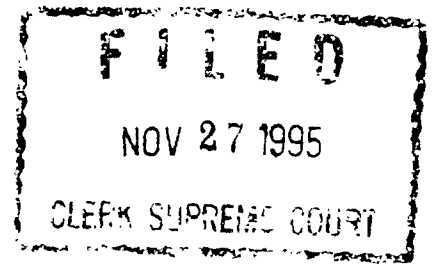


IN THE COURT OF APPEALS OF IOWA

No. 5-494 / 94-2019



STATE OF IOWA,

Appellee.

vs.

JOHN WALTER SPOONER,

Appellant.

Appeal from the Iowa District Court for Black Hawk County, Jon Fister, Judge.

Spooner appeals his conviction, following a jury trial, for first-degree theft and third-degree burglary, as an habitual offender. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and John F. Fatino, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Angelina M. Smith, Assistant Attorney General, Thomas Mullin, County Attorney, and Linda Hall, Assistant County Attorney, for appellee.

Heard by Hayden, P.J., and Habhab and Huitink, JJ.

HAYDEN, P.J.

John Spooner was charged with first-degree theft, third-degree burglary, and being a habitual offender.

At trial, the State presented evidence Spooner, and codefendant John Syphrit, broke into Syphrit's former employer's business and took \$19,000 worth of precision tools. The owner of the business testified the perpetrator must have known where the particular tools were located. Several employees stated they immediately suspected Syphrit.

Two State witnesses, Susan Crimmins and Kenneth White, testified Syphrit and Spooner, on the day of the crime, bragged about breaking into Syphrit's former employer's business and stealing tools. According to these witnesses, Syphrit and Spooner stated they intended to sell or pawn the tools in Omaha. The State introduced a pawn shop receipt reflecting such a sale in Omaha.

On cross-examination, the defense tried to establish Crimmins was motivated to lie because she feared she would be criminally responsible for her initial failure to cooperate with the police. To rebut this, the State was allowed to introduce, over Spooner's objection, Crimmins' prior consistent statement made to the police.

Spooner was found guilty as charged. The district court sentenced him to two fifteen-year terms as a habitual offender to run concurrently with a three-year mandatory minimum term.

Spooner appeals. He argues the district court erred in admitting Crimmins' prior consistent statement because the statement was made after she had been threatened with criminal prosecution. He asserts this court should interpret Iowa Rule of Evidence 801(d)(1)(B) (prior charge against declarant of recent fabrication, improper influence, or motive), to require, as a precondition for admissibility, the prior statement be made before any improper influence or motive arose. Spooner states this interpretation of the same federal rule was recently adopted in *Tome v. United States*, 513 U.S. ___, 115 S. Ct. 696, 130 L. Ed. 2d 574 (1995), and should be applied in this case.

The State argues, among other things, Spooner has not preserved error on his claim. The State also asserts this court has already stated rule 801(d)(1)(B) does not speak to a time sequence such as the one Spooner urges. According to the State, the Iowa Supreme Court has adopted a flexible approach which allows the trial court to determine whether a consistent statement will aid the jury in determining whether the witness told the truth. *State v. Gardner*, 490 N.W.2d 838, 841 (Iowa 1992).

I. Standard of Review.

Our scope of review is for the correction of errors of law. Iowa R. App. P. 4. On this evidentiary issue, we review for an abuse of discretion. *State v. Halstead*, 362 N.W.2d 504, 506 (Iowa 1985). In order to show an abuse of discretion, one generally must show the court exercised its discretion ““on grounds or for reasons clearly untenable or to an extent clearly unreasonable.”” *State v. Blackwell*, 238 N.W.2d 131, 138 (Iowa 1976) (quoting *Weeks v. Burnor*, 326 A.2d 138, 140 (Vt. 1974)).

II. Preservation of Error.

The State argues error was not preserved in this case because, at trial, defense counsel objected on the basis the prior consistent statement was not being offered to rebut an express or implied charge against Crimmins of recent fabrication or improper influence or motive. The State contends the objection regarding the timing of the prior consistent statement was never asserted at trial and, therefore, was not preserved on appeal.

In order to preserve error an objection must be made at the earliest opportunity or it will be deemed waived. *State v. Wages*, 483 N.W.2d 325, 326 (Iowa 1992). Further, if the district court overrules a specific objection, the objecting party is limited to the grounds asserted in the objection when the party appeals. *State v. Goodson*, 503 N.W.2d 395, 399 (Iowa 1993). “The defendant may not announce an objection at trial and on appeal rely on a different objection to challenge an adverse ruling.” *Goodson*, 503 N.W.2d at 399.

We determine error was preserved in this case. Spooner objected to the introduction of Crimmins’ statement at the time it was being offered. Arguments by both the State and defense counsel indicate the crux of the objection was whether or not the statement was admissible under 801(d)(1)(B)’s hearsay exception. Furthermore, the judge found the statement did fit under the 801(d)(1)(B) exception to hearsay and overruled the objection. Clearly, defense counsel’s objection at trial was based on

801(d)(1)(B) hearsay grounds. Because his argument on appeal is also based on 801(d)(1)(B) hearsay grounds, error was preserved.

We reject the State's argument *Wages*, 483 N.W.2d at 326, and *Goodson*, 503 N.W.2d at 399, are controlling. In *Goodson* the defendant, on appeal, argued testimony invaded the province of the jury. 503 N.W.2d at 399. At trial, however, the defendant objected on grounds the questions asked were hypothetical and were unsupported by the facts in the case. *Id.* The court held the objections at trial were insufficient to apprise the district court of any valid grounds for excluding the testimony. *Id.* Similarly, in *Wages*, the defendant's appeal was based on Constitutional grounds. At trial, however, no Constitutional issue was raised. In the case at bar, Spooner's objection at trial was based on hearsay grounds, in particular rule 801(d)(1)(B). Considering the ground asserted on appeal is also based on rule 801(d)(1)(B), the district court was sufficiently appraised of a valid grounds for excluding the testimony, and error was properly preserved.

III. Merits.

The United States Supreme Court has recently interpreted Federal Rule of Evidence 801(d)(1)(B) to require, as a precondition for admissibility, the purported prior consistent statement be made prior to the time the improper influence or motive to fabricate arose. *Tome v. United States*, 513 N.W.2d U.S. ___, 115 S. Ct. 696, 130 L. Ed. 2d 574 (1995). The Iowa Supreme Court has adopted the *Tome* approach to admissibility of prior consistent statements and overturned *State v. Gardner*, 490

N.W.2d 838 (Iowa 1992). *State v. Johnson*, No. 93-1556 (Iowa Oct. 25, 1995). Consequently, since Crimmins' prior consistent statement was made after the improper influence or motive arose, it was error to admit the statement.

In *Johnson*, our supreme court stated, "Our new interpretation regarding the application of Iowa rule of evidence 801(d)(1)(B) applies to the present case. prospectively to cases pending at the time this decision is filed, *and to cases in which the issue resolved herein was preserved.*" *Johnson*, slip op. at 11 (emphasis added). We determine the third clause requires this court to apply the new rule to the case at bar. Because the issue was properly preserved for review, *Johnson* is binding.

IV. Harmless Error.

"The current rule used to determine the harmlessness of hearsay evidence was stated in *State v. Brown*, defined in *State v. Nims*, and combined in *State v. Barrett*." Dick R. Schlegel, *The Evolution of Harmless Error in Iowa*, 43 Drake Law Review 547, 565 (1995). "The admission of hearsay over a proper objection is presumed to be prejudicial error unless the contrary is affirmatively established." *Id.* (quoting *State v. Brown*, 341 N.W.2d 10, 15 (Iowa 1983)). "The contrary is established when the record shows that the challenged evidence did not impact on the jury's finding of guilt." *Id.* (quoting *State v. Nims*, 357 N.W.2d 608, 609 (Iowa 1984)). In *Barrett*, the court made "the analysis of the prejudice of hearsay, or its harmlessness, a determination of whether the challenged hearsay evidence did not impact the jury's finding." *Id.* at 565-56 (citing *State v. Barrett*, 445 N.W.2d at 754). *Chapman v.*

California, 386 U.S. 18, 23-24 (1967), requires the “error must be harmless beyond a reasonable doubt *and* the state must show it did not contribute to the conviction.” *Id.* at 566 (quoting *State v. Sowder*, 394 N.W.2d 368, 372 (Iowa 1986) (quoting *State v. Ware*, 205 N.W.2d 700, 704 (Iowa 1973))).

We determine there is overwhelming evidence of Spooner’s guilt irrespective of whether Crimmins’ prior consistent statement was introduced into evidence. As the State points out in its brief, the jury was presented with pawn shop receipts for precision tools signed in Spooner’s name. The pawn shop employee testified the man pawning the items matched the photo identification bearing Spooner’s name. The pawn of the tools occurred in Omaha the day after the burglary corroborating Crimmins’ and White’s testimony. Furthermore, White’s testimony was substantively identical to Crimmins’ testimony and Crimmins’ prior consistent statement. The case against Spooner, even without the admission of Crimmins’ prior consistent statement, was overwhelming. The admission of Crimmins’ statements was harmless error beyond a reasonable doubt, and the evidence did not contribute to the conviction. As such, Spooner is not entitled to relief.

AFFIRMED.