burglary. He recalled asking the pair

about the guns, but could not remember who answered his questions. The prosecuting attorney clearly established Reyna's lack of memory concerning the statements at issue.

The rule further requires a "satisfactory showing of (1) the 'freshness' of the witness's recollection of the event at the time the recording takes place, and (2) the accuracy of the process utilized to record that recollection." *Thompson,* 397 N.W.2d at 683. Here, the crime occurred on February 27 and the recording process occurred on March 14 and 16. This interval satisfies the freshness test. *See Id.* (finding an interval of thirty-one days satisfies the freshness test). Further, we find the accuracy of the recording is satisfied by the showing that Reyna wrote the statements himself and adopted them as true and correct when they were made. He also identified his handwriting and signature on the statement at trial. Finally, the trial court allowed the recorded statement to be read aloud to the jury, but did not admit the document itself into evidence as required by the rule. We conclude all the criteria for admission of a recorded recollection pursuant of Iowa Rule of Evidence 803(5) were met in this case.

Because we find the trial court correctly allowed a portion of Reyna's written statement to be read to the jury, we affirm his conviction.

AFFIRMED.