

IN THE COURT OF APPEALS OF IOWA

FILED

MAR 23 1982

CLERK SUPREME COURT

STATE OF IOWA,

)

Plaintiff-Appellee,

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Filed March 23, 1982 596

vs.

)

JOHN WIRTJERS, JR.,

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2-58

66673

Defendant-Appellant.

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Appeal from Sac District Court - Albert L. Habhab, Judge.

Defendant appeals his conviction of second degree burglary in violation of sections 713.1 and 713.3, The Code. AFFIRMED AND REMANDED FOR RESENTENCING.

Richard O. McConville and Lawrence F. Scalise of Scalise, Scism, Gentry, Brick & Brick, Des Moines, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and John P. Messina, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

Defendant appeals his conviction of second degree burglary in violation of sections 713.1 and 713.3, The Code. He asserts that the trial court committed error: (1) by joining defendant's trial with that of a separately charged co-defendant in violation of Iowa R. Crim. P. 6(4)(b); (2) by finding no prejudice to defendant as a result of such joinder; (3) by admitting an out-of-court statement made by the co-defendant that would have been inadmissible against defendant alone; (4) by failing to give an adequate cautionary instruction on the use the jury could make of that statement; (5) in failing to allow defendant to present to the jury evidence relative to the complaining witness's motive for testifying and credibility; and (6) in abusing its discretion in considering impermissible factors in sentencing defendant. The State asserts that error on some of defendant's issues was not preserved, but concedes the court's error on sentencing. We affirm the conviction, but remand for resentencing.

On July 27, 1980, a man named Dan Hoffard filed a complaint charging defendant John Wirtjers and two others with burglary in the second degree. Separate trial informations were filed on each of the three defendants September 2, 1980. The State moved to join the trials of defendant and one of the other co-defendants; that motion was sustained by the court, and the joint trial commenced March 17, 1981. Both defendants were found guilty by jury of burglary in the second degree.

I. Joinder. Defendant argues that it was error to permit the State to try him and a co-defendant jointly since, under State v. Berry, 247 N.W.2d 263 (Iowa 1976), he had an absolute right to a separate trial because he was charged with a felony. On appeal, he also argues that the plain wording of Iowa R. Crim. P. 6(4)(b) does not allow joint trials unless co-defendants are jointly informed against, and that the court's allowance of joinder despite the rule resulted in prejudice to him. The State asserts that the grounds of defendant's first argument

are gone with the change in Iowa's criminal procedure rules, and that defendant failed to raise the latter ground to the trial court so that that issue is not preserved for review.

Ordinarily, matters not advanced in the trial court cannot be raised for the first time on appeal. State v. Mark, 286 N.W.2d 396, 414 (Iowa 1980). However, since defendant did complain of joinder in the court below, and the trial court papers, a part of the record here, indicate that the co-defendant resisted joinder on the basis of resulting prejudice, we think defendant's position, although not presented with the specificity that it ought to have been, was sufficiently before the trial court so that we may consider it on appeal. See State v. Hartman, 281 N.W.2d 639, 643 (Iowa 1979).

Defendant's main complaint, stated in the first two issues of his brief, is that joinder of trials is not permitted when co-defendants are not charged on the same trial information and that prejudice automatically results when such error occurs. Iowa R. Crim. P. 6 covers treatment of multiple defendants and states in pertinent part:

a. Multiple defendants. Two or more defendants may be charged in the same indictment, information, or complaint if they are alleged to have participated in the same act or the same transaction or occurrence out of which the offense or offenses arose. Such defendants may be charged in one or more counts together or separately, and all the defendants need not be charged in each count.

b. Prosecution and judgment. When an indictment charges a defendant with a felony, and the same indictment charges two or more defendants, those defendants jointly charged may be tried jointly, if in the discretion of the court a joint trial will not result in prejudice to one or more of the parties; otherwise the defendants shall be tried separately. Where jointly tried, each defendant shall be judged separately on each count.

Iowa R. Crim. P. 6(4)(a)(b). Prior to the adoption of this rule, a defendant charged with most felonies was absolutely entitled to a separate trial if he requested one. State v. Berry, 247 N.W.2d 263, 264-65 (Iowa 1976). Since the adoption of rule 6(4) as part of the code revision, an accused is entitled to a separate trial as a matter of right when the court finds a joint trial would result in prejudice. State v. Belieu, 288 N.W.2d 895, 897 (Iowa 1980). See also J. Yeager & R. Carlson, 4 Iowa Practice: Criminal Law and Procedure § 1002 at 216 (1979); J. Roehrick, The New Iowa Criminal Code: A Comparison § XIII at 517 (1977) ("The decision as to joint trials will be left to the discretion of the court.").

Defendant argues here that his situation is distinguishable because he was not jointly charged and he was not seeking to sever his trial; rather, the State sought to join his trial with that of another. We think defendant makes too fine a distinction. It is clear that these co-defendants could have been jointly charged since they had allegedly participated in the same act out of which the offense arose. Iowa R. Crim. P. 6(4)(a). The supreme court has previously adopted the A.B.A. Standards Relating to Joinder and Severance § 3.1(a), at 46-47 (Approved Draft, 1968), which permit a court to join charges or defendants sua sponte if prejudicial effects are outweighed by the State's interest in judicial economy. State v. Trude, 253 N.W.2d 101, 104 (Iowa 1977). Had the county attorney chosen to charge both defendants in one information, or had the court chosen sua sponte to join the two defendants, then either defendant who believed he might be prejudiced by a joint trial would have had to make a motion for severance under Iowa R. Crim. P. 10(2)(e). The standard for determining then if severance was proper would be whether a joint trial would result in prejudice to either defendant. State v. Belieu, 288 N.W.2d at 897. In a similar situation, when a defendant had sought severance of individual counts of a charge brought under section 204.408, The Code, the supreme court considered severance despite the fact that the plain words of the statute indicated that "[a] strict construction of section 204.408

arguably would permit severance only to an accused who is 'jointly charged.' "State v. Gibb, 303 N.W.2d 673, 677 (Iowa 1981).

In short, we believe the overall statutory scheme, as well as case law and common sense, dictates a new belief in joint trials in the interest of judicial economy unless a defendant can show that a joint trial would result in prejudice to him. State v. Belieu, 288 N.W.2d at 897; State v. Trudo, 253 N.W.2d at 104. Of course, once joined, a court has a continuing duty to grant severance if prejudice does appear, provided only that the defendant informs or alerts the court in sufficient time to permit consideration of steps to avoid prejudice. State v. Belieu, 288 N.W.2d at 899.

Defendant argues that, when error appears in the trial court record, prejudice is assumed unless otherwise affirmatively established by the State. State v. Mattingly, 220 N.W.2d 865, 869 (Iowa 1974). Such is not now the standard for evaluating the propriety of joint or separate trials; defendant must show that the likelihood of prejudice to his right to a fair trial outweighs the State's interest in judicial economy. We think defendant here has failed to demonstrate such prejudice, either before the joint trial commenced or during its course. In any case, we have found that the trial court did not commit error by joining defendant's trial with that of his co-defendant.

II. Co-defendant's Statement. State's exhibit number sixteen was a typed, out-of-court statement given and signed by defendant Wirtjers' co-defendant. The exhibit was admitted into evidence after police testimony, including that of the officer who had typed the statement. It was admitted against the co-defendant, and the State then asked to have it also admitted against defendant. The following colloquy took place:

CO. ATTY.: I'd offer it [the statement, exhibit 16] in the State versus Wirtjers matter.

DEFENSE COUNSEL: I don't see what it has to do with Wirtjers.

COURT: Is that your objection?

DEFENSE COUNSEL: Yes, it is, Your Honor.

COURT: Sustained to defendant Wirtjers.

Jury instructions numbered four and five explained the matter of a joint trial and the use of evidence with only the defendant against whom it was offered. The jury was also cautioned to make no inference of guilt solely because the defendants were tried together. On appeal defendant now asserts that the method of the introduction of co-defendant's statement and these instructions did not sufficiently protect defendant from "spill-over" prejudice resulting from co-defendant's statement, and did not sufficiently alert the jury to consider the statement in ascertaining the guilt of only the co-defendant. The State argues that defendant made no timely objection to the method of admitting exhibit sixteen and further points out that the record reveals no objection to instructions four and five or any request for additional cautionary instructions.

Our review of the transcript and record leads us to the same conclusion that the State reaches. Defendant cannot complain that no cautionary instruction was given when he didn't request one. State v. Rouse, 290 N.W.2d 911, 914 (Iowa 1980). Nor has he preserved any error on the introduction of the statement and its potential use against him rather than his co-defendant. Even if he had properly objected and alerted the trial court, such objection would not be beneficial to him.

In Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), the Supreme Court pointed out the violation of a defendant's sixth amendment right of confrontation when a confession of a co-defendant, which implicated the defendant, was admitted into evidence and the co-defendant did not take the stand. Despite a cautionary instruction the court found that the danger of misuse of the confession by the jury was too great to be constitutionally admissible. Id., 391 U.S. at 136-37, 88 S. Ct. at 1628, 20 L. Ed. 2d at 485. Defendant's situation is factually distinguishable from that in Bruton. His co-defendant did take the stand, repeated substantially the contents of his statement,

and was available for exhaustive cross-examination by defendant. See State v. Waterbury, 307 N.W.2d 45, 49 (Iowa 1981).

We find no merit in defendant's theory that he was impermissibly prejudiced by the introduction of the statement of his co-defendant, and also fail to see either that he preserved error as to the instructions or that the instructions were in any way inadequate.

III. Complaining Witness. Defendant argues finally that he was prevented from calling Dan Hoffard, the complaining witness, back to the stand to testify in defendant's case. After Mr. Hoffard had testified for the State, he asked to speak with the judge and did speak with defendant's counsel. Thereafter, the judge, Mr. Hoffard, and all counsel met outside the presence of the jury for the stated purpose of "making a record." Mr. Hoffard was questioned by counsel and the court; the record reveals that he was generally concerned that the incidents underlying the burglary charge had been blown out of proportion, and that he also was not very interested in pursuing this charge. When questioned by the court, he said that he had testified truthfully the previous day and was not intimidated into testifying. The record also reveals that, after Mr. Hoffard was thanked for coming forward and had left, defendant made no request to present this testimony to the jury, and the court did not refuse to allow it to be presented. The trial simply continued. Defendant did not make any record indicating his dissatisfaction with the proceeding, and we cannot review a matter not before the trial court. State v. Mark, 286 N.W.2d at 414. Error in not presenting Mr. Hoffard's testimony to the jury, if any, was not preserved.

IV. Sentencing. Defendant asserts, and the State concedes, that the record of defendant's sentencing reveals that the court, in arriving at defendant's sentence, considered some arrests of defendant's unrelated to the instant case and not reduced to judgment. See generally, State v. Hildebrand, 280 N.W.2d 393, 394-96 (Iowa 1979). Consequently, this matter is remanded for resentencing.

We have considered all of defendant's arguments and find no basis for reversal. Defendant's judgment and conviction are affirmed.

AFFIRMED; REMANDED FOR RESENTENCING.