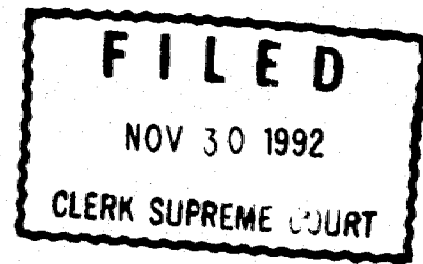


IN THE COURT OF APPEALS OF IOWA

No. 2-160 / 91-785



STATE OF IOWA,

Appellee,

vs.

TROY ANGELO McGEE,

Appellant.

Appeal from the Iowa District Court for Black Hawk County, L. D. Lybbert, Judge.

Troy McGee appeals, after a jury trial, from a judgment and sentence entered following his conviction of robbery in the first degree. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Ahmet S. Gonlubol, Assistant Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General; Bruce Kempkes, Assistant Attorney General; Thomas J. Ferguson, County Attorney; Michael W. Buckner, Assistant County Attorney; and Thomas N. Bower, Assistant County Attorney, for appellee.

Heard by Oxberger, C.J., and Donielson and Schlegel, JJ.

DONIELSON, J.

The defendant, Troy Angelo McGee, appeals his conviction, following a jury trial, of first-degree robbery.

At 9:00 p.m. on March 10, 1991, a man wielding a handgun robbed a Kum & Go convenience store near Falls Avenue in Waterloo, Iowa. The store's associate manager, Robert Dahlgaard, Jr., and his friend, Dale Ulfers, testified they were cleaning some of the machines in the store when a young black male approached them with a small black handgun and demanded all the store's money.

Dahlgaard opened the Lotto machine, which was being used in lieu of the broken cash register. The robber grabbed the money out of the machine and asked, "Where's the rest of it?" Dahlgaard pointed to the drop safe and the robber stood beside him as he opened it. As Dahlgaard pulled the money from the safe, the robber grabbed it and shoved it into a brown paper bag.

The robber then told Dahlgaard to stand back and began to walk toward the door with the paper bag containing over \$1,000. As the robber approached the door, a car pulled up and his nervousness became apparent. The robber waived the gun at Dahlgaard and stated, "You're coming with me." As the two walked out the door, the robber demanded Ulfers come as well. Dahlgaard and Ulfers were forced to walk in front of the robber until they reached Falls Avenue at which time the robber instructed them to run west. The two

men complied, and the robber ran in the opposite direction across Falls Avenue. Dahlgaard returned to the store where he called the police.

Although it was dark outside, the store had been brightly lit, and Dahlgaard was able to study the robber's facial features from a few feet away. He described the robber as approximately six feet tall, skinny, and about twenty to twenty-one years old. He stated the robber had a medium to light complexion and unusual eyes for his race, as they appeared "slanty" and light in color. He also testified the robber wore a hooded, black jacket with red sleeves. He said the hood on the jacket had covered the robber's hair.

Ulfers testified the robber was approximately five feet nine inches tall. He stated the robber was clean shaven, had "big" eyes, and weighed about 130 pounds. According to Ulfers, the robber wore a black windbreaker with three red stripes down the sleeves, and his black curly bangs protruded from under the hood of his jacket.

When the police arrived a few minutes later, Dahlgaard pointed in the direction the robber had fled. One police officer stopped to question Dahlgaard, and the others left to pursue the robber. About five minutes later, officers brought two black males to the store for Dahlgaard to view. Dahlgaard identified neither as the robber.

Several days after the robbery, Dahlgaard viewed a photo lineup at the police station. He was unable to

identify the robber from any of the photos. A few weeks later, Dahlgaard was again asked to view a photo array. From among six photographs, Dahlgaard identified McGee's picture as depicting the robber. Ulfers also identified McGee as the robber.

The State charged McGee with robbery in the first degree. Prior to trial, McGee filed a notice of alibi defense and listed three potential alibi witnesses. At trial, Delores Hall and Centralia Brown both testified on McGee's behalf. Both testified Brown had picked up Delores and Darlene Hall, as well as McGee, between 5:00 and 7:00 p.m. on March 10, 1990. They claimed Brown picked them up at their residence in Waterloo, and he was driving a gray loaner car obtained from Holdiman Motors. Hall testified the four had spent the evening driving around to celebrate the birth of her niece until 11:30 or 11:45 p.m., at which time Brown dropped the Hall sisters and McGee off at their residence. Both Hall and Brown testified neither they nor McGee went anywhere near Falls Avenue on that evening. McGee also testified in his own behalf confirming the testimony of his two witnesses.

After presenting this evidence, McGee made an oral motion in limine to preclude the State from presenting testimony to discredit his alibi. In support of his motion, McGee alleged the State had failed to comply with Iowa Rule of Criminal Procedure 10(11)(a). Rule 10(11)(a) provides the State must, within ten days of the defendant's

notice of alibi, "file written notice of the names and addresses of the witnesses the state proposes to offer in rebuttal to discredit the defendant's alibi." The district court denied McGee's motion in limine because McGee had testified on his own behalf.

The State then presented the testimony of its rebuttal witnesses. Lou Ella Brown testified she was Centralia Brown's mother and her car had been taken into Holdiman Motors for repair in March of 1990. She testified she was given a gray Horizon as a loaner which she kept for three to four days.

David Praisner testified he was the service manager at Holdiman Motors. He stated the work order for Lou Ella Brown's car showed the car was brought in for repairs on March 13, three days after the robbery. At that time, Lou Ella Brown was given a loaner car.

The jury found McGee guilty on the charge of robbery in the first degree. McGee now appeals.

McGee contends the district court abused its discretion in permitting the State to offer rebuttal testimony discrediting his alibi defense without giving the notice required by Iowa Rule of Criminal Procedure 10(11)(a) and the due process clause. McGee also argues he was denied effective assistance of trial counsel due to defense counsel's failure to object to certain testimony given by State's witness William Lacy. Lacy testified, without objection, that he heard McGee tell someone named James

that he had committed a robbery on Falls Avenue. McGee contends the testimony was hearsay and his counsel should have objected to or moved to strike it.

I. Ineffective Assistance of Trial Counsel. We find McGee's ineffective assistance of counsel claim to be without merit. The testimony of Lacy only related an alleged admission made by McGee as contemplated by Iowa Rule of Evidence 801 (d)(2)(A). As such, his testimony was not hearsay, and McGee's trial counsel breached no duty in failing to object to the admissible evidence.

II. Iowa Rule of Criminal Procedure 10(11). McGee also contends the district court abused its discretion in permitting the State to offer rebuttal testimony without giving the requisite notice under Iowa Rule of Criminal Procedure 10(11)(a).

We first address McGee's assertion regarding our standard of review in this matter. McGee asserts we must conduct a de novo review, making an independent evaluation of the totality of the circumstances surrounding the alleged error because his due process rights were infringed by the district court's evidentiary ruling. See, e.g., State v. Gregg, 464 N.W.2d 431, 432 (Iowa 1990). We disagree.

McGee presented no argument of constitutional error to the district court, and we will not address one presented for the first time on appeal. State ex rel. Iowa Department of Human Services v. Duckert, 465 N.W.2d 871,

873 (Iowa 1991). Therefore, on this issue we review for an abuse of discretion. In order to show an abuse of discretion, one generally must show that the court exercised its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." State v. Blackwell, 238 N.W.2d 131, 138 (Iowa 1976) (quoting State v. Burnor, 132 Vt. 603, 326 A.2d 138, 140 (1974)).

Rule 10(11) provides in relevant part:

a. Alibi. A defendant who intends to offer evidence of an alibi defense shall, within the time provided for the making of pretrial motions or at such later time as the court shall direct, file written notice of such intention. The notice shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom the defendant intends to rely to establish such alibi. In the event that a defendant shall file such notice the prosecuting attorney shall file written notice of the names and addresses of the witnesses the state proposes to offer in rebuttal to discredit the defendant's alibi. Such notice shall be filed within ten days after filing of defendant's witness list, or within such other time as the court may direct.

* * *

d. Failure to Comply. If either party fails to abide by the time periods heretofore described, such party may not offer evidence on the issue of alibi . . . without leave of court for good cause shown. In granting leave, the court may impose terms and conditions including a delay or continuance of trial. The right of a defendant to give evidence of alibi . . . in his own testimony is not limited by the rule.

Iowa R. Crim. P. 10(11)(a), (d) (emphasis added).

Once the defendant has given proper notice of his alibi defense, the reciprocal notice requirement on the State arises not only as a matter of Iowa criminal procedural

law, but also as a matter of constitutional due process. See State v. Fechter, 397 N.W.2d 711, 713 (Iowa 1986) (citing Wardius v. Oregon, 412 U.S. 470, 472, 93 S. Ct. 2208, 2211, 37 L. Ed. 2d 82, 86 (1973); State v. Walton, 228 N.W.2d 21, 25 (Iowa 1975)). However, a defendant's limited compliance with rule 10(11)(a) will limit the protection he or she may claim under the rule. Id.

We believe McGee's notice of alibi defense was insufficient to trigger the State's duty to reciprocate with notice. McGee's notice failed to state, as the rule requires, "the specific place or places" where he claimed to have been when the robbery occurred. Therefore, within the meaning of the rule, McGee failed to "file such notice." This deficiency relieved the State of any duty under rule 10(11)(a) to notify McGee of the names and addresses of the witnesses it intended to call to discredit McGee's alibi.

McGee's notice of alibi defense did not sufficiently alert the State of his intentions. The purpose of Iowa's alibi notice rule is "to give the prosecution time and information to investigate the merits of such defense." State v. Lewis, 391 N.W.2d 726, 729 (Iowa 1986). By not providing the State with notice of where McGee was alleged to have been when the crime occurred, this deficiency certainly would have made the State's investigation of McGee's alibi more difficult.

Furthermore, even if McGee had properly complied with rule 10(11)(a), there was no abuse of discretion by the district court in allowing the rebuttal witnesses to testify on the ground these witnesses rebutted McGee's own alibi testimony. The district court correctly observed the defense had no obligation under rule 10(11)(a) to inform the prosecution before trial whether McGee would be testifying, and consequently the State had no reciprocal obligation to inform the defense before trial whether it had any witnesses rebutting McGee's own alibi testimony.

Accordingly, we find the district court did not abuse its discretion by allowing the State to call its rebuttal witnesses to discredit McGee's alibi.

The costs of this appeal are taxed to McGee.

For all the reasons stated, the judgment of the district court is affirmed.

AFFIRMED.

Oxberger, C.J., specially concurs; Schlegel, J., dissents.

OXBERGER, C.J. (specially concurring)

I concur specially. The prosecution's objection to the defendant's alibi notice that it was insufficient was untimely. The prosecution cannot lie in wait, lulling defendant into a belief the notice is adequate. To permit the prosecution to fail to comply with the statutory requirement to give notice of its rebuttal witnesses does not provide the defendant with a fair trial.

However, I find any error in permitting the State's rebuttal witnesses to testify was not prejudicial. The defendant testified as to the same facts to which his alibi witnesses testified. Because the State did not know the defendant was going to testify until he did testify, it had no duty to advise the defendant of the State's rebuttal witnesses. The State's rebuttal witnesses properly were allowed to testify in rebuttal to the defendant's own alibi testimony. Because the rebuttal evidence was properly before the jury, it would be an exercise in futility to tell the jury they could consider the rebuttal evidence as to the defendant's testimony but not to his alibi witnesses.

SCHLEGEL, J. (dissenting)

I respectfully dissent.

Because I believe the district court abused its discretion in permitting the State to offer rebuttal testimony discrediting McGee's alibi defense without giving the requisite notice, I would reverse and remand the case for a new trial.

McGee argues the trial court abused its discretion by permitting the State to offer rebuttal testimony discrediting his listed alibi defense witnesses without giving the requisite notice under Iowa Rule of Criminal Procedure 10(11)(a) and the Due Process Clause. In response, the State argues McGee's alibi notice was insufficient to trigger any duty on the part of the State to disclose its rebuttal witnesses since McGee failed to state the specific place or places at which he claimed to have been at the time of the alleged offense. Therefore, the State argues, the district court did not abuse its discretion in allowing rebuttal testimony which impeached McGee's testimony.

In the present case McGee filed a timely notice of alibi defense. The State filed no written notice to discredit McGee's alibi witnesses in accordance with rule 10(11)(a). While it is true McGee's notice of alibi defense did not include the specific place or places at which the defendant claimed to have been at the time of the alleged offense as provided in rule 10(11)(a), the

defendant's notice did specify the names and addresses (or telephone numbers) of the witnesses upon whom the defendant intended to rely to establish such alibi. I believe McGee's notice of alibi defense sufficiently alerted the State of his intentions. This is particularly true since the State did not challenge the sufficiency of the notice at the time and the notice enabled the State to locate witnesses to effectively testify in rebuttal.

On the other hand, McGee received no notification whatsoever regarding the names and addresses of the State's rebuttal witnesses. At the very least, the defendant is entitled to know the identity of such rebuttal witnesses following the defendant's disclosure to the State of the alibi defense and the names and addresses of the alibi witnesses upon which the defendant will rely. The absence of this rebuttal information surely prejudiced McGee's defense and perhaps his entire strategy.

The majority cites State v. Fechter, 397 N.W.2d 711 (Iowa 1986), to support the proposition that limited compliance with rule 10(11)(a) limits the protection the defendant can claim, leaving him vulnerable to rebuttal. See id. at 713. The majority contends this case effectively means the defendant's failure to comply with both conditions giving rise to a reciprocal prosecutorial duty under rule 10(11)(a) precludes any complaint concerning the State's nonperformance of the duty. I disagree with this interpretation of Fechter.

The issue addressed by the court in Fechter was whether the State's testimony discredited the defendant's alibi defense and thereby entitled the defendant to notice of the State's intent to call a particular rebuttal witness (Officer Saville). The State in Fechter argued, and the court agreed, the testimony was properly admissible because it did not discredit the defendant's listed alibi witnesses in his notice of alibi defense.

In Fechter the defendant filed timely notice of the alibi defense, proposing to offer the testimony of two witnesses who would account for his whereabouts during the time the offense occurred. Like the present case, the State in Fechter filed no written notice of intent to call witnesses to discredit the defendant's alibi. At trial a defense witness (Brammer), who was not listed by the defendant as an alibi witness in the defendant's notice of alibi, testified concerning the defendant's whereabouts during the approximate time period in question. After the defense rested the State proposed calling Officer Saville as a rebuttal witness to refute Brammer's in-court testimony. Saville was permitted to testify over the defendant's oral motion in limine claiming Saville's testimony should be prohibited since the State had not complied with the reciprocal notice provision of rule 10(11)(a). Saville's testimony during the State's rebuttal case was offered to discredit the unlisted Brammer's alibi testimony.

In this context, the Fechter court declared "Fechter's limited compliance with rule 10(11)(a) limits the protection he can now claim, leaving him vulnerable to rebuttal [testimony]." The court continued, "In summary, we conclude that the trial court ruled fairly in allowing officer Saville's testimony under the circumstances of this case. The rebuttal evidence neither discredited the alibi witnesses listed by the defendant in his notice, nor did it place the defendant at the scene of the crime. The defendant's claim that the evidence discredited his alibi is without merit." (Emphasis added.)

The emphasized portions of the Fechter court's discussion illustrate the essence of the court's analysis in determining whether the defendant is entitled to the reciprocal written notice contemplated in rule 10(11)(a) of the names and addresses of the witnesses the state proposes to offer in rebuttal to discredit the defendant's alibi. The court's underlying and guiding considerations are: (1) whether reciprocal notice to the defendant is fair under the circumstances of the case and (2) whether the State's rebuttal testimony discredited the defendant's alibi witnesses listed in his notice of alibi defense.

Applying the Fechter court's analysis to the instant case reveals the present case is readily distinguishable from Fechter on its facts. Here, McGee filed a notice of alibi defense and listed three potential alibi witnesses. At trial two of the listed witnesses, Delores Hall and

Centralia Brown, testified McGee had been riding around with them in a gray loaner car obtained from Holdiman Motors for most of the evening of March 10, 1990, the evening the robbery occurred. Both testified Brown had picked up Delores and Darlene Hall, as well as McGee, between 5 and 7 p.m. on March 10, 1990. Brown, they claim, picked up the members of this group at 440 Dawson in Waterloo. Hall testified the four had gone riding around to celebrate the birth of her niece. They claim to have gone several places and to have ridden around in the car until 11:30 or 11:45 p.m. when Brown delivered the Hall sisters and McGee to 440 Dawson. Both Hall and Brown testified neither they nor McGee went anywhere near Falls Avenue on the evening of March 10, 1990.

The Fechter court has noted:

By asserting an alibi defense, the defendant is claiming the impossibility of his having committed the offense by reason of being elsewhere when it was committed. [Citations omitted]. In other words, the fact of defendant's presence elsewhere is essentially inconsistent with his presence at the place where the offense was committed; therefore, he could not have personally participated. [Citation omitted].

Id. at 712-13. Here, two of McGee's listed alibi witnesses testified McGee was with them in a gray loaner car from Holdiman Motors from between 5 p.m. and 7 p.m. until approximately 11:30 or 11:45 p.m. on March 10, 1990. The robbery occurred at the Kum & Go at 9 p.m. that evening.

The State presented the testimony of two rebuttal witnesses which directly discredited McGee's alibi

witnesses. The State called Lou Ella Brown and David Praisner. Lou Ella Brown testified her car had been taken into Holdiman Motors for repair in March of 1990. She testified she was given a gray Horizon as a loaner during that time and she kept the loaner for three to four days.

David Praisner testified he is the service manager at Holdiman Motors. He stated the work order for Lou Ella Brown's car showed the car was brought in for repairs on March 13, 1990--three days after the robbery--and she was given a loaner car at that time.

Clearly the rebuttal testimony of Lou Ella Brown and David Praisner discredited the defendant's alibi defense as established specifically by Delores Hall and Centralia Brown. The names of these alibi witnesses had been divulged to the State seven months prior to trial in the defendant's notice of alibi defense. The Fechter court has stated:

[O]nce the defendant has given notice of intent to rely on the alibi defense, the State's right to discovery of the defendant's alibi witnesses triggers a reciprocal obligation by the State to reveal the identity of witnesses it intends to call to rebut the defense. Iowa R. Crim. P. 10(11)(a). This reciprocal notice is required not only as a matter of state procedural law, but also as a matter of constitutional due process. Wardius v. Oregon, 412 U.S. 470, 472, 93 S. Ct. 2208, 2211, 37 L. Ed. 2d 82, 86 (1973); State v. Walton, 228 N.W.2d 21, 25 (Iowa 1975).

Fechter, 397 N.W.2d at 713. The State knew of McGee's intent to rely on the alibi defense and failed to reveal the identity of its rebuttal witnesses as required by rule 10(11)(a).

The State, as well as the majority in this case, points out that the defendant has no obligation under rule 10(11)(a) to inform the prosecution before trial whether the defendant will give evidence of alibi. See Iowa R. Crim. P. 10(11)(d). Therefore, they argue, the State has no reciprocal duty to inform the defense before trial whether it will call witnesses to rebut the defendant's own testimony. Whether this contention is true or not, the argument ignores the fact that the State's rebuttal witnesses did directly contradict the defendant's listed alibi witnesses. This point is paramount as illustrated by the fact that the supreme court's analysis in Fechter centered around the determination of whether the State's rebuttal witness testimony discredited the defendant's listed alibi witnesses.

In Fechter the defendant took the stand and voluntarily amplified his alibi beyond the testimony of his listed alibi witnesses. As a result, the State in Fechter was able to put on rebuttal testimony which effectively impeached the defendant's amplified alibi testimony without contradicting the testimony of the defendant's listed alibi witnesses. Therefore, as the Fechter court determined, the State's rebuttal did not actually discredit the defendant's listed alibi. In the instant case, however, McGee's own testimony was precisely the same as the testimony of his listed alibi witnesses. McGee did not add any new dimensions to the alibi defense beyond the alibi provided by the listed alibi witnesses' testimony.

Therefore, unlike the Fechter case, the State in the present case could not possibly call rebuttal witnesses which would discredit the defendant's own alibi testimony without contradicting the testimony of the defendant's listed alibi witnesses. The Fechter court stated:

The State argues that the [rebuttal] testimony was properly admissible because it neither discredited the defendant's alibi witnesses nor placed the defendant at the scene of the crime. Our review of the nature of alibi, generally, and an examination of the litigants' duties under rule 10(11)(a) leads us to agree with the State. . . . In summary, we conclude that the trial court ruled fairly in allowing officer Saville's testimony under the circumstances of this case. The rebuttal evidence neither discredited the alibi witnesses listed by the defendant in his notice, nor did it place the defendant at the scene of the crime.

Id. at 712-13. As evidenced by the Fechter court's analysis, the controlling question in the present case is whether the State's rebuttal evidence, about which no written notice was given to the defendant, discredited the alibi witnesses listed in McGee's notice of alibi defense. Clearly the State's rebuttal evidence regarding the gray loaner car directly discredited the testimony of McGee's listed alibi witnesses, Delores Hall and Centralia Brown.

Our duty as a court is not to determine the guilt or innocence of defendants; our duty is to ensure a fair trial. Even if McGee is guilty of first-degree robbery, which he may be, he is entitled to a fair trial in order to ensure a just outcome. Holding the State to the same standard as that required by the defendant promotes

justice; to do otherwise is a denial of due process. The trial court abused its discretion by permitting the State's use of rebuttal evidence which employed witnesses of whom McGee had no notice; reversible error resulted. Accordingly, this case should be reversed and remanded to the district court for a new trial.