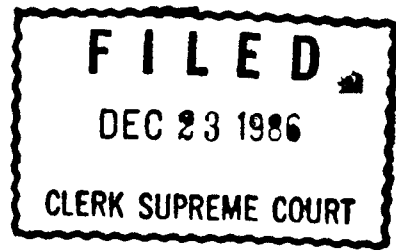


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

DAVID ALLEN ROWE,)

Defendant-Appellant.)

Filed December 23, 1986

304

6-310
85-972

Appeal from the Iowa District Court for Johnson County (No. 15995) -
Harold J. Swailes, Judge.

Defendant appeals his conviction of extortion, in violation of Iowa Code section 711.4 (1985), and his sentence as a habitual offender under Iowa Code section 902.8 (1985). **REVERSED AND REMANDED.**

Charles L. Harrington, Appellate Defender, and Raymond E. Rogers, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Ann DiDonato, Assistant Attorney General; and Dorothy M. Maher, Assistant Johnson County Attorney, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson and Hayden, JJ.

DONIELSON, J.

305

The defendant, David Allen Rowe, appeals his conviction of extortion, in violation of Iowa Code section 711.4 (1985), and his sentence as a habitual offender under Iowa Code section 902.8 (1985). Rowe contends that the district court erred in admitting improper hearsay testimony and by admitting a deputy sheriff's opinion testimony that suspects seldom tell the truth in initial police interviews. We reverse.

The defendant Rowe was accused of threatening to expose an acquaintance's alleged drug-dealing activities unless the acquaintance paid him \$5,000. This demand was made during a four-person confrontation which resulted in a gun battle; the defendant was not accused of firing a shot, although shots were fired by his companion and also by his antagonists.

As a result of these events, Rowe was charged with three crimes: extortion, carrying a concealed weapon, and possession of a firearm by a felon. A jury found Rowe guilty of extortion but not guilty of the other two charges. Rowe has appealed from the resulting conviction for extortion.

Rowe contends the district court erred by admitting testimony by Joe Solomon, a friend of the extortion victim and a participant in the shoot-out, that the extortion victim had told him the defendant habitually carried a gun. Rowe contends Solomon's testimony was inadmissible hearsay. The State responds that the testimony was not hearsay because it was not offered to prove the truth of the matter asserted (that Rowe habitually carried a gun); the State asserts the Solomon testimony was offered merely to show the background of the gun battle and to show why Rowe was feared by other parties to the gun battle.

Rowe also contends the district court erred by permitting a deputy sheriff to give opinion testimony that suspects questioned by police usually lie during

the first interview. Rowe argues that the testimony does not involve a proper subject for opinion evidence. Rowe also contends the State did not make an adequate foundation showing that the deputy sheriff was qualified to express such an opinion. Rowe contends the testimony was prejudicial because it tended to enhance the credibility of the State's witnesses. Several of the State's witnesses told different stories at trial than they had told during initial police interviews, and Rowe contends the deputy sheriff's opinion evidence was intended to suggest that trial testimony is usually more reliable than initial police interviews.

Our scope of review is limited to the correction of errors at law. Iowa R. App. P. 4. The jury's findings of fact are binding on appeal in a law action tried if there is substantial evidence in the record such that a reasonable trier of fact could find for the party in whose favor the verdict was rendered. Bauer v. Curran, 360 N.W.2d 88, 91 (Iowa 1984); Paulsen v. Russell, 300 N.W.2d 289, 294 (Iowa 1981). We view the evidence in a light most favorable to the party in whose favor the verdict was rendered. Russell, 300 N.W.2d at 296.

Rowe contends that the trial court erred in allowing opinion testimony from Deputy Sheriff Robert Carpenter that persons questioned often lie during the first interview. Rowe argues that because this is not a proper subject of opinion testimony and because the State failed to present a proper foundation for the opinion, the trial court erred in overruling defendant's objections. We agree.

During the State's direct examination of Deputy Sheriff Carpenter, who had been present when Rowe was being transported to a hospital in Iowa City and witnessed Rowe's statement that he had gone to the trailer to ask directions and didn't know who shot him, the following exchange occurred:

Q. Now, also, as you've been an investigator and detective for many years, you've undoubtedly had interviews with many, many suspects throughout that period of time? A. That's true.

Q. Do people often tell the truth the first time you interview them?

MR. ROHOVIT: Objection. This calls for an opinion which is beyond the scope of this witness's expertise. It also invades the province of the jury, that is, what the prosecution is trying to get here is an opinion from the witness as to the truth and veracity of various testimony given by various witnesses. That is up to the jury to decide so the question is improper on both grounds, and I object on both grounds.

THE COURT: Overruled.

A. In most cases, the first story is never accurate, and in this particular case, as far as I'm concerned, none of the stories were accurate from any of the witnesses I interviewed.

The general rule in Iowa is one of liberality in the admission of opinion evidence. State v. Moses, 320 N.W.2d 581, 587 (Iowa 1982). The decision as to the admissibility of such testimony rests in the trial court's discretion, and we will reverse only on a clear showing of an abuse of discretion. State v. Halstead, 362 N.W.2d 504, 506 (Iowa 1985). Such discretion is to be exercised under the facts of the particular case, guided by the question of whether the expert's testimony will be helpful to the jury in performing its functions. Id. The body of knowledge which the expert brings must be outside the realm of common knowledge and experience. State v. Hines, 223 N.W.2d 191, 192-93 (Iowa 1974).

In State v. Myers, 382 N.W.2d 91, 97 (Iowa 1986), the Iowa Supreme Court held that expert opinions as to the truthfulness of a witness are not admissible pursuant to Iowa Rule of Evidence 702. The Myers court stated that "expert opinions on the truthfulness of a witness should generally be excluded because weighing the truthfulness of a witness is a matter reserved exclusively to the fact finder." 382 N.W.2d at 95. The Myers court went on to state that "[t]he ultimate determination of the credibility or truthfulness of a witness is not

a 'fact in issue,' . . . an exception to this would be where the defendant is charged with perjury." Id. at 97. The Myers court extensively reviewed other jurisdictions which had considered the question of the admissibility of testimony regarding an expert's opinion as to the credibility or truthfulness of witnesses. Id. at 95-97. The court found that in a majority of jurisdictions, most courts rejected expert testimony that either directly or indirectly renders an opinion on the credibility or truthfulness of a witness. Id. at 97; see, e.g. State v. Perkins, 444 N.E.2d 878, 879 (Ind. Ct. App. 1983) (psychiatrist not allowed to testify that defendant was telling the truth); Beishir v. State, 522 S.W.2d 761, 765 (Mo. 1975) (expert testimony that a witness not truthful is inadmissible); State v. Middleton, 294 Ore. 427, 438, 657 P.2d 1215-1221 (1983) ("We expressly hold that in Oregon a witness, expert or otherwise, may not give an opinion on whether he believes a witness is telling the truth.").

We believe that in the present case the State sought to introduce Deputy Sheriff Carpenter's testimony to bolster the credibility and truthfulness of Keith Moore's testimony. Moore had initially told police that on the day in question two men he did not know had stopped at his trailer to ask for directions, that the two men said, "Don't move," that he then pulled out his gun, and that he did not know who had shot first. Moore admitted on cross-examination that his initial story was not the truth. Moore admitted that he knew Rowe and that Rowe had owed him money. In an effort to bolster Moore's credibility, the State therefore sought to introduce testimony that would minimize the impact of Moore's change in testimony by offering Carpenter's testimony that people often do not tell the truth the first time they are interviewed.

We therefore hold that the trial court abused its discretion in allowing into evidence Carpenter's opinion regarding the truthfulness of the witnesses he interviewed. Such credibility or truthfulness was to be determined solely

by the jury upon all the evidence introduced at trial. The ability to determine whether or not a witness is telling the truth is certainly not beyond the realm of a jury's common knowledge and experience, nor is it beyond the jury's knowledge that witnesses sometimes do change their testimony during the course of a trial. Since the credibility or truthfulness of a particular witness was not at issue, such determination should have been properly left for the jury, and Carpenter's opinion should have been excluded.

Rowe additionally contends that the trial court erred in overruling his hearsay objection to testimony that the defendant carried a gun. During the State's cross-examination of Keith Moore's accomplice, Joe Solomon, the following exchange occurred:

Q. Did you — Did you see any weapon on Rowe when he first came in the trailer? A. In the morning?

Q. Yes. A. It looked like a weapon that was inside of his coat, yes.

Q. Did you tell Keith about that? A. He told me that Keith — I mean Dave does carry a gun.

MR. ROHOVIT: I would object. I would ask that my objection precede this witness' testimony as to hearsay from Keith Moore. It's not responsive to the question in any event, but I would ask that my objection precede the answer from the witness — that the witness made and that the answer be stricken because it was hearsay — because of its hearsay nature.

THE COURT: Read the question and answer back.

(The previous question and answer were read back by the court reporter.)

THE COURT: Overruled. The answer will remain in.

Rowe contends that this exchange was highly prejudicial and should have been excluded. We disagree.

Hearsay has been defined as a statement, other than one made by defendant while testifying at trial, offered in evidence to prove the truth of the matter asserted. State v. Kern, 307 N.W.2d 22, 25 (Iowa 1981); Iowa R. Evid. 801(c). We have, however, acknowledged that there is a distinction between statements

offered to prove the truth of the matter asserted and those offered to prove only (1) the fact such statements were made or (2) their effect on subsequent actions of the hearer. State v. Rush, 242 N.W.2d 313, 319 (Iowa 1976). Third party statements that are offered only to explain responsive conduct are not hearsay. State v. Williams, 360 N.W.2d 782, 785 (Iowa 1985). Thus, if the statements offered are necessary to complete the whole of the transaction concerning the crime, the statements are not hearsay and will be admissible. State v. Leonard, 243 N.W.2d 887, 889 (Iowa 1976).

Upon careful examination of the record, we do not believe that Solomon's statements regarding what Keith Moore stated about Rowe owning or carrying a gun constituted hearsay. Keith Moore had testified that he was "pretty uncomfortable" when Rowe threatened him at his trailer on January 2, 1985, and also testified that he knew a lot of times Rowe carried a gun. In describing the chronology of events leading up to the shootings on January 2, Solomon testified that Moore appeared quite scared and very shook up. Solomon's statement that Moore had told him that Rowe carried a gun was thus offered to show Moore's state of mind at the crucial periods of time leading up to the shootings. Such testimony was a necessary extension of the events of January 2, 1985, and were not offered to prove that Rowe was carrying a gun.

We further note that there was other testimony offered in evidence which indicated that Rowe carried a gun. Solomon testified three times that he saw a gun in Rowe's jacket on Rowe's first visit to Keith Moore's trailer. Moore testified that he observed Rowe with a handgun in a holster in Rowe's jacket when he met him on November 11, 1984. Moore also testified that the gun and holster he saw on Rowe resembled the same exhibit seen by witness Traci Vander-Maten at Rowe's residence and which was found under Rowe's front car seat. Therefore, even assuming that Solomon's statement was hearsay,

such statement was not prejudicial since substantially the same evidence was offered into evidence without objection. State v. Smith, 309 N.W.2d 454, 456 (Iowa 1981).

Because we hold that the trial court erred in admitting Deputy Sheriff Carpenter's statement that persons often don't tell the truth in the first interview, we believe the judgment of the district court should be reversed and remanded for a new trial.

REVERSED AND REMANDED.