

IN THE UTAH COURT OF APPEALS

-----ooOoo-----

State of Utah,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellee,)	
)	Case No. 20090471-CA
v.)	
)	F I L E D
Timothy Lamoreaux,)	(October 7, 2010)
)	
Defendant and Appellant.)	2010 UT App 276

Fourth District, Provo Department, 081401889
The Honorable Lynn W. Davis

Attorneys: Dana M. Facemyer and McKay G. King, Provo, for
Appellant
Mark L. Shurtleff and Kenneth A. Bronston, Salt Lake
City, for Appellee

Before Judges Thorne, Roth, and Christiansen.

THORNE, Judge:

Timothy Lamoreaux appeals from his conviction for distributing or arranging to distribute a controlled substance in a drug-free zone, a first degree felony, see Utah Code Ann. § 58-37-8(1)(a)(ii) (Supp. 2010). Lamoreaux argues that the district court erred when it allowed the State to introduce certain testimony by Officer Sorenson into evidence in violation of rules 602 and 612 of the Utah Rules of Evidence. We affirm.

Under rule 602 of the Utah Rules of Evidence, "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Utah R. Evid. 602. Rule 612 allows a witness to use a writing to refresh his or her memory while testifying. See id. R. 612. However, the contents of the writing cannot serve as evidence in the event that they do not, in fact, refresh the witness's memory. See State v. Oliver, 820 P.2d 474, 479 (Utah Ct. App. 1991) ("It is evident from the trial transcript that [the witness] had no independent knowledge or memory of the value of the ring, nor was his memory refreshed after looking at the police report. He had no present personal knowledge of the ring's value and, therefore, his testimony concerning the value is inadmissible."). We review the district court's evidentiary rulings only for an abuse of discretion. See State v. Rhinehart, 2006 UT App 517, ¶ 10, 153 P.3d 830.

Here, Officer Sorenson testified that Lamoreaux had made incriminating statements at the time of his arrest. However, when pressed to recall what the incriminating statements were, Officer Sorenson could not remember Lamoreaux's exact words even after reviewing his police report in an effort to refresh his memory. Officer Sorenson testified on direct examination,

A: [Lamoreaux] initially denied, again, that he was involved in any kind of distribution issue at the scene, but eventually he did make some incriminating statements.

. . . .

Q: Okay. You mentioned after you advised him that it might be better for him to be honest and cooperate that he made some admissions. Will you describe what he said?

A: I will. Initially, he would--he kept asking me, Why am I here, why am I here? I-- I didn't do anything. You know, I wasn't involved in any of this.

And then I would--I told him, Tim, you know, I've got all this information. You know, just come clean and tell me--tell me what's going on, you know.

And at that point, according to my report, I indicated here--if I can refer to that?

Q: You can refer to it to refresh your memory, but please don't read from it.

A: Okay. He did admit that he was involved in making the arrangements to distribute methamphetamine.

Q: And did he use those words?

A: He probably did not use those specific words.

Q: Do you recall roughly what he said?

A: To--to be honest, to the best of my recollection, I--I can't recall his specific words, exactly what he said.

Q: How did he indicate to you that he had been involved?

A: He--he eventually said, Yeah, you know, I--you're right.

. . . .

Q: Okay. What about what he said indicated to you that he had been involved with this drug deal?

A: Let me refer to my report one more time, please.

. . . .

Q: Does that report refresh your memory about what Mr. Lamoreaux said to you that night?

A: To be honest, no, it doesn't.

It is "evident from the trial transcript," see Oliver, 820 P.2d at 479, that Officer Sorenson independently recalled certain facts without reference to his report. These facts included that Lamoreaux "did make some incriminating statements"; "admit[ted] that he was involved in making the arrangements to distribute methamphetamine"; and "eventually said, Yeah, you know, I--you're right." Because Officer Sorenson had personal knowledge of these facts, his testimony thereto was admissible under rule 602. See Utah R. Evid. 602.

Officer Sorenson also made clear that he could not remember Lamoreaux's exact words and that his police report did not refresh his memory in that regard. The district court, which observed Officer Sorenson's testimony firsthand, made the following observations in denying Lamoreaux's subsequent motion to strike Officer Sorenson's testimony:

An officer's report can be utilized for the purpose of refreshing memory. It is accurate that as to a number of details Officer Sorenson looked at his report and it did not refresh his memory. But he indicated those areas on the record which areas he had no independent recollection of and which he did.

My recollection as it relates to the admission is as follows. He had no recollection of the exact wording that he

said in connection with it, but he had made-- the officer had made some statement as it relates to his involvement. And his testimony was that Mr. Lamoreaux finally said "Right" or "Correct." There was an admission as it relates to the statement of the officer relative to Mr. Lamoreaux's involvement with the drugs.

As to the specifics beyond that, counsel, you are accurate that he was not able to refresh his memory from referral to the police report itself. But those areas were patently clear on the record and before the jury, so.

The district court's observations are consistent with our reading of the trial transcript. If Officer Sorenson's report contained information about Lamoreaux's exact statements,¹ that information was not relayed to the jury because Officer Sorenson forthrightly stated only that the report did not refresh his memory.

In sum, Officer Sorenson testified only as to those facts that he did recall and refrained from testifying about facts about which he had no recollection. These circumstances do not present a violation of either rule 602 or rule 612. Accordingly, we affirm Lamoreaux's conviction.

William A. Thorne Jr., Judge

WE CONCUR:

Stephen L. Roth, Judge

Michele M. Christiansen, Judge

¹Officer Sorenson's report is not part of the record on appeal.