IN THE COURT OF APPEALS OF IOWA

No. 9-383 / 88-379

FILED
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CLERK SUPREME COURT

441

STATE OF IOWA,

Appellee,

vs.

MONTE DALE BOWMAN,

Appellant.

Appeal from the Iowa District Court for Pottawattamie County, Paul H. Sulhoff and J. C. Irvin, Judges.

The defendant appeals from his conviction, following a jury trial, of attempted burglary and possession of burglar's tools. **AFFIRMED.**

William L. Wegman, State Public Defender, and Shari Barron, Assistant State Public Defender, for appellant.

Thomas J. Miller, Attorney General; Sarah J. Coats, Assistant Attorney General; E.A. Westfall, County Attorney, and Drew Kouris, Assistant County Attorney, for appellee.

Considered by Oxberger, C.J., and Sackett and Habhab, JJ.

HABHAB, J.

Defendant Monte Bowman appeals his conviction, following a jury trial, of attempted burglary in the second degree and possession of burglar's tools. We affirm.

Defendant came to trial charged with attempted burglary in the second degree and possession of burglar's tools after an incident at the Harvest Inn Restaurant in Council Bluffs. The owner of the restaurant testified that in the early morning hours of October 4, 1987, he was sleeping in the lounge of the restaurant when he heard noises suggesting that someone was trying to break in; he telephoned the police, who arrived in time to surprise two men on the roof. The defendant's first trial on the resulting charges ended with the district court's declaration of a mistrial.

A second trial was subsequently scheduled, and during that retrial the State requested that the restaurant owner's prior testimony be read into evidence, claiming that he was now unavailable to testify. He had apparently sold the restaurant and moved away, and the State asserted that it was unable to find him.

On appeal, the defendant contends that the trial court erred by admitting the prior testimony. He asserts that the State did not make a sufficient effort to locate the restaurant owner and failed to show that he was in fact an unavailable witness under Iowa Rule of Evidence 804(a)(5).

Our scope of review is for errors at law. Iowa R. App. P. 4.

The State asserts that defendant failed to preserve error on the issue of unavailability. We agree. Under Iowa law error must be preserved in order to obtain appellate review. See State v. Williams, 341 N.W.2d 748, 751 (Iowa 1983). As the Iowa Supreme Court has pointed out:

> The orderly, fair and efficient administration of the adversary system requires that litigants not be permitted to present one case at trial and a different one on appeal. One reason is that the trial court's ruling on an issue may either dispose of the case or affect its future course. In addition, the requirement of error preservation gives opposing counsel notice and an opportunity to be heard on the issue and a chance to take proper corrective measures or pursue alternatives in the event of an adverse ruling.

State v. Tobin, 333 N.W.2d 842, 844 (Iowa 1983).

Turning to the facts at hand, defendant did not question the witness's unavailability in regard to the introduction of the prior testimony. Indeed, his trial counsel stated: "I'm satisfied that the County Attorney had made legitimate effort to obtain Mr. D'Ambrosa's presence. [sic] I'm not -- I haven't questioned that, and I didn't question it on the record previously. I don't question it now." As such, defendant has failed to preserve error on this issue. We affirm defendant's convictions for attempted burglary in the second degree and possession of burglar's tools.

AFFIRMED.