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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

417

STATE OF IOWA,)

Plaintiff-Appellee,) Filed December 23, 1980

vs.)

CHARLES EDWARD STEVENS,) 0-280
62940

Defendant-Appellant.)

Appeal from Story District Court - Russell Hill, Judge.

Defendant appeals from his conviction for sexual abuse in the second degree in violation of section 709.3(1), supplement to the Code 1977, contending 1) that there was no good cause for delay beyond ninety days in bringing him to trial and therefore he was denied his statutory right to a speedy trial; 2) that he should have been permitted to cross-examine a witness for the State about all recent felony convictions and about being on parole; and 3) that error occurred during closing rebuttal argument when the State was allowed to comment on whether defendant had a beard, since it went beyond the scope of defendant's closing argument. REVERSED AND REMANDED.

Timothy J. Finn of Murray, Curtis & Finn, Ames, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Shirley Ann Steffe, Assistant Attorney General, for plaintiff-appellee.

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

Defendant appeals from his conviction for sexual abuse in the second degree in violation of section 709.3(1), supplement to the Code 1977. He contends 1) that there was no good cause for delay beyond ninety days in bringing him to trial and he, therefore, was denied his statutory right to a speedy trial, 2) that he should have been permitted to cross-examine a witness for the State about all recent felony convictions and about being on parole, and 3) that error occurred during closing rebuttal argument when the State was allowed to comment on whether defendant had a beard, since the comment went beyond the scope of defendant's closing argument. We reverse and remand for a new trial.

On July 24, 1978, defendant was charged with sexual abuse in the second degree. Prior to trial on October 24, 1978, defendant moved to dismiss the charges on speedy trial grounds. Trial court overruled the motion.

During the trial, defendant was identified by the victim who testified that the man who raped her "wasn't clean-shaven, but he didn't have a full beard or full mustache. It was just like he hadn't shaved in a week or so." She further stated that she was "positive he didn't have a beard." Defendant testified that at the time of the alleged attack, he had a beard which he began growing in mid-June. Defendant's mother and aunt similarly testified that defendant had a beard on July 9, 1978. Defendant's ex-fiancee' testified that when she saw the defendant on July 11, 1978, he had been growing a beard for about a week and one-half.

The State's rebuttal witness, Reginald S. Buckner, testified that as defendant's work supervisor he saw defendant on July 9, 1978, at which time the defendant did not have a beard. On cross-examination, Buckner testified to having been convicted of the crime of receiving stolen property. No further testimony on prior convictions was allowed by the court. Outside the presence of the jury, the witness testified that he had been convicted of breaking and entering in 1973 and of receiving stolen property in 1976 and that he was released on parole in April 1978.

During closing argument, which was not transcribed, the State referred to defendant's beard. Defendant objected on grounds that the references were beyond the scope of defendant's closing arguments. The motion was overruled. The jury returned a verdict of guilty. This appeal followed.

I. Scope of Review. Since this is an action at law, our review is on assigned error only. Iowa R. App. P. 4.

II. Speedy Trial. Defendant alleges trial court erred in overruling his motion to dismiss for failure to bring him to trial within 90 days as required by Iowa R. Crim. P. 27(2)(b). He also raises his constitutional right to a speedy trial. We, however, find no error.

We will examine defendant's claim under Iowa R. Crim. P. 27(2)(b) which provides:

> If a defendant indicted for a public offense has not waived his right to a speedy trial he must be brought to trial within ninety days after indictment is found or the court must order the indictment to be dismissed unless good cause to the contrary be shown.

Iowa R. Crim. P. 27(2)(b).

This ninety-day requirement is "... both more specific and more stringent than the constitutional speedy trial requirement." State v. Petersen, 288 N.W.2d 332, 335 (Iowa 1980). Dismissal of defendant's case is required if trial is not commenced within the 90-day period unless: "(1) the defendant has waived his right to a speedy trial, (2) the delay is attributable to the defendant, or (3) there is 'good cause' for the delay." Id.; State v. Ege, 274 N.W.2d 350, 354 (Iowa 1979). The State has the burden to show good cause for the delay in order to be excused from the 90-day requirement. Petersen, 288 N.W.2d at 334.

On appeal, we do not review trial court's determination of good cause de novo. State v. Reynolds, 250 N.W.2d 434, 437 (Iowa 1977). To obtain a reversal of trial court's finding, defendant must show trial court abused its limited discretion. Ege, 274 N.W.2d at 354.

Good cause focuses only on the reason for delay; the four-factor balancing test for constitutional claims set forth in Barker v. Wingo, 407 U.S. 514, 530, 530, 92 S. Ct. 2182, 2192, 33 L. Ed. 2d 101, 116-17 (1972), is inapplicable under our rule 27(2)(b). Petersen, 288 N.W.2d at 335. In assessing sufficiency of the reasons for delay, we will consider the surrounding circumstances including 1) length of delay, 2) whether the defendant asserted his right to a speedy trial, and 3) whether he was prejudiced by the delay. Id.

Under the facts presented in this case, we find the delay was extremely short. The County Attorney's information was filed on July 24, 1978; trial was held October 24, 1978. The ninety-day limit ran on October 22, 1978, a Sunday, which by section 4.1(22), The Code 1977, extended the expiration date until October 23, 1978. The delay therefore was only one day. We note that the defendant did not demand a speedy trial at any time before the day scheduled for trial. His first assertion of the 90-day rule came just prior to the beginning of trial. Significantly, defense counsel in argument on

his motion for dismissal stated ". . . he [defendant] could make the decision to forego the mental examination, to not give up his speedy trial rights and go to trial today and that's the decision that he took." (emphasis added.) In addition, defendant cites no prejudice due to the one-day delay, nor do we find any in the record before us. As in Petersen, "[t]hese matters show that a less serious reason will suffice to constitute good cause." Id.

As to the reason for the delay, the State cites defendant's application for a mental examination; defendant cites cancellation of his trial date on two prior dates, despite his readiness. Defendant contends that the third trial date was the first time his trial was scheduled as the lead-off trial. Defendant's application for a mental examination was made on September 14, 1978; the matter came on for hearing on October 2, 1978. Some testimony was given to the effect that the county attorney's office planned to file a resistance; this, however, did not materialize. The county attorney testified she told defense counsel that she would not resist an application if it were more specifically stated. Trial court subsequently ordered an October 18th examination. Defendant also filed several other motions.

The time and effort necessary for processing, considering, and ruling upon defendant's motion in the prescribed manner may be examined as a reason for delay, although a delay by itself is no longer a factor constituting good cause. See Id.; State v. Truax, 232 N.W.2d 861, 863 (Iowa 1975). We find no other evidence that earlier trial dates were set and then postponed or that defendant was ready for trial. We conclude trial court did not abuse its discretion in refusing to dismiss the prosecution on speedy trial grounds.

III. Cross-Examination of Witness. Defendant also contends trial court erred in not permitting cross-examination of the State's witness, Reginald S. "Reggie" Buckner, about all recent felony convictions and his current parole status, thereby denying his right to effective and adequate cross-examination and also preventing his inquiry into the credibility, biases, and motives of this witness. We agree.

Other than the alleged victim, the only witness testifying that defendant had no beard on July 9, 1978, was Reginald S. Buckner. The issue of whether on July 9, 1978, defendant had a beard was central to his identification in the State's case against him; the witness' testimony was, therefore, crucial. Defendant was allowed to establish by cross-examination only that the witness had a prior conviction for receiving stolen property; no cross-examination was permitted on the witness' 1973 conviction for

breaking and entering. Further, no testimony was allowed on the witness' status as a current parolee.

We find defendant should have been allowed to cross-examine the witness on his parole status.

A. Parole Status. We examine first the admissibility of parole status testimony. The sixth amendment right of confrontation includes the right to cross-examine witnesses to determine motive for testifying. Davis v. Alaska, 415 U.S. 308, 315-16, 94 S. Ct. 1105, 1110, 39 L. Ed. 2d 347, 353 (1974). "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony is tested." Id. This constitutional right of confrontation was extended to the states through the fourteenth amendment. Pointer v. Texas, 380 U.S. 400, 403, 85 S. Ct. 1065, 1068, 13 L. Ed. 2d 923, 926 (1965). In Davis, the Supreme Court reversed a habeas petitioner's burglary and grand larceny convictions because of limitations placed on defense counsel in cross-examining a prosecution witness regarding his status as a probationer. Davis, 415 U.S. at 320-21, 94 S. Ct. at 1112, 39 L. Ed. 2d at 356. There, defense counsel wanted to show that the witness' bias and prejudice led to a faulty initial identification of defendant, which then could have affected the witness' later in-court identification of defendant. The Supreme Court stated:

> We cannot speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted this line of reasoning had counsel been permitted to fully present it. But we do conclude that the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on [the witness'] testimony which provided "a crucial link in the proof . . . of petitioner's act." [citation omitted.] The accuracy and truthfulness of [the witness'] testimony were key elements in the State's case against petitioner. The claim of bias which the defense sought to develop was admissible to afford a basis for an inference of undue pressure because of [the witness'] vulnerable status as a probationer, ...

Id. at 317-18, 94 S. Ct. at 1111, 39 L. Ed. 2d at 354. The Davis court found that, while defense counsel was permitted to ask whether the witness was biased, ". . . counsel was unable to make a record from which to argue why . . ." the witness might be biased. This was held to be error. Id., at 318, 94 S. Ct. at 1111, 39 L. Ed. 2d at 355. (emphasis added.) The court concluded that counsel should have been allowed to pursue the cross-examination relevant to the witness' status as a probationer and that this denial of ". . . the right of effective cross-examination . . . 'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.' [citations omitted]." Id.; cf. Alford v. United States, 282 U.S. 687, 693, 51 S. Ct. 218, 220, 75 L.

Ed. 624, 628 (1931) (reversed because of abuse of discretion and prejudicial error; the court upheld the right of defense counsel to impeach a witness by showing that due to the witness' status as a prisoner at trial time, the testimony was biased as "given under promise or expectation of immunity, or under the coerced effect of his detention by officers of the United States"); Patterson v. McCarthy, 581 F.2d 220, 221 (9th Cir. 1978) (defense was entitled to probe motives and the jury to consider all relevant admissible factors regarding the witness' credibility including his parole status.)

In the present case, we find that no motive testimony was allowed. Neither was defendant allowed to develop "whether" the witness was biased or the record from which to argue "why" the witness was biased. The court refused to permit any question as to whether the witness was currently on parole. We believe that the principles of Davis directly apply and conclude that trial court abused its discretion in excluding testimony of the witness' current parole status.

Further, we do not find the error to be harmless even in the face of the incriminating physical evidence. In Mills v. Estelle, 552 F.2d 119 (5th Cir. 1977), the court noted that the Supreme Court in Davis "...seemed unwilling to engraft a 'harmless error' exception on its holding that a prior conviction could be introduced in order to show bias." Mills, 552 F.2d at 122; see Davis, 415 U.S. at 317-18, 94 S. Ct. at 1111, 39 L. Ed. 2d at 354.

We find defendant is entitled to a new trial on this issue.

B. Prior Convictions. Defendant's counsel was able to cross-examine the witness Buckner only on his 1976 conviction for receiving stolen property. Trial court permitted no evidence on the witness' prior conviction for breaking and entering in 1973. Both convictions resulted from guilty pleas. The State argues that the only permissible question was whether the witness had been convicted, which required only a "yes" or "no" response. Relying on State v. Martin, 217 N.W.2d 536, 542 (Iowa 1974), and State v. Conner, 241 N.W.2d 447, 454 (Iowa 1976), defendant contends both prior convictions were admissible for the purpose of attacking credibility under section 622.17, The Code 1977. We review trial court's ruling to determine whether the court abused its discretion. Martin, 217 N.W.2d at 544.

Felonies involving theft and breaking and entering have been held to reflect on veracity. Conner, 241 N.W.2d at 455; Hampton v. United States, 340 A.2d 813, 817 (D.C. 1975). In Conner, the prior conviction involved larceny and burglary; in Hampton, a five-year-old attempted housebreaking conviction was involved. Conner, 241 N.W.2d at 454;

Hampton, 340 A.2d at 815. The burden is on the party seeking to exclude evidence of prior convictions to preserve the record by showing the nature of the prior felony convictions. See State v. Davis, 229 N.W.2d 249, 252 (Iowa 1975). The State has presented no evidence here to indicate that the prior convictions did not involve dishonesty or false statement. Assuming, therefore, without deciding that the witness' prior convictions involved dishonesty and false statement, the first part of the Martin test appears to have been satisfied. The second part of the test requires trial court to balance ". . . the nature of each conviction, its bearing on veracity, its age, and its propensity to improperly influence the minds of the jurors" in making its finding as to whether the danger of unfair prejudice outweighs the probative value of admitting the prior conviction. Martin, 217 N.W.2d at 542. We presume trial court was aware of its responsibilities under Martin, although we find the record is inadequate to make such a determination. While on the record before us, we see no apparent reason for excluding the 1973 conviction, we also find the record inadequate to determine whether trial court abused its discretion in not admitting this conviction. Because we find the record inadequate under the second part of the Martin test, we cannot review this issue. This, however, does not preclude trial court's application of the Martin test to these prior convictions upon retrial.

IV. Closing Argument Statements. As his last assignment of error, defendant alleges trial court improperly allowed the State to continue its closing rebuttal argument, over defendant's objections, with references to whether defendant had a beard at the time the offense was committed. We find no merit in defendant's argument.

Closing arguments were not recorded. In summarizing, trial court stated that during closing argument defendant's counsel referred to the composite picture derived from the victim's description of the attacker, that the State directed arguments to the significance of the beard, and that a part of the closing argument necessarily went to the question of defendant's identity. We have examined fully defendant's contentions on this issue and find no error.

Having determined that defendant was denied his right to fully cross-examine the State's witness, we reverse and remand this case for a new trial.

REVERSED AND REMANDED.