

FILED

MAR 22 1979

IN THE COURT OF APPEALS OF IOWA

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CLERK SUPREME COURT

Filed March 22, 1979

STATE OF IOWA,

)

Appellee,

)

vs.

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GARY DELFORD HALL,

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Appellant.

)

Appeal from the Des Moines District Court - Thomas E. Tucker, Judge.

Defendant appeals from conviction and sentence imposed for offenses of robbery with aggravation and larceny of a motor vehicle. AFFIRMED.

William L. Dowell, Public Defender, of Burlington, Iowa, for appellant.

Thomas J. Miller, Attorney General of Iowa, and Thomas A. Evans, Jr., Assistant Attorney General, for appellee.

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

PER CURIAM

Defendant appeals from convictions and sentences imposed for offenses of robbery with aggravation and larceny of a motor vehicle. He assigns several errors which we consider separately.

I. Defendant's first contention is that the trial court erred in refusing to permit an alibi witness to testify because of defendant's failure to give notice of said witness's testimony four days prior to trial as required by section 777.18, The Code, 1977. We find such contention to be answered by State v. Rourick, 245 Iowa 319, 60 N.W.2d 529 (1953), where it was held that such denial was the proper sanction for a failure to comply with section 777.18. Defendant seeks to avoid the proscriptive effect given the statute in Rourick, by urging that the statute, as so applied, is unconstitutional under the holding in Wardius v. Oregon, 412 U.S. 470, 93 S.Ct. 2208, 37 L.Ed.2d 82 (1973). This claim is based upon a lack of reciprocal discovery with respect to alibi witnesses. We conclude that as a result of the decision in State v. Walton, 228 N.W.2d 21 (Iowa 1975), a defendant giving notice of alibi under the statute is entitled to reciprocal discovery. This rule was fully applicable at all times material prior to defendant's trial and obviates the claimed deficiency, if any, in the statute. We find no merit in defendant's first assignment of error.

II. We next consider defendant's claim that the trial court abused its discretion in failing to grant a continuance during the trial to permit defendant to secure the attendance of two additional alibi witnesses. This contention calls into issue both (a) the necessity for such witnesses' testimony, and (b) the reason these witnesses were not present to testify on the day the trial concluded. The State urges that defendant's failure to comply with Rule of Civil Procedure 183 relating to motions for continuance, precludes reversal on this ground. We do not agree that all motions for delay in proceedings after trial has been commenced must be in strict compliance with Rule 183. But we do agree that the rather meager record which was made in open court on the request for delay in the present case provides an insufficient basis upon which to posit trial court error. While we believe the trial court might well have granted such request (see, e.g., State v. Wright, 274 N.W.2d 307, 310 (Iowa 1979)), no abuse of discretion has been shown. See State v. Johnson, 219 N.W.2d 690, 697 (Iowa 1974). Nor is the record sufficient to establish any prejudice to defendant by the ruling.

III. As an additional claim of error, defendant asserts that he was entitled to have the crime of assault with intent to inflict great bodily injury submitted to the jury as a lesser included offense with respect to the crime of robbery with aggravation. We disagree. Under the statutory (common elements) test of State v. Rosewall, 239 N.W.2d 171, 174 (Iowa 1976), the offense of assault with intent to inflict great bodily injury is not included within the offense of robbery with aggravation. The former offense requires proof of an unconditional intent to injure. The latter offense only requires proof of a conditional intent to injure if resisted. The trial court properly refused to submit the requested lesser offense.

IV. Lastly, we consider defendant's claim that he was prejudiced by the trial court's order consolidating the offenses of robbery with aggravation and larceny of a motor vehicle for trial when they were charged in separate informations. Defendant concedes on this point that such consolidation is permitted by State v. Cook, 261 Iowa 1341, 1348, 158 N.W.2d 26, 30 (1968), unless prejudice is shown. We have considered defendant's claims of prejudice in the present case and find them to be unconvincing. The trial court did not err in ordering the charges consolidated for trial.

We have considered all issues presented and find no ground for reversal.

AFFIRMED.