

FILED

FEB 24 1981

264

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed February 24, 1981

vs.

)

ELMER RUSSELL BUFORD,

)

0-443

64551

Defendant-Appellant.

)

Appeal from Warren District Court - Van Wifvat, Judge.

Defendant appeals his conviction of second-degree burglary in violation of sections 713.1 and 713.3, The Code 1979. REVERSED AND REMANDED.

Louis M. Fusco of Wilson, Goodhue & Fowler, Indianola, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, Thomas N. Martin and Richard Cleland, Assistant Attorneys General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

PER CURIAM

Defendant appeals his conviction of second-degree burglary in violation of sections 713.1 and 713.3, The Code 1979. He argues that the trial court erred in overruling his motion for a continuance after the prosecutor made a motion for leave to introduce a new witness on the day the trial began, in failing to suppress a confession alleged to have been given involuntarily, and in failing to sustain his challenge for cause to a juror. We reverse and remand for a new trial.

I. Attached to the information charging defendant with second-degree burglary were minutes of testimony indicating that Yves Wysong would testify that his house was broken into, certain items were taken and defendant had no permission to be in that house. On October 30, 1979, the day the trial began, the State made a motion for leave to introduce the testimony of Sandra Wysong, Yves' wife. The motion alleged that Yves was unable to testify because he had sustained injuries in an on-the-job accident and that Sandra would give substantially the same testimony as Yves would have given. After the trial court sustained the State's motion, defendant's request for a continuance pursuant to Iowa R. Crim. P. 18(5) was denied.

That rule provides in relevant part as follows:

Whenever the prosecuting attorney desires to call witnesses to support the indictment, of which he or she shall not have given ten days' notice because of insufficient time therefor since the prosecutor learned said testimony could be obtained, the prosecutor may move the court for leave to introduce such testimony . . . Except where the testimony goes to merely formal matters, if the court sustains said motion, the defendant shall elect whether said cause shall be continued on his motion, or the witness shall then testify.

It is undisputed that defendant did not have ten days' notice of the State's intent to introduce Sandra's testimony. Therefore, because the trial court sustained the State's motion, defendant had a right to a continuance. Although Sandra apparently would have given substantially the same testimony as Yves it certainly cannot be said to relate to "merely formal matters." The failure to grant a continuance at defendant's request was error and a new trial is required.

II. In the interest of judicial economy, we also consider defendant's argument that his confession was induced by promises of leniency and, therefore, was involuntarily given and should have been suppressed. In determining the voluntary nature of confessions or other inculpatory statements, we must examine the totality of the circumstances as shown by the record. State v. Cullison, 227 N.W.2d 121, 127 (Iowa 1975). The State has the burden of proving voluntariness by a preponderance of the evidence. Id; see also State v. Munro, 295 N.W.2d 437, 440 (Iowa 1980).

With these principles in mind, we examine the evidence presented at the suppression hearing. Deputy Sheriff John Babyar testified that he picked up defendant and read him his Miranda rights. Defendant said he understood his rights. Babyar told him that the police had enough evidence to make an arrest and that defendant was named by others as being involved in the burglary. Defendant was told that his statement was not required but that he could talk if he wanted to. Babyar said he used no force, coercion, trickery or promises to induce defendant's confession, nor did he make any statements which might be interpreted as incentives for defendant to implicate himself.

Defendant testified that he initially told Babyar that he would not say anything. He later changed his mind, however, and made a written statement which he says was induced by Babyar's statements that "things would be easier" if he confessed. Two of defendant's friends who were arrested at the same time as defendant testified that Babyar told them that it would be better for them if they talked. Neither, however, was present during defendant's interrogation.

On this record we must conclude that the State met its burden of proving the voluntariness of defendant's confession. First, it is not clear that the allegedly inducing "things-would-be-easier" statements were ever made to defendant. Even if they were, we do not believe that such statements would automatically render defendant's confession involuntary. In reaching this conclusion we have considered those cases such as State v. Franks, 239 N.W.2d 588, 591-92 (Iowa 1976), and State v. Ware, 205 N.W.2d 700, 703 (Iowa 1973), wherein confessions induced by promissory leniency have been invalidated. But as stated in Franks, 239 N.W.2d at 591: "voluntariness must be evaluated on an ad hoc basis, not on any isolated factor but upon a consideration of all the circumstances."

Defendant admitted that no absolute promises of leniency were made; he points only to the general and noncommittal alleged statements that "things would be easier" on him if he did talk. We are not prepared to say that such statements invalidated defendant's confession. See U.S. v. Morris, 491 F. Supp. 226, 230 (S.D. Ga. 1980) (fact that FBI agent told defendant "if you cooperate, it will go easy on you" does not render defendant's subsequent confession involuntary). Nor do we conclude that police statements that they did not need defendant's confession constitute an inducement which would render the subsequent confession invalid. Trial court did not err in overruling defendant's motion to suppress his confession.

We need not discuss defendant's issue regarding a challenge of one of the jurors for cause since a new trial (necessitating a different jury) is required for the reason described above. Defendant's conviction is reversed and the case is remanded for a new trial.

REVERSED AND REMANDED.

All judges concur except Donielson, J., who dissents.

DONIELSON, J., dissenting

Under Iowa R. Crim. P. 18(5), a defendant is entitled to a continuance except where the "testimony [of the substitute witness] goes to merely formal matters." Without elaborating on the meaning of that phrase, the majority concludes that Sandra's testimony cannot be said to relate to merely formal matters and that the defendant is thus entitled to a continuance. I would conclude otherwise.

Since Rule 18(5) does not define the scope of the phrase "except where the testimony goes to merely formal matters," it is our duty to give those words their practical and logical construction. Doe v. Ray, 251 N.W.2d 496, 504 (Iowa 1977). The notice requirement of Rule 18(5) is obviously designed to allow the defendant a fair opportunity to prepare to meet the State's allegations and to provide for a continuance where surprise "testimony" has deprived the defendant of this opportunity. The provision in Rule 18(5) that a continuance is unwarranted if the surprise "testimony" relates only to "merely formal matters" is a clear indication that the phrase "merely formal matters" logically refers to matters of such nature that prior notice thereof would not be of substantial benefit to the defendant in meeting the State's allegations against him.

Applying this logical construction to the instant case, it becomes apparent that Sandra's "testimony" referred to "merely formal matters" and that a continuance is not justified under Rule 18(5). Sandra testified on three points: that her home had been burglarized, that certain items were taken, and that no one, the defendant included, had permission to enter her home and remove those items. At no time did she identify the defendant as the burglar or provide any factual statements to connect him with the burglary or to implicate him in any way; such "testimony" would have in fact been impossible on her part, since she was not at home when the burglary occurred. The most that can be said about her "testimony" is that it establishes the foundation of the crime, i.e., that a crime was committed in her home and what kind of crime it was. It is inconceivable to me that such "testimony" can be equated with anything other than "testimony . . . [on] merely formal matters" as that term is used in Rule 18(5), unless the defendant proposes as his defense (and he does not) that the house was never burglarized. Furthermore, since the defendant had known from the time the information was filed and he was arraigned that Sandra's husband would provide substantially the same kind of nonidentification evidence, I fail to see how the

defendant can now claim that the same evidence when obtained from Sandra deprives him of a fair chance to formulate a defense. I therefore would support the trial court's refusal to grant defendant a continuance and would affirm his conviction.