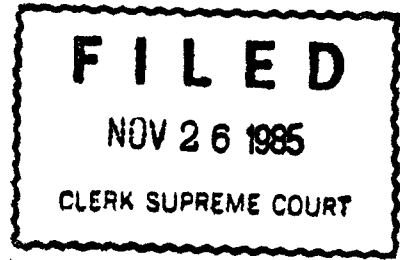


IN THE COURT OF APPEALS OF IOWA



384

STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed November 26, 1985

vs.

)

LARRY G. FENSKE,

)

5-456
84-1672

Defendant-Appellant.

)

Appeal from the Iowa District Court for Howard County - Joseph C. Keefe and William G. Klotzbach, Judges.

Defendant appeals from his conviction for theft in the second degree in violation of Iowa Code sections 714.1(3) and 714.2(2), asserting that certain business records should not have been admitted over a hearsay objection and that the evidence was insufficient to support the trial court's verdict of guilty.

AFFIRMED.

Michael J. Winter, Council Bluffs, for defendant-appellant.

Thomas J. Miller, Attorney General, Pamela Greenman Dahl, Assistant Attorney General, and Mark B. Anderson, County Attorney, for plaintiff-appellee.

Heard by Snell, P.J., and Schlegel and Hayden, JJ.

An El Camino truck driven by defendant Fenske was extensively damaged in an accident on October 27, 1981. An endorsement on Fenske's automobile insurance policy dated October 28, 1981, expanded the policy limits to cover the damage to the truck. This change was made in the Aid Insurance Company home office in Des Moines. Fenske reported the damage to the truck to Aid as vandalism and claimed that it occurred on November 7, 1981. Based on this claim, Aid issued a \$50.00 check payable to Fenske's wife, a \$2,501.34 check payable to Fenske's wife and a body shop, and a \$41.72 check payable to a service station.

Over hearsay and best evidence objections, business records of the local insurance agent were introduced indicating that on October 28, 1981, a change was made at the insurance company's home office adding comprehensive and collision coverage to the policy covering the truck that was damaged. Fenske testified that he did not call and make such a change in the policy. Two witnesses for the State testified that they overheard Fenske call the insurance company on October 28, 1981, and change the policy. Fenske was convicted on a criminal charge of theft by deception.

On appeal, Fenske contends that the local insurance agency records were erroneously admitted into evidence. Fenske also argues that the evidence was insufficient to support his conviction.

I. Business Records Exception. The principal witness for the State with regard to the October 28 change in Fenske's insurance policy was Aid's local insurance agent, Nehl McKone. Through McKone, the State introduced carbon copies of Fenske's insurance policy. These documents were used by the State to establish that Fenske changed his policy on October 28, 1981, the day after the damage to the truck occurred. Fenske contends that the State did not

establish a proper foundation for the admission of the exhibits because they were not prepared by the Cresco local office and McKone did not have knowledge of how the documents were prepared in the Des Moines home office. Therefore, Fenske argues that the admission of the policy exhibits constituted inadmissible hearsay.

Iowa Rule of Evidence 803(6) (1984) enunciates the business records exception to the hearsay rule:

Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and the regular practice of that business activity was to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

This relatively new Iowa rule 803(6) is identical to Federal Rule of Evidence 803(6). While the Iowa appellate courts have not had much opportunity to apply rule 803(6), several federal courts have interpreted the rule and serve as persuasive authority for our application of the rule in the present situation. "The issue of admissibility under Rule 803(6) is chiefly a matter of trustworthiness. In this inquiry the trial court is given great latitude." Mississippi River Grain Elev. v. Bartlett & Co., Grain, 659 F.2d 1314, 1319 (5th Cir. 1981). The trial court's ruling should be disturbed only when its discretion is abused. Rosenburg v. Collins, 624 F.2d 659, 665 (5th Cir. 1980).

In order for evidence to be admissible under the business records exception, the trial court must find that five elements are satisfied. The record must be proven:

- 1) by its custodian or other qualified witness to have been
- 2) made at or near the time the events occurred which are the subject of the record;
- 3) made from information transmitted by a person with knowledge;
- 4) kept in the course of a regularly-conducted business activity; and
- 5) made as the regular practice of that business activity.

Fenske's contention primarily concerns the first element—whether McKone was qualified to establish the foundation for admissibility of the policy. Fenske initially complains that McKone was not the custodian of the records in question. This contention ignores the fact that a qualified witness other than a custodian may testify regarding the record's admissibility.

Furthermore, it is well established under federal law that a "qualified witness" is not required to have personal knowledge of the preparation of the particular record in issue. United States v. Mendel, 746 F.2d 155, 166 (2d Cir. 1984); Mississippi, 659 F.2d at 1319; United States v. Grossman, 614 F.2d 295, 297 (1st Cir. 1980); Rosenburg, 624 F.2d at 665; United States v. Bowers, 593 F.2d 376, 380 (10th Cir. 1979); United States v. Reese, 568 F.2d 1246, 1252 (6th Cir. 1977); United States v. Pfeiffer, 539 F.2d 668, 671 (8th Cir. 1976). Moreover, "the business records exception does not require that the records be prepared by the business which has custody of them." Mississippi, 659 F.2d at 1319; see also Mendel, 746 F.2d at 166; United States v. Ulrich, 580 F.2d 765, 771-72 (5th Cir. 1978).

McKone's testimony established that he was an employee of Aid Insurance Company. The copies of Fenske's insurance policy were sent to his local office by the Des Moines home office. McKone testified that while several of the policy endorsements were not prepared in his local office, the company had

an obligation to furnish each of its local agents with true and correct copies of insurance issued to the agent's policyholders. In fact, the changes from the home office are integrated into the local office's records and relied upon to establish current coverage. McKone further stated that copies of all original policies together with all changes and amendments to coverage are routinely kept on file in his office.

We conclude that McKone is a qualified witness and these documents are admissible as business records under Iowa Rule of Evidence 803(6) (1984). They are records transmitted by persons with knowledge and relied upon in the regular course of the insurance agency's business. The policies have all the indicia of trustworthiness that the federal rules require for the admission of hearsay evidence. There was no error in the admission of the policy exhibits over defense counsel's hearsay objection.

II. Best Evidence Rule. Iowa Rule of Evidence 1002 (1984) provides that "[T]o prove the content of a writing, recording, or photograph, an original is required, except as otherwise provided in these rules or by statute." Rule 1003 otherwise provides as follows: "A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) under the circumstances, admission of the duplicate would be unfair." The Iowa Supreme Court has dealt with the admissibility of carbon copies both before and after the enactment of rules 1002-1003 and concluded that "[c]arbon copies are not subject to the best evidence rule; they are admissible as primary evidence." State v. Hershey, 348 N.W.2d 1, 3 (Iowa 1984); see also State v. Evans, 169 N.W.2d 200, 209-10 (Iowa 1969).

In this case, the policy exhibits at issue were carbon copies of Fenske's original policy. Therefore, the best evidence rule has no application.

III. Sufficiency of the Evidence. Fenske was charged and convicted under Iowa Code section 714.1(3) (1983) which provides that a person commits theft when the person "obtains the labor or services of another, or a transfer of possession, control, or ownership of the property of another, or the beneficial use of property of another by deception." Fenske argues that the State did not meet its burden of proving that Fenske obtained another's property or the beneficial use thereof or that Fenske contacted Aid Insurance Company to increase his coverage on October 28, 1981. Because there was no proof that he deceived Aid, Fenske contends that the trial court erred in denying his motion for a directed verdict.

In reviewing a motion for directed verdict based upon insufficiency of the evidence in a criminal case, we view the evidence in a light most favorable to the State. State v. Aldape, 307 N.W.2d 32, 39 (Iowa 1981). "A trial court's refusal to direct a verdict for a defendant will withstand challenge if there is any substantial evidence in the record tending to support the charge." Id. Substantial evidence means evidence which would convince a rational trier of fact that the defendants are guilty of the crime charged beyond a reasonable doubt. State v. Blair, 347 N.W.2d 416, 419 (Iowa 1984).

McKone testified that as of August 4, 1981, both Fenske and his wife were named insureds on the automobile insurance policy. Fenske testified that he drove the damaged truck before, during, and after the accident and also after it was repaired. This testimony constitutes substantial evidence that Fenske received beneficial use of the money Aid paid for the truck's repairs. Furthermore, it was not disputed that the truck was severely damaged when Fenske rolled it into a ditch near Kendallville on October 27, 1981. Two witnesses testified that they heard Fenske call his insurance company and increase coverage on the truck on the day after the accident. The insurance policy and endorse-

ments confirm that collision and comprehensive coverage on the truck were added on October 28, 1981. Yet, Fenske did not file a claim for the truck damage until November 9, 1981. At that time Fenske told Aid that the damage to the truck resulted from vandalism which occurred on November 7, 1981.

We conclude that by taking the evidence in the light most favorable to the State and drawing all reasonable inferences in favor of the verdict, there was substantial evidence to sustain Fenske's conviction of theft in the second degree.

AFFIRMED.