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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-467 / 89-148

464

STATE OF IOWA,

Plaintiff-Appellee,

vs.

TRACY ALLEN McGREW,

Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Ray A. Fenton, Judge.

The defendant appeals his conviction of burglary in the second degree. **REVERSED AND REMANDED FOR A NEW TRIAL.**

George W. Appleby of Roehrick, Hulting & Moisan, Des Moines, for appellant.

Thomas J. Miller, Attorney General; Amy M. Anderson, Assistant Attorney General; James Smith, Polk County Attorney; and James Ward, Assistant County Attorney, for appellee.

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

SACKETT, J.

The issue in defendant-appellant Tracy Allen McGrew's direct appeal from his conviction of burglary in the second degree is whether the trial court erred in allowing trial testimony the defendant contends exceeded the scope of the minutes of testimony. We find the trial court erred. We reverse and remand for a new trial.

The State is required to provide minutes of testimony according to the dictates of Iowa R. Crim. P. 5(3), which provides:

> The prosecuting attorney shall, at the time of filing such information, also file the minutes of evidence of the witnesses which shall consist of a notice in writing stating the name, place of residence and occupation of each witness upon whose expected testimony the information is based, and a full and fair statement of the witness' expected testimony.

The purpose of the current rule is to assure minutes of testimony that eliminate most claims of foul play and provide meaningful minutes from which a defendant can prepare his or her defense. State v. Walker, 281 N.W.2d 612, 613 (Iowa 1979). Minutes of testimony need not detail each circumstance of the testimony, but they must be sufficient to fairly and fully alert the defendant to the evidence against him. State v. Olsen, 315 N.W.2d 1, 2 (Iowa 1982); State v. Olsen, 293 N.W.2d 216, 220 (Iowa 1980); Walker, 281 N.W.2d at 614.

Defendant is not forced by the State's violation of the rule regarding minutes of testimony to show upon retrial a

jury might reach a different result. Olsen, 293 N.W.2d at 220-21. The remedy for new trial fashioned in Walker, 201 *N.W.2d at 614-15, is intended to encourage the State's* compliance with Rule 5(3). Olsen, 293 N.W.2d at 221. The State's violation of Rule 5(3) entitles defendant to a new trial.

Defendant was convicted of burglary in the second degree following an alleged break-in at the home of a Des Moines woman. The woman was sleeping when defendant allegedly broke a screen on a window near her bed and grabbed her arm. The woman testified in part about the events surrounding the incident:

> Q. What happened next? A. I rolled over to my left.
>
> Q. Why did you roll over? A. I'm not sure. Because there was a tugging at my blanket, I would guess. Rolled over to my left-hand side towards the windows, and I was grabbed then on my right arm, and I woke up and ran to my roommate's room.
>
> Q. What did you see when your arm was grabbed? Anything? A. I saw a guy.
>
> Q. Okay. Could you see his face? A. Yes.
>
> * * *
>
> Q. How long did that person have ahold of your arm? A. Five seconds, if that.
>
> Q. What did you do when he grabbed your arm, that person grabbed your arm. A. I was startled. And I looked at him in the eyes and grabbed away. And then I ran to my roommate's room.
>
> * * *
>
> Q. Was it still dark out? A. It was dusk out.
>
> Q. Did you recognize the person when you saw him first, the first time? Had you ever seen the person before? A. No.

Q. Was he a stranger that night? A. Yes.
* * *

The minutes of the victim's testimony provided in relevant part:

> This witness will testify that she then called to report the incident to the police. When the police arrived she described the individual as white male in his 30s, approximately five foot seven to five foot eight inches tall, wearing a baseball hat, a white t-shirt and long pants. She described him as having medium length hair, possibly blond, with a mustache trimmed over the lip. This witness will testify that she later met with officers of the Des Moines Police Department and was shown a photo spread possibly containing the individual involved in her break-in. She will testify that she was unable to identify the individual that had broken into her house. This witness will testify that she does not know the defendant in this case, Tracy Allen McGrew . . . .

As relevant to the issue were the minutes as to testimony of police officer Dawson which provided in part:

> Because of the similarities of this incident with several others that had occurred in this area, this witness was familiar with the defendant in this case, Tracy Allen McGrew, who was a suspect in those cases. Based on this knowledge this witness showed a photo spread containing the defendant, Tracy McGrew, to the victim . . . . After viewing the photo spread she was unable to identify the defendant.

The crucial issue was identification of defendant as a perpetrator of the crime. The only evidence on this issue other than the victim's identification was testimony that defendant's fingerprints were found on the window sill of the victim's home. Defendant testified his fingerprints were left on the window sill when he visited the premises earlier in the day.

Defendant claims the trial court erred in allowing the victim to testify to facts contradictory to the facts in the minutes of testimony filed by the State. The contradictory facts related to the description the witness would give as to her memory of defendant's looks on the night of the incident. At trial the victim identified defendant for the first time.

At trial the witness described the perpetrator on the night of the incident as:	The minutes of testimony said the witness would describe the perpetrator on the night of the incident as:
having dark hair;	possibly having blond hair;
not in his 30s;[1]	about 30 years old;
having no mustache.	having a mustache trimmed over the lip.

The trial court overruled defendant's motions to strike the testimony and for a mistrial.

The State argues the trial court's decision is correct because the minutes told the defendant the victim's testimony would describe the man she saw that night. These minutes, the State says, were sufficient to alert the defendant "generally to the source and nature of the evidence against him." The State contends at the very least, defendant was placed on notice "of the necessity of further investigation of the witness's probable testimony."

1. Defendant at the time of trial was twenty-one years old.

We agree with the State the rule is not a substitute for discovery. See State v. Lord, 341 N.W.2d 741, 743 (Iowa 1983). Minutes may be sufficient if they put the defendant on notice of the necessity of further investigation of the witness's probable testimony. Id. However, it is not always necessary for the defendant's attorney to depose witnesses before trial. State v. Williams, 341 N.W.2d 748, 752 (Iowa 1983); Bizzett v. Brewer, 262 N.W.2d 273, 276 (Iowa 1978). This is an issue of the accuracy of minutes. The defendant has the right to accept facts in the minutes of testimony as being accurate statements of a witness's testimony and to assume the witness will not be allowed to testify contrary to specifics set forth in the minutes. A contrary decision would charge the defendant to verify by deposition each fact the minutes recite and would result in unnecessary discovery.

The State could not have included correct testimony because the victim was not aware she was changing her testimony, and she did not advise the prosecutor about a change or a potential change. See Walker, 281 N.W.2d at 614 (court rejected the State's claim that testimony was within scope of minutes when evidence was not even contemplated by the State at the time minutes were prepared).

Defendant next contends there is not substantial evidence of any intent on the part of the defendant to commit a felony, assault, or theft. Substantial evidence is such evidence as could convince a rational trier of fact that the defendant is guilty of the crime charged beyond a reasonable doubt. State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984). There is evidence from which the jury could conclude defendant's intent when entering the home was to commit an assault. There is evidence defendant did not have permission to climb through the window. Cf. State v. Morelock, 164 N.W.2d 819, 822 (Iowa 1969) ("an intent to steal may be inferred from the actual breaking and entering of a building which contains things of value or from an attempt to do so"). Additionally, there is evidence defendant grabbed the victim.

Viewing the evidence in the light most favorable to the State, we find substantial evidence to support the intent of defendant to enter the home to commit a felony. We reverse and remand for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

Schlegel, P.J., concurs; Habhab, J., dissents.

HABHAB, J. (dissenting)

For the reasons hereafter set forth, I respectfully dissent.

The Iowa Supreme Court pointed out in State v. Epps, 313 N.W.2d 553, 558 (Iowa 1981), that under rule 5(3):

> [T]he State is only required to provide in the minutes "the name, place of residence and occupation of each witness upon whose expected testimony the information is based, and a full and fair statement of the witness' expected testimony."

Id. (emphasis original). The record in this case unequivocally discloses that the State could not have listed the victim's revised description of the perpetrator in the minutes because the State was not cognizant of the revised description until trial. Under questioning by defense counsel, the following colloquy between defense counsel and the victim took place at trial:

> Q. Did you tell Mr. Ward that you were changing your description when you talked to him on Tuesday? A. No.
>
> Q. All right. And, similarly, with the other items, did you tell Mr. Ward that you were going to change your description? A. I didn't -- I don't know if I'm changing my -- I don't understand what you're getting at.
>
> Q. All right. What I'm getting at is: On August 19, you talked to Officer Follett, one of the police officers who came to your house; is that right? A. Right.
>
> Q. And you told Officer Follett that the person who reached through the window was a white male in this thirties. Do you remember that? A. Yes. I was -- The description I gave him, when I gave him at the time, I was very upset.
>
> Q. I understand. A. And I -- I woke up from a deep sleep.

> Q. I understand that too. I'm just wondering if whether or not you had advised the State that the description that you're giving today is different from the one that you gave the police? A. I told you I didn't talk to Mr. Ward about that.
>
> Q. All right. In any regard? A. In any regard.
>
> Q. Okay, thank you.

Moreover, it cannot go unnoticed that defendant did not request a continuance in order to prepare a defense in light of the revised description. As such, any error in the admission of the victim's testimony was waived. See id. Thus, I would hold there was no reversible error in permitting the victim's testimony. I concur with the majority that there is substantial evidence of intent on the part of the defendant to commit a felony, assault, or theft.