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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA 389

STATE OF IOWA,)

Plaintiff-Appellee,) Filed February 26, 1985

vs.)

KEITH DARYL DeGROOTE,) 4-537
85-550

Defendant-Appellant.)

Appeal from the Iowa District Court for Black Hawk County - L. D. Lybbert, Judge.

Defendant appeals from the denial of his motion for a new trial on the grounds of newly discovered evidence. AFFIRMED.

Richard A. Knock of Mershon, Snow, Knock & Moothart, Cedar Falls, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Steven K. Hansen, Assistant Attorney General, for plaintiff-appellee.

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

HAYDEN, J.

Defendant appeals from the denial of his motion for a new trial on the grounds of newly discovered evidence.

Defendant was convicted in 1982 on a charge of robbery in the first degree for participating in the 1981 robbery of a movie theater. Defendant denied any knowledge of the robbery and presented an alibi defense.

Based on the evidence presented at trial the jury apparently found the following facts. On December 2, 1981, Robert Gene Christensen and Mary St. John were living together in the home of Richard and Alicia Butts in Cedar Falls. Sometime that afternoon the defendant came to the residence. Sometime after 9:30 p.m. Christensen and St. John left with defendant in defendant's father's pickup truck. The three of them went to the Cinema Theaters located in the College Square Shopping Center in Cedar Falls where they parked. Christensen walked over to the theaters and was allowed inside after knocking on a back door. Christensen ordered the theater manager to open the safe at gunpoint, took the money, and tied up the manager and the janitor. Over an hour and a half elapsed, during which time St. John and defendant remained in the pickup truck. When Christensen exited the theater, St. John and defendant picked him up. The three then left the area and Christensen handed a ".410 pistol" to St. John and had her give it to defendant. St. John recognized the gun as belonging to defendant. The three of them proceeded to Iowa Falls where they slept for a short time in a motel. They then drove to Webster City and inquired about bus schedules. Being dissatisfied with the schedule, they drove to Fort Dodge where Christensen and St. John purchased bus tickets to New Orleans and then rented a motel room. The defendant drove back to his parents' farm located between Parkersburg and Cedar Falls. The manager of the motel had copied the license number of defendant's pickup. Christensen and St. John were arrested and, either through their statements or a tracing of the license plate number, defendant became involved in

the investigation and was later arrested and charged with the robbery. Defendant wrote a letter to Christensen while Christensen was incarcerated at the Black Hawk County Jail which suggested that Christensen tell the authorities that defendant picked them up hitchhiking on the outskirts of Cedar Falls. Defendant in return proposed to testify on Christensen's behalf that Christensen was highly intoxicated on the night of the robbery.

On January 20, 1983, defendant filed a motion for new trial based on grounds of newly discovered evidence. A hearing was held on defendant's motion but prior to the trial court ruling defendant moved to reopen the hearing to present additional newly discovered evidence. Following the reopened hearing the trial court denied the motion for new trial.

On appeal defendant alleges the trial court erred in denying his motion. He cites essentially three areas in which new evidence was discovered after trial. First, the weapon used in the robbery was discovered after trial and does not correspond to some of the trial descriptions of it. Second, defendant presented evidence of statements made by St. John to another inmate of the Correctional Institution for Women in Mitchellville concerning defendant's participation in the robbery. Third, defendant presented evidence that the letter admitted into evidence at trial may not have been the same letter defendant wrote to Christensen.

Our review of this criminal proceeding is on assigned error. State v. Cuevas, 322 N.W.2d 910, 911 (Iowa Ct. App. 1982). In order to prevail on a motion for new trial on the basis of newly discovered evidence under Iowa Rule of Criminal Procedure 23(2)(b)(8) a defendant must show each of the following: (1) the evidence was discovered after trial; (2) it could not have been discovered earlier through the exercise of due diligence; (3) it is material to the issue, not merely cumulative or impeaching; and (4) it would probably change the result if a new trial is granted. State v. Folck, 325 N.W.2d 368, 375 (Iowa 1982); State v. Gilroy,

313 N.W.2d 521-22 (Iowa 1981). Motions for new trial on the basis of newly discovered evidence are not favored; they should be closely scrutinized and sparingly granted. State v. Gilroy, 313 N.W.2d at 522. The trial court has wide discretion in ruling on the motion; we will only interfere when there is a clear abuse of that discretion. Id.

A. The Gun. At trial St. John testified that when Christensen got in the truck after the robbery he handed her a gun to give to defendant. She also testified that earlier in the day she had seen a .410 gauge pistol with a long barrel in defendant's possession. In a pretrial statement, St. John had described defendant's gun as a single shot .410 pistol which she had seen defendant break down many times. She stated that the gun had "Snake Charmer" written on it and that she had never seen one exactly like it before.

Christensen testified at trial that although defendant and St. John were in the pickup truck during the robbery, they did not know of his plans to rob the theater. He testified that the gun he used was a "sawed-off .410" which he owned and had put together himself from the parts of other guns. Christensen stated that he threw the gun out of the truck between Cedar Falls and Iowa Falls. Contradicting Christensen's trial testimony, however, was a statement he made shortly after being arrested to the effect that he had obtained the gun from defendant. This out-of-court statement was admitted only for the limited purpose of impeachment of Christensen's testimony.

A private investigator hired by defendant's parents unsuccessfully attempted to find the gun based on Christensen's testimony that he threw it in a ditch along the highway. However, at defendant's hearing on his motion for new trial Rachel Ritzman testified concerning statements made by St. John while they were both incarcerated at Mitchellville. She stated that St. John told her the weapon used in the robbery was a sawed-off shotgun and it had been dropped from a green bridge in Cedar Falls.

Also at the first hearing on defendant's motion for new trial the manager of the of the theater testified that he had ample opportunity to observe the gun during the robbery. He stated that the gun had an octagonal barrel. He was shown exhibit 1, a Thompson/Center Contender, and exhibit 2, an H. Koob Snake Charmer. He testified that the coloring of the gun used by Christensen was more like exhibit 1, but that part of the hand grip on exhibit 2 was similar to the gun used in the robbery.

The manager of a gun department testified that the Thompson Contender is the only handgun now manufactured with an octagonal barrel and that the Thompson Contender .44 magnum barrel will accommodate a .410 gauge shotgun shell if the chamber is lengthened by reaming.

Following the hearing an octagonal barrel was found in the Cedar River approximately 130 feet downstream from a green bridge in Cedar Falls. The rest of the gun was not recovered. At the reopened hearing on defendant's motion, a chemist testified regarding the barrel's state of oxidation and concluded that it had been immersed two and a half to three years.

The trial court concluded that this newly discovered evidence was not material, but bore primarily on the credibility of St. John. The only purpose of the evidence was to impeach St. John's pretrial statement, which was not introduced at trial, that the gun she had seen in defendant's possession had "Snake Charmer" inscribed on it. Furthermore, although the barrel of the gun could not have been discovered prior to trial, the inconsistency between St. John's statement and the victim's recollection of an octagonal barrel could have been discovered prior to trial. While St. John was questioned in detail about the type of gun used, apparently no one thought to question the victim to see if their statements agreed. In the exercise of due diligence, this should have been done and the impeachment of St. John could have taken place at trial.

B. Statements of Rachel Ritzman. Rachel Ritzman testified at the hearing on defendant's motion that while the two women were confined together, St. John told her that Christensen and St. John borrowed defendant's truck, leaving him at the Butts house; that after Christensen robbed the theater the two of them drove to Fort Dodge where they were arrested. St. John also reportedly stated she involved defendant in the robbery because she though he had "snitched" on them and because she did not like the things Christensen did with other women when he was with defendant.

This testimony was also designed to impeach St. John's credibility. It differs not only from St. John's trial testimony, but also from Christensen's and defendant's versions of the incident. Defendant admitted at trial that he drove Christensen and St. John to Fort Dodge. We hold the trial court did not abuse its discretion in failing to give defendant a new trial on the basis of this evidence.

C. The Letter. While defendant was released on bond, he wrote a letter to Christensen at the county jail. This letter, which was admitted into evidence at trial, provided in part: "I also asked him [defendant's attorney] about your being loaded that night and it could get you off with about 5 years in Anamosa or less if I testify for you. If you will keep your part and testify about me picking you up a couple miles out of town on Hwy. 20, I will do everything in my power to help you." (Emphasis in original.) At trial defendant admitted that he wrote the letter and attempted to explain why he wrote it and what he meant by the language used.

After trial defendant contended that the letter admitted into evidence was not the same one which he wrote to Christensen. He stated that before trial he saw only a photocopy of the letter consisting of three separate pages, whereas after trial he saw that the original was two pages with writing on the back of the second page. Defendant maintained he had never sent a letter written on both sides of the page.

At the hearing on defendant's motion for new trial, a document examiner testified that he compared the letter to Christensen with other letters known to have been written by defendant, and concluded they were not all written by the same person. He testified the letter to Christensen was written by a right-handed person whereas the other letters were written by a left-handed person. Defendant is left-handed. On rebuttal a document examiner working for the State criminalistics division testified that the letter to Christensen was written by the same person who wrote the known samples.

The trial court did not err in denying defendant's motion for a new trial on the basis of this evidence since it could have been discovered prior to trial in the exercise of due diligence. Defendant's trial attorney testified that before trial defendant questioned whether he had written all of the letter. The attorney said they discussed the matter at length but did not pursue it because defendant could not point to any particular parts of the letter which he thought he had not written. The attorney testified that defendant raised the possibility that his mother may have written part of the letter. Furthermore, the attorney stated he was sure defendant saw the original of the letter prior to taking the witness stand and admitting authorship. We conclude that this was not newly discovered evidence.

AFFIRMED.