IN THE COURT OF APPEALS OF IOWA

No. 9-091 / 08-0534
Filed March 26, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DION SCOTT MILLER,
Defendant-Appellant.

Appeal from the Iowa District Court for Webster County, William Ostlund, Judge.

Dion Scott Miller appeals his conviction for burglary in the first degree. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and David Adams, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney General, Timothy Schott, County Attorney, and Sarah Livingston Smith, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Potterfield and Mansfield, JJ.

MANSFIELD, J.

Dion Scott Miller appeals his conviction for burglary in the first degree. The conviction arises out of the events of October 3, 2007, when Miller entered the house of his half-brother and assaulted his former girlfriend. Miller contends that the district court erred in refusing to admit evidence of an out-of-court statement by Miller's half-brother, who did not testify at trial. For the reasons set forth in this opinion, we affirm.

I. FACTUAL BACKGROUND

According to the trial testimony, over a period of about six years, Miller had a relationship with Renysha Newsome. In August 2007, Newsome broke off the relationship, and at some point began a relationship with Miller's half-brother, Marcus Hill.

The following month, Miller sent a number of threatening text messages to Newsome's cellphone, such as: "U said dat s*** u dead"; "U dead"; "N if u eva say nothing to me I will kill ur trifling ass."

Very early in the morning of October 3, 2007, Newsome received a couple of text messages from Miller asking about her whereabouts: "Where u at," and "U ain't home f** do wat u do." Newsome decided to leave her car at the Sports Page and ride with Hill to his home. Newsome intentionally did not drive to Hill's house because she was concerned about parking her car in front of the house where Miller could see it.

Around 3:00 a.m., Miller also arrived at Hill's house. Hill and Newsome heard a knock on the front door. Newsome asked Hill not to answer the front door, but Hill said it would be okay to answer it. Hill instructed Newsome to go

into the bedroom and shut the door. Newsome did so. Newsome could not see what was going on in the front room, but heard grumbling and bumping going on — "maybe like someone was wrestling." Miller then opened the bedroom door and came in. He grabbed Newsome by the hair and began punching her. He hit Newsome all over her face. Hill tried to get Miller off of Newsome, repeatedly telling Miller to "get the f*** out." Hill also told Newsome to call the police. The beating continued even after Hill told Miller to get out.

Eventually, Hill got a hold on Miller, enabling Newsome to escape. Newsome ran out of the house into the nearby woods, and listened as Hill and Miller argued and Hill continued to tell Miller to "get the f*** out." Eventually, Miller left the house. Newsome remained hidden in the woods while Miller drove his car back and forth, apparently looking for Newsome. Miller then sought refuge at a friend's house not far from Hill's. Subsequently, Newsome sought medical attention and contacted the police.

As part of their investigation, Iowa Division of Criminal Investigation arranged for Newsome's cousin, Valerie Newsome, to call Miller on a recorded line. In the call, Miller said that Hill:

> didn't want to let me in the house, 'cause I sat out there and beat on the door, beat on the door because I was . . . I was peep[ing tom] all night and I said I knew what was going on. . . [W]hen I [said] please open the door, I'm like the police, police now the police is on me. He, and he, I'm trying to walk in the house, he tried a football [tackle] and s***.

Newsome did not actually see Miller enter the house on October 3, because she was hiding in the bedroom, but she later told the police that Hill had "let him in."

In a recorded interview with Officer Larry Hedlund of the Division of Criminal Investigation on the evening of October 3, Hill stated that Miller "came pounding on our door . . . so I let him in." Hill denied tackling Miller but said that Miller "pushed" past him.

Miller went to trial before the court on December 11, 2007, after waiving his right to a jury. At the commencement of trial, Miller's counsel gave a brief opening statement. He explained that Hill was "on the lam" because of a probation violation and would not be testifying. However, Miller's counsel stated that Hill had given a recorded statement to the effect that he had "let [Miller] in." In short, Miller's counsel made it clear that this statement was an important part of his client's defense and that he intended to rely upon it at trial.

Newsome testified at trial along with several law enforcement officials. The contest at trial was not over whether Miller had assaulted Newsome, but whether he had entered Hill's home without a "right, license or privilege to do so." *See* Iowa Code § 713.1 (2007). Miller's counsel tried repeatedly to introduce evidence of Hill's recorded statement that he had "let [Miller] in." However, the State objected on hearsay grounds, and the district court sustained the State's objections.

When the testimony finished around mid-day, Miller's counsel asked that the court wait until 1:00 p.m. to see if Hill would appear. (The mother of Miller and Hill had appeared and testified.) The court agreed to this recess, but Hill did not arrive. At that point, Miller's counsel moved for a mistrial. The district court asked if a motion to continue had been filed, but Miller's counsel indicated that he was asking for a new trial rather than a continuance. The district court denied

the motion for a mistrial. Subsequently, the court found Miller guilty of first-degree burglary in violation of Iowa Code sections 713.1 and 713.3(1)(c) and denied Miller's motion for a new trial. This appeal followed.

II. ANALYSIS

This appeal presents the question whether the district court should have admitted evidence of Hill's out-of-court statement that he "let him [Miller] in." Miller does not dispute that the statement is hearsay, but maintains it should have been admitted under the residual exception set forth in Iowa Rule of Evidence 5.803(24) and 5.804(5).[1] Our review is for errors at law. *State v. Newell*, 710 N.W.2d 6, 18 (Iowa 2006). A district court has no discretion to deny the admission of hearsay that falls within a hearsay exception, and no discretion to admit hearsay if it is not covered by an exception. *Id.*; *State v. Dullard*, 668 N.W.2d 585, 589 (Iowa 2003). Against that backdrop, we consider whether the statement in question met the criteria of the residual exception.

The residual exception reads as follows:

> *Other exceptions*. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (a) the statement is offered as evidence of a material fact; (b) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (c) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to

[1] The residual exceptions in rules 5.803(24) and 5.804(5) are identically worded, the difference being only that rule 5.804(5) applies when the declarant is unavailable. The district court did not resolve whether Hill should have been considered "unavailable," or which of the two rules should apply, but the analysis would be the same in any event.

> prepare to meet it, the opponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Iowa R. Evid. 5.803(24); 5.804(5).

Essentially, the rule sets forth five requirements that must be met before evidence can be admitted under the residual exception: (1) trustworthiness; (2) materiality; (3) necessity; (4) notice; and (5) service of the interests of justice. *State v. Rojas*, 524 N.W.2d 659, 662-63 (Iowa 1994); *State v. Kone*, 557 N.W.2d 97, 100 (Iowa Ct. App. 1996). The district court is to make findings on each of these criteria, and each must be satisfied before the evidence can be admitted. *State v. Weaver*, 554 N.W.2d 240, 247 (Iowa 1996), *overruled on other grounds by State v. Hallum*, 585 N.W.2d 249, 254 (Iowa 1998); *Kone*, 557 N.W.2d at 100-01.

Here the district court found that the criteria of materiality, notice, and service of the interests of justice had been met. However, it determined the statement to be insufficiently trustworthy. This factual finding is entitled to deference, and should be upheld if supported by substantial evidence. *State v. Cagley*, 638 N.W.2d 678, 681-82 (Iowa 2001) (upholding district court's finding that out-of-court statement was not sufficiently trustworthy to qualify for admission under the residual hearsay exception).

We believe the district court's finding on the trustworthiness requirement was supported by substantial evidence. As the district court noted, Hill's statement was not made under oath. Hill was also Miller's half-brother. Moreover, the recorded interview as a whole suggests that Hill may have been somewhat downplaying the incident. For example, Hill said, "I don't know if

[Miller] was really hitting her" until Officer Hedland responded, "Well, somebody hit her, she's got cuts and bruises," at which point Hill replied, "Yeah, that's what I was gonna say, like you said, she got a lot of cuts, so he must a been hitting, you know." Similarly, in the interview, Hill denied having an understanding why Miller would care if Hill was with Newsome. Accordingly, we sustain the district court's determination that Hill's out-of-court statement did not meet the trustworthiness element of the residual hearsay exception.

We also note, as did the district court, that Miller apparently made no attempt to subpoena Hill for trial, nor did Miller move for a continuance to try to locate Hill when essentially invited to do so by the district court.

When the district court denied Miller's motion for new trial, it stated that admission of the statement "probably would not change the result in this case." Along this line, the State argues that even if Hill's out-of-court statement should have been admitted under the residual hearsay exception, any error was harmless. Among other things, the State points out that the definition of burglary in Iowa Code section 713.1 includes "remain[ing] therein . . . after the person's right, license or privilege to be there has expired . . . ." *See State v. Walker*, 600 N.W.2d 606, 608-09 (Iowa 1999) (recognizing the "remaining over" theory even when the defendant was not expressly told to leave). The district court noted that during the skirmish, according to Renysha Newsome's testimony, Hill told Miller to "get the f*** out." The district court, however, did not rely on the "remaining over" theory in finding Miller guilty. Because we uphold the district court's decision to reject the statement based on its failure to meet the trustworthiness

element, we need not reach the question whether refusal to admit the evidence would have constituted harmless error in any event.

In addition to this evidentiary argument, raised by both Miller and his appellate counsel, Miller makes a number of arguments pro se. Miller maintains that Hill's out-of-court statement should have been admitted because it was either an "adoptive admission," cumulative of other evidence, or a statement about pedigree. We respectfully disagree. The adoptive admission exception would have required adoption of this statement by the State, which did not occur. *See* Iowa R. Evid. 5.801(*d*)(2)(B). If the evidence in question were cumulative, that would have been a reason *not* to admit it. The pedigree exception is not a blanket exception for statements made by family members of the defendant, as suggested by Miller. *See* Iowa R. Evid. 5.803(19). In short, Miller's counsel was not ineffective in failing to raise any of these grounds for admitting Hill's out-of-court statement.

In his pro se briefing, Miller also contends that the district court erred in denying his motion for judgment of acquittal because there was insufficient evidence to sustain a conviction. Miller asserts that the only evidence establishing he did not have a "right, license or privilege" to enter Hill's home was his own recorded statement to Valerie Newsome. *See* Iowa Code § 713.1. Miller relies on the proposition that "a confession standing alone will not warrant a criminal conviction unless other proof shows the defendant committed the crime." *State v. Polly*, 657 N.W.2d 462, 466 (Iowa 2003) (citing Iowa R. Crim. P. 2.21(4)). However, Miller's argument is misplaced. Miller "is incorrect in asserting there must be evidence to corroborate every element of the crime

charged. 'Corroboration need not be strong nor need it go to the whole case so long as it confirms some material fact connecting the defendant with the crime.'" *Id*. (quoting *State v. Liggins*, 524 N.W.2d 181, 187 (Iowa 1994)). The State must introduce evidence that a crime has been committed, as the evidence as a whole must prove the defendant is guilty beyond reasonable doubt. *Id*. However, the corroborating evidence does not itself have to prove every element of the offense beyond a reasonable doubt. *Id*.

In addition to Miller's recorded statement, the State introduced substantial corroborating evidence. The State proved that Miller had previously sent threatening text messages to Newsome. Newsome herself testified that Miller came to Hill's house and after Hill answered the door, she heard noises that she described as "maybe someone wrestling." Newsome testified that Miller then entered the bedroom where he beat her, punching her repeatedly in the face. Photographs documented Newsome's injuries as a result of the attack. There was sufficient evidence of guilt in this case.

Next, Miller argues that the district court should have granted his motion for a new trial based on newly discovered evidence. The evidence, according to Miller, was that Hill, if called as a witness, would testify that Miller did not break into the house. However, we agree with the district court that Miller has confused newly discovered evidence with newly available evidence. As the district court put it, "[E]vidence does not become newly discovered because it has become newly available." Here the evidence was not newly discovered and the district court did not abuse its discretion in denying the motion.

Finally, Miller asserts that the district court should have granted his motion for a new trial because the finding of guilt was against the weight of the evidence. Upon our review of the record, we find that the evidence discussed above demonstrates that the verdict was not against the weight of the evidence. Thus, we find the district court did not abuse its discretion in denying Miller's motion for a new trial.

AFFIRMED.