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IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Plaintiff-Appellee,)
vs.)
DAVID MICHAEL ADCOCK,)
Defendant-Appellant.)

Filed February 5, 1980

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62436

Appeal from Polk District Court - Ray Hanrahan, Judge.

Defendant appeals from jury conviction for sexual abuse in the second degree in violation of section 709.3, supplement to the Code 1977, asserting trial court erred 1) in overruling his motion for severance; 2) in admitting certain evidence; and 3) in limiting his cross-examination of a rebuttal witness, in not permitting the witness to be called as an adverse or rebuttal witness for the defense or in not allowing defendant to reopen his case-in-chief. Defendant also alleges he was denied effective assistance of counsel and, therefore, must be granted a new trial. We affirm on all issues and find defendant was adquately represented by trial court. AFFIRMED.

Alfredo G. Parrish of Parrish and Del Gallo, Des Moines, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa; Richard L. Cleland, Selwyn L. Dallyn, and Ann Fitzgibbons, Assistant Attorneys General; for plaintiff-appellee.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Defendant, David Michael Adcock, appeals from jury conviction for sexual abuse in the second degree in violation of section 709.3, supplement to the Code 1977, asserting trial court erred: (1) in overruling his motion for severance; (2) in admitting certain evidence; and (3) in limiting his cross-examination of a rebuttal witness, in not permitting the witness to be called as an adverse or rebuttal witness for the defense or in not allowing him to reopen his case-in-chief. Defendant also alleges he was denied effective assistance of counsel and, therefore, must be granted a new trial. We affirm on all issues and find defendant was adequately represented by trial counsel.

The facts are undisputed that Sharon Johnson and a girlfriend, Mary Kennedy, were in downtown Des Moines "scooping the loop" in Mary's car before dawn, January 8, 1978. The three defendants were engaged in the same activity in a decorated van belonging to defendant Adcock. After some conversation and the exchange of a couple of cans of beer, the five young people ended up in an area known as "Reefer Road," where they smoked marijuana. Subsequently, Mary left the van and drove away in her car. Sharon remained in the van. Mary became concerned and notified the police, describing Sharon, the van and her perceptions of the situation. Sometime later Sharon was let out of the van in a highly deserted area on the far northwest side of the Des Moines metropolitan area. She ultimately reached a residence and phoned friends to pick her up. As a result of Mary's communication, the police located Sharon and the defendants. After Sharon told her story to the police, defendant Adcock and co-defendants Jack Eldridge and Glenn Nuckolls were arrested and charged with sexual abuse in the second degree in violation of section 709.3, supplement to the Code 1977, for committing a sex act[1] upon the person of Sharon Johnson by force and against her will on January 8, 1978. The defendants were tried jointly in July 1978. Each was convicted by the jury and sentenced to a term not to exceed twenty-five years.[2]

I. Severance. On March 28, 1978, a motion for joint trial was made by the State to consolidate the trials of Adcock, Eldridge and Nuckolls. This motion was resisted by

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[1] Under the supplement to the Code 1977, " 'sex act' or 'sexual activity' . . . means any sexual contact between two or more persons, by penetration of the penis into the vagina or anus, by contact between the mouth and genitalia or by contact between the genitalia of one person and the genitalia or anus of another person, or by use of artificial sexual organs or substitutes therefore in contact with genitalia or anus." Section 702.17, supplement to the Code 1977.

[2] Appeals on similar issues for all defendants are before this court. See State v. Nuckolls, No. 62455, and State v. Eldridge, No. 62456, decisions filed this date.

defendant Eldridge,[3] but the trial court overruled the resistance, found the defendants would not be prejudiced by a joint trial on charges arising out of the same occurrence, and ordered the trials to be held jointly. At trial, the three defendants joined in a motion for severance, which was overruled. On appeal, defendant contends he was prejudiced by the joint trial because his defense was inconsistent with those of the other co-defendants. He further claims he was denied the right to fully and effectively cross-examine either of his co-defendants about their extra-judicial statements and trial court's admonishments to the jury to disregard certain hearsay statements were not sufficient to prevent prejudice.

Rule 6(4)(b) of the Iowa Rules of Criminal Procedure provides for a joint trial, "... if in the discretion of the court a joint trial will not result in prejudice to one or more of the parties." That rule also provides "[w]here jointly tried, each defendant shall be judged separately on each count." While there is no case law interpreting this rule, the Iowa Supreme Court previously stated, after the effective date of the new criminal code, a separate trial of defendants who have been jointly indicted "may be had only when the court determines a joint trial would result in prejudice to one or more of the parties." State v. Berry, 247 N.W.2d 263, 265 (Iowa 1976).

In the federal courts, granting or denying a motion for severance rests in the sound discretion of the court and a clear abuse of that discretion must be shown by defendant to warrant reversal of trial court's denial of a motion to sever. See United States v. Runge, 593 F.2d 66, 73 (8th Cir. 1979); United States v. Rochon, 575 F.2d 191, 197 (8th Cir. 1978). See also 75 Am. Jur. 2d Trial § 17 (1974). Federal cases also have held a defendant's failure to renew a pretrial motion for separate trial at the close of the government's case or at the close of all the evidence results in a waiver of any right to separate trial. Rochon, 575 F.2d at 197. See also United States v. Lewis, 547 F.2d 1030, 1032 (8th Cir. 1976), cert. denied 429 U.S. 1111, 97 S.Ct. 1149, 57 L.Ed.2d 566 (1977). In the instant case, the motion for severance made at the opening of trial was not renewed thereafter. Without finding a waiver, however, we conclude defendant failed to show any prejudice or confusion resulted from the joint trial that would require reversal. The charges against the three defendants involved common questions of law

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[3] Although defendants Adcock and Nuckolls did not formally join in the motion and argument, their counsel apparently were present in the court when the motion was argued.

and facts. There is no showing the defenses of the three defendants were inconsistent, antagonistic, or irreconcilable. See United States v. Ehrlichman, 546 F.2d 910, 929 (D.C. Cir. 1976), cert. denied, 429 U.S. 1120, 97 S.Ct. 1155, 51 L.Ed.2d 570 (1977); Brady v. United States, 39 F.2d 312 (8th Cir. 1930). There was clear testimony as to the actions of each defendant; specific behavior or acts were attributed to each defendant; and each defendant took the stand in his own behalf. See Rochon, 575 F.2d at 197; United States v. Graham, 548 F.2d 1302, 1311 (8th Cir. 1977).

We also find defendant's argument regarding the prejudicial effect of alleged hearsay statements to be unpersuasive. This is not a Bruton situation wherein the United States Supreme Court held a cautionary instruction is inadequate to erase the prejudicial effect of trial court's admission into evidence of a non-testifying co-defendant's confession implicating defendant in the crime. See Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). A defendant's right to confrontation is abridged in such a circumstance. Id. See also Parker v. Randolph, 442 U.S. ___, 99 S.Ct. 2132, 60 L.Ed.2d 713 (1979). In the instant case, none of the alleged hearsay statements of the co-defendants implicated defendant. We conclude defendant has established no prejudice.

Defendant also argues he was denied full and effective cross-examination because the prior statements of his co-defendants were introduced after the close of defendant's case and, therefore, after the defendant who made the statement had left the stand. However, defendant made no attempt to call either co-defendant in rebuttal and did not ask to re-open his case for purposes of cross-examination of the co-defendants. Defendant has waived any right to challenge this aspect of his trial. State v. Uebberheim, 263 N.W.2d 710, 712 (Iowa 1978); State v. Washington, 257 N.W.2d 890, 895 (Iowa 1977).

II. Admission of Evidence. During direct examination of Sharon Johnson, the State sought to introduce into evidence the bra and panties she wore the night of the alleged crime. The articles had been held by law enforcement officers and examined and tested by the Bureau of Criminal Investigation (BCI). Defendant alleges the first knowledge he and his co-defendants had the panties were blood-stained came during the prosecution's opening statement. On appeal, defendant asserts the panties were not admissible because the State violated its duty to provide continuing discovery by failing to give defendant notice the panties were blood-stained. He further maintains the panties should not have been admitted into evidence because their prejudicial effect on the jury far outweighs their probative value.

Trial court's order for discovery required the State "to permit defendant to inspect, copy or photograph any tangible object pertaining to the alleged crimes" of which the State had possession, custody or control.[4] All such information was to be delivered to the defendant by May 5, 1978. The State also was required to notify defendant promptly of any additional evidence which was subject to discovery.

It appears from the record defendants, in compliance with the court's order, were given copies of, or made aware of, the report of both the BCI and the examining doctor. Also, defendants were advised the criminologist and the doctor would be called as witnesses. Because these reports were not introduced into evidence at trial, this court cannot verify their exact contents, but the physician's report apparently discussed the presence of blood on the outer portion of the victim's vagina and two lacerations which appeared on her external genitalia.[5] We cannot ascertain from the record why the BCI report did not mention the blood stain, but we do not find trial court abused its discretion in allowing the panties into evidence for this reason. Defendant had notice and ample opportunity to examine the panties prior to trial, but did not avail himself of the opportunity. See State v. Rush, 243 N.W.2d 313, 316 (Iowa 1976); State v. Eads, 166 N.W.2d 766, 772 (Iowa 1969).

We further find the panties' probative value outweighed any prejudicial effect they may have had on the jury. Trial court must balance the relevance of the evidence against a possible prejudicial effect and determine "if it tends to shed light upon a material inquiry in the case." State v. Nowlin, 244 N.W.2d 591, 593 (Iowa 1976). In this case defendant was charged with a crime involving force committed against the will of the complaining witness. The challenged evidence is probative as to these elements of the crime. It was not reversible error to allow introduction of this evidence.

III. Limitation of Cross-Examination and Denial of Defendant's Motion to Call Adverse or Rebuttal Witness or to Re-Open Case-in-Chief. Deputy sheriff Shirley Reynolds, one of the investigating officers, was called as a witness for the State in its case-in-chief. After the State's direct examination of the witness, only counsel for defendant Eldridge proceeded to cross-examine. Deputy Reynolds was recalled as a rebuttal witness for the State after the defense rested. At that time, she gave

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[4] Adcock, App. p. 4.

[5] Adcock, App. at 53.

testimony regarding supplemental police reports she had filed. After Reynolds' rebuttal testimony, defense counsel were furnished copies of the supplemental reports. Counsel for defendant Eldridge called the court's attention to paragraph 28 of one of the reports, which read: "At one time, while one was having intercourse with her, the other two subjects got out of the van. This was while the blonde was having intercourse with her (Glen Nuckolls)."

On appeal, defendant contends his right to a fair trial was abridged by trial court's refusal to permit him to bring this evidence before the jury by cross-examination of Deputy Reynolds following her rebuttal testimony, by calling her as a rebuttal or adverse witness, or by re-opening of his case-in-chief. The thrust of defendant's argument focuses on the issue of credibility. The State's theory of the case was that one of the defendants actually had sexual intercourse with Sharon Johnson and two attempted to do so. At the preliminary hearing and at trial, Sharon Johnson identified David Adcock as the person who had intercourse with her. Deputy Reynolds' supplemental report, based on statements made by the prosecutrix, as quoted above, identified defendant Nuckolls as the individual who actually had intercourse with Ms. Johnson.

"Granting permission to recall a witness for further examination, either direct or cross, lies largely within the discretion of the trial court." State v. Hall, 235 N.W.2d 702, 724 (Iowa 1975). Further, the Iowa Supreme Court often has reiterated the principle that the scope of cross-examination is a matter which lies within the sound discretion of the trial court. State v. Ege, 274 N.W.2d 350, 357 (Iowa 1979); State v. Jackson, 259 N.W.2d 796, 800 (Iowa 1977); State v. Everett, 214 N.W.2d 214, 219 (Iowa 1974). Likewise, the trial court has wide discretion in re-opening a case for the reception of additional testimony, Davidson v. Van Lengen, 266 N.W.2d 436, 440 (Iowa 1978), State v. Mason, 203 N.W.2d 292, 295 (Iowa 1972), and in determining what is proper rebuttal testimony. State v. Proulx, 252 N.W.2d 426, 432 (Iowa 1977); State v. McCullough, 226 N.W.2d 216, 217 (Iowa 1975); State v. Walker, 218 N.W.2d 915, 919 (Iowa 1974); State v. Willey, 171 N.W.2d 301, 302-03 (Iowa 1969). The trial court's rulings in these areas will not be disturbed except for a clear abuse of discretion. McCullough, 226 N.W.2d at 217; State v. Harrington, 178 N.W.2d 314, 316 (Iowa 1970).

Defendant argues he was not permitted to expose the jury to all facts from which the jurors could draw inferences relating to the credibility of Sharon Johnson. We believe this evidence is merely cumulative on the issue of the victim's credibility. There is substantial evidence in the record to corroborate Sharon Johnson's testimony she did not consent to sexual intercourse or genital contact with any of the three defendants. To sustain a conviction under section 709.3, it must be proven only that the accused, aided or abetted by one or more persons, committed a sex act constituting sexual abuse on a person in a threatening manner, by force or against the will of the other participant, that is, without consent.[6] The question of actual penetration, or which defendant may have made such penetration, does not have to be proven, if all other elements of the offense are proven beyond a reasonable doubt. The uncontroverted testimony illicited from the victim at trial established her perceptions of the events of the evening were confused and distorted. Further, defendant had an opportunity to question both Sharon Johnson and Deputy Reynolds when they testified in the State's case-in-chief and, with due diligence, could have discovered at that time the extent of Reynolds' investigation. In any event, the substance of the supplemental report in this case is not of a nature which would be material or change the results. Bizzett v. Brewer, 262 N.W.2d 273, 278 (Iowa 1978). The relevant issue is whether "... the jury has been deprived of a satisfactory basis for evaluating the truthfulness of the prosectuion witness' testimony." State v. Ege, 274 N.W.2d at 356. There has been no deprivation in this case.

We find trial court did not err in limiting cross-examination of the State's rebuttal witness or in overruling defendant's request to re-open his defense or to call Deputy Reynolds as a rebuttal or adverse witness.

IV. Ineffective Assistance of Counsel. On appeal, defendant contends he was denied effective assistance of counsel for and during the trial of this case. Because defendant alleges violation of a basic constitutional safeguard, we will evaluate the totality of relevant circumstances shown by the entire record. Long v. Brewer, 253 N.W.2d 549, 552 (Iowa 1977). "... '[E]ffective assistance of counsel' does not mean every mistake of judgment or error in trial strategy by an attorney serves to deprive an accused of a constitutional right." Long, 253 N.W.2d at 558. See also Tollett v.

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[6] See footnote 1, supra.

Henderson, 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973). Iowa has adopted the standard of "the range of normal competency" when reviewing an allegation of this nature. State v. Veverka, 271 N.W.2d 744, 750 (Iowa 1978); State v. Rand, 268 N.W.2d 642, 648 (Iowa 1978); Zacek v. Brewer, 241 N.W.2d 41, 50-51 (Iowa 1976). There must be an affirmative factual basis demonstrating counsel's inadequacy of representation. Cleeson v. State, 258 N.W.2d 330, 332 (Iowa 1977); Zacek, 241 N.W.2d at 50. The burden of proof as to each allegation is upon the defendant. Veverka, 271 N.W.2d at 750; Rand, 268 N.W.2d at 648.

Defendant alleges his counsel failed to perform in a competent manner by filing no written motion to sever and by making no objections to jury instructions at trial. Our review of the record leads us to conclude defendant has not shown how these failures have prejudiced him in any way. The motion to sever was presented orally to trial court and was denied. The objections to instructions, which defendant maintains counsel should have made at trial, do not point to any substantive deficiencies in the court's instructions which could have prejudiced defendant. Accordingly, we affirm trial court's judgment and find defendant was adequately represented by counsel at trial.

AFFIRMED.