FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Appellee,) Filed October 7, 1977
vs.)
STANLEY BAKER,) 287/60139
Appellant.)

Appeal from Clay District Court - Joseph P. Hand, Judge.

Defendant appeals conviction of larceny of a motor vehicle, § 321.82, The Code, asserting, inter alia, that trial court erred in refusing to permit him to reopen his case and in admitting prejudicial and irrelevant testimony regarding defendant's appearance.

AFFIRMED.

Michael L. Zenor, of Spencer, counsel for appellant.

Richard C. Turner, Attorney General of Iowa, Richard H. Doyle IV, Assistant Attorney General, and Ronald R. Barrick, Clay County Attorney, counsel for appellee.

Submitted to Allbee, C. J., Donielson, Snell, Oxberger and Carter, JJ.

DONIELSON, J.

Defendant-Stanley Baker appeals his conviction of larceny of a motor vehicle, in violation of § 321.82, The Code. On appeal, Baker asserts that the trial court erred (1) in overruling his motion to reopen his case immediately following the state's rebuttal evidence; (2) in overruling his motions for mistrial and new trial because the state did not previously disclose the identity of its rebuttal witness in accordance with defendant's discovery motion; and (3) in admitting testimony concerning defendant's appearance at the time the crime was committed even though the identity of the defendant was not in issue.

Initially Baker contends that he was entitled to reopen his case after the introduction of the state's rebuttal evidence, inasmuch as his request was made for the purpose of introducing testimony regarding matters first raised in the state's rebuttal evidence. After the state presented the rebuttal witness, who, incidentally, was only discovered the day before the trial began, both sides rested and jury instructions were discussed. Defendant then made his motion to reopen his case pursuant to rule 191(d), Rules of Civil Procedure, which was overruled by the trial court. As that court noted, rule 191(d), R.C.P., is only applicable to civil cases.

As the court stated in State v. Coughlin, 200 N.W.2d 525, 526 (Iowa 1972): "' Rules of Civil Procedure have no application to criminal cases unless a statute makes them applicable.'" Accord, State v. Addison, 250 Iowa 712, 716, 95 N.W.2d 744 (1959). Although some statutes have been promulgated to apply certain Rules of Civil Procedure to criminal cases, see, e.g., §§ 780.2, 780.4, 780.35, 781.11, 782.1, The Code, we can find no authority, statutory or otherwise, which authorizes the application of rule 191(d), R.C.P., to criminal cases.

Section 780.5(6), The Code, which does authorize such motions, states:

> Rebutting or additional evidence. The parties may then, respectively, offer rebutting evidence only, unless the court, for good reasons, in furtherance of justice, permit them to offer evidence upon their original case.

In making its decision whether to permit a party to reopen his case, the trial court is given broad discretion. State v. Conner, 241 N.W.2d 447, 461 (Iowa 1976); State v. Moreland, 201 N.W.2d 713, 714 (Iowa 1972). After a review of the complete record in this

case, we are unable to say that the trial court abused its discretion in finding that no furtherance of justice would be achieved by permitting Baker to reopen his case. [1]

Baker also contends that the trial court should have granted his motion for mistrial or new trial because the state did not inform him or the trial court of the existence of the rebuttal witness. He asserts that the state had a continuing duty to comply with his discovery request, and the fact that the witness was not discovered until the day before trial does not alter that obligation.

However, the record reflects that defendant did not timely object to the introduction of this testimony at the time it was proffered. Not only did the defendant not make any objection when this witness was called, but he cross-examined the witness as he would any other. Since defendant did not make his discovery objection until prior to closing arguments, he did not validly preserve error and thus may not raise this issue upon appeal. State v. Baker, 246 Iowa 215, 238, 66 N.W.2d 303 (1954); see State v. Pitlik, 247 N.W.2d 741, 743 (Iowa 1976); State v. Winquist, 247 N.W.2d 256, 259 (Iowa 1976); State v. Droste, 232 N.W.2d 483, 487 (Iowa 1975).

Finally, defendant asserts that the trial court erred in overruling defendant's objection to testimony which indicated that, at the time of trial, defendant had been long-haired, bearded and unclean. He argues that since his identity was not in issue, testimony regarding his appearance was irrelevant and, in this instance, prejudicial.

Although testimony of this nature is ordinarily relevant, we do agree that it was not necessary in this case since the defendant's identity was not in issue. However, the admission of such evidence is within the sound discretion of the trial court and, unless a clear abuse of that discretion can be demonstrated, no reversible error exists. State v. Ostrand, 219 N.W.2d 509, 513 (Iowa 1974); State v. Youngbear, 202 N.W.2d 70, 71 (Iowa 1972). See also State v. Davison, 245 N.W.2d 321, 324 (Iowa 1976).

[1] The State urges here that defendant waived error on this issue by failing to produce any surrebuttal evidence at trial, pursuant to § 780.5(6), The Code, before asking the court to allow him to reopen his case. Although the state's interpretation of the statute has merit, we are not fully persuaded.

However, we are convinced that defendant's assertion that his right to compulsory process of witnesses was violated, Iowa Constitution, Article I, § X, was not raised below, and therefore cannot be considered on appeal. State v. Fowler, 248 N.W.2d 511, 517 (Iowa 1976); State v. Nowlin, 244 N.W.2d 596, 604 (Iowa 1976).

Upon the present state of facts, we find that the trial court did not abuse its discretion in admitting this testimony and hence, no reversible error exists. We see no reason to limit the holding of State v. Ostrand, supra, to photographic evidence only, as defendant would suggest. Here, the same type of information was conveyed by testimony and we are convinced that the language in Ostrand is equally applicable in this case. Finding no error, we affirm the judgment of the district court.

AFFIRMED.

Allbee, C. J., concurs in result only; Snell and Oxberger, JJ., dissent.

OXBERGER, J. (dissenting)

I dissent. I believe we must make two inquiries: 1) the stage in the proceedings at which the issue arose and 2) if not precluded by the first inquiry, the materiality of the evidence proffered.

The supreme court said in State v. Thomas, 158 Iowa 687, 692, 138 N.W. 864 (1912):

> "If the case had not reached the stage in the procedure where the court was without authority to permit it to be made, the correction of a mistake upon a material matter of evidence is so manifestly in accord with the very purpose for which the courts of justice have been created that its propriety ought not to be open to question. No man ought to be convicted upon false or mistaken testimony."

The first inquiry reveals the issue arose before the jury had retired, when the witness whose testimony was sought was apparently available but refusing to comment to defense counsel. Pivotal to our determination is the fact that the State's evidence Baker sought to rebut was itself offered as rebuttal testimony. Baker had no advance warning of its substance; indeed, the witness's name was not shown in the minutes of testimony. Baker acknowledges she was not discovered by the prosecution until the day before trial.

The testimony of the rebuttal witness was devastating to Baker, if believed. Baker was charged with larceny of a motor vehicle. The witness testified Baker,on the evening of the alleged larceny, questioned her husband regarding how to rip off a truck. Baker informed her and her husband that he and his companion were leaving to go rip off a truck. On cross examination she said they were talking about a semi and how to hot-wire it. The larceny Baker was charged with was of a Chevrolet pick-up truck. Baker claimed in seeking the reopening, before the jury retired, that the rebuttal witness's husband would testify the conversation was in jest.

Citing the **Thomas** case and applying rule 192, Rules of Civil Procedure, State v. Mason, 203 N.W.2d 292, 295 (Iowa 1973) affirmed the reopening sought by the prosecution for the purpose of supplementing and clarifying previous evidence. I believe **Thomas** and **Mason** are clear authority mandating a reopening of a case for a defendant standing in the posture of Baker. The rebuttal testimony came without

any forewarning, it was unquestionably devastating to Baker's claim of innocent hitchhiking. Without affording Baker an opportunity to substantiate his claim of jest, we cannot know whether Baker stands convicted of larceny by false or mistaken testimony. This result is manifestly counter to the purpose for which we sit.

I would reverse and remand for a new trial.

SNELL, J. joins in this dissent.