

IN THE COURT OF APPEALS OF IOWA

FILED

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CLERK SUPREME COURT

STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

SCOTT M. LYNCH,)

Defendant-Appellant.)

9-50
87-1583

251

Appeal from the Iowa District Court for Black Hawk County (No. 0502) on change of venue from Dubuque County (No. 16198), L. D. Lybbert, Judge.

Defendant appeals from his conviction, after a jury trial, of first-degree robbery. **REVERSED AND REMANDED.**

William L. Wegman, State Public Defender, and James F. Whalen, Assistant Public Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Sarah J. Coats, Assistant Attorney General; and Timothy Gallagher, Assistant County Attorney, for plaintiff-appellee.

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

OXBERGER, C.J.

Defendant Scott M. Lynch appeals from his conviction, following a jury trial, of first-degree robbery. He argues the trial court erred in (1) allowing a police officer to testify regarding out-of-court statements made by defendant's wife, Dana Lynch, having found such statements admissible under either hearsay exception Iowa Rule of Evidence 804(b)(3) or 804(b)(5); (2) allowing into evidence and giving to the jury the same officer's typewritten memorandum of the conversation during which defendant's wife made the statements; and (3) prohibiting the defendant from cross-examining his wife who refused to answer the prosecutor's questions after claiming marital privilege. Defendant also contends his statutory right to speedy trial was violated, as well as numerous constitutional rights, when the State deposed his wife prior to trial without notice to, and in the absence of, defendant or his counsel. We find reversible error on defendant's first two claims and remand for a new trial.

I. Officer's Testimony.

Defendant's wife's statements were properly objected to as hearsay and were not admissible under Iowa Rules of Evidence 804(b)(3) and 804(b)(5). These rules state in relevant part:

804(b) The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

* * *

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true.

* * *

(5) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Before statements are admissible under 803(b)(3), courts have required the proponent to show: (1) the declarant is unavailable as a witness, (2) the statement must so far tend to subject the declarant to criminal liability that a reasonable person in the declarant's position would not have made the statement unless he or she believed it to be true, and (3) corroborating circumstances clearly indicate the trustworthiness of the statement.

United States v. Riley, 657 F.2d 1377, 1383 (8th Cir. 1981); see also United States v. Brisco, 742 F.2d 842, 846 (5th Cir. 1984).

Defendant concedes his wife was an unavailable witness for purposes of rule 803(b). Defendant takes exception to the district court's conclusion the statements were against her penal interests and had the necessary guarantees of trustworthiness required by 803(b)(3) and (5). We agree.

The officer testified defendant's wife admitted being in the restaurant when it was robbed by her husband and speaking to him immediately before the robbery, but denied all prior knowledge of his intent to rob the restaurant. She admitted recognizing him during the robbery because he wore some of her clothing, that she went to his motel room immediately after the robbery, and that she was present when defendant divided the money with his accomplice.

The district court's ruling admitting the officer's testimony indicates the court viewed the facts elicited from the wife as subjecting her to possible charges as a before-the-fact or after-the-fact accessory to the robbery.

Iowa Code section 703.3 (1987) indicates defendant's wife could not be charged as an accessory after the fact based on these statements because of her marital relationship with the defendant. A review of the officer's testimony shows the wife disavowed any prior knowledge of defendant's intent to rob the restaurant and that she had

not given him the clothing or gun used in the robbery. The statements can only be seen as subjecting her to before-the-fact accessory if her statements disassociating her with the crime are not believed.

When a shotgun was discovered during a search, defendant's wife amended her statement to include how she had taken her brother's shotgun and given it to the defendant to use in a different robbery which was never attempted. This explanation was one short paragraph to a five-page typewritten summary of her conversation with the officer. Such a minor and easily separated statement which is irrelevant to the present crime does not make the complete statement against her penal interest. See United States v. Lilley, 581 F.2d 182, 188 (8th Cir. 1978). See also United States v. Garris, 616 F.2d 626, 629 (2nd Cir. 1980) (part of defendant's sister's statement inculpatory to defendant was integral part to her complete statement which clearly was inculpatory to herself).

Certain factors to be considered when determining the trustworthiness element are: (1) whether there is any apparent motive for the out-of-court declarant to misrepresent the matter, (2) the general character of the speaker, (3) whether other people heard the out-of-court statement, (4) whether the statement was spontaneous, and (5) the timing of the declaration and the relationship between the speaker and the witness. United States v.

Rasmussen, 790 F.2d 55, 56 (8th Cir. 1986). Defendant's wife made her statements to the police officer while at the police station after she was read her Miranda rights and in response to some questioning by the officer. The statements were not made under oath. The typewritten memorandum of the conversation admitted into evidence was not signed by defendant's wife, who denied the accuracy of some of the statements when she was later deposed. The statements clearly minimize her involvement. We recognize the fact testimony by other witnesses corroborated the wife's statements, but we must also look at the circumstances under which the statements were made to determine possible motives to speak truthfully or falsely. United States v. Bailey, 581 F.2d 341, 349 (3rd Cir. 1970).

The same 803(b)(3) analysis regarding the trustworthy element makes the officer's testimony of the wife's statements inadmissible under 803(b)(5). See United States v. Tovar, 687 F.2d 1210, 1214 (8th Cir. 1982).

II. Officer's Memorandum.

Officer Gieseeman, who interviewed defendant's wife, later typed up her notes of the conversation into a memorandum entitled "Statement" of Dana Lynch. The typewritten memorandum was admitted into evidence and sent back with the jury during deliberations. The memo was not signed by Dana nor were the original notes of the conversation available. Defendant made a proper hearsay

objection to the admission. The State argues the memorandum is admissible under Iowa Rule of Evidence 803(5) (recorded recollection) or 803(6) (business records) exceptions to the hearsay rule. Officer Gieseeman's testimony preceding the admission of the memorandum does not fulfill the foundational requirements of 803(5), which states in relevant part:

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 heard by an adverse party.

No testimony indicates, nor does the exhibit indicate, Dana Lynch adopted the statement. If the statement is viewed as Officer Gieseeman's, who made the initial notes and typed the memorandum introduced as an exhibit, its admission is expressly prohibited by Iowa Rule of Evidence 803(8)(B)(i). State v. Reitenbaugh, 392 N.W.2d 486, 490 (Iowa 1986). See also McCormick on Evidence § 308, pp. 877-78 (3rd ed. 1984); 4 J. Weinstein & M. Berger, Weinstein's Evidence § 803(8)[04], pp. 803-259 to 266 (1988).

We find the erroneous admission of Officer Gieseeman's testimony regarding Dana Lynch's statements and the memorandum reversible error. Because defendant's other claims of error could occur on remand or a subsequent appeal, we shall address those issues.

III. Speedy Trial.

The trial court's order overruling defendant's motion to dismiss based on his statutory right to speedy trial was proper. After a hearing during which defendant and his second counsel testified, the trial court made specific fact findings adopting counsel's version of the events leading to a continuance and rescheduling of the trial beyond the time limits found in Iowa Rule of Criminal Procedure 27(2)(b). The trial court found defendant had orally authorized counsel to seek the continuance and waived his right to speedy trial. A written waiver signed by the defendant was not filed until later. The trial court's findings of fact upon conflicting evidence are binding upon us if supported by substantial evidence. State v. Phelps, 379 N.W.2d 384, 387 (Iowa App. 1985) (citing State v. Bond, 340 N.W.2d 276, 279 (Iowa 1983)).

We find no reason to disturb these fact findings and also affirm the trial court's application of the law to the facts. Defendant's trial counsel was acting within his authority and in compliance with his client's wishes when

he sought the continuance and in effect waived defendant's right to speedy trial. State v. Leflore, 308 N.W.2d 39, 41 (Iowa 1981).

Since the court did not receive a written waiver and no trial was held before expiration of the ninety-day statutory period, we must still determine whether dismissal was required. State v. Bond, 340 N.W.2d 276, 279 (Iowa 1983). Three exceptions to the dismissal rule are (1) waiver, (2) delay attributable to the defendant, and (3) good cause. Id. We agree with the trial court the State carried its burden in proving failure to have a timely trial or file the waiver falls within either exception (2) or (3) in this case. Defendant asked counsel to delay trial as long as possible. Counsel had difficulty scheduling and completing discovery depositions prior to the first trial date. Defendant made no objections to the continuance when he became aware of it, and he later signed the written waiver which was filed. See generally State v. Moehlig, 250 N.W.2d 42, 46 (Iowa 1977); State v. LaMar, 224 N.W.2d 252, 254 (Iowa 1974).

IV. Deposition.

We also find the trial court did not abuse its discretion in ruling defendant's wife's deposition inadmissible in light of the State's violation of notice procedures. State v. Brown, 397 N.W.2d 689, 698 (Iowa 1986); State v. Thompkins, 318 N.W.2d 194, 198 (Iowa 1981).

V. Right to Confront Witness.

Defendant also contends his constitutional right to confront witnesses and have a fair trial was violated by the trial court's limiting his cross-examination of his wife.

On remand, should defendant's wife again be placed on the stand and refuse to answer questions based on marital privilege, the same limiting of defendant's cross-examination to the subject matter testified to on direct, i.e., marital privileges, will be proper. The trial court properly cautioned both the State and defendant's counsel to ask questions which did not infer the answer being sought. The State received a favorable pretrial ruling that Dana Lynch's observations before and during the robbery did not come within the privilege exception for marital communication. The State was justified in calling her as a witness to ask about her whereabouts and observations the day of the robbery. The limitation put on defendant's cross-examination of this witness is a result of her claiming the privilege regardless of the court order to testify and not a result of improper limitations on cross-examination. Having ruled her statements to the officer, her deposition, and the memorandum are not admissible, the need for cross-examination may not arise again.

REVERSED AND REMANDED.