

NOV 22 1978

234

IN THE COURT OF APPEALS OF IOWA
CLERK SUPREME COURT

STATE OF IOWA,

)

Appellee,

)

Filed November 22, 1978

vs.

)

DALE DUANE PETERSON,

)

635

Appellant.

)

61418

Appeal from Wright District Court - Newt Draheim, Judge.

Defendant appeals conviction for violations of § 321.82, The Code, larceny of a motor vehicle, claiming error in State's failure to comply with Order of Trial Statute, § 780.5, The Code. - Affirmed.

Robert W. Brinton, of Archerd, Johnson & Brinton, Clarion, for Appellant.

Richard C. Turner, Attorney General of Iowa, Raymond W. Sullins, Assistant Attorney General, and Lee E. Poppen, Wright County Attorney, for Appellee.

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

PER CURIAM

Defendant Dale Peterson appeals his conviction for larceny of a motor vehicle in violation of § 321.82, The Code 1977. He asserts the trial court erred by refusing to set aside the verdict because neither the county attorney nor the court clerk read the information and defendant's plea thereto as required by § 780.5, The Code. We affirm.

Section 780.5, The Code, states in pertinent part:

Order of trial. The jury having been impaneled and sworn, the trial must proceed in the following order: 1. Reading indictment and plea. The clerk or county attorney must read the indictment or, the supplemental indictment as required under the provisions of the Code, and state the defendant's plea to the jury.

The information and plea were not read to the jury at the beginning of Peterson's trial. Peterson objected to this omission at the close of State's evidence, and it was agreed that the county attorney would read the information at the close of defendant's case or after State's rebuttal. The county attorney failed to do so and Peterson moved to set aside the verdict. In overruling this motion, trial court found that the jury was informed of the charge and the plea by remarks made at voir dire and by the jury instructions.

Since the purpose of the statute is to advise the jury of the issue to be tried, we agree that there has been substantial compliance therewith in this case. The State's failure to formally read the information and plea at commencement of the trial, therefore, does not constitute reversible error. See *State v. Raiston*, 139 Iowa 44, 51, 116 N.W. 1058, 1061 (1908). Defendant cites no authority that prejudice is to be presumed when the Order of Trial Statute is not literally followed. We find no prejudice in this case.

AFFIRMED.

All judges concur, except Donielson, J., who dissents.

DONIELSON, J. (dissenting)

I dissent. The use of the word "must" makes the requirement of § 780.5 that the indictment or information be read mandatory. *State v. Nowlin*, 244 N.W.2d 596, 599 (Iowa 1976). This is not a case where the indictment or plea were read out of order or by someone other than the county attorney or clerk. See *State v. Ralston*, 139 Iowa 44, 51, 116 N.W. 1058 (1908); *State v. Norton*, 67 Iowa 641, 642, 25 N.W. 842 (1885). When defense counsel brought the matter before the court at the close of State's evidence, the State was permitted to read the information "at the most convenient place in the proceedings that remain," either at the close of the defense or at State's rebuttal. But the information was never presented, even after the objection was made and the State was offered the opportunity to correct its omission. The disregard of a statute which is mandatory in character must be conclusively presumed to be prejudicial. See *State v. Porter*, 74 Iowa 623, 624, 38 N.W. 514 (1888). The statements by the county attorney and trial court during *voir dire* and the instructions of the trial court were not sufficient to inform the jury of the exact issue to be presented to them. *State v. Ralston*, supra at 51. They stated the offense charged; it is the statement of facts alleged in the information that determine the offense charged. *State v. Steinke*, 185 Iowa 481, 170 N.W. 801 (1919). I would reverse the trial court and remand for a new trial.