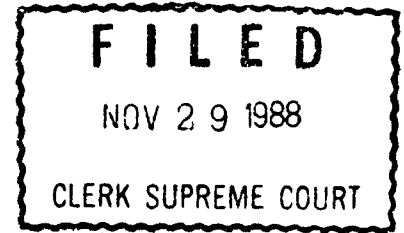


IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Plaintiff-Appellee,)
vs.)
RONALD EUGENE BRINKLEY,)
Defendant-Appellant.)



395

8-460
87-929

Appeal from the Iowa District Court for Scott County
(128682-02), James R. Havercamp, Judge.

Defendant appeals a jury verdict of second-degree theft
for his role in stealing a car and pushing it into the
Mississippi River. **AFFIRMED.**

Randy J. Hohenadel of Wells, McNally & Bowman,
Davenport, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa; Sarah J.
Coats, Assistant Attorney General; and Jack Burds, Student
Intern; for plaintiff-appellee.

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

HAYDEN, J.**396**

Ronald Eugene Brinkley appeals a jury verdict finding him guilty of second-degree theft for his role in stealing a car and pushing it into the Mississippi River. On appeal he contends the trial court erred in excluding testimony from two alibi witnesses. He also alleges ineffective assistance of counsel because his trial attorney failed to file timely notice of an alibi defense. Finally, he argues there was insufficient evidence to support the verdict. We affirm.

I.

On February 26, 1987, a Ford Pinto station wagon was stolen in Davenport and pushed into the Mississippi River. Ronald Brinkley and codefendant, Clifford Sisco, were charged with the crime after an eyewitness gave police the description and license number of a Cadillac driven away from the scene by two white males he had seen push the Pinto into the river. The jury heard testimony the Pinto belonged to codefendant's ex-wife. The codefendant's divorce had been finalized about two weeks before the crime. Sisco's ex-wife had been awarded the Pinto as part of the settlement, and Sisco still had a key to her car. Brinkley and Sisco both claim they had been somewhere else at the time in question and offered to produce two corroborating witnesses. The trial court sustained the State's motion to exclude such testimony on the ground the

defendant did not disclose the names of such witnesses to the State, or show good cause why he did not file notice of an alibi defense. The jury found both Brinkley and Sisco guilty of second-degree theft. It is from this decision the defendant now appeals. We affirm.

II.

On appeal, defendant contends the trial court erred by excluding testimony from the two alibi witnesses. He also alleges ineffective assistance of counsel because his trial attorney failed to file timely notice of an alibi defense. Finally, he argues an insufficiency of evidence to support the verdict.

In response, the State contends the trial court properly excluded the alibi witnesses after defendant failed to show good cause why no alibi notice had been given. The State further urges, based on an offer of proof of the two alibi witnesses' testimony, they could have accounted for defendant's whereabouts only part of the time in question and would have added little or nothing to his case. Consequently, in view of the overwhelming evidence produced at trial to support Brinkley's conviction, the State submits that he failed to show a reasonable probability the outcome would have been different if an alibi defense had been properly made.

III.

398

A. **Alibi Witnesses.** The defendant initially asserts he was denied a fair trial because of the exclusion of two proposed "alibi witnesses." At trial, counsel for Brinkley joined in a request by counsel for Sisco to call two alibi witnesses. After the defendant was allowed to make an offer of proof of this testimony, the trial court denied the defendant's request.

The rules regarding notice required by defendants, and particularly the notice of alibi witnesses, is contained in Iowa Rules of Criminal Procedure 10(11)(a) and the sanction for failing to comply in rule 10(11)(d), Iowa Rules of Criminal Procedure. The rules provide if the defendant fails to give notice of his intention to offer evidence of an alibi, the defendant may not offer such evidence without leave of court for good cause shown. The court in granting leave, however, may grant a delay or continuance of trial. The purpose of these notice requirements is to balance the interests of the defendant in a fair trial against the interests in protecting the State from sudden and unexpected appearance of a witness for the first time at trial under circumstances that make it impossible for the State to investigate the alibi defense or the witness. State v. Taylor, 336 N.W.2d 721, 724 (Iowa 1983).

The trial court's ruling disallowing the alibi testimony will not be disturbed absent an abuse of the

trial court's discretion. State v. Lewis, 391 N.W.2d 726, 728 (Iowa App. 1986). Iowa appellate courts will not find an abuse of discretion unless "such discretion was exercised on grounds for reasons clearly untenable or to an extent clearly unreasonable." Id. The burden of proving abuse of discretion lies with the defendant. Id.

Based upon defendant's failure to show good cause for not filing timely notice of an alibi defense, we determine the trial court acted properly in imposing the exclusion sanction of Iowa Rule of Criminal Procedure 10(11)(d).

The prosecution did not become aware of the intentions of the codefendant until opening statements at trial. After the State rested its case, counsel for codefendant told the trial court that she had been apprised there were alibi witnesses and asked that her client be allowed to go forward with an alibi defense. In response to the trial court's request for good cause why notice of an alibi defense had not been filed, defendant's attorney indicated he didn't see it as an alibi. The prosecuting attorney objected to defendant's motion because the shortage of time caused by the delay would have precluded him from deposing the two alibi witnesses and obtaining criminal histories on them to discover impeachable evidence. Under these circumstances the trial court's decision to impose the preclusion sanction was sound and must be affirmed.

B. Ineffective Assistance of Counsel.

Defendant

also contends trial counsel was ineffective in failing to file a timely notice of an alibi defense, which precluded him from using two alibi witnesses in his defense. We review claims of ineffective assistance of counsel de novo. State v. Hildebrandt, 45 N.W.2d 839, 841 (Iowa 1987).

Where the record on direct appeal is not adequate to permit us to resolve the issue, we preserve the defendant's claim for postconviction proceedings so the facts may be so developed. State v. Klemighian, 356 N.W.2d 237, 238 (Iowa App. 1984). This also gives the allegedly ineffective attorney an opportunity to explain his or her conduct. State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978). Defendant's complaints against his trial counsel are somewhat clouded by an assertion he could be responsible for the alleged ineffective assistance, because he did not give proper information to his trial counsel. We conclude there is inadequate record for us to adjudicate the defendant's claims without counsel's explanation for his conduct. We therefore preserve defendant's ineffective assistance of counsel claim for a later proceeding.

C. Insufficient Evidence.

The definition of theft

is found in Iowa Code section 714.1:

A person commits a theft when the person does any of the following:

1. Takes possession or control of the property of another, or property in the possession of

another, with the intent to deprive the other thereof.

As the trial court properly instructed the jury, in order to sustain a guilty verdict, the State must prove beyond a reasonable doubt:

1. That on or about February 26, 1987, the defendant knowingly took possession or control of the 1979 Ford Pinto station wagon;
2. That the defendant did so with the intent to permanently deprive Patricia Sisco of the 1979 Ford Pinto station wagon; and
3. That the 1979 Ford Pinto station wagon, at the time of the taking, was owned and in the possession of Patricia Sisco.

Defendant specifically argues the State's witness could not give a positive identification of either defendant or his accomplice, as the individuals who pushed or drove the car into the river. Defendant implies without this testimony the State cannot carry its burden of proving its allegations beyond a reasonable doubt. Those principles governing a challenge to the sufficiency of the evidence may be summarized as follows:

When reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the evidence in the record. State v. Hall, 371 N.W.2d 187, 188 (Iowa App. 1985); State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984). Direct and circumstantial evidence are equally probative so long as the evidence raises a "fair inference of guilty and [does] more than create speculation, suspicion, or conjecture." State v. Hamilton, 309 N.W.2d 471, 479 (Iowa 1981). It is necessary to consider all the evidence in the record and not just the

evidence supporting the verdict to determine whether there is substantial evidence to support the charge. Hall, 371 N.W.2d at 188; Bass, 349 N.W.2d at 500. Substantial evidence means evidence which would convince a rational factfinder that the defendant is guilty beyond a reasonable doubt. Hall, 371 N.W.2d at 188; State v. LeGeer, 346 N.W.2d 21, 23 (Iowa 1984).

State v. Wheeler, 403 N.W.2d 58, 60 (Iowa App. 1987).

Iowa case law does not require the State to produce witnesses who can positively identify the defendant. State v. Lewis, 242 N.W.2d 711, 723 (Iowa 1976). The State is required, as we have noted, to prove each element of the crime beyond a reasonable doubt. Id. The State may meet its burden through either direct or circumstantial evidence. Iowa R. App. P. 14(f)(16).

Despite the defendant's contentions, we find, after reviewing the evidence the State produced at trial, a rational trier of fact could find beyond a reasonable doubt defendant and codefendant on or about February 26, 1987, took possession or control of a 1979 Ford Pinto station wagon from Patricia Sisco with the intent to deprive her thereof.

No direct evidence identifying defendant was produced by the State, however, as we have stated, a defendant's close proximity to the scene of a crime and location and time are considered relevant circumstances a trier of fact could use in support of the defendant's conviction. Lewis, 242 N.W.2d at 723. Here the State's witness, Joseph Gradient, testified while driving to work shortly before

7:00 a.m. on February 26th, he observed a white male pushing a 1979 Ford Pinto into the Mississippi River. The man then jumped into a two-toned light gold or brown-colored Cadillac Eldorado, which was driven by another white male, with the license plate number ROX970. At trial, Gradient identified defendant's Cadillac Eldorado as the vehicle he saw that morning. Defendant, together with codefendant, both white males, were stopped by Davenport police officer Lynn Kindred, driving a tan Cadillac Eldorado with license plate number ROX970, a quarter of a mile from where the Pinto was found. Evidence indicated the time span between Gradient's observation and the defendant's arrest was short. Officer Kindred also testified the defendant was bleeding from his left hand when he stopped him. Later at the scene of the crime Officer Kindred observed blood and broken glass on the dashboard of the stolen car.

Further, Patricia Sisco, owner of the stolen Pinto, testified that during the six-month period while they were separated prior to their divorce, Clifford Sisco continually harassed her about the whereabouts of the Pinto. Also, Clifford Sisco still possessed a key to the Pinto at the time it was stolen. In addition, there was no evidence the car's ignition had been tampered with. When all the evidence in this case is taken in the light most favorable to the State, and all reasonable inferences are

drawn in favor of the verdict, it is clear a rational trier of fact could find from the surrounding circumstances defendant committed the theft of Patricia Sisco's 1979 Ford Pinto. We determine sufficient evidence was produced to sustain the verdict convicting the defendant of theft in the second degree.

AFFIRMED.