FILED
NOV 30 1983
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Plaintiff-Appellee,)
vs.)
JAMES EMERY ROUSE,)
Defendant-Appellant.)

Filed November 30, 1983

3-272
69103

Appeal from Johnson District Court - William R. Eads, Judge.

Defendant appeals from his conviction of burglary in the second degree, Iowa Code sections 713.1 and 713.3, asserting that the trial court abused its discretion in: (1) allowing defendant's alleged accomplice to testify even though the prosecution had failed to give timely notice of the accomplice's testimony; and (2) denying defendant's motion for mistrial based on prosecutorial misconduct. AFFIRMED.

Larry L. Fugate of David P. Poula Law Firm, Iowa City, for defendant-appellant.

Thomas J. Miller, Attorney General, and Marcia Mason, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Snell and Hayden, JJ.

PER CURIAM

Defendant James Emery Rouse was convicted of burglary in the second degree, Iowa Code sections 713.1 and 713.3, in April 1982. He appeals from the conviction, asserting that the trial court abused its discretion in: (1) allowing the defendant's alleged accomplice to testify even though the prosecutor had failed to give timely notice of the accomplice's testimony; and (2) denying defendant's motion for mistrial based on prosecutorial misconduct. We affirm the trial court's decision.

Our review in criminal cases is on assigned error. State v. Cullison, 227 N.W.2d 121, 126-27 (Iowa 1975). Abuse of discretion has been defined as "an erroneous conclusion and judgment, one clearly against the logic and effect of facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom." State v. Morrison, 323 N.W.2d 254, 256 (Iowa 1982) (quoting Best v. Yerkes, 247 Iowa 800, 816, 77 N.W.2d 23, 32 (1956)). The defendant must show "that such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable." State v. Morrison at 254 (quoting State v. Buck, 275 N.W.2d 194, 195 (Iowa 1979)).

I. Timely Notice of Accomplice's Testimony. On April 26, 1982, at the opening of his jury trial, defendant moved in limine to prevent the State from introducing the testimony of his alleged accomplice, Ronald Thompson; he asserted that the State had not given notice of the testimony at least ten days before trial, pursuant to Iowa Rule of Criminal Procedure 18(4) (1981), nor had it moved for leave to introduce the testimony on a showing of diligence, pursuant to Iowa Rule of Criminal Procedure 18(5) (1981).

A hearing was held. The testimony indicated that the county attorney had delivered the notice of additional testimony to the jail on Friday, April 16, ten days before trial, to be served on defendant but that defendant had not been served in fact until the following Monday, April 19. The county attorney testified

that he had not personally served defendant's attorney with the notice until Tuesday, April 20, in part because defendant's attorney had been out of town from April 16 to April 19. The county attorney also testified that he had approached defendant's attorney about the possibility of Thompson testifying almost immediately after Thompson had been arrested and that he had not known until Saturday, April 24, that Thompson would in fact testify against defendant. The county attorney offered to make a formal motion for leave to introduce Thompson's testimony. The court did not require the county attorney to make a formal motion, but invited the county attorney to offer evidence of diligence. After the county attorney testified as to his diligence, the court ruled that the accomplice's testimony could come in as if a motion had been made.

Iowa Rule of Criminal Procedure 18(5) states:

> Whenever the prosecuting attorney desires to call witnesses to support the indictment, of which he or she shall not have given ten days' notice because of insufficient time therefor since the prosecutor learned said testimony could be obtained, the prosecutor may move the court for leave to introduce such testimony, giving the same particulars as in the former case, and showing diligence, supported by affidavit or other evidence . . . . [I]f the court sustains said motion, the defendant shall elect whether said cause shall be continued on his motion, or the witness shall then testify. If said defendant shall not elect to have said cause continued, the prosecuting attorney may examine said witness in the same manner and with the same effect as though ten days' notice had been given defendant or the defendant's attorney . . . .

Iowa R. Crim. P. 18(5) (1981) (emphasis added). The trial court informed defendant of his right to a continuance, but suggested it would be easier for the court and more efficient to go ahead as planned. The defendant chose to go ahead with the trial. The State contends that by choosing to go ahead with the trial, defendant waived his right to appeal any error by trial court in admitting the testimony. See State v. King, 256 N.W.2d 1, 9 (Iowa 1977); State v. Sevcik, 239 N.W.2d 571, 574 (Iowa 1976). The defendant claims his actions in electing against a continuance did not waive his right of appeal in this case in light of the trial court's assurances:

> Gentlemen, I'm going to . . . permit Mr. Thompson's testimony. However, we are confronted with the delay period.
>
> For any appeal rights, Mr. Fugate [defendant's attorney], would you have any inclination to go on with the trial without, in any sense, waiving it? I mean, we can delay it until Thursday or whenever the ten days is; however, that certainly plays chaos or could with the court schedule. However, your client has a right to insist on it without any prejudice to him whatsoever . . . .
>
> Could we proceed with the trial tomorrow without you waiving in any way the fact that it should not have been permitted in the first place?

Under the circumstances, we find that defendant has not waived any right to proceed with a timeliness of notice objection; however, we also find that defendant was not prejudiced by allowance of accomplice's testimony in this case.

The purpose of the notice rule is "to inform defendant of the witnesses against him and the substance of their testimony." State v. Sevcik at 573 (quoting State v. Bruno, 204 N.W.2d 879, 886 (Iowa 1973)). Defendant was present at the accomplice's deposition. Defendant's counsel admitted he felt he could be prepared to oppose accomplice's testimony at trial. Thus, he was informed of the substance of the witness's testimony and had sufficient time to prepare for its introduction at trial.

The trial court inquired extensively into the county attorney's "due diligence" in serving timely notice. The court also made sure that going forward with the trial as planned would be acceptable to defendant. Taking into account the explanations given by the county attorney and the arguments in opposition given by defendant, we do not find an erroneous judgment "clearly against the logic and effect of facts and circumstances before the court . . . ." State v. Morrison at 256 (quoting Best v. Yerkes, 247 Iowa 800, 816, 77 N.W.2d 23, 32 (1956)).

II. Prosecutorial Misconduct. During his opening statement, defendant's attorney, in an attempt to impeach Thompson, the accomplice witness, told the

jury that when Thompson was stopped at the scene of the burglary for which defendant was charged, a stolen TV set was found in his car, and that, as part of a plea agreement, in return for his testimony at defendant's trial, Thompson would not be charged with any offense arising out of the TV set incident. During his direct examination of Thompson, the prosecutor argued that he should be able to question Thompson about events which had occurred earlier in the day of the burglary in question, including the burglary involving the TV set, because defendant's attorney had "opened the door" for such testimony with his opening statement. The prosecutor also argued that evidence of other crimes could be introduced to show motive, intent, or common scheme. Defendant objected to the admission of the testimony, and the trial court excluded it.

During his closing argument, defendant's attorney again attacked Thompson's credibility; he mentioned the stolen property charge in connection with the plea agreement. During his closing argument, the prosecutor responded to the attack on Thompson's credibility; he discussed the plea agreement and the effect it should have on Thompson's credibility. He stated:

> [Defendant's attorney] referred, I think in his opening argument or opening statement and also in his closing, about stolen property, possession of stolen property charge, and that was based on a T.V. that was found in the car with Mr. Thompson when he was stopped at the Kloubec residence, and, ladies and gentlemen, if that is designed to further impeach Mr. Thompson, I submit to you that if it's true — and that's your decision to make — that Mr. Rouse was the other person that was present that night with Mr. Thompson, and he also was in possession of the same stolen property. Okay. So that's something that is being used here to impeach Mr. Thompson, quite possibly unfairly.

Out of the presence of the jury, defendant's attorney moved for a mistrial on the basis of prosecutorial misconduct; he asserted that defendant had been prejudiced by the prosecutor's remarks during closing argument because they implied defendant had committed another crime. The trial court did not declare a mistrial, but it offered to give a cautionary instruction to the jury. Defendant's attorney refused the offer.

On appeal, defendant argues that the trial court should have granted his motion for a mistrial. The Iowa Supreme Court has stated:

> In passing on a mistrial motion predicated on alleged prosecutorial misconduct trial courts are vested with considerable, though not unlimited, discretion . . . . So our primary concern is whether there was an abuse of discretion by trial court in overruling defendant's motion for mistrial.

State v. Morris, 227 N.W.2d 150, 153 (Iowa 1975). See also State v. Wright, 309 N.W.2d 891, 893 (Iowa 1981). Misconduct of a prosecutor is ground for reversal only if it deprives the accused of a fair trial. Wright at 893. In turn, "[t] o prevail on a claim that a defendant has been denied a fair trial by prosecutorial misconduct, defendant must show the misconduct and that defendant was prejudiced by it. State v. Gilroy, 313 N.W.2d 513, 519 (Iowa 1981); State v. Love, 302 N.W.2d 115, 119 (Iowa 1981).

Defendant has not demonstrated sufficiently that he was prejudiced by the prosecutor's conduct. We cannot say, therefore, that defendant was deprived of a fair trial or that the trial court abused its discretion in denying defendant's motion for mistrial. Defendant's request for reversal on the ground of prosecutorial misconduct fails.

AFFIRMED.