FILED
OCT 28 1987
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

262

STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

KEVIN LOWELL COOPER,)

Defendant-Appellant.)

Filed October 28, 1987

7-269
86-1165

Appeal from the Iowa District Court for Polk County (30835), Theodore H. Miller, Judge.

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

Charles Harrington, Chief Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Lona Hansen, Assistant Attorney General, for plaintiff-appellee.

Considered by Donielson, P.J., and Schlegel and Sackett, JJ. Snell, J., takes no part.

SCHLEGEL, J. 263

The defendant appeals his conviction, following a jury trial, for robbery in the first degree. He contends that the district court abused its discretion by admitting the testimony of a witness who asserted her fifth amendment right to avoid self-incrimination until granted immunity. The defendant contends that the timing of the grant of immunity prevented him from deposing this witness before trial, and he argues that the admission of her testimony under these circumstances denied him his right to pretrial discovery. We affirm the district court's denial of the defendant's motion to strike the testimony of the witness.

The defendant was accused of robbing a prostitute's customer. After his arrest, the defendant gave notice of his intent to depose the alleged prostitute. When the prostitute was made available for discovery deposition, she exercised her fifth amendment right against self-incrimination ten times. At this point the State offered the prostitute immunity from prostitution charges in return for her testimony. She indicated through counsel, however, that she would continue to exercise her fifth amendment right unless she were also granted immunity from any possible robbery charges. The State refused at that time to grant her immunity from robbery charges. The deposition therefore did not continue. During subsequent pretrial negotiations, the State refused several more times to offer the prostitute the full immunity she requested.

At trial, the State called the prostitute as a witness. The defendant moved to disqualify her as a witness in anticipation that she would assert her fifth amendment right and would refuse to testify. The district court sustained the defendant's motion to disqualify the prostitute, ruling that her assertion of her fifth amendment right would deny the defendant a fair trial. At that point, for the first time, the State offered the prostitute full immunity from any charges

related to the alleged robbery. The district court approved this grant of immunity. The defendant objected to her testifying under these circumstances and the court overruled the objection. The court offered to let the defendant have a continuance for the purpose of deposing the witness, but the defendant refused to take the continuance. The prostitute testified that the defendant was one of the robbers. A jury subsequently found the defendant guilty of first-degree robbery. He has appealed the resulting conviction. He contends that the district court abused its discretion by admitting the prostitute's testimony. The defendant reiterates his argument that he was denied his right to pretrial discovery by the timing of the State's offer of full immunity to the prostitute, and he argues that the admission of her testimony under these circumstances denied him a fair trial.

We hold that the defendant has failed to preserve for appeal the issue in this case, due to his refusal to take the continuance offered by the district court in order to depose the witness. As noted by the State's brief, the issue we face is analogous to the discovery issue raised when a defendant alleges that the prosecution has failed to make available a witness's statements before trial. The Iowa Supreme Court stated in State v. Horn, 282 N.W.2d 717, 723 (Iowa 1979), that when a witness testifies for the State at trial and the prosecution has not made the witness's statement available to the defendant before trial, the defendant is entitled to the witness's statement after direct examination so that it may be used for cross-examination of the witness. Furthermore, the Iowa Supreme Court has stated that when a State's witness's criminalistics report is not made available to the defendant in a timely fashion as provided for by statute, the proper relief the defendant is entitled to is a continuance. State v. Givens, 248 N.W.2d 86, 88 (Iowa 1976). In Givens, the supreme court held that the trial court was correct in overruling the defendant's objection

to the use of the report in light of the court's offer of a continuance and the defendant's refusal to take it. Id.

Similarly, in the instant case, the defendant was offered the opportunity for a continuance in order to depose the prostitute. The defendant's refusal to take the continuance, as in Givens, constitutes a waiver of the issue of whether the trial court abused its discretion in denying his motion to strike the prostitute's testimony. Because the issue was not properly preserved for appeal, we do not reach the merits of the issue.

AFFIRMED.