FILED
OCT 18 1979
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,) Filed October 18, 1979

vs.)

MELVIN RICHARD GEIDD,) 131
61833

Defendant-Appellant.)

Appeal from Woodbury District Court - George F. Davis, Judge.

Defendant appeals conviction of child stealing in violation of section 706.2, The Code 1975, asserting trial court erred (1) in its application of sections 780.10-13, The Code 1977, regarding notice of additional testimony, and (2) in denying his motion for a directed verdict. AFFIRMED.

Gary E. Wenell of Baron & Wenell, Sioux City, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Lona Hansen, Assistant Attorney General, for plaintiff-appellee.

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

Defendant, Melvin Richard Geidd, appeals a jury verdict finding him guilty of child stealing in violation of section 706.2, The Code 1975. He asserts trial court erred (1) in its application of sections 780.10-13, The Code 1977, regarding notice of additional testimony not contained in the original minutes of the county attorney's information and (2) in denying his motion for a directed verdict. We affirm.

At approximately 9:00 a.m. on July 23, 1976, seven year old Karl Popham and a friend were playing in an alley near Karl's home in Sioux City, Iowa, when a man approached and asked if one of them could direct him to the paperboy's home. Karl got in the car and they proceeded to the paperboy's house. Instead of stopping when Karl pointed out the paperboy's residence, the man continued to drive to an old farm house in the country. At no time did he obtain permission from any member of Karl's family to take Karl anywhere. Three to four hours subsequent, Karl's seventeen year old brother, Jeff, observed a man drop Karl off three blocks from home. Jeff obtained the license number and description of the car. At approximately 1:30 p.m. on July 23, Police Officer Shuck stopped a car bearing the same license number. Defendant was the driver. Later that afternoon at police headquarters, both Karl and Jeff identified defendant as the man who had taken Karl. Both again made in-court identifications of defendant.

Defendant entered his plea of not guilty to the charge on May 4, 1977, in Woodbury County District Court. Trial was set for February 21, 1978, upon defendant's waiver of his right to speedy trial. On November 1, 1977, the county attorney filed a Notice of Additional Testimony with the sheriff's office. Attempts to serve defendant at his residence and his place of employment were unsuccessful.

In accordance with section 780.10, The Code 1977, the county attorney then sent a notice for two additional witnesses by certified mail to Patrick G. McCormick, trial counsel for defendant, on February 7, 1978. Although the notice was received by McCormick's office on February 8, 1978, he was not in to examine his mail from that date until Monday, February 20, 1978. On Friday, February 17, 1978, McCormick received a phone call at home from the sheriff's office requesting him to come that afternoon and pick up a notice on a third additional witness. McCormick failed to pick up the notice as requested. Monday, February 20, 1978, was a legal holiday and, although McCormick stopped by the sheriff's office to pick up the notice, he was unable to obtain it. Consequently, McCormick did not learn the contents of the minutes of additional testimony until the morning of trial, Tuesday, February 21, 1978.

Outside presence of the jury, a hearing was held on defendant's motion in limine to exclude the additional testimony. It was urged the testimony be excluded pursuant to section 780.10, The Code 1977, on the grounds there was no showing of due diligence to serve the notice on defendant personally before the notice was served on his counsel, or that notice had not been given at least four days prior to commencement of trial.

At that time defendant was offered a four day continuance, which he declined. Trial court found defendant had waived his rights to exclude the additional testimony and overruled his motion in limine. Trial proceeded as scheduled with defendant objecting each time the State sought to introduce the additional testimony.

Defendant asserts on appeal trial court erred in its application of sections 780.10-13, The Code 1977, by failing to require the State to "show diligence" in either ascertaining witnesses or making him aware of them. He also argues that before any witness can testify whose name does not appear in the original minutes, the county attorney must: (1) move the trial court for an order allowing them to testify; (2) show insufficient time since learning of the potential testimony of the witness to serve the notice outside the four day period; and (3) show diligence in trying to ascertain the identity, availability, and knowledge of such potential witnesses. Under the facts of the instant case, defendant urges the aforementioned standards were not satisfied and trial court erred in finding he waived his rights to exclude the additional testimony by declining a continuance.

I. Notice of Additional Testimony. Section 780.10, The Code 1977, provides:

> The county attorney, in offering the evidence in support of the indictment in the order prescribed in section 780.5, shall not be permitted to introduce any witness who was not examined before a committing magistrate or the grand jury, and the minutes of whose testimony were not presented with the indictment to the court, unless he shall have given to the defendant, or his attorney of record if the defendant be not found within the county, a notice in writing stating the name, place of residence, and occupation of such witness, and the substance of what he expects to prove by him on the trial, at least four days before the commencement of such trial.

Under the Iowa Supreme Court's interpretation of this statute, in order "[t]o authorize service of the notice of additional testimony on the attorney, instead of the accused, it is not essential that the latter should have gone beyond the boundaries of the county. It is sufficient that the officer, after diligent search, failed to find him." State v. Bruno, 204 N.W.2d 879, 886 (Iowa 1973). Trial court has wide discretion in

determining whether this due diligence standard was employed. State v. Kramer, 231 N.W.2d 874, 877 (Iowa 1975). This exercise of judicial discretion will not be interfered with absent a showing of abuse. Id.

Section 780.11, The Code 1977, states:

> Whenever the county attorney desires to introduce evidence to support the indictment, of which he shall not have given four days' notice because of insufficient time therefor since he learned said evidence could be obtained, he may move the court for leave to introduce such evidence, giving the same particulars as in the former case, and showing diligence such as is required in a motion for a continuance, supported by affidavit.

Section 780.12 further stipulates that if the court sustains the motion, the defendant shall elect to have a continuance or let the witness testify.

Applying these standards to the record of this case, we find trial court never exercised its judicial discretion by entering a 780.10 due diligence ruling. Nor did the county attorney make a 780.11 motion for leave to introduce the additional testimony, supported by affidavit. These procedural defects, however, are not dispositive.

It is well settled we will not reverse on the "ground of technical defects in procedure unless it appears in some way they have prejudiced the complaining party or deprived him or her of full opportunity to make defense to the charge presented in the indictment or information." State v. Smith, No. 62414 (Iowa, Aug. 29, 1979) slip op. at 6; State v. Rank, 214 N.W.2d 136, 138 (Iowa 1974); State v. Conley, 176 N.W.2d 213, 215 (Iowa 1970); State v. Jensen, 245 Iowa 1363, 1369, 66 N.W.2d 480, 483 (1954); State v. Heft, 155 Iowa 21, 26-27, 134 N.W. 950, 953 (1912). Defects relating to minutes of testimony are included. Smith, slip op. at 6; State v. Walker, 281 N.W.2d 612, 614-15 (Iowa 1979); State v. Johnson, 259 Iowa 599, 604, 145 N.W.2d 8, 11 (1966); State v. Burk, 88 Iowa 661, 665-67, 56 N.W. 180, 181-82 (1893); State v. Guisenhause, 20 Iowa 227, 230 (1866).

The purpose of the four day notice rule is "to inform defendant of the witnesses against him and the substance of their testimony." State v. Sevcik, 239 N.W.2d 571, 573 (Iowa 1976); Kramer, 231 N.W.2d at 877; Bruno, 204 N.W.2d at 885. These statutory sections, 780.10 **et seq.**, do not provide an exclusionary mechanism. Rather, they are designed to provide a procedural device to accomplish "timely evidential notice." Sevcik, 239 N.W.2d at 573. (emphasis in original)

The record before us discloses this objective was achieved. Defendant was apprised of the notices of additional testimony prior to trial. Yet, he elected to refuse trial court's offer of a four day continuance. Defendant consequently waived any objection to the untimely call of additional witnesses. State v. Sevcik, 239 N.W.2d at 573; State v. Kidd, 89 Iowa 54, 61, 56 N.W. 263, 265-66 (1893).[1] See also State v. King, 256 N.W.2d 1, 9 (Iowa 1977).

II. Motion For Directed Verdict. Defendant's second assignment of error charges trial court erred in failing to grant his motion for a directed verdict due to insufficiency of proof on the issue of intent. The standards for review are "well settled that on defendant's appeal from criminal conviction based on jury verdict challenging sufficiency of evidence to sustain the verdict, this court views the evidence in the light most favorable to the State and accepts as established all reasonable inferences tending to support the jury's action. It is necessary to consider only the supporting evidence whether contradicted or not. It is for the fact finder, not us, to resolve questions of fact and determine the credibility of witnesses. Thus, a finding of guilt by the trier of fact is binding on this court unless we find it is without substantial support in the record or is clearly against the weight thereof." State v. Overstreet, 243 N.W.2d 880, 884 (Iowa 1976). See also State v. Jones, 281 N.W.2d 13, 18 (Iowa 1979); State v. Jones, 271 N.W.2d 761, 763 (Iowa 1978).

Applying these standards to the record, we find Karl Popham identified defendant as the man who took him to a farm in the country both at the police station and at trial. This evidence was corroborated by Karl's older brother who also identified defendant. Defendant was stopped while driving the automobile meeting the description Karl's older brother gave to police as the car in which Karl was riding when he was dropped off near his home. At no time did defendant obtain permission from any member of Karl's family to take Karl anywhere. From these circumstances it may be inferred defendant intended to "detain or conceal" Karl from his family in violation of section 706.2, The Code 1975. See State v. Baker, 224 N.W.2d 7, 8 (Iowa 1974).

Judgment of trial court is affirmed.

AFFIRMED.

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[1] While Kidd speaks in terms of a defendant's privilege to elect a continuance "[w]hether the [section 780.11] motion for leave is rightfully or wrongfully sustained," 89 Iowa at 61, 56 N.W. at 265, we conclude the absence of a motion is not material in view of trial court's offer of a 4-day continuance.

JOHNSON, J. (specially concurring)

I concur in the majority's opinion as to Division I only because I believe it correctly applies the law as it has been articulated in the Iowa cases from Kidd through Sevcik. The record in this case does not establish compliance with section 780.10. An attempt to serve defendant personally was made around November 1, 1977. During the rest of November and all of December and January, no further attempts were made by the county attorney to serve defendant personally before serving his counsel in February. I find the county attorney's failure to attempt service on defendant personally after a lapse of three months does not constitute due diligence sufficient to permit service on defendant's counsel. I further find the service on defendant's counsel to fall outside the four-day notice requirements. Thus, sections 780.11 and 730.12 must be considered.

A defendant should be put to an election under section 780.12 only if the county attorney shows diligence in ascertaining witnesses or does not learn of the witnesses within four days prior to trial. Requiring a defendant to elect whether the section 780.11 motion is rightfully or wrongfully sustained permits a trial court to "disregard [the statutory] requirements and force[s] the defendant to waive the error although the county attorney was not diligent or in fact knew of the witnesses for weeks, as the record shows he knew here."[1] State v. Sevcik, 239 N.W.2d at 574 (Uhlenhopp, J., concurring specially). I cannot agree philosophically with this result.

Oxberger, C.J., joins in this special concurrence.

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[1] I agree with the majority's conclusion that absence of a section 780.11 motion is not material in this case.