FILED
APR 29 1980
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

582

STATE OF IOWA,

Plaintiff-Appellee,

vs.

LARRY HARLAN RAND,

Defendant-Appellant.

Filed April 29, 1980

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63572

Appeal from Black Hawk District Court - L. John Degnan, Judge.

Defendant appeals jury verdict finding him guilty of robbery in the first degree in violation of section 711.2, supplement to the Code 1977, alleging trial court erred in overruling 1) his motion to dismiss for violation of his right to speedy trial, 2) his motion for directed verdict, and 3) his request for a jury instruction on accessory after the fact. AFFIRMED.

Alvin R. Davidson, Assistant Public Defender, Black Hawk County Public Defender's Office, Waterloo, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Selwyn L. Dallyn, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

JOHNSON, J.

Defendant, Larry Harlan Rand, appeals jury verdict finding him guilty of robbery in the first degree in violation of section 711.2, supplement to the Code 1977. He alleges trial court erred in overruling 1) his motion to dismiss for violation of his right to speedy trial, 2) his motion for directed verict, and 3) his request for a jury instruction on accessory after the fact. We affirm.

At approximately ten o'clock p.m. on September 19, 1978, Kenneth LaRue Brant and Nyleeta Elaine Huffaker, armed with a sawed-off shotgun, entered the Kum N Go convenience store in Cedar Falls, Iowa, and demanded the cashier turn over all the store's money to them. Upon fleeing the store, they jumped into a waiting car owned and operated by defendant. After a short pursuit by a witness, defendant drove his car out of town, where he missed a turn and skidded into a ditch. The trio tried to no avail to remove the car and subsequently obtained a ride. Indicating they lived there, defendant and his companions requested to be dropped off at a farm house before proceeding on foot to their real destination, the residence of Kenny Brant.

Utilizing trained tracking dogs, law enforcement officers traced the trio to Brant's farmhouse. After requesting the suspects to come out, officers entered the house, where they found Huffaker hiding in an upstairs bedroom closet. Brant and defendant were in an attic crawl space and did not come out until ordered to do so by officers. After a brief search, officers found money from the Kum N Go store hidden in the attic and also seized from the kitchen the gun used by Huffaker during the robbery.

Defendant was charged by a Black Hawk county attorney's information on September 26, 1978. On October 25, 1978, defendant filed a motion for change of venue due to adverse pretrial publicity. The State resisted on November 1, 1978, and hearing was held November 16, 1978. Trial court granted defendant's motion on December 5, 1978. The case was continued and trial was rescheduled for January 29, 1979, in Dubuque County. A motion to dismiss due to the State's failure to comply with the ninety day speedy trial requirement was filed by defendant on January 9, 1979. Trial court overruled the motion on January 10, 1979, finding cause for the delay in trial attributable to defendant.

I. Right to Speedy Trial. Under Iowa's speedy trial statute, a defendant must be tried within ninety days after indictment, unless 1) the right is waived by defendant, 2) the delay is attributable to defendant, or 3) other good cause to the contrary is shown. Iowa R. Crim. P. 27(2)(b); State v. Ege, 274 N.W.2d 350, 354 (Iowa 1979). It is

the State's duty, not defendant's, to timely prosecute and begin trial within this allowable period. State v. Lybarger, 263 N.W.2d 545, 546 (Iowa 1978).

On review we will not examine trial court's determinations of delay in bringing defendant to trial de novo. State v. Reynolds, 250 N.W.2d 434, 437 (Iowa 1977). In order to obtain a reversal, defendant must show trial court abused its discretion. Ege, 274 N.W.2d at 354. In determining whether good cause exists, our sole focus is on the reason for the delay. State v. Petersen, 288 N.W.2d 332, 335 (Iowa 1980). In assessing sufficiency of the reasons for delay, we will consider the surrounding circumstances, including 1) length of the delay, 2) whether defendant asserted his right to a speedy trial, and 3) whether he was prejudiced by the delay. Id.

To support his contentions trial court abused its discretion, defendant cites State v. Goff, 244 N.W.2d 579 (Iowa 1976), which held trial court's forty-one day delay in ruling on defendant's motion for change of venue was not attributable to defendant. Id. at 583. We, however, conclude Goff is factually distinguishable. In the case at bar, defendant's motion for change of venue was granted. Had defendant's motion been denied as in Goff, trial would have proceeded on December 12, 1978, as originally scheduled. Trial in fact commenced on January 29, thirty-five days after expiration of the ninety day period. Defendant filed his motion on October 25, 1978; hearing was held November 16, 1978; and trial court granted defendant's motion on December 5, 1978. Since time reasonably required to process and implement a defense motion is attributable to defendant, we find trial court under these circumstances properly ruled the delay in trial was chargeable to defendant. State v. Moehlis, 250 N.W.2d 42, 46 (Iowa 1977); State v. Butler, 243 N.W.2d 232, 233 (Iowa 1976).

Defendant also alleges Iowa R. Crim. P. 27(2)(b), by expanding the time for speedy trial to ninety days, reflects an intention by the legislature to eliminate as "good cause" any delay attributable to defense motions which are timely filed within the thirty day period of Iowa R. Crim. P. 10(4). Defendant cites no authority for this novel proposition, however. We, therefore, will not consider it on appeal. Iowa R. App. P. 14(a)(3); State v. Janssen, 239 N.W.2d 564, 569 (Iowa 1976).

Moreover, in considering the strength of the reason for delay, we find length of the delay was reasonable since trial had to be rescheduled in another county. Further, defendant failed to make any demand for speedy trial. Nor has defendant shown he was prejudiced in any way by the delay.

In light of these considerations, we cannot find trial court abused its discretion either in continuing the case or denying defendant's motion for dismissal.

II. Motion for Directed Verdict. Defendant's second assignment of error alleges the State presented insufficient evidence to support a finding he was guilty of first-degree robbery and trial court erred in denying his motion for a directed verdict. The jury's finding of guilt is binding on this court if there is substantial evidence in the record to support the verdict. State v. Cuevas, 281 N.W.2d 627, 631 (Iowa 1979); State v. Jones, 271 N.W.2d 761, 763 (Iowa 1978). Substantial evidence is "such evidence as could convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt." State v. Robinson, 288 N.W.2d 337, 339 (Iowa 1980). In our review, we consider the evidence in the light most favorable to the prosecution. Jones, 271 N.W.2d at 763. Although the rule enunciated in Robinson requires Iowa courts to consider all the evidence when determining sufficiency of the evidence, Robinson, 288 N.W.2d at 340, this modification of the previous Iowa rule applies prospectively only.[1]

Viewing the evidence under these standards, we find defendant, by his own admission, at the scene of the crime, waiting outside the establishment which was robbed in a car with its engine running. His two companions entered the establishment wearing masks. One was carrying a sawed-off shotgun. His companions ran out of the store towards the parking lot where defendant already was "reving up" the getaway car. He sped away from the scene and evaded the pursuit of a witness. Defendant, along with his companions, attempted to hide from police after they had been tracked down. Money from the Kum N Go store was found in defendant's possession in the attic. Defendant's participation in the event may be inferred by his presence, companionship, and conduct before and after the offense is committed. State v. Larson, 221 N.W.2d 278, 280 (Iowa 1974). Such an inference also may be drawn to show defendant's knowledge of the crime prior to its commission. State v. Buttolph, 204 N.W.2d 824, 825 (Iowa 1973). The verdict is supported by substantial evidence. Trial court properly denied defendant's motion and submitted the case to the jury.

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[1] "...[M]odification of the ...rule applies only to trials of criminal prosecutions beginning on or after the day the present opinion is filed, and to cases tried before the filing of this opinion in which the question was preserved and which are now on appeal or are appealed after the filing of this opinion." Robinson, 288 N.W.2d at 340.

III. Instruction on Accessory After the Fact. As a final allegation, defendant contends trial court erred in refusing to instruct the jury on accessory after the fact. Accessory after the fact, however, "is a separate offense, and not a lesser included offense of robbery." State v. Sanders, 289 N.W.2d 375, 377 (Iowa 1979) (quoting Newkirk v. State, 222 So. 2d 435, 436 (Fla. App. 1969)). Trial court properly refused defendant's requested instruction.

Judgment of trial court is affirmed.

AFFIRMED.