IN THE COURT OF APPEALS OF IOWA

No. 4-537 / 94-0333

FILED
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CLERK SUPREME COURT

STATE OF IOWA,

Plaintiff-Appellee,

vs.

MAR'YO DORJUAN LINDSEY,

Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, George L. Stigler, Judge.

Mar'yo Lindsey appeals from his conviction, following a jury trial, of third-degree burglary in violation of Iowa Code sections 713.1 and 713.6A (1993). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Ahmet S. Gonlubol, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Robert P. Ewald, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kasey E. Wadding, Assistant County Attorney, for appellee.

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

HABHAB, J.

The State charged Mar'yo Dorjuan Lindsey with third-degree burglary. The charge was based on the theory that Lindsey broke into Demitrius Qualls' vehicle with the intent to commit a theft.

Lindsey filed a pretrial motion in limine seeking to preclude Qualls from testifying regarding a conversation Qualls had with Montez Hawkins and Demarius Burt. Lindsey claimed such testimony would be inadmissible hearsay.

At the motion hearing, the State argued the testimony would not be offered for the truth of the matter asserted, but rather to show why Qualls was awake at 2:00 a.m. when the incident involving Qualls' car occurred. Defense counsel indicated he did not intend to question why Qualls was up at that hour. The district court ruled the challenged testimony was not hearsay because it was not offered for the truth of the matter asserted. The court did rule there would be no mention of Lindsey's alleged affiliation with a street gang or his alleged intimidation of Qualls.

At trial, Qualls testified he remained awake in the early morning hours of February 25, 1993, because he was afraid someone would try to steal his car stereo. Qualls had spoken with Hawkins and Burt at East High School in an attempt to sell them his car stereo. Qualls showed them where the components were located in the trunk of his car.

Qualls indicated he became suspicious when they asked if he had a car alarm.

Qualls testified that at about 2:00 a.m. he saw a car park across the street from his residence. Qualls called the police. Qualls testified he saw one of the individuals approach his car and break a window. He then saw one of the two individuals enter the vehicle and begin pulling on the back seat as if to gain access to the trunk. Qualls testified that the two returned to their car and came back and began tampering with the steering wheel on Qualls' car. They were frightened away by a neighbor's lights and backed their car down the street without lights.

Qualls' mother, Joanne Qualls-Carr, testified that after the incident she removed the tip of a small screwdriver lodged in her son's car ignition.

Officer Brent Cirksena testified he was dispatched to the Qualls' house at 2:12 a.m. He observed a car backing down the street with its lights off. Cirksena gave chase and eventually apprehended Lindsey and Corey Hughes. Cirksena testified he observed a screwdriver on the front seat of the Lindsey-Hughes car. The screwdriver testimony was admitted over Lindsey's objection that it exceeded the minutes of testimony. A photograph of the screwdriver was admitted into evidence.

After the State rested, Lindsey moved for a continuance because he had not known of the existence of either the screwdriver or the photograph of the screwdriver. Defense

counsel believed a continuance was necessary to discuss the possibility of changing trial strategy with his client based on the new evidence.

The trial court concluded reference to observations Cirksena made during the course of the investigation in the minutes was adequate notice to the defense. The court concluded the State should not be faulted for defense counsel's failure to depose the officers.

Lindsey testified and admitted he participated in damaging Qualls' vehicle. He denied intending to commit a theft and claimed they just wanted to damage the car due to a dispute between Hughes and Qualls. Lindsey admitted on cross-examination, over defense counsel's objection, he knew Burt and Hawkins.

After Lindsey testified, the State moved to reopen its case to lay a foundation for admission of the screwdriver into evidence. Joanne Qualls-Carr testified she now thought her daughter had removed the screwdriver tip from Demitrius's ignition. Officer Cirksena then testified he searched the Lindsey vehicle and discovered a screwdriver with a broken tip.

The jury found Lindsey guilty as charged. The district court entered judgment and imposed sentence. Lindsey appeals.

I. Hearsay evidence. Lindsey contends the district court erred in admitting evidence which Lindsey urges is impermissible hearsay evidence. We review for an abuse of

discretion. In order to show an abuse of discretion, one generally must show the district 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)).

Lindsey objects to Qualls' testimony that Burt and Hawkins asked him if he had a car alarm in his car. "Hearsay is a statement, other than one made by the declarant, while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." Iowa R. Evid. 801(c). It is not considered hearsay if the testimony is not used to show the truth of the matter asserted, but rather to explain responsive conduct. State v. Mitchell, 450 N.W.2d 828, 832 (Iowa 1990). Our supreme court has stated:

> In reviewing trial court's admission of evidence the State argues was offered for the purpose of explaining certain responsive conduct, we do not blindly accept as controlling the purpose urged by the State. Rather, we review the relevant record to determine if the purpose voiced by the State can reasonably be found to be the real purpose for which the challenged testimony was offered.
>
> For us to conclude the State's purpose in offering challenged testimony was in fact to explain certain responsive conduct, not only must the offered statement actually tend to explain the responsive conduct, but that conduct must itself be relevant to some aspect of the State's case.

State v. Hollins, 397 N.W.2d 701, 705-06 (Iowa 1986)(citations omitted).

We do not follow a subjective, speculative test for determining the real purpose. Id. Rather, we objectively review the record and determine if the evidence is relevant and otherwise admissible for the proposed purpose. Id. The objective test used in these issues to determine the "real purpose" is "[i]f, on a review of the record, the evidence is deemed relevant and otherwise admissible for the purpose for which it supposedly was offered, then that purpose is supported objectively in the record and will be accepted." Id. at 706. Thus, the evidence is inadmissible if the evidence is irrelevant in light of the proposed purpose or if the admission of such evidence is an attempt, when viewed in context, to put before the fact finder evidence beyond that necessary to accomplish the proposed purpose. Mitchell, 450 N.W.2d at 832; Hollins, 397 N.W.2d at 706.

The State argues Qualls' testimony regarding his discussion with Hawkins and Burt was not offered to prove the truth of the matter asserted; but rather to show that there was such a conversation and, as a result of the conversation, Qualls stayed up late that night because he became worried about the safety of his car stereo. Lindsey contends the State's true purpose in wanting the admission of the testimony was to plant the suggestion that Burt and Hawkins provided Lindsey with the knowledge of the stereo's existence and that there was no alarm in the car.

Although we question the relevancy of the responsive conduct in question, we believe there is a larger problem with the testimony. We find the testimony was offered to prove the truth of the matter asserted. Specifically, the State wanted to show knowledge of the location of the stereo in the trunk and knowledge of the fact that there was no car alarm. In view of Lindsey's proposed defense that he only intended to damage the car, this testimony was particularly important to the State to help refute his defense. As a result, we find the testimony to be impermissible hearsay.

However, our finding that the testimony was impermissible hearsay does not end the inquiry. We must next look to the well-established rule that error in the admission of hearsay is presumed prejudicial unless the contrary is affirmatively established. State v. McKettrick, 480 N.W.2d 52, 60 (Iowa 1992). The contrary is established when the record shows that the challenged evidence did not impact on the jury's finding of guilt. State v. Nims, 357 N.W.2d 608, 609 (Iowa 1984). We think the record here qualified.

There are several factors that bring us to the conclusion that the "contrary is affirmatively established." First, although certainly not controlling, the trial court made certain the jury received the evidence

for that single and limited purpose by giving the following instruction:

> INSTRUCTION NO. 10A: Evidence was received of a February 24, 1993, conversation between Demetrius Qualls and Demarius Burt and Montez Hawkins regarding the sale of Mr. Qualls' car stereo system. You are not to consider such evidence for the truth of the matter asserted but solely for the purpose of explaining the subsequent conduct of Mr. Qualls, to explain why Mr. Qualls was up at 2:00 a.m., February 25, 1993.

Secondly, the defendant freely admitted that he participated in the entry and damage to Qualls' vehicle.

The defendant, in closing argument, admitted that the first element of the offense had been committed, i.e. the defendant broke into a motor vehicle. In addition, the defendant admitted the second and third elements that the motor vehicle was not an occupied structure and neither he nor Corey Hughes had permission or authority to break into the motor vehicle. The defendant only argued that the fourth element was not proven by the State, i.e. specific intent to commit a theft or that he had knowledge that Corey Hughes had the specific intent to commmit a theft.

The defendant admitted further that he drove Corey Hughes to Qualls' car for the purpose of breaking a window. He denied that he intended to steal anything from the car. But, there is substantial evidence in the record that the window was not only broken but there was an actual entry into the car. There is further testimony that ". . .

one of them bust the glass and the other one was in the back -- one of them was in the back seat jerking on my seat." (The victim's speaker and amps were in the trunk of his car). Further, there is testimony that after the two individuals retreated from the car one reentered the front of the car while the other stood watch. The testimony is that the one who entered the car "messed around with my steering wheel." The steering wheel was broken and a tip of a screwdriver was broken off in the ignition. A screwdriver was found on the front seat of the Lindsey-Hughes car by a police officer.

We believe the other evidence is so overwhelming as to prove the error was harmless beyond a reasonable doubt. The presumption of prejudice has been overcome by the other evidence.

II. Motion for a continuance. Lindsey contends the district court erred in denying a motion for a continuance after the State was allowed to produce evidence which Lindsey alleges was beyond the minutes of evidence. The district court is accorded broad discretion in ruling on a motion for continuance. State v. Teeters, 487 N.W.2d 346, 348 (Iowa 1992); State v. Ware, 338 N.W.2d 707, 714 (Iowa 1983); State v. Kyle, 271 N.W.2d 689, 691 (Iowa 1978); State v. Jacoby, 260 N.W.2d 828, 833 (Iowa 1977). We review for an abuse of discretion. Teeters, 487 N.W.2d at 348; State v. Slayton, 417 N.W.2d 432, 435 (Iowa 1987).

The State is required to file minutes of evidence which is to consist of a "full and fair statement of the witness' expected testimony." Iowa R. Crim. P. 5(3). The purpose of this rule is to provide the defense with information which fairly alerts the defendant to the source and nature of evidence against him. State v. Waterbury, 307 N.W.2d 45, 50-51 (Iowa 1981); State v. Walker, 281 N.W.2d 612, 614 (Iowa 1979). The minutes need not list each detail to which a witness will testify, but rather must provide a full and fair statement which will alert the defendant as to the source and nature of the evidence against him. State v. Ellis, 350 N.W.2d 178, 181 (Iowa 1984); State v. Lord, 341 N.W.2d 741, 743 (Iowa 1983); State v. Conner, 314 N.W.2d 427, 430 (Iowa 1982). A "full and fair statement of the witness' expected testimony" is determined on a case-by-case basis. Walker, 281 N.W.2d at 614.

The minute of evidence for Officer Brent Cirksena stated, in pertinent part:

> This witness will testify regarding all his actions, statements, observations and knowledge acquired during the course of his investigation of this particular matter and all actions and statements of others which he saw or heard during the course of the same. This witness will testify regarding his observations of the damage to the victim's vehicle and the description of the same.

Qualls first testified that when he went out to his car the morning after this incident took place, he noticed his steering column had been broken and his mother had to remove a piece of a screwdriver from the ignition for the

car to be operational. Next, Qualls' mother, Joanne Qualls-Carr, testified she removed the tip of a screwdriver lodged in her son's ignition. Finally, Officer Cirksena was allowed to testify, over Lindsey's objections, that he observed a screwdriver lying on the front seat of the vehicle driven by Lindsey and Hughes, after both subjects had been apprehended. The State was also allowed to introduce a photograph of the screwdriver into evidence.

The district court stated this testimony was allowed because the minute of evidence refers to testimony regarding observations made during the investigation and the screwdriver was in open view on the front seat. The district court further noted Lindsey's attorney had reviewed the county attorney's file and had the opportunity to depose Officer Cirksena and chose not to do so.

Although the State could have made a more complete effort in its minutes of evidence, we find Lindsey was provided with minimally adequate information. The purpose of minutes of evidence "is to alert the defendant generally to the source and nature of the evidence against him. A defendant may thus be put on notice of the necessity of further investigation of the witness' probable testimony." Lord, 341 N.W.2d at 743. We conclude Lindsey was provided with minimally sufficient information and the district court, as a result, did not abuse its broad discretion in denying the motion for continuance.

We affirm Lindsey's conviction of third-degree burglary.

AFFIRMED.