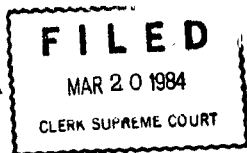


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,)

Plaintiff-Appellee,)

Filed March 20, 1984

vs.)

WILBUR SCOTT LeMOINE,)

Defendant-Appellant.)

4-09
83-175

Appeal from the Iowa District Court for Woodbury County - Charles R. Wolle, Judge.

Defendant appeals his conviction for theft in the second degree in violation of Iowa Code section 714.2(2) (1981). AFFIRMED.

Charles Harrington, Appellate Defender, and Linda Del Gallo, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Sherie Barnett, Assistant Attorney General, for plaintiff-appellee.

Considered by Schlegel, P.J., and Hayden and Sackett, JJ.

Defendant, Wilbur Scott LeMoine, appeals his conviction for theft in the second degree in violation of Iowa Code section 714.2(2) (1981). The defendant asserts that he was denied his right to a speedy trial pursuant to Iowa Rule of Criminal Procedure 27(2)(b) and that the evidence was insufficient to prove he had exercised control over stolen property. We affirm.

I. A trial information charging defendant with theft in the second degree was filed on July 26, 1982. Defendant entered a plea of not guilty and trial was set for September 21, 1982. For reasons not appearing in the record, the matter was subsequently rescheduled for trial to October 19, 1982. Assistant Woodbury County Attorney Charles N. Thoman was the attorney responsible for the preparation of the State's case. Mr. Thoman's mother died on October 17, 1982, and the County Attorney's Office filed a motion for continuance on October 18, 1982. The district court found good cause for the continuance and continued the trial to November 2, 1982. The funeral for Mr. Thoman's mother took place on October 19, 1982. On October 21, 1982, the defendant filed a motion to dismiss alleging that his right to a speedy trial had been violated. The ninety day speedy trial period under Iowa Rule of Criminal Procedure 27(2)(b) expired October 24, 1982. The trial court held a hearing on the defendant's motion to dismiss and overruled the motion on November 1, 1982, finding good cause for the continuance.

Iowa Rule of Criminal Procedure 27(2)(b) provides:

If a defendant indicted for a public offense has not waived his right to a speedy trial he must be brought to trial within ninety days after indictment is found or the court must order the indictment dismissed unless good cause to the contrary be shown. (emphasis added).

It is undisputed in this case that the defendant did not waive his right to a speedy trial and that he was tried after the ninety-day period. Therefore, the only issue is whether the State has met its burden to show good cause for the delay. See State v. Brandt, 253 N.W.2d 253, 255 (Iowa 1977).

Our review of the trial court's determination of the question of good cause is not de novo. When the determination of the trial court is supported by substantial evidence in the record, we must affirm. State v. Brandt, 253 N.W.2d at 256; State v. Reynolds, 250 N.W.2d 434, 437 (Iowa 1977). To secure a reversal defendant must show that the trial court abused its limited discretion in refusing to dismiss. State v. LaPlant, 244 N.W.2d 240, 242 (Iowa 1976).

In determining whether good cause exists which will justify a delay under Iowa Rule of Criminal Procedure 27(2)(b), the focus is on the reason for the delay. State v. Petersen, 288 N.W.2d 332, 335 (Iowa 1980). The trial court found that a fair trial of this matter could not be had on October 19, 1982, because another assistant county attorney would not have had time to sufficiently prepare the State's case. We believe this finding is supported by substantial evidence. The absence of Mr. Thorman was certainly unintentional and unforeseeable. Moreover, the delay in this case was minimal and the resulting prejudice to defendant was virtually nonexistent. The absence of the assistant county attorney was not brought about as a result of an administrative breakdown. See State v. Hunziker, 311 N.W.2d 692, 694 (Iowa Ct. App. 1981).

The sudden unavailability of a judge or prosecutor may be good cause for delay. State v. Newman, 257 N.W.2d 29, 31 (Iowa 1977).

We are unable to find the trial court erred in determining that good cause existed for delay of trial in this case.

II. At the close of the State's case and again at the close of all the evidence, the defendant moved for a judgment of acquittal on the ground that the State had presented insufficient evidence to show that the defendant had exercised control over the stolen property.

In reviewing the defendant's claim, this court views the evidence in a light most favorable to the State. All legitimate inferences that may reasonably be deducted therefrom will be accepted. State v. Freie, 335 N.W.2d 169, 171 (Iowa

1983); State v. Schrier, 300 N.W.2d 305, 306 (Iowa 1981). All the evidence must be considered when determining evidentiary sufficiency. State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980). Direct and circumstantial evidence is equally probative. Iowa R. App. P. 14(f)(16). Whether the evidence is direct or circumstantial, however, it must raise a fair inference of guilt; it must do more than create speculation, suspicion, or conjecture. State v. Schier, 300 N.W.2d at 308. The verdict will be upheld if supported by "substantial" evidence, i.e., evidence which would convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt. State v. Epps, 322 N.W.2d 288, 289 (Iowa 1982).

The defendant was accused of removing a John Deere lawn and garden tractor from a storage shed in Hartington, Nebraska, and selling it to Terry Taggart in Sioux City, Iowa. Viewing the evidence in the light most favorable to the State, it appears that Taggart approached the defendant about the possibility of buying a used John Deere lawn and garden tractor. Defendant subsequently informed Taggart that he thought he could get Taggart a tractor, but he wanted \$100 as good faith money. Taggart paid the defendant the \$100 in cash in May of 1980. On the morning of June 14, 1980, Taggart and his family returned from a trip and found a John Deere lawn and garden tractor in their driveway. Taggart testified that he subsequently paid the defendant an additional \$1,000.

The caretaker of the Harrington Cemetery, owner of the John Deere tractor, testified that the tractor was taken from a locked shed sometime between the afternoon of June 12th and the morning of June 14th. The tractor was large enough that it required special transport. The evidence shows that defendant had borrowed a truck and trailer the weekend of June 12th and 13th from an acquaintance. Furthermore, a friend of defendant's wife, Janice Peters, testified that defendant had used her phone to ask the owner of the truck and trailer for its use on the weekend of June 12th and 13th. Defendant told Peters that he planned to use the truck and trailer to get a tractor in Hartington,

Nebraska, to sell to Terry Taggert. Peters also testified that defendant's wife subsequently had several hundred dollars in her possession.

It is true, as defendant contends, that there was no direct evidence that he had taken actual physical possession of the tractor. However, there was substantial circumstantial evidence of defendant's possession of the tractor. The jury's verdict was supported by substantial evidence.

AFFIRMED.