IN THE COURT OF APPEALS OF IOWA

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CLERK SUPREME COURT

STATE OF IOWA,)
Plaintiff-Appellee,)
vs.)
LUANN KAE KENNEBECK,)
Defendant-Appellant.)

298

8-695
88-387

Appeal from the Iowa District Court for Sac County (No. 2872), Louie F. Beisser, Judge.

Defendant appeals the judgment of conviction and sentence for the crime of obstructing prosecution. **REVERSED.**

Lon R. Tullar, Sac City, for defendant-appellant.

Thomas J. Miller, Attorney General; Richard J. Bennett, Assistant Attorney General; and David P. Jennett, County Attorney, for plaintiff-appellee.

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

SACKETT, J.

Defendant appeals her conviction for obstructing prosecution. Defendant claims the trial court erred in certain jury instructions, in communications with the jury during deliberations, and in not directing a verdict for defendant because the record does not contain substantial evidence to support a finding defendant was guilty of obstructing justice beyond a reasonable doubt. We find there is not substantial evidence and reverse the conviction.

The State contends defendant furnished false information with the intent it be used in the trial of a case against Kelly Mann. Defendant was charged under Iowa Code section 719.3(1) which states in relevant part:

> A person who, with intent to prevent the apprehension or obstruct the prosecution or defense of any person, knowingly does any of the following acts, commits an aggravated misdemeanor:
>
> 1. Destroys, alters, conceals or disguises physical evidence which would be admissible in the trial of an other for a public offense, or makes available false evidence or furnishes false information with the intent that it be used in the trial of that case. (emphasis supplied).

There are four elements of this crime. The State must prove the defendant (1) knowingly, (2) made available false evidence or furnished false information, (3) with the intent the false evidence or false information be used in the trial of another person, and (4) with the intent the false evidence or false information obstruct the prosecution or obstruct the defense of the other person.

See Donahoo, The New Iowa Criminal Code Part II, 29 Drake L.R. 491, 608.

We look at the evidence in the light most favorable to the State. State v. Schrier, 300 N.W.2d 305, 306 (Iowa 1981). Defendant was to have witnessed incidents surrounding an alleged burglary by Kelly Mann. Defendant was questioned about the burglary and on October 7, 1986, defendant gave a written statement to a Sac county deputy. The State contends in giving the October 7 statement defendant violated the statute. The statement defendant wrote out and signed on October 7 is set forth below:

> Weekend of February 26-28 early Sat. or Sun. morning Mike Wollesen, Kelly Mann and I went to Lyndell Tjaden's trailer. Kelly was looking for my sister Lori (his wife) and thought she might be at the trailer with a former boyfriend. We drove in, Kelly got out, we parked the car. I got out of the car to go in and the trailer door was already open. I went in to see if Lori was there. She wasn't so I turned around and Kelly had the VCR in his hands. He said let's go and we left and came back to my house. Mike and I came in, Lori was here, Kelly came in a few minutes later without the VCR. I never saw it again. A few days later I asked Kelly to return it and he told me it was in the lake. The day after the incident with the VCR Kelly came in and wanted a gun. He went and got it from under my mattress. I didn't know it was even there. He took it that day and I never saw it again either. It was a small gun-pistol or hand gun of some kind. My intention of even going to the trailer was out of concern for my sister. I was shocked that Kelly kicked in the door and especially took the VCR.

The deputy who took the statement testified after defendant made the statement he left a copy for her and told her charges might be filed against Kelly Mann, she was

a witness to the crime and might be called to testify. The deputy investigating the incident testified he found nothing from his investigation to prove the October 7 written statement given by defendant was not true. The State contends there was substantial evidence defendant's written statement knowingly contained false information because she later contradicted her written statement at the Mann trial. The defendant contends the testimony at Kelly Mann's trial does not prove she made a false statement. Defendant also contends there is no evidence she gave the October 7 statement with the knowledge it would be used at trial or to obstruct justice. Defendant contends her motion for directed verdict should have been sustained.

Defendant was subpoenaed by the State to testify at Mann's trial on October 13, 1987. The county attorney called her as a witness. The county attorney had not talked to defendant or reviewed her statement with her before she testified. At Mann's trial defendant testified in part as follows:

> Q. Where does Peggy Tjaden live? A. South of Lake View a couple miles.
> Q. What type of home it is? A. Trailer house.
> Q. When you arrived there, was anyone home? A. I don't believe so.
> * * *
> Q. Were there any lights on in the trailer home? A. No.
> A. I think it was open.
> * * *
> Q. When you got inside, what happened? A. I walked back to the back of the trailer and walked back up front.
> * * *

Q.. What was the condition of the door at that point? Was it open? A. I suppose it was.

Q. Was it damaged? A. I didn't look.

* * *

When you left, did you have anything with you that you didn't have when you went to the Tjaden trailer? A. Personally, I didn't.

Q. Who did? A. I don't know.

Q. Did you have anything in your car that you didn't have when you went out to the Tjaden trailer? A. Yeah.

Q. What was in the car? A. The VCR.

Q. Anything else? A. Not that I know of.

Q. How did that come to be in your car? A. I don't know.

Q. Did you see anyone carry the VCR from the trailer home to the car? A. I don't -- Hum-um.

Q. No? Did you have any conversations with anyone in the car about the origin of the VCR? A. I don't remember.

Q. What did you do after you left the Tjaden trailer? A. Went back to his house.

Q. Who was there? A. I think we all went in the house, and Lori was there then.

Q. Did anyone bring the VCR in the house? A. I don't think so.

Q. Did you ever see it again? A. No.

* * *

Q. When was the next time you saw Kelly? A. I don't remember; maybe the next day.

Q. The next day, did he come over to your house? A. I don't think so. I talked to Lori.

Q. Pardon? A. Lori came to my house, but I don't believe Kelly did.

Q. Did Kelly ever take -- remove anything else from your house that didn't belong there? A. I don't know.

Q. No, or you don't know? A. I don't know.

Q. Do you recall giving the Sac County Sheriff's office a statement on October 7th, 1986? A. I remember giving them a statement, yes.

Q. I'm going to hand you what's been marked as State's Exhibit No. 2. Take a moment to look at that and see if you can identify it. Have you ever seen this statement before? A. Yes.

Q. Where did you see it? A. I wrote it.

Q. Is that your signature on the bottom? A. Yes.

Q. After reviewing it, is there anything you wish to correct about your testimony today? A. I don't know.

Q. What about your testimony of Kelly's return to your premises the next day? A. I just don't remember it I guess. I remember -- I remember, um, the gun was there; but I don't remember Kelly getting it.

Q. Well, in the statement you said that he came and got the gun. A. yeah, that's what it says.

* * *

Q. And using your statement today, now, you can recall that Kelly came and got the gun from your house? A. Yeah.

Q. Do you see the last line of your statement? A. Yes.

Q. Do you recall now how you gained access or how Kelly gained access to the Tjaden trailer? A. No, because I didn't see him do it.

Q. What made you make that statement then? A. I guess I just assumed that he did. I didn't actually see him.

Q. Didn't see him do what? A. Kick the door in.

Q. Did you see him take the VCR? A. Not really.

Q. That's not what your statement says, though, is it? A. No.

Q. No? Your statement also says that -- in the middle of the page, it has more detail about what happened inside the trailer, doesn't it? A. Yeah, I guess it does a little bit.

Q. At that time, you recalled that Kelly had the VCR in his hands. A. I can't remember for sure. I had been drinking a lot that night and I -- you know.

Q. Were you drinking on October 7th when you made this statement out? A. No.

Were you attempting to tell the officers to the best of your recollection what had occurred? A. I suppose I probably was.

Q. And at that date, that was your best recollection as to what had occurred on that weekend, right? A. Yeah, I suppose, yes.

Q. When you went out to the Tjaden trailer, you weren't invited in, were you? A. No.

* * *

Q. Specifically, what did you tell her? A. Well, that we went there; and we were looking for Lori and that Kelly had said he got rid of the gun -- or the VCR in the lake. I remember saying that.

Q. Does that refresh your recollection as to any of the things that you've written in your statement, State's Exhibit 2? A. No.

Q. So you still can't recall exactly what went on out there? A. Not for sure, no.

Q. But you could recall them on October 7th, 1986, when you gave this statement, State's Exhibit 2? A. I just wrote what I thought I remembered, you know; but, uh, I don't know.

Q. Are you saying that statements made in here are not true? A. Not exactly true, I don't think.

Q. Are there statements in her that are not accurate? A., Probably.

Q. But you did make them? A. Yeah. (emphasis supplied).

We determine the State has not introduced substantial evidence the October 7 statement was false. We find as the State admits the investigating officer did not find anything that shows defendant's October 7 statement was false. We do not accept the State's argument defendant's testimony at the Mann trial supports a finding the October 7 statement was false when defendant gave it She cannot be said to have given false information if she believed the statement to be true when she gave it. See State v. Lazarus, 181 Iowa 625, 626, 164 N.W. 1037, 1039 (1917).

Both the statement and defendant's testimony are confusing. Defendant testified her written statement was her best recollection on that date as to what had occurred and she wrote what she thought she remembered. She said she didn't think the statements were exactly true and some are not accurate.

In assessing the statements the State contends were contradictory we consider they were made in answer to questions put to defendant when she was called to testify as a witness without preparation. She was asked while on the witness stand about events that transpired some time earlier. She was questioned about a written statement she gave months earlier. She had not reviewed the statement prior to testifying. Her testimony indicates some reluctance on her part to testify. We do not construe her statement to provide substantial evidence she gave what she thought to be false information in her October 7 statement.

Because of our holding we find it unnecessary to address defendant's challenges to the jury instructions and the trial court's communications with jurors during deliberation.

REVERSED.