IN THE COURT OF APPEALS OF IOWA

No. 1-430 / 90-1759

FILED
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CLERK SUPREME COURT

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STATE OF IOWA,

Appellee,

vs.

KEVIN JOHNSON,

Appellant.

Appeal from the Iowa District Court for Woodbury County, Michael S. Walsh and Gary E. Wenell, Judges.

Johnson appeals his conviction, following a jury trial, for second-degree criminal mischief. **AFFIRMED.**

Jeffrey A. Neary of O'Brien, Galvin, Moeller & Neary, Sioux City, for appellant.

Bonnie J. Campbell, Attorney General, Sheryl A. Soich, Assistant Attorney General, Thomas S. Mullin, County Attorney, and Connie E. Anstey, Assistant County Attorney, for appellee.

Heard by Donielson, P.J., and Hayden and Sackett, JJ.

HAYDEN, J.

In 1988 Kevin Johnson was convicted of burglary in the second degree, serious assault, and suborning perjury. The convictions resulted from a plea agreement filed in April 1988. Johnson was placed on probation. In November 1989 Johnson was arrested for probation violations.

In December 1989 Johnson entered into the plea agreement at issue in the present case. Johnson agreed to plead guilty to serious assault. In exchange, the State agreed not to pursue other charges against Johnson and to refrain from revoking his probation on the other charges.

In April 1990 Johnson was arrested for the charge involved here, criminal mischief in the second degree. This charge arose from an incident which occurred in October 1989, prior to the December 1989 plea agreement. Following his arrest, the State's application for revocation of Johnson's probation was denied. Johnson then filed a motion to dismiss the criminal mischief charge. His motion was denied.

In October 1990 a jury found Johnson guilty of the second-degree criminal mischief charge. He was convicted of that charge and sentenced as a habitual offender. In addition, his probation was revoked.

Johnson appeals his conviction for second-degree criminal mischief and his probation revocation. Johnson claims the trial court abused its discretion in denying his motion to dismiss the criminal mischief charge. Johnson

contends by filing this charge, the State breached the December 1989 plea agreement. It is Johnson's belief the plea agreement encompassed and disposed of all pending and potential charges concerning him including the criminal mischief charge. Johnson also claims the trial court abused its discretion in allowing rebuttal testimony of a State witness. Finally, Johnson contends if the criminal mischief conviction is overturned, his probation should be reinstated because this conviction was the sole ground for revoking his probation.

In ruling on a motion to dismiss as a remedy for the State's alleged repudiation of a plea agreement, the trial court possesses the same limited discretion it exercises when ruling on a motion to dismiss for failure to provide a speedy trial. State v. Lummus, 449 N.W.2d 95, 96 (Iowa App. 1989). To secure a reversal, defendant must show the trial court abused its limited discretion. Id. The trial court's ruling must be reversed if it is found there is no reasonable basis for it in the record. Id.

Apparently in October 1989, the county attorney's office received an input on Johnson's involvement in the criminal mischief charge. The State did not file a formal charge regarding this matter until April 1990. Between these two times, in December 1989, Johnson struck a plea agreement with the county attorney's office. Johnson asks us to implicitly include the criminal mischief charge as part of the bargained exchange in the plea agreement. This we cannot do.

In pertinent part, the agreement provides: "This agreement disposes of all possible state and federal criminal charges against defendant arising out of the facts referred to in the Minutes of Testimony and Application for Probation revocation filed herein." There is no indication before us the criminal mischief charge was referred to in the minutes of testimony or the application for probation revocation. We determine objectively reasonable minds could not reach different inferences from the quoted terms of the plea agreement. The fact defendant subjectively disagrees with the plain meaning of the agreement, without more, does not establish its ambiguity. Ridinger v. State, 341 N.W.2d 734, 737 (Iowa 1983). Where the language is clear and unambiguous, the intention expressed in the agreement prevails over the intent or interpretation of a party. Id. We hold there is no reversible error on this issue.

Johnson next claims the trial court erred in allowing the State to call a rebuttal witness. At trial Johnson offered the testimony of Steve Williams who was with Johnson at the time of the alleged criminal mischief. Williams testified he, rather than Johnson, had committed the act constituting criminal mischief. Williams also testified he had pleaded guilty to second-degree criminal mischief and two other charges. During cross-examination, the State admitted Exhibit No. 18 which indicated Williams had actually pleaded guilty to third-degree criminal

mischief in exchange for the dismissal of the other two counts. Nevertheless, Williams maintained his original account of the plea. The State was then permitted to call Williams' juvenile probation officer, Donald Mathews, as a rebuttal witness. Mathews testified Williams had pleaded guilty only to third-degree criminal mischief, and had done so in return for the dismissal of the other two charges. Johnson contends the district court abused its discretion by allowing the State to present this rebuttal evidence. He argues the rebuttal evidence prejudiced him because it suggested Williams' involvement in the crime was less and Johnson's was therefore greater.

The trial court has considerable discretion in admitting rebuttal evidence. State v. Baker, 262 N.W.2d 538, 543 (Iowa 1978). Its ruling will be disturbed only upon a clear abuse of discretion. Id.

Rebuttal testimony is "'that which explains, repels, converts, or disproves evidence produced by the other side.'" Id. (quoting State v. Miller, 229 N.W.2d 762, 770 (Iowa 1975)). In the present case, Mathews' testimony refuted Williams' testimony regarding the disposition of the criminal charges against Williams. We hold this was proper rebuttal testimony especially when Williams still appeared confused on the subject after viewing State Exhibit No. 18. Johnson is, therefore, not entitled to a reversal on this issue. In light of our holding, we do not reach Johnson's request to reinstate his probation.

AFFIRMED.