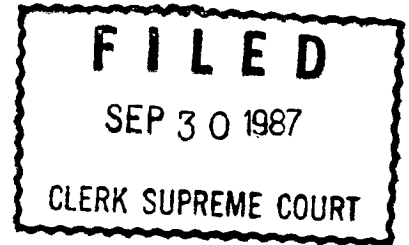


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

MICHAEL EDWARD BURROWS,)

Defendant-Appellant.)

Filed September 30, 1987

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7-02
85-1013

Appeal from the Iowa District Court for Scott County, on change of venue from Lee (No. CR 1042), R. David Fahey and William S. Cahill, Judges.

The defendant appeals from his conviction, following a jury trial, of first-degree murder, contending he was denied his rights to speedy trial and speedy indictment and that he was denied due process by preaccusatorial delay; challenging the admissibility of evidence; maintaining that he was entitled to a mistrial due to improper comments by the trial court and the prosecutor; and arguing that he was entitled to a new trial due to unauthorized communication between a court attendant and the jury. **AFFIRMED.**

Gary R. Noneman, Keokuk, for defendant-appellant.

Thomas J. Miller, Attorney General; Ann E. Brenden and Bruce C. McDonald, Assistant Attorneys General; and Gordan M. Liles, Assistant Lee County Attorney.

Heard by Snell, P.J., and Schlegel and Sackett, JJ.

SNELL, P.J.**232**

This appeal represents the final leg of a direct appeal trilogy arising from the 1977 murder of James Anthony Varner. The present appellant, Michael Edward Burrows, was found guilty of murder in the first degree and sentenced accordingly. The appeals of Burrows' codefendants have been decided by our supreme court, State v. Florie, No. 85-1014 (Iowa Aug. 19, 1987); State v. Hall, 395 N.W.2d 640 (Iowa 1986), and will be referred to herein where relevant. Because pertinent to the resolution of several of Burrows' contentions, a brief outline of this case's convoluted procedural history is required.

On October 29, 1984, the State filed a trial information charging Burrows and his codefendants alternatively with first-degree murder or with aiding and abetting the commission of first-degree murder. Burrows was arraigned on November 5, 1984, and preserved his right to speedy trial. Following various motions and rulings which will be noted below where pertinent, jury selection began on January 16, 1985. On that date, the State filed a "Substituted Trial Information." The next day, Burrows responded with various motions including a "Demurrer" which was sustained and a motion to dismiss which was overruled. The catalyst for these January 16 and 17 motions was the parties' belated recognition that the criminal statutes in effect at the time of the crime were applicable, not those in effect at the time the information was filed. See Iowa Code § 801.5 (1985). Burrows was initially charged under the latter set of statutes. This fact, coupled with the district court's finding that the substituted information was also in improper form, led the court to sustain the demurrer. See Iowa Code § 777.2 (1975). Believing the information was remediable, the court refused to discharge Burrows from prosecution. See Iowa Code § 777.9 (1975).

The State, following an additional set of motions, hearings, and orders, filed a proper trial information on February 21, 1985. Burrows' subsequent

attacks on the information were unsuccessful. Venue was changed upon Burrows' motion. Burrows elected to proceed from this point on under present procedural law. See Iowa Code § 805.1 (1985). Jury selection began on April 3, 1985.

I.

Burrows maintains his statutory right to a speedy indictment was violated by the procedure below. This right is codified in Iowa Code section 795.1 (1975), as follows:

When a person is held to answer for a public offense, if an indictment be not found against him within thirty days, the Court must order the prosecution to be dismissed, unless good cause to the contrary be shown.

As is obvious from a reading of the statute, this right attaches only to criminal defendants who have been "held to answer." State v. Proulx, 252 N.W.2d 426, 429 (Iowa 1977); State v. Mays, 204 N.W.2d 862, 866 (Iowa 1973). A number of cases have held the phrase "held to answer" as used in section 795.1 to mean "held to answer by a magistrate after a preliminary examination or waiver of the same." E.g., Proulx, 252 N.W.2d at 429. No preliminary examination was held in the present case, nor did defendant waive that procedure. Burrows argues that the sum effect of a number of pretrial procedures employed in this case was the equivalent of a preliminary examination. Our courts have rejected similar claims in past cases, State v. Paulsen, 265 N.W.2d 581, 585 (Iowa 1978); Proulx, 252 N.W.2d at 429-30, and on the strength of this precedent we reject Burrows' current claim. Nor do we think this conclusion inconsistent with Bergman v. Nelson, 241 N.W.2d 14 (Iowa 1976), and State v. White, 223 N.W.2d 173 (Iowa 1974), which interpreted section 795.1 in the context of juveniles who were transferred from juvenile court to district court for prosecution as adults. In light of the overwhelming case law directly applicable to Burrows'

situation, we think these cases should be restricted to their special factual contexts. Burrows' first contention is without merit.

II.

Burrows contends his statutory right to speedy trial has been violated. The right upon which Burrows relies is codified at section 795.2 of the 1975 Iowa Code as follows:

If a Defendant indicted for a public offense, whose trial has not been postponed upon his application, be not brought to trial within sixty days after indictment is found, the Court must order it to be dismissed, unless good cause to the contrary be shown.

This right applies to the use of informations as well as indictments. See e.g., State v. Ege, 274 N.W.2d 350, 353-55 (Iowa 1979); State v. Moehlis, 250 N.W.2d 42, 46 (Iowa 1977). The original information charging Burrows was filed on October 29, 1984. We may assume for the purposes of this issue that, notwithstanding the subsequent defects found in this information, it was sufficient to begin the sixty-day limitation period. Accordingly, as the district court noted, this period expired on December 28, 1984; Burrows' trial was originally scheduled for January 8, 1985, and jury selection, in fact, began on January 16, 1985.

Our case law is clear that a criminal defendant may not successfully complain of delays in excess of the period mandated by section 795.2 where such delays are properly attributable to the defendant. E.g., Moehlis, 250 N.W.2d at 46. In addition, and notwithstanding section 795.2, a defendant must accept such passage of time as is reasonably necessary for action upon his or her own motions and applications. Id. Burrows was arraigned on November 5, 1984. Following the reservation of Burrows' right to speedy trial, the following colloquy

took place between the court and Burrows' counsel:

THE COURT: Could you estimate for me, Mr. Phelan, the minimum amount of time that you would need for discovery and the filing of motions?

MR. PHELAN: Your Honor, it is very difficult for me to give that estimate. I will do the best I can. The reason it is difficult is that I was appointed Friday to represent Mr. Burrows. I know absolutely nothing about this case other than what I have read in the Minutes of Evidence attached to the Information. It is my understanding that this case stems back some seven years, that there have been prior depositions taken in a previous related matter.

I would anticipate that we do have a number of motions to file. I would ask the Court to please allow us at least 60 to 70 days to complete our discovery in this matter.

THE COURT: Here's what I propose to do. One of the problems we have is the fact that this Trial Information was filed October 29. So we have already lost a week in our effort to assure him that he receives his speedy trial. So what I propose to do is to fix December 21—that's a Friday—as the deadline for the completion of all discovery, and as the deadline for the filing of all motions.

Now, I tell you, Mr. Phelan, that that schedule will still leave some flexibility, and it is devised primarily so that the Court Administrator will be able to gauge when to set the matter for trial. If you discover that you are unable to meet that deadline, make an application, either oral or in writing, and it will be extended. It will be extended to the limit that we have available and can still offer a trial within the 90 days.

In addition, Burrows filed a number of motions and applications on December 20, 1984, including a motion to extend the time limits for filing motions, notices, and for additional discovery.

It is apparent from the record that at all times prior to trial all parties were laboring under the incorrect assumption that the ninety-day speedy trial period of post-1978 law applied. See Iowa R. Crim. P. 27(2)(b). This does not alter the fact, however, that it was Burrows who requested "at least 60 to 70 days" from November 5, 1985, to complete discovery, and filed numerous motions just before the expiration of the sixty-day period. We reaffirm the principle that it is the duty of the State, and not that of the criminal defendant, to effectuate the statutory limitations period. E.g., State v. Hines, 225 N.W.2d 156, 158 (Iowa 1975). We do not believe, however, that this principle requires us

to ignore the fact that in the case at bar the defendant requested a pretrial schedule which effectively rendered impossible trial within the statutory period. See State v. LaPlant, 244 N.W.2d 240, 241-42 (Iowa 1976); State v. Truax, 232 N.W.2d 861, 863 (Iowa 1975). Accordingly, we reject Burrows' contention. See also State v. Petersen, 288 N.W.2d 332, 335 (Iowa 1980).

III.

Burrows argues his due process rights under the federal and state constitutions were violated by preaccusorial delay. The same issue was presented by Burrows' codefendants on substantially similar facts. State v. Florie, No. 85-1014 (Iowa Aug. 19, 1987); State v. Hall, 395 N.W.2d 640, 642-44 (Iowa 1986). The analytic framework for our analysis of the federal claim is well established. See e.g., Hall, 395 N.W.2d at 642; State v. Williams, 264 N.W.2d 779, 783 (Iowa 1978). Because we think the same intent and purpose should be attributed to the applicable portions of the state constitution as are given to the federal constitutional guarantee, we believe this analysis governs both Burrows' claims. Cf., Florie, slip op. at 10 (in context of sixth amendment speedy trial claim).

In order that this opinion not be unnecessarily lengthened, suffice it to say the issue is controlled, as was the similar claim made in Florie, slip op. at 10, by our supreme court's opinion in Hall. 395 N.W.2d at 642-44. We do not believe Burrows has made the requisite showing in support of his claim, see Hall, 395 N.W.2d at 642, and accordingly we reject it.

IV.

Burrows maintains his state and federal constitutional rights to speedy trial were violated. We note both these claims are subject to the same analysis. Florie, slip op. at 10. Although Burrows refers in his argument to the seven-year period between the murder and the filing of charges, it is now settled that no constitutional right to a speedy trial arises until charges are pending. United

States v. MacDonald, 456 U.S. 1, 7, 102 S. Ct. 1497, 1501, 71 L. Ed. 2d 696, 703 (1982); see United States v. Loud Hawk, 474 U.S. 302, ___, 106 S. Ct. 648, 654, 88 L. Ed. 2d 640, 652 (1986) ("The [Speedy Trial Clause] does not, for example, limit the length of a preindictment criminal investigation even though 'the [suspect's] knowledge of an ongoing criminal investigation will cause stress, discomfort, and perhaps a certain disruption in normal life.'" (citing MacDonald, 456 U.S. at 9, 71 L. Ed. 2d at 704, 102 S. Ct. at 1502)). Accordingly, the earliest date upon which the constitutional guarantee attached would be October 29, 1984, the date the original information was filed. In determining whether this guarantee was abridged, we apply and balance the following four factors: (1) length of delay; (2) reason for delay; (3) defendant's assertion of his right to speedy trial; and (4) prejudice resulting from the delay. Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192, 33 L. Ed. 2d 101, 116-17 (1972); State v. Petersen, 288 N.W.2d 332, 334 (Iowa 1980).

As in part III above, we see no reason for an extended recitation of our analysis on this point. Burrows was originally charged on October 29, 1984; his first trial began on January 16, 1985; his second trial began on April 3, 1985. This delay was not extensive; the reasons for the delay do not inhere substantially to Burrows' favor; no sufficient demonstration of prejudice has been made. As a result, we reject Burrows' constitutional claim.

V.

Burrows maintains the district court erroneously allowed certain testimony into evidence pursuant to the coconspirator exception to the rule against hearsay. See Iowa R. Evid. 801(d)(2)(E). That exception defines as non-hearsay statements offered against a party which were made "by a coconspirator of a party during the course and in furtherance of the conspiracy." Id. The cases have summarized this exception in the following fashion:

Any act or declaration by one coconspirator committed in furtherance of the conspiracy and during its pendency is admissible against each and every coconspirator provided that a foundation for its reception is laid by independent proof of the conspiracy.

State v. Blyth, 226 N.W.2d 250, 269 (Iowa 1975). Accordingly, there are three prerequisites to the admissibility of evidence under the exception at issue: (1) the existence of a conspiracy must be established by a preponderance of the evidence, State v. Florie, No. 85-1014, slip op. at pp. 14-15; (2) the statement must have been made during the pendency of the conspiracy, State v. Kidd, 239 N.W.2d 860, 864 (Iowa 1976); and (3) the statement must have been in promotion of the objection or design of the conspiracy. Id. Contrary to Burrows' position, our law is clear that a conspiracy may continue into the concealment phase. Id.; State v. Waterbury, 307 N.W.2d 45, 50 (Iowa 1981). In addition, a conspiracy after the fact to conceal a crime or to further the escape of a perpetrator will support the admissibility of coconspirator statements under rule 801(d)(2)(E) tending to establish the existence of the after-the-fact activities. State v. Elam, 328 N.W.2d 314, 319 (Iowa 1982); see Florie, slip op. at pp. 15-16. These activities constitute evidence relevant to the primary crime because they reveal guilty knowledge of the accused. Florie, slip op. at 16.

Burrows, in support of his contention, refers this court by way of footnote to approximately fifty-nine pages of testimony throughout the five-volume appendix. This challenged testimony comes from five witnesses. We do not believe any good purpose would be served by setting forth in detail the precise colloquies of which Burrows complains. We have read the pages of testimony to which we were referred and find Burrows' contentions unpersuasive. Those statements which may be said to constitute hearsay at all were properly admissible pursuant to the previous cases, see, e.g., Elam, 328 N.W.2d at 319, and

we find Burrows' attempts to distinguish those cases singularly unpersuasive. Accordingly, we reject his contentions.

VI.

Burrows contends the admission into evidence of the coconspirator's statements violated his rights under the federal and state constitutions to due process, equal protection, and confrontation of adverse witnesses. Burrows' equal protection claim is never argued and we accordingly deem it waived. Iowa R. App. P. 14(a)(3). Also, Burrows' due process reference is limited to the fourteenth amendment's incorporation as against the states of the sixth amendment right to confrontation.

Our supreme court has directly addressed, mutatis mutandis, the issue advanced by Burrows here. In State v. Kern, 307 N.W.2d 22, 27 (Iowa 1981), the court stated, with reference to testimony there under attack, that "it was admissible under the conspiracy exception and for that reason did not violate defendant's right to confrontation." See Dutton v. Evans, 400 U.S. 74, 87-89, 91 S. Ct. 210, 219-20, 27 L. Ed. 2d 213, 226-27 (1970). The United States Supreme Court has recently arrived at an identical holding. Bourjaily v. United States, 55 U.S.L.W. 4962, 4965 (U.S. June 23, 1987). Notwithstanding Burrows' protestations to the contrary, we believe these cases dispose of his current claims. Consequently, we reject them.

VII.

Burrows maintains the district court erred in admitting against him, over motion in limine and objection at trial, evidence of another crime. This evidence dealt with an Illinois armed violence charge against Burrows. See People v. Burrows, 21 Ill. Dec. 593, 64 Ill. App. 3d 764, 381 N.E.2d 1040 (1978). The evidence tended to show that Burrows had fired a shotgun at the home of an Illinois judicial magistrate who had earlier fined Burrows for an alcohol-related offense.

The evidence further tended to show that Anthony Varner, whose murder led to the present prosecution, had knowledge of Burrows' participation in the earlier crime. The State offered the evidence in order to demonstrate Burrows' motive for killing Varner; the district court admitted it for that purpose.

The general rule is that "one crime cannot be proved by proof of another." State v. Cott, 283 N.W.2d 324, 326 (Iowa 1979) (quoting State v. Schlak, 253 Iowa 113, 115, 111 N.W.2d 289, 291 (1961)). The purpose of the rule is to exclude from the jury's consideration evidence which has no relevancy except to show that the defendant is a bad person and thus likely committed the crime in question. Id. This rule is codified as Iowa Rule of Evidence 404(b). See Iowa R. Evid. 404(b), federal advisory committee's notes. That rule reads as follows:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The exceptions to this rule are based upon the relevancy of certain evidence to the proof of some fact or element in issue other than the defendant's criminal disposition. Cott, 283 N.W.2d at 326. The test of admissibility under an exception to rule 404(b) is two-pronged. First, the challenged evidence must be relevant to one or more legitimate issue other than a general propensity to commit wrongful acts. State v. Barrett, 401 N.W.2d 184, 187 (Iowa 1987). In order to be "legitimate" within this rule, the issue must be a material one which has been raised concerning one of the exceptions to rule 404(b). United States v. Farber, 630 F.2d 569, 571 (8th Cir. 1980), cert. denied, 449 U.S. 1127, 101 S. Ct. 846, 67 L. Ed. 2d 114 (1981). Stated differently, the proffered evidence must tend to establish some material issue in the case. State v. Roth, 403 N.W.2d 762, 765 (Iowa 1987); Barrett, 401 N.W.2d at 187. Unless evidence of other crimes, wrongs, or acts has probative value under a recognized exception to

the general prohibition of such evidence, a district court has no discretion to admit it. State v. Belieu, 288 N.W.2d 895, 901 (Iowa 1980). Second, even if the proffered evidence is relevant to a material issue, its probative value must not be substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. State v. Munz, 355 N.W.2d 576, 579 (Iowa 1984).

We think Burrows' arguments here are plainly without merit. The relevance of the evidence as establishing a potential motive for Burrows to kill Varner is obvious. Likewise we cannot say the district court abused its discretion in finding that the evidence's probative character was not substantially outweighed by the possibility of prejudice. We find no error on this point.

VIII.

Burrows maintains the district court erred in overruling his motion for mistrial which was based upon the trial court's comment during trial that "that will preserve the appellate record." Burrows contends this remark may have caused the jury to be more inclined to convict, being now aware that they are only one stage in a multistage process. Alternatively, he argues the remark may have conveyed to the jury the impression that the judge believed the defendant's guilt to be a foregone conclusion.

Our evaluation of the present subject is undertaken with an eye to the totality of all relevant circumstances shown by the entire record. State v. King, 256 N.W.2d 1, 12 (Iowa 1977). With respect to Burrows' latter hypothetical scenario of prejudice, we think the cautionary instruction given the jury was sufficient to dispel the possibility suggested by Burrows. See State v. Brewer, 247 N.W.2d 205, 215 (Iowa 1976); State v. Warren, 212 N.W.2d 509, 515 (Iowa 1973). Similarly, we believe neither that the challenged statement was per se prejudicial, see King, 256 N.W.2d at 13, nor that Burrows has demonstrated

a prejudice accruing to his fair trial right. Id. We are reluctant to hold that the single isolated remark, addressed to counsel following a discussion at the bench, was sufficient to persuade the jury to disregard its sworn duty. Accordingly, we reject his first argument on this point. See also Brewer, 247 N.W.2d at 215.

IX.

Burrows asserts he was deprived of a fair trial because of prosecutorial misconduct at trial. He contends the district court erred in overruling his motion for mistrial which was based upon that conduct. The claimed misconduct consists of a reference during voir dire to the large amounts of time and money spent by the State on the prosecution; an intimation during cross-examination of Burrows' court-appointed investigator that he had wasted the taxpayers' funds; a reference during closing argument to Burrows' intention to put an arresting officer "on his list, too." The applicable framework for our analysis of this claim was recently outlined in State v. Ruble, 372 N.W.2d 216, 218 (Iowa 1985):

To prevail on a matter of prosecutorial misconduct, the defendant must show both the misconduct and that he was prejudiced by it.

Trial courts are vested with broad authority to determine whether prejudice has resulted from an act of prosecutorial misconduct. We do not overturn trial court rulings in the absence of a showing of abuse of discretion. "Abuse of discretion is shown only when it is demonstrated that such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable."

(citations omitted).

We have reviewed Burrows' contention in light of the record and the above-cited general principles. We are not persuaded that an abuse of discretion on the part of the district court has been demonstrated. Accordingly, we reject Burrows' claim.

X.

Finally, Burrows argues the district court erred in overruling his motion

for new trial which was based upon an unauthorized communication between jurors and a court attendant. This communication consisted of the jury telling the court attendant the name of the jury foreperson in response to the attendant's request for this information. Our cases require appellant to show an abuse of discretion inhering in the district court's ruling on a motion for new trial based on such a ground. State v. Poffenbarger, 247 Iowa 552, 556, 74 N.W.2d 585, 587 (1956). Burrows has not done so.

The judgment of the district court is affirmed.

AFFIRMED.