FILED
NOV 10 1977
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

Appellee,

v.

RICHARD DIMITRE VAN ARSDALE,

Appellant.

Filed November 10, 1977

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Appeal from Black Hawk District Court - Dennis D. Damsgaard, Judge.

Defendant appeals convictions of attempted arson of a motor vehicle and conspiracy to commit arson, alleging error in rulings on the admissability of evidence. Reversed and remanded.

Richard C. Turner, Attorney General, J. Susan Carney, Assistant Attorney General, and David Correll, Black Hawk County Attorney, for appellee.

Don E. Gottschalk, of Hoxie, Gottschalk and Patterson, of Waterloo, for appellant.

Submitted to Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

Defendant, Richard Dimitre Van Arsdale, appeals his convictions of attempted arson of a motor vehicle and conspiracy to commit arson, violations of sections 707.5 and 719.1, The Code 1975, respectively. Defendant alleges the trial court committed reversible error by excluding evidence of material conversations offered during defendant's case in chief.

Van Arsdale was accused of hiring Harold Green, his employee, to destroy a truck which Van Arsdale owned, in order to collect insurance proceeds. Green and David Frost, operator of the service station where the truck was often repaired, testified for the State. Frost testified that Van Arsdale asked him to destroy the truck. Green testified that he set fire to the truck at Van Arsdale's request and that he was to be paid $200 by Van Arsdale for doing so.

During cross examination, defense counsel asked Frost if Van Arsdale had threatened to report him to the Better Business Bureau for several failures to repair the truck prior to its destruction. Frost denied the conversation ever occurred. Similarly, during his cross examination by defense counsel, Green denied having said to Van Arsdale, after the destruction of the truck, that he told the police he burned the truck at Van Arsdale's request because he was "facing time" for burning the truck and he was "not going to take the rap for it."

During its case in chief, the defense called Angela Michalek, Van Arsdale's employee, as a witness. She testified that she was present and heard the Frost-Van Arsdale and Green-Van Arsdale conversations referred to above. When she was asked to recall what was said during those conversations, the State made hearsay objections. Defense counsel made offers of proof, Ms. Michalek testifying that Van Arsdale had threatened to report Frost to the Better Business Bureau and that Green, when asked by Van Arsdale why he had lied to the police about Van Arsdale being involved, answered that "he had five years facing him and he didn't care who he blamed as long as he didn't get the blame."

Defense counsel then said,

> "It seems to me this would come within the exception to the hearsay and is not for the purpose of proving the truthfulness of the statement but merely to show that statement has been made since in each case the individual involved has denied making that statement."

The trial court judge responded;

> I think we are into hearsay at this point. If the defendant should take the stand himself, I am sure he would be allowed to testify on those matters.

The hearsay objections were sustained.

Later, during direct examination, defendant was asked to repeat what had been said during the conversations. The State again made hearsay objections and the defense made offers of proof. Van Arsdale's offer corroborated that of Angela Michalek. The following discussion then occurred:

> MR. GOTTSCHALK: "My position is this is not hearsay and the purpose of the testimony is to impeach the State's witnesses and to preclude the defense from presenting this testimony is in error. The only way I can protect that error is to make an offer of proof.
>
> THE COURT: Do you have some case authority to show this comes within the exception of the hearsay rule?
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> MR. GOTTSCHALK: Not right offhand.
>
> THE COURT: Isn't this going to be pure hearsay? In other words, your witness is going to testify to statements of other people with the idea his testimony as to the Statements they made are true.
>
> MR. GOTTSCHALK: No. As I indicated yesterday in my objection, the purpose is to show in fact they made the statements. They denied they made the statements. The only way I can impeach their testimony is to show the statements were made."

The hearsay objections were again sustained. Defendant assigns these rulings as error. We reverse the trial court and order a new trial.

Hearsay is a statement, other than one by the declarant while testifying at the trial, offered in evidence to prove the truth of the matter asserted. State v. Rush, 242 N.W.2d 313, 319 (Iowa 1976). As quoted above, defense counsel, while making his offers of proof, clearly apprised the court of the limited purpose for which the evidence was being offered. The defense did not offer the conversations to prove the truth of what was stated. It offered the conversations to show that the conversations themselves, contrary to Frost's and Green's testimony, did occur. For this purpose Michalek's and Van Arsdale's offers were not hearsay. State v. Wycoff, 255 N.W.2d 116, 118 (Iowa 1977). Moreover, the statements bear upon potential bias or interest of the witness, a proper subject of inquiry for the defense. State v. Armento, 256 N.W.2d 228, 229 (Iowa 1977).

Impeachment is the term denoting the technique for questioning the veracity of a witness. The law of evidence recognizes five lines of attack upon the credibility of a witness; (1) prior inconsistent statements, (2) bias, (3) attack on character, (4) defect in observation, memory or ability to recount, and (5) proof by other witnesses that material facts are otherwise than as testified to by the witness under attack. State v. Peterson, 219 N.W.2d 665, 671 (Iowa 1974). The fifth catagory above fits this case. Michalek's and Van Arsdale's testimony, thus used, was proper impeaching evidence.

Furthermore, concerning the Green-Van Arsdale conversation, the Michalek and Van Arsdale testimony is proper impeachment evidence to show Green's prior inconsistent statement. State v. Wycoff, 255 N.W.2d 116, 118 (Iowa 1977); State v. Hill, 243 N.W.2d 567, 569-71 (Iowa 1976). We conclude that the trial court erred in excluding this evidence.

Finally, in this situation a reversal is required if the error is prejudicial. Of course, prejudice is presumed when such errors appear unless the contrary is affirmatively established. State v. Mattingly, 220 N.W.2d 865, 869 (Iowa 1974). It appears from the record that Van Arsdale was harmed by the failure to admit the evidence in question. Without Michalek's and defendant's sworn testimony, the testimony of Frost and Green regarding these conversations goes unchallenged. We cannot say that the presumption of prejudice has been rebutted.

REVERSED AND REMANDED.