IN THE COURT OF APPEALS OF IOWA

No. 5-471 / 94-1190

STATE OF IOWA.

Plaintiff-Appellee.

vs.

CHAD DAVID DIETRICK,

Defendant-Appellant.

FILED
NOV 27 1995
CLERK SUPREME COURT

Appeal from the Iowa District Court for Black Hawk County, Jon Fister, Judge.

Chad David Dietrick appeals from his conviction, following a jury trial, of second-degree robbery. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Annette L. Hitchcock, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Shawn Wehde, Assistant County Attorney, for appellee.

Considered by Hayden, P.J., and Habhab and Huitink, JJ.

HABHAB, J.

Defendant Chad Dietrick appeals his conviction for the crime of robbery in the second degree in violation of Iowa Code sections 711.1 and 711.3. We affirm his conviction.

On January 16, 1994, Dietrick and Donald Rottinghaus drove to a QuikTrip in Cedar Falls, Iowa. Dietrick was driving Rottinghaus' car. Rottinghaus put $13 worth of gasoline into the car. At this same time, Rick Watters was shoveling snow in the parking lot as a favor for his wife who worked there. Watters testified he felt Rottinghaus was acting in a suspicious manner. Watters walked by the car to get the license plate number and he then saw Rottinghaus place snow over the back license plate.

Watters told Rottinghaus he had already seen the license plate and told him to pay for the gasoline. Watters then walked to the front of the car in order to observe the driver. Rottinghaus talked to Dietrick briefly, then got into the car. The car accelerated forward suddenly. Watters jumped onto the hood of the car in order to avoid getting hit. In the street, the car spun around and hit a snow bank. Watters rolled off the car into the snow bank. A rear tire on the car hit Watters' buttocks.

Watters reported the incident to the police. Police officers were able to trace Rottinghaus' vehicle from the license plate number. Rottinghaus was arrested and he gave a statement to the police. Officers then arrested Dietrick and he also gave a statement. Both men were charged with robbery in the first degree.

The State filed a motion to consolidate the cases. Dietrick objected on the ground he and Rottinghaus had mutually antagonistic defenses. He was also concerned the jury would improperly consider Rottinghaus' statement in determining Dietrick's case. The district court granted the State's motion to consolidate.

At trial, Dietrick's defense was based on a claim of diminished capacity. He testified he was under the influence of alcohol, marijuana, and mescaline at the time of the robbery. Rottinghaus testified only that he had a high grade point average in high school. Rottinghaus' attorney presented the claim Rottinghaus did not aid and abet Dietrick because he did not intend or know Dietrick would drive the car towards Watters.

A jury found Dietrick guilty of robbery in the second degree. He was sentenced to a term of imprisonment. He appeals.

Defendant contends the district court abused its discretion in consolidating his trial with that of Rottinghaus. He believes the joint trial in this case prejudiced his right to a fair trial.

Iowa Rule of Criminal Procedure 6(4)(b) provides:

> When an indictment or information jointly charges two or more defendants, those defendants 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, defendants shall be tried separately. When jointly tried, defendants shall be adjudged separately on each count.

When a trial court has ruled on a motion to sever, our standard of review is for abuse of discretion. *State v. Thornton*, 506 N.W.2d 777, 779 (Iowa 1993). To

establish an abuse of discretion, the defendant must show sufficient prejudice to constitute denial of a fair trial. *State v. Snodgrass*, 346 N.W.2d 472, 475 (Iowa 1984).

Joint trials have the potential to prejudice a defendant's right to a fair trial in several ways: (1) the admission of evidence in a joint trial, which would have been inadmissible in separate trials; (2) a defendant may be prevented from presenting exculpatory testimony of a codefendant; (3) the trial is of such complexity and length the jury is unable to effectively compartmentalize the evidence against each defendant; or (4) conflicting defenses presented by the codefendant. *State v. Clark*, 464 N.W.2d 861, 863 (Iowa 1991).

Defendant has raised an argument under each of these four potential areas of prejudice. It is defendant's burden to establish separate trials are necessary to avoid prejudice that would deny a fair trial. *State v. Truesdell*, 511 N.W.2d 429, 431 (Iowa App. 1993). We will consider each of defendant's arguments in turn.

I. In Rottinghaus' statement to police officers, he stated he and Dietrick both knew when they went to the QuikTrip they were going to take gasoline without paying for it. Also, Rottinghaus' statement did not support Dietrick's claim Watters was not in front of the car when he started to leave and Watters jumped from the side onto the hood of the car. Defendant claims he was prejudiced because these statements would have been inadmissible if there had been separate trials.

We note the jury was instructed to consider the guilt or innocence of each defendant separately. We do not find the jury was unable to separately consider the

guilt or innocence of each defendant. Also, the location of Watters before the car started moving was already in evidence through Watters' testimony. Furthermore, defendant admitted he knew when they left the QuikTrip they had not paid for the gasoline. We find defendant has failed to show he was prejudiced by the admission of Rottinghaus' statement.

II. Defendant claims Rottinghaus would have provided exculpatory testimony at a separate trial. However, he has failed to allege what exculpatory testimony Rottinghaus would have provided. Based on defendant's bare assertion of exculpatory testimony, we find defendant has failed to show prejudice under this argument.

III. Defendant contends the trial was of such complexity and length the jury was unable to effectively compartmentalize the evidence against each defendant. The trial started on May 25, 1994, and concluded on May 27, 1994. The jury deliberated for about one-half hour on May 27, 1994, and then returned after the Memorial Day weekend and reached its verdict on May 31, 1994. Defendant claims if the cases had been separated, one could have been heard before Memorial Day and one after Memorial Day.

We do not find defendant has sufficiently shown prejudice due to the length or complexity of the case.

IV. Finally, defendant claims his defense and that of Rottinghaus were in conflict to the point of being irreconcilable and were mutually exclusive. Defendant

claimed he was intoxicated and did not know a crime was occurring until they left the QuikTrip without paying for the gasoline. He points out this is in conflict with Rottinghaus' statement in which he stated he and Dietrick knew when they went to the QuikTrip they were going to take gasoline without paying for it.

The test for irreconcilability of defenses is if the jury, in order to believe the core testimony offered on behalf of one defendant, must necessarily disbelieve the testimony offered on behalf of a codefendant. *Clark*, 464 N.W.2d at 864. The mere presence of conflict, antagonism, or hostility among defendants or the desire of one to exculpate himself by inculpating another are insufficient grounds to require separate trials. *Snodgrass*, 346 N.W.2d at 475. That two defendants may completely disagree on some detail of the facts is not sufficient to compel severance. *Id.* at 476.

We do not find defendant has shown the core testimony of his defense and that of Rottinghaus are mutually exclusive. Defendant's defense was that he was intoxicated and was unable to form a specific intent. Rottinghaus' defense was that he was not responsible for Dietrick's actions. We do not find these defenses are irreconcilable or mutually exclusive.

We determine defendant has failed to show he was prejudiced by the district court's denial of his request to sever the trials. We affirm defendant's conviction for robbery in the second degree. Costs of this appeal are assessed to defendant.

AFFIRMED.