IN THE COURT OF APPEALS OF IOWA

No. 1-344 / 90-1414

FILED
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CLERK SUPREME COURT

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**STATE OF IOWA,**

Appellee,

vs.

**JOHN LYNN CLEMENTS,**

Appellant.

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Appeal from the Iowa District Court for Polk County, Ray A. Fenton, Judge.

Clements appeals his conviction for robbery in the first degree. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Brian K. Sissel, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Thomas S. Tauber, Assistant Attorney General, John P. Sarcone, County Attorney, and Jamie Bowers, Assistant County Attorney, for appellee.

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

**SCHLEGEL, P.J.**

John Clements was accused of robbing the manager of Paesano's Pizza, Bruce Kennedy. Clements was a former employee of Paesano's Pizza and was known to Kennedy. Kennedy reported to police that he was able to recognize Clements even though the robber was wearing a ski mask.

Clements was charged with first-degree robbery. At his jury trial he testified that he had not committed the robbery and that he was home in bed at the time of the robbery. Clements' attorney, however, had failed to file a notice of alibi defense. Therefore, according to Clements, he was not afforded an instruction on his alibi defense and was unable to develop that defense by calling additional witnesses. The jury found Clements guilty of robbery in the first degree. Clements has appealed the resulting conviction.

Clements contends the district court erred by admitting testimony from victim Bruce Kennedy which exceeded the scope of the minutes of testimony. The challenged testimony related to Kennedy's degree of acquaintance with Clements before the robbery. Clements contends this testimony was prejudicial because it supported Kennedy's eyewitness identification of Clements as the robber.

Clements also contends his trial attorney rendered ineffective assistance by failing to file a notice of alibi defense. The State responds that this issue should be preserved for a future postconviction action.

Our review is limited to the correction of errors at law. Iowa R. App. P. 4.

I.

Clements first contends the trial court erred in admitting testimony which exceeded the minutes of testimony. The minutes of testimony stated in pertinent part that Bruce Kennedy would testify:

> He is the manager for Paesano's Pizza, 2804 S.W. Ninth in Des Moines. He was working there on December 9, 1989, at approximately 12:40 a.m., when a man wearing blue jeans and a blue ski mask came in and robbed him. The robber asked him to step back from the money and get on the ground. He (Kennedy) asked if it was a joke because he recognized the voice and the face of the robber from the part of the face that was visible. He recognized the robber to be John Clements, a person who had worked at Paesano's Pizza earlier.
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> * * *
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> He (Kennedy) recognized the voice, build and face of the robber. The robber had a bad case of acne and that was another reason why he recognized the robber to be John Clements. The mask left the nose, cheeks, eyes and one-half the robber's forehead exposed.
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> * * *
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> The witness will testify to all of these matters in detail. . . .

At trial, with respect to the basis of his ability to recognize Clements as the robber, Kennedy testified:

> Q. So how do you know him? A. He used to work for us.
>
> Q. In what capacity? What did he do for you at the pizza place? A. He was strictly a delivery driver.

Q. How long had he worked for you approximately? A. I believe about six months. Six to nine months.

Q. Would you describe to this jury the relationship you have between you and your other employees? Is it a close one, is it one where you don't know who these people are? Tell them what it's like. A. Well, like I say, me and my wife has ran the place for eight years. And we've always kept a close relationship with our employees. It's a close-held company. We're there day-to-day. And we have pool parties, Christmas parties, stuff like that with the employees.

Q. During the time that Mr. Clements here worked for you, did he attend those kind of parties and stuff like that? Did he get to know you on a social basis? A. Yes. We -- John was just like any other employee. And we accepted him just like any other employee.

Q. Do you know approximately when he quit working for you as a delivery driver? Ballpark. A. I would say the winter of '88, I would say.

Q. Okay. After he quit working for you as a delivery driver, did you have any contact with him in any way socially or did you see him ever again? A. Yeah. When John had become -- after his employment, he was a relatively frequent customer.

* * *

Q. I think where I left off, I was talking to you, Mr. Kennedy, and asking you about your relationship with this defendant, whether or not you knew him socially or in any other occasions outside of just being a delivery driver for your pizza place. A. Well, not outside being, being one of our employees. But we were in close contact; we had a close relationship with everybody that worked for us.

Q. How about after he quit then? A. After he quit, he was a frequent customer of the restaurant.

Q. When you say frequent customer, does that mean once a month, once a week, once a day? What do you mean by that? A. Well, in John's case, it seemed like he was -- After he'd quit, it seems

> like I hadn't seen him for three or four months. But then after that, he was coming in probably once or twice a week. He was good friends with a lot of the other employees. A lot of the situations was maybe stopping by and seeing somebody that worked there.

Clements claims the above testimony went beyond the minutes of testimony since it touched upon the social relationship between Kennedy and Clements and upon Clements' visits to Paesano's after he quit working there. Clement contends the court erred in admitting this testimony over his objection and that he is entitled to a new trial.

The State is required to provide the defendant with a "full and fair statement" of the expected testimony of each witness upon filing a trial information. Iowa R. Crim. P. 5(3).

> A minute of evidence shall consist of a notice in writing stating the name, place of residence, occupation of the witness upon whose testimony the indictment is found, and a full and fair statement of the witness' testimony before the grand jury and a full and fair statement of additional expected testimony at trial.

Iowa R. Crim. P. 4(6)(a). The minutes must "alert defendant generally to the source and nature of the evidence against him." State v. Musso, 398 N.W.2d 866, 868 (Iowa 1987) (citations omitted). The purpose of this requirement is to apprise an accused of the evidence in the "prosecution's arsenal." Id. If the minutes fail to adequately apprise and do so to defendant's prejudice, a reversal will follow. State v. Walker, 281 N.W.2d 612, 614-15 (Iowa 1979). If the challenged minutes, though

incomplete, put defendant "on notice of the necessity of further investigation of the witness' probable testimony" a reversal need not follow. Musso, 398 N.W.2d at 868 (citing State v. Lord, 341 N.W.2d 741, 743 (Iowa 1983)).

We believe Kennedy's testimony was within the general nature of the minutes. See Lord, 341 N.W.2d at 742-43. The minutes made clear that Kennedy would testify as to the basis of his ability to recognize Clements as the robber. Clements cannot claim he was surprised by Kennedy's testimony. The challenged testimony was within the scope of the minutes and the court properly admitted it.[1]

II.

Clements also argues the defense counsel's failure to file a notice of alibi denied him his constitutional right to effective assistance of counsel. Advance notice of the defense of alibi is required. Iowa R. Crim. P. 11(a). A defendant may, in absence of notice of alibi, take the

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1. See, e.g., State v. Ellis, 350 N.W.2d 178, 181-82 (Iowa 1984) (minutes stated witness would identify defendant as perpetrator; testimony that defendant's hand was bleeding held within overall nature of the minutes); Lord, 341 N.W.2d at 742-43 (minutes stated police technician would describe vehicle; testimony that insides of windows had been wiped with cloth and that marks on light covers were made by defendant's knife held properly admitted); State v. Ristau, 340 N.W.2d 273, 275 (Iowa 1983) (minutes stated kidnapping victim would testify about confinement; testimony that defendant told her "don't run off" held consistent with minutes); State v. Epps, 313 N.W.2d 553, 557-58 (Iowa 1981) (minutes stated willful injury victim would testify about relationship with defendant; testimony that defendant told victim he would get revenge held properly admitted); State v. Caldwell, 404 N.W.2d 186, 188 (Iowa App. 1987) (minutes stated witness would testify concerning stolen tractor; testimony as to tractor's value held properly admitted).

stand and claim he was far from the scene. State v. Fechter, 397 N.W.2d 711, 713 (Iowa 1986). When the defendant elects to go further by calling a witness to support his alibi, however, he must have meet the notice requirements. Id. (citation omitted).

Clements himself was allowed to testify that he was home in bed at the time of the robbery. We do not know (1) whether he could have produced any witnesses to corroborate this alibi, (2) whether Clements' counsel decided not to file notice of an alibi defense as a matter of trial strategy, or (3) whether Clements concurred in the decision. On the present record we simply do not have enough information to determine whether there is merit to Clements' claim. We preserve his ineffective assistance of counsel claim for postconviction proceedings under Iowa Code chapter 663A.

III.

We affirm Clements' conviction and preserve his ineffective assistance of counsel claim for a postconviction action.

**AFFIRMED.**