

JAN 25 1979

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IN THE COURT OF APPEALS OF IOWA

CLERK SUPREME COURT

STATE OF IOWA,

)

Appellee,

)

Filed January 25, 1979

vs.

)

JAMES LOPEZ,

)

702

Appellant.

)

61686

Appeal from the Mills County District Court - Jerry L. Larson, Judge.

Defendant appeals rape conviction on grounds of trial court's failure to grant continuance, improper submission of venue issue to jury, and improper giving of verdict-urging instruction. Affirmed.

Richard D. Crotty, of Council Bluffs, for appellant.

Thomas J. Miller, Attorney General, Thomas A. Evans, Assistant Attorney General, Robert Huibregtse, Special Assistant Attorney General, and H. Walter Green, Mills County Attorney, for appellee.

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

PER CURIAM

Defendant, James Lopez, appeals his conviction by jury of the crime of rape in violation of § 698.1, The Code, 1977. He argues trial court erred in overruling his motion for continuance, in allowing the jury to consider the issue of venue raised by his Demurrer to the Information, and in giving a verdict-urging instruction to the jury. We affirm.

I. A trial court's disposition of a motion for continuance is a matter largely within the court's discretion and will not be disturbed on appeal "unless it clearly and affirmatively appears that there was an abuse of discretion and an injustice done to the defendant." *State v. French*, 240 Iowa 1, 25, 35 N.W.2d 1, 14 (1948). The exercise of sound discretion requires trial court to protect defendant's constitutional right to effective assistance of counsel, which of necessity encompasses adequate time for preparation of a defense. *State v. Youngbear*, 229 N.W.2d 728, 734 (Iowa 1975).

Defendant's original motion stated reasons for the request for continuance: (1) to give defendant sufficient time to subpoena and depose witnesses upon whose testimony the rape charges were based; (2) to give defendant sufficient time to obtain a transcript of prosecutrix's deposition. At the hearing on the motion, defendant, for the first time, stated that he needed additional time to locate witnesses and discover their testimony relative to prosecutrix's reputation.

Section 780.2, The Code, 1977, makes R.C.P. 183 applicable to continuances in criminal cases. Rule 183(b) requires any motion for continuance to be accompanied by an affidavit of the defendant, defendant's agent or defendant's attorney. "The motion 'must' contain the factual allegations specified in the rule." *State v. Cowman*, 212 N.W.2d 420, 423 (Iowa 1973). Defendant's request for additional time to locate witnesses relative to prosecutrix's reputation was not supported by the mandatory affidavit. Therefore, trial court did not abuse its discretion in overruling defendant's motion on this ground. *Cowman*, supra, at 423; *Youngbear*, supra.

Defendant's original motion, however, was supported by affidavit as required. We, then, must decide whether there is a clear and affirmative showing of abuse of discretion with resulting injustice to defendant. *French*, supra, 240 Iowa at 25, 35 N.W.2d at 14.

The court in *Stamps v. United States*, 387 F.2d 993 (8th Cir. 1967), states that the question of whether the time allowed defendant's counsel for preparation of a defense is sufficient depends upon the nature of the charge, the issues presented, counsel's familiarity with the applicable law and pertinent facts, and the availability of material witnesses. *Stamps*, supra, at 995. In the case at bar, familiarity with pertinent facts and availability of material witnesses are particularly important.

The record discloses the following facts: October 31, 1977, the county attorney's true Information charging defendant with the crime of rape was filed with attached minutes of testimony of all witnesses upon which the charge was based; November 14, 1977, defendant's counsel was appointed; November 16, 1977, defendant filed a motion to produce any exculpatory evidence; November 21, 1977, prosecutrix's deposition was taken; December 1, 1977, names, addresses and telephone numbers of the State's witnesses were provided in the Reply to Motion for Discovery; December 3, 1977, defendant's counsel received his copy of the Reply; December 5, 1977, defendant filed his motion for continuance; December 9, 1977, trial court entered its Order denying the continuance; December 9, 1977, defendant's request to depose State's witnesses, including one additional witness whose testimony was not attached to the Information, was granted.

We believe the record supports trial court's finding that defendant was sufficiently apprised of the identification of the State's witnesses from the minutes of testimony attached to the Information and had access to the information contained in prosecutrix's deposition through taking her deposition and, thus, did not abuse its discretion in finding that defendant's counsel had adequate time to prepare for defense of the case.

II. Section 753.2, The Code, 1977, requires criminal actions to be tried in the county in which the crime was committed. Venue is a jurisdictional fact which the State must establish as a vital ingredient of any prosecution with proof beyond a reasonable doubt. *State v. Wardenburg*, 261 Iowa 1395, 1401, 158 N.W.2d 147, 151 (Iowa 1968).

There is evidence in the record which suggests that the crime could have been committed in either Pottawattamie County or Mills County. However, the evidence is not so overwhelming as to require, or even permit, a determination as a matter of law that the bridge in question is in one county or the other. Applying the principle that the question of venue should be submitted to the jury when there is any substantial evidence reasonably tending to support the jurisdictional fact of venue, we believe trial court did not err in overruling defendant's Demurrer to the Information. *State v. Dahlstrom*, 224 N.W.2d 443, 447 (Iowa 1974).

III. In his Motion for New Trial, which trial court overruled, defendant asserted that trial court abused its discretion in giving the verdict-urging instruction. Defendant argues on appeal that he has been prejudiced by the instruction because a guilty verdict was returned one-half hour after the instruction was given and because the language of

the instruction was erroneous. We do not reach the merits of these issues, however, because we believe defendant has expressly waived any right to assert them on appeal.

After trial court had advised counsel of its intent to give the verdict-urging instruction for the jury, and a copy had been given to each of them, the following colloquy took place:

THE COURT: "At this time, if you have any objection to the proposed instruction, the record should be made in regard to that matter." (Tr. p. 182, ll. 15-17)

* * *

MR. GREEN: "Your Honor, for the state, there is no objection to the additional instruction." (Tr. p. 182, ll. 22-23)

* * *

THE COURT: "Mr. Crotty?" (Tr. p. 183, l. 5)

MR. CROTTY: "No, your Honor. We have none, do we, Jim?" (Tr. p. 183, ll. 6-7)

Defendant argues that, despite this statement of counsel, he has preserved the record as required by R.C.P. 197, which is applicable in criminal prosecutions. Section 780.35, The Code, 1977; State v. Schmidt, 259 Iowa 972, 979, 145 N.W.2d 631, 636 (1966). He also quotes, without citation, § 793.18, The Code, 1977, which requires appellate review of the record "... without regard to technical errors or defects which do not affect the substantial rights of the parties" We find the record in this case shows no technical error or defect. We also find that Rule 197 in no way precludes the defendant from expressly waiving any objection to the verdict-urging instruction.

Rules 196 and 197 should be read in conjunction with each other and with § 787.3, The Code, 1977. Rule 196 addresses itself to the original instructions prior to jury arguments wherein counsel is given reasonable time to make objections to the trial court's giving or failing to give instructions. Such objections are to specify the matter objected to and on what grounds. If the court revises or adds (emphasis added) to the original instructions, similar specific objections may be made in the Motion for New Trial "and if not so made shall be deemed waived." R.C.P. 196. Rule 197 refers to further instructions by the court while the jury is deliberating and provides, in part, "that any objections thereto shall be made in a Motion for New Trial."

Despite the provisions of Rules 196 and 197 for civil cases, §§ 787.3(5) and (7) give a defendant in a criminal trial the right to raise the objections to any of the court's instructions for the first time in a motion for new trial.¹ This right, however, is subject to two exceptions, one of which is an express waiver. *State v. Willis*, 250 N.W.2d 428, 430 (Iowa 1977); *State v. Brown*, 172 N.W.2d 152, 157 (Iowa 1969); *State v. Hartung*, 239 Iowa 414, 424-25, 30 N.W.2d 491, 497 (1948).

We conclude, therefore, under these facts, that defendant had the right to object to trial court's giving the additional instruction in a motion for new trial, but expressly waived that right. He is not free to await the outcome of the trial and then claim he has been prejudiced by the trial court's action. See *State v. Robinette*, 216 N.W.2d 317, 318 (Iowa 1974); *State v. Brown*, supra at 158; c.f. *State v. Cornell*, 266 N.W.2d 15, 17-18 (Iowa 1978). The judgment of the trial court is affirmed.

AFFIRMED.

Subsections 3 and 5, § 787.3, The Code, state:

"The court may grant a new trial for the following causes, or any of them:

* * *

"5. When the court has misdirected the jury in a material matter of law.

* * *

"7. When the court has refused properly to instruct the jury."