FILED
APR 02 1991
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-622 / 89-1923

427

STATE OF IOWA,

Appellee,

vs.

DAVID RAYMOND BABBE,

Appellant.

Appeal from the Iowa District Court for Carroll County, Carl D. Baker, Judge.

Babbe appeals his convictions, following a jury trial, for second-degree arson and conspiracy to commit second-degree arson. **REVERSED AND REMANDED FOR NEW TRIAL.**

Linda Del Gallo, State Appellate Defender, for appellant.

Bonnie J. Campbell,. Attorney General, Richard J. Bennett and Charles N. Thoman, Assistant Attorneys General, for appellee.

Considered by Oxberger, C.J., and Hayden and Sackett, JJ.

HAYDEN, J.

David Babbe and his mother were accused of setting fire to an apartment building owned by Babbe. The State theorized Babbe hoped to collect insurance proceeds on the building. Babbe denied any involvement in the fire. He suggested the fire had been set by a person who held a grudge against him. Babbe also asserted he had never filed an insurance claim for the fire loss. He did, however, file a proof of loss.

Babbe was charged with second-degree arson and conspiracy to commit second-degree arson. A jury found him guilty of those crimes. He was then sentenced as a habitual offender.

Babbe has appealed his convictions.

Babbe contends the marshaling instruction was erroneous because it omitted an element of arson under these facts, namely, fraudulently exposing an insurance carrier to risk. Babbe also contends the district court erred by failing to include this element in any of the other instructions. Babbe acknowledges his trial attorney did not object to the instructions on this ground. However, he argues this omission resulted from ineffective assistance of counsel and therefore should not be held against him.

Babbe also contends the district court abused its discretion by denying his motion for a continuance due to the absence of a subpoenaed witness.

Our standard of review is on errors of law. Iowa R. App. P. 4.

I. Ineffective Assistance of Counsel

We decline to address Babbe's ineffective assistance of counsel claim at this time. 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. Koenighain, 356 N.W.2d 237, 238 (Iowa App. 1984). This also gives the allegedly ineffective attorney the opportunity to explain his or her conduct. State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978). We conclude there is an inadequate record for us to adjudicate the defense claim without counsel's explanation for his conduct. Moreover, due to our holding on the next issue, it is unnecessary to decide this issue.

We note for instructional purposes only, where the defendant or his principal owns the property destroyed, arson includes as one of its elements an insurer must have been exposed to a risk of fraud. Iowa Code § 712.1; II Iowa Criminal Jury Instructions, Nos. 1200.1, 1200.3, 1200.4, 1200.5 (Nov. 1988). On remand, the trial court shall take this into consideration in fashioning its jury instructions.

II. Motion for Continuance

Babbe asserts the trial court abused its discretion by denying his motion for continuance due to the non-appearance of a subpoenaed defense witness.

> It is well established that trial courts are accorded broad discretion in ruling on a motion for continuance. The trial court's ruling will be disturbed only where it appears that the court has abused its discretion. In criminal cases, motions for continuance are discouraged. "A motion for continuance shall not be granted except upon a showing of good and compelling cause." Iowa R. Crim. Pro. 8.1(2). "Whether in any case enough time has been afforded for consultation, investigation for witnesses and preparation of the law and facts depends on the circumstances of the case including the complexity of the factual issues and the legal principles involved." Orcutt v. State, 173 N.W.2d 66, 71 (Iowa 1969).

State v. Watt, 389 N.W.2d 408, 410 (Iowa App. 1986) (citations omitted).

Apparently defense witness Steve Brookbank had been in a federal prison. He had been released a short time before Babbe's trial. A subpoena was served on him Saturday in Storm Lake. Brookbank was to appear Monday at 1 p.m. He failed to appear. The trial court issued a bench warrant for Brookbank. The next day, Tuesday, Brookbank turned himself in and was transported to Carroll about midnight. Babbe's trial was taking place in Carroll.

On Tuesday Babbe's attorney requested a continuance due to Brookbank's failure to appear. The trial court denied the continuance, apparently on grounds the attorney had failed to make diligent preparation in the case. See id. at 410-11.

In the present case Babe had already subpoenaed Brookbank. The offer of proof, in the form of a professional statement, shows Brookbank would seriously impeach one of the State's main witnesses. Brookbank

failed to appear at the time shown on his subpoena. The trial court issued a warrant for his arrest. However, it refused to grant a continuance so Brookbank could be located. We determine the trial court abused its discretion in denying the continuance.

We rely in our holding on the fact Brookbank had already been served with subpoena in adequate time to effect an appearance. See cf., State v. Cowman, 212 N.W.2d 420, 422 (Iowa 1973) ("The fact a witness is not subject to subpoena, standing alone, is no ground for refusing a continuance."). It is the duty of our citizens to comply with subpoenas. Parties are not to be unduly penalized for the failure of a witness to so comply, especially in a criminal case with its attendant due process considerations.

While we sympathize with the trial court's desire to keep the trial moving, we determine the court should have allowed a continuance to enable Babbe to locate his witness. In this case, a continuance merely until the next day would have sufficed. Nor can we say Babbe was not prejudiced by the denial of a continuance to locate his subpoenaed witness.

We reverse the trial court on this issue and remand for a new trial.

REVERSED AND REMANDED FOR NEW TRIAL.