IN THE COURT OF APPEALS OF IOWA

No. 7-189 / 06-0208
Filed July 12, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

L.C. PENDLETON,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Stephen Clarke, Judge.

L.C. Pendleton appeals from his conviction and sentence for third-degree burglary. **REVERSED AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Patricia Reynolds, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Ann E. Brenden, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Ray Walton, Assistant County Attorney, for appellee.

Considered by Zimmer, P.J., and Miller and Baker, JJ.

ZIMMER, P.J.

L.C. Pendleton appeals from his conviction and sentence for third-degree burglary in violation of Iowa Code sections 713.1 and 713.6A(1) (2005). He contends the district court erred in excluding evidence that was not hearsay and was relevant to his theory of defense. He also claims his trial counsel was ineffective in several respects, and he maintains the district court erred in ordering him to pay a fine of $750. We reverse and remand for a new trial.

I. Background Facts & Proceedings

Tammy Wright's home at 912 West Sixth Street in Waterloo was burglarized on June 26 and 27, 2005. Wright lived in the home with her children; however, at the time of the burglary, she and her family were staying elsewhere.[1] During the first burglary, the window in the front door was broken out, and the burglar stole clothing, "all [the] stuff off the walls, all of the baby stuff, [and] [a]ll the stuff off the [c]hina hutch." Wright testified it appeared the burglar had moved items around in the home in preparation for a second burglary. Wright boarded up her front door after the first burglary.

The second burglary occurred the next day. When Wright returned to her home, she saw the front door was open and the back door had been taken off its hinges. The items that had not been taken the first day were taken in the second burglary, including a refrigerator.

Grace Flenoy, Wright's next door neighbor, witnessed Pendleton taking a refrigerator out the back door of Wright's home. Pendleton was using a dolly to remove the refrigerator and was accompanied by another person. Flenoy did not

[1] Wright returned to the home every day.

know Pendleton, so she asked him, “Are they moving?” Pendleton answered, “Yes.” Flenoy did not know if the person accompanying Pendleton was a man or woman. Tammy Wright was not acquainted with Pendleton. He did not have permission to enter her residence or remove any property from Wright’s home.

The State filed a trial information charging Pendleton with third-degree burglary and alleged he was a habitual offender pursuant to Iowa Code section 902.8 and 902.9. A jury found Pendleton guilty as charged. The court sentenced Pendleton to a prison term not to exceed fifteen years and imposed a $750 fine. Pendleton now appeals.

II. Scope & Standards of Review

We review the defendant’s hearsay claim for the correction of errors at law. *State v. Newell*, 710 N.W.2d 6, 18 (Iowa 2006). Iowa Rule of Evidence 5.801(*c*) defines hearsay as “as statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Hearsay is not admissible unless it falls within one of several enumerated exceptions. Iowa R. Evid. 5.802. Subject to the requirement of relevance, a district court has no discretion to deny the admission of hearsay if the statement falls within an enumerated exception, and it has no discretion to admit hearsay in the absence of a provision providing for it. *State v. Dullard*, 668 N.W.2d 585, 589 (Iowa 2003).

III. Discussion

We first address Pendleton’s claim that the district court erred by excluding testimony offered by a defense witness at trial. The defendant called Mary Goss to testify on his behalf. Goss testified that on an unspecified

afternoon in June 2005, she played cards with Pendleton and several other individuals at Pendleton's home in Waterloo. She claimed Porcia Gamblin walked into the house and asked for assistance moving a refrigerator and stove. Goss testified Gamblin said, "I need somebody to go get my refrigerator and stove. It's mine and I need it moved right away and I will pay as soon as they go get my stuff out of there." The State objected on the basis of hearsay and asked that the testimony be stricken. Defense counsel immediately explained the statement was not being offered for the truth of the matter asserted. The district court sustained the State's objection on the basis of hearsay and instructed the jury to disregard the testimony.

A discussion ensued in chambers. Defense counsel argued the challenged testimony should be admitted because it was not offered for the truth of the matter asserted and was not hearsay. Counsel informed the court that Pendleton was not attempting to prove Gamblin actually owned a refrigerator which needed to be moved from her home. The defense acknowledged that Gamblin's statements probably were not truthful, but contended they should be admitted because she uttered them at Pendleton's home in the presence of the witness and others before leaving the home with the defendant. After some further discussion regarding matters not at issue in the appeal, the court again ruled the testimony was inadmissible hearsay. When trial resumed, Goss continued her testimony and stated Pendleton left his home with Gamblin.

The State maintains Pendleton failed to preserve error on his hearsay claim because he did not specifically argue the statement was admissible not for its truth, but to show why he responded to the statement. The State also

contends Pendleton failed to preserve error on his claim that the testimony was necessary for his theory of defense. Our supreme court has recognized an exception to the standard rule for error preservation when the record reveals the grounds for a motion were apparent and understood by the district court and counsel. *State v. Williams*, 695 N.W.2d 23, 27 (Iowa 2005). In this case, we believe the record reveals the grounds for Pendleton's claim were apparent; therefore, we will address the defendant's claim.

On appeal, Pendleton again contends the testimony in question was not offered for the truth of the matter asserted. We agree. The record reveals the defendant was not offering Goss's testimony to prove the truth of the matter asserted, that Gamblin needed assistance moving appliances that belonged to her. The testimony was only offered to prove Gamblin made a statement. *See Newell*, 710 N.W.2d at 18 (finding evidence that the defendant called the victim derogatory names was not hearsay because it was not offered to prove the truth of the matter asserted, that the victim was what the defendant called her).

We also find this testimony was relevant to Pendleton's theory of defense. It is apparent from the record Pendleton offered Goss's testimony to prove he acted on his belief Gamblin's statement was true, not that the statement was actually true. *See State v. Campbell*, 714 N.W.2d 622, 629-31 (Iowa 2006) (reversing a defendant's conviction and remanding for a new trial based on the district court's improper exclusion of cross-examination of a witness for the State designed to show her bias as a result of the defendant's intention to turn her nephews in for the same burglaries with which he was charged). A defendant is

entitled to present evidence relevant to the defendant's theory of defense. *State v. Begey*, 672 N.W.2d 747, 751 (Iowa 2003).

We find the testimony by Goss regarding Gamblin's statement to Pendleton immediately prior to the burglary was not hearsay and was relevant to the defendant's theory of defense. We conclude the district court erred in sustaining the State's hearsay objection and excluding the testimony.[2]

IV. Conclusion

We reverse Pendleton's conviction of third-degree burglary and remand the case to the district court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

[2] Because we have reversed Pendleton's conviction on the basis that the district court erred in excluding testimony that was not hearsay, we need not address his ineffective assistance of counsel or sentencing claims. In case the issue should arise again, we note that it was error for the district court to impose a fine as part of the defendant's habitual offender sentence.