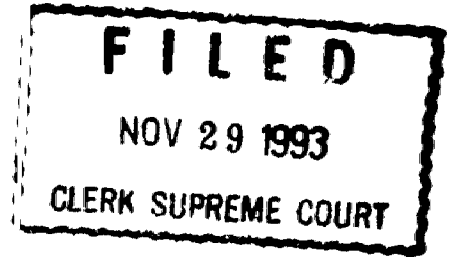


IN THE COURT OF APPEALS OF IOWA

No. 3-458 / 92-306



STATE OF IOWA,

Appellee,

vs.

MARTIN RANDOLPH SULLIVAN,

Appellant.

Appeal from the Iowa District Court for Winneshiek County, James C. Bauch, Judge.

Sullivan appeals from his conviction, following a jury trial, of assault with intent to commit sexual abuse.

AFFIRMED.

Linda Del Gallo, State Appellate Defender, and Andi S. Lipman, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General; Chris Odell, Assistant Attorney General; and Karl G. Knudson, County Attorney, for appellee.

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

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DONIELSON, P.J.

On ~~June~~ 7, 1991, Lona Hageman went to the Zipper, a tavern in Festina, Iowa. She danced with a man she met there. He suggested they go to another bar, but said she would have to drive. Hageman's friend told her not to go because the friend needed Hageman to give her a ride home. Nevertheless, Hageman left with the man while her friend was in the bathroom.

After the man got Hageman to pull off the highway and onto a gravel driveway, he threatened to assault her sexually. She attempted to run away, but he caught her and took her back to the car where he ripped off her clothes. He wanted to have intercourse, but she refused. He said if she would not have intercourse then she had to perform oral sex on him. She did not feel she had a choice in the matter and performed fellatio. When cars drove by on the highway he threw her on top of the car, warned her to keep quiet, and covered her mouth and nose with his hand.

When the assault was completed, the man threatened to kill her unless she drove him back to the Zipper. She drove him back and he returned her blouse and skirt. He kept her undergarments so she would not have them as evidence. He also left a twenty-dollar bill in her car, stating it would pay for his actions.

Hageman drove to a house ten miles away and told her friends she had been sexually abused. She contacted the police the next afternoon after talking with her mother.

As a result of police investigation, the State charged Martin ~~Randolph~~ Sullivan with sexual abuse in the second degree. Sullivan filed a motion to dismiss, alleging among other things, prosecutorial misconduct. After a hearing, the court found the State had withheld some exculpatory evidence until shortly before the trial, but dismissal was not appropriate. Instead, the court continued the trial and allowed Sullivan to redepose witnesses, including Hageman. The court also authorized Sullivan to spend up to \$1000 on an investigator. The court further informed the parties it would instruct the jury the State had withheld exculpatory evidence and the jury could consider this fact in reaching its decision.

After jury selection but before trial, the State filed separate charges against Sullivan of tampering with witnesses and suborning perjury. Sullivan moved to strike the jury panel or dismiss the case contending the charges were filed to taint the jury. The district court, after questioning the jury, denied the motions but sealed the file. The charges were later dismissed.

Prosecution witnesses included Carolyn Ackerman and her sister Lisa Bolding. Sullivan objected to the testimony of both witnesses. Ackerman testified that three or four years previously Sullivan had raped her. She had known Sullivan for fifteen years and had had a child by him. Bolding testified that Sullivan had raped her during their ten year acquaintance. As in the assault on Hageman,

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Ackerman and Bolding said Sullivan had ripped their undergarments and had covered their mouths and noses with his hand.

The jury convicted Sullivan of assault with intent to commit sexual abuse, in violation of Iowa Code section 709.11 (1991). The court sentenced him to an indeterminate term of confinement not to exceed two years.

Sullivan appeals. He argues prosecutorial misconduct denied him a fair trial. He also asserts the trial court erred in admitting testimony concerning prior claims of sexual abuse.

I. Prosecutorial misconduct.

We review allegations of prosecutorial misconduct to ascertain whether the trial court abused its discretion in determining whether misconduct occurred and prejudice resulted. State v. Anderson, 448 N.W.2d 32, 33 (Iowa 1989); State v. Williams, 315 N.W.2d 45, 55 (Iowa 1982). One complaining of prosecutorial misconduct has the burden to prove both that misconduct occurred and that prejudice resulted. State v. Ruble, 372 N.W.2d 216, 218 (Iowa 1985).

Appellant asserts our review should be de novo citing State v. Blanks, 479 N.W.2d 601 (Iowa App. 1991) and Polly v. State, 355 N.W.2d 849 (Iowa 1984). We disagree. In Blanks, the prosecutor made racial allusions in closing remarks, clearly injecting bias. Blanks, 479 N.W.2d at 605. In Polly, the defendant failed to appeal alleged errors at trial to avoid disturbing a plea bargain. Polly,

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355 N.W.2d at 853-56. The de novo review was to determine whether Polly met his burden to show sufficient cause for failing to appeal. Id. at 856. Both cases are inapposite to this case. Appellant does not allege any racial bias and properly raised the issues at trial and on appeal. Therefore we examine each allegation of prosecutorial misconduct to determine whether the court abused its discretion when ruling on the allegations.

A. Withholding exculpatory and impeachment evidence.

Appellant first asserts he was prejudiced because the State withheld evidence until just before trial. We disagree. The State did not disclose all the evidence in its possession until just before the initial date for trial, but appellant cannot show prejudice. The trial court granted a continuance and allowed appellant to conduct extensive discovery including the opportunity to depose witnesses and redepose witnesses. The court also instructed the jury "along the lines that the State . . . withheld exculpatory evidence in this case and that that may be considered by them in reaching their decision." We find the trial court's response appropriate. Appellant has not shown that the outcome of the trial would have been different if he had received the evidence earlier. Brewer v. State, 444 N.W.2d 77, 83 (Iowa 1989).

B. Influencing and intimidating witnesses.

1. **William Collins.** Appellant alleges Collins changed his testimony in depositions based on promises of

immunity from the prosecutor. The record discloses disagreement between the prosecutor and defense counsel concerning exactly what immunity was promised. Collins' own testimony is unclear. The trial court and defense counsel had ample opportunity to explore the issue and to examine the witness. We determine the trial court did not abuse its discretion in deciding there was no prosecutorial misconduct and appellant was not prejudiced.

2. **Deb Lennon and Lona Hageman.** Appellant asserts the victim's identification of appellant "was based upon improper influences by officers." We do not believe the alleged influence is prosecutorial misconduct. Even if we assume for sake of argument that the officer's actions are imputed to the prosecutor, appellant had Lennon's identification suppressed. The court examined Hageman's identification and the photographic lineup during trial and correctly found the lineup "not unduly suggestive." The trial court did not abuse its discretion in finding no prosecutorial misconduct in this situation.

C. **Failure to have State witnesses appear for depositions.**

Appellant alleges the prosecutor advised the witnesses they did not need to attend depositions if the depositions would be inconvenient for the witnesses. Nothing in the record supports this assertion. Rather, it appears the prosecution worked with defense counsel to reschedule the depositions. The court granted a continuance to allow

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appellant ample time to depose the witnesses. We agree with the trial court there was no prosecutorial misconduct.

D. Instructing the victim not to answer questions during redeposition.

After the trial was continued, appellant moved to redepose the victim. The State resisted the motion. In granting the motion, the district court restricted the allowable areas of questioning to questions about alleged inconsistencies. Appellant was not to question about past behavior. When defense counsel asked questions about past behavior the State advised the victim not to answer. The State correctly advised the victim pursuant to the limitations imposed by the court. The district court properly found no misconduct by the prosecutor.

E. Filing additional charges after the jury was empaneled.

During its investigation of the case, the prosecution received information of an attempt by the defendant to bribe a witness. The prosecution filed additional charges of suborning perjury and witness tampering. Defendant moved to strike the jury panel and dismiss the case. Before trial, the court questioned the jurors about any knowledge they had about the case and any additional charges. Satisfied there was no effect on the jury, the court denied the motions to strike and to dismiss and sealed the file. We find no evidence in the record the charges were filed in bad faith. The record clearly shows

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the charges had no effect on the jury. The trial court did not abuse its discretion in finding appellant was not prejudiced by the charges filed after the jury was empaneled.

F. Providing false or misleading information to the court.

1. Appellant argues the prosecutor misled the court by stating that October 16, 1991 "would be the last trial date within the 90 days" when the trial information was filed on July 16, 1991. The trial court properly exercised its discretion in determining this logical miscalculation does not amount to misconduct. The prosecution did not intentionally try to delay the trial until the time for a speedy trial had passed. Rather, the record suggests defense counsel, knowing October 16th was two days beyond the ninety allowed, did not inform the court in an effort to use the rule as a trap to avoid prosecution. See State v. Hamilton, 309 N.W.2d 471, 475 (Iowa 1981) ("The rule was not intended to provide a defendant with a weapon to trap state officials and terminate prosecutions.").

2. Appellant also asserts inaccuracies in an affidavit filed by the prosecutor amount to misconduct. We disagree. The trial court could find the inaccuracies to be the result of incomplete recollections of the precise wording of what was said in a hearing. Absent more indication of intent to mislead the court, appellant has failed to meet his burden to show the trial court did not

properly exercise its discretion in determining the prosecutor's actions were not misconduct.

3. Appellant argues the prosecutor lied to the court about promises of immunity made to a witness. The record does not support such claim. The prosecution did seek immunity for the witness from charges of perjury. It also discussed immunity relating to other charges, but made no offers, since the other charges were not within the jurisdiction of the prosecutor. The court could find that answering questions about immunity and referring the witness to private counsel was not misconduct.

Appellant asserts, as his final charge of prosecutorial misconduct, that the timing in filing an amended trial information was designed to prejudice appellant. The amended trial information was filed within the applicable time standards of Iowa R. Crim. P. 18(2). In ruling on the motion to amend, the trial court specifically found a lack of design by the State "to cause difficulties to the defendant." We agree with the trial court's determination and find no abuse of discretion.

In summary, we determine the trial court did not abuse its discretion in any of the circumstances complained of above. The court properly found no prosecutorial misconduct and, consequently, no prejudice to appellant. He has failed to carry his burden of showing the trial court exercised its discretion unfairly, arbitrarily, or in

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a manner not to effectuate justice. State v. Monroe, 236 N.W.2d 24, 30 (Iowa 1975).

II. Improper Admission of Evidence.

Appellant alleges the trial court improperly admitted testimony of two prior sexual abuse victims in violation of Iowa R. Evid. 404(b). We disagree. Appellant argued at trial that the victim was mistaken in her identification of him as her assailant. The State introduced testimony from two witnesses who related similarities between their experience being attacked by appellant and the attack in this case for purposes of proving a correct identification of appellant. Evidence of "other crimes" may be admissible if relevant. Iowa R. Evid. 404(b). The prior crimes must be reasonably similar to the crime at bar. State v. Emerson, 375 N.W.2d 256, 260 (Iowa 1985). Once the court determines the evidence is relevant, the prejudicial effect must substantially outweigh its probative value before the court should exclude it. Iowa R. Evid. 403; State v. Plaster, 424 N.W.2d 226, 229 (Iowa 1988). The court weighed the admission of the testimony, found it relevant, and determined its probative value outweighed its potential to cause unfair prejudice. Such determination rests within the sound discretion of the court. Iowa R. Evid. 403; State v. Harmon, 238 N.W.2d 139, 145 (Iowa 1976). After a careful review of the record, we cannot say the trial court abused its discretion to allow the testimony.

AFFIRMED.