IN THE COURT OF APPEALS OF IOWA

No. 7-551 / 96-1463

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FILED
DEC 29 1997
CLERK SUPREME COURT

STATE OF IOWA,
Appellee,

vs.

ROBERT JOHN ARMSTRONG,
Appellant.

Appeal from the Iowa District Court for Jasper County, Darrell J. Goodhue, Judge.

Defendant, Robert Armstrong, appeals the judgment and sentence entered upon his conviction of first-degree burglary in violation of Iowa Code sections 713.1 and 713.3 (1995). **AFFIRMED.**

Maggi Moss and Patrick Wegman of Parrish, Kruidenier, Moss, Dunn & Montgomery, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, Steven Johnson, County Attorney, and John Heinicke, Assistant County Attorney, for appellee.

Heard by Streit, P.J., and Vogel and Mahan, JJ.

VOGEL, J.

The defendant, Robert John Armstrong, appeals the judgment and sentence entered upon his conviction of first-degree burglary in violation of Iowa Code sections 713.1 and 713.3 (1995). He argues: (1) the trial court erred in denying his motion to exclude testimony of four State's witnesses; (2) the evidence was insufficient to support his conviction; and (3) his trial counsel provided ineffective assistance by failing to timely file a notice of an alibi defense and to properly prepare for State witnesses.

Background facts. On November 22, 1995, at approximately 6:30 a.m., Dale Runner was preparing breakfast for his grandson, Matt Piatt. Runner heard a knock on the kitchen door and observed a man standing outside. The man was wearing a camouflage suit and had a parka pulled up around his face. As Runner was speaking with this man, another man, wearing a camouflage suit and a dark colored ski mask, approached and sprayed mace in Runner's face. One of the men then hit Runner in the head, opening up a three-inch gash, and both men kicked him in the ribs.

The men entered the house and went to Piatt's room. The men, one of whom was carrying an assault rifle, marched Piatt out of his bedroom. Runner shoved his cane at the gun and Piatt attempted to grab it. A struggle ensued, a shot was fired, and Matt was maced. Piatt was able to leave the room and retrieved a .410 shotgun. Another struggle ensued and more shots sounded. During the struggles Runner

grabbed one of the intruders and pulled out a hunk of his hair. The intruders left the house when a car was heard coming up the driveway.

Deputy Sheriff Michael Balmer investigated the crime. Runner and Piatt told him the .410 shotgun was missing. Balmer found a knife in the dining room that did not belong to any of the household residents. Balmer returned to the Runner home on November 24 and received from Piatt other items associated with the crime including a ski mask, a pepper mace can, a large hunk of hair, and a rifle round.

In early December 1995 the sheriff's office received information from the Ames Police Department that led investigators to suspect Armstrong and two other men of the burglary.

Armstrong was charged with the burglary. Trial was scheduled for May 29, 1996. On May 21 defendant filed a notice of an alibi defense. On May 23 the State filed a fourth notice of additional minutes of evidence. This evidence included the testimony of four witnesses: Faye Jarnigan, Rhonda Pratt, Darrell Pratt, and Ron Miller. Defendant filed a motion to exclude the testimony of these witnesses on the basis that the filing of notice was untimely pursuant to Iowa Rule of Criminal Procedure 18(2). The State filed a motion to exclude defendant's alibi witnesses on the basis that the notice of an alibi defense was untimely filed.

Following a hearing on the motions the court opined that it was not satisfied with "the diligence of the county attorney's office relative to the four additional

000328

witnesses." However, the court found the defendant knew of the witnesses, was offered "at least a limited opportunity" to depose some of the witnesses, and was offered a continuance. The court denied both motions.

I. Motion to exclude witnesses. We review the trial court's denial of Armstrong's motion to exclude the State's witnesses for an abuse of discretion. *State v. LeGrand,* 501 N.W.2d 59, 62 (Iowa App. 1993). Armstrong argues the trial court abused its discretion under Iowa Rule of Criminal Procedure 18(3) in allowing four of the State's witnesses to testify despite late notice of their testimony.

Iowa Rule of Criminal Procedure 18(2) provides in relevant part that "[a]dditional witnesses in support of the indictment or trial information may be presented by the prosecuting attorney if he or she has given the defendant's attorney of record . . . a minute of such witness' evidence, . . . *at least ten days before the commencement of the trial.*" (Emphasis added.) If the State does not comply with the ten-day requirement, pursuant to Iowa Rule of Criminal Procedure 18(3), the court may order discovery, continuance, or other relief for the defense it deems necessary, including the exclusion of the testimony. We generally do not reverse on grounds of technical procedural defects unless it appears to have prejudiced the complaining party or deprived them of a full opportunity to defend. *See State v. Braun*, 495 N.W.2d 735, 741 (Iowa 1993).

In this case the State did not comply with the ten-day requirement. The trial court tried to remedy this by offering Armstrong a continuance pursuant to Rule 18(3), which defense counsel declined. The defense still had a limited opportunity to depose the witnesses but made no effort to do so. The State filed extensive minutes of testimony to minimize surprise as to the content of the testimony. The defense was also provided with copies of sworn videotaped statements of two witnesses. Moreover, defense counsel, in an informal conference admitted to the court he had a sense as to what these additional witnesses would testify.

Although the State failed to provide defense with prompt notification of the four additional witnesses, the court attempted to rectify the situation. Where the trial court provides an opportunity for defense counsel to interview additional witnesses before trial, we are reluctant to find the trial court abused its discretion in not excluding the witnesses. *State v. LeGrand*, 501 N.W.2d 59, 63 (Iowa App. 1993). In *LeGrand*, the State did not notify the defendant of eight additional witnesses until six days before trial. *Id.* At 61. The defendant asked for a continuance, or alternatively, that the witnesses be excluded. *Id.* The court declined both requests; nevertheless, we held it was sufficient that the court allowed defense counsel an opportunity to question these witnesses before trial. *Id.* at 63. We found no prejudice to defendant, nor did we find the court abused its discretion. *Id.* In this case, the defendant was at least offered an opportunity to have the case continued, which was

sufficient to cure any prejudice resulting from the State's dilatory notification pursuant to Rule 18(2). *See State v. Bedwell*, 417 N.W.2d 66, 69 (Iowa 1987).

Armstrong argues that had he accepted the trial court's offer for a continuance, his constitutional right to a speedy trial would be effectively waived. We do not agree. The trial informations were filed on March 18 and March 20, 1996. A speedy trial under Iowa Rule of Criminal Procedure 27(2)(b) mandates a defendant be brought to trial "within ninety days after indictment is found." Trial was set for May 29, 1996. The ninety days would have lapsed on June 16, 1996. We cannot assume that eighteen days (from May 29 to June 16) would not have been adequate to reschedule the trial within the limitations of the ninety-day speedy trial period. Therefore, no speedy trial violation was shown.

We accordingly find Armstrong was not prejudiced and further find the trial court did not abuse its discretion; we affirm on this issue.

II. Sufficiency of evidence. A jury's verdict is binding upon this court unless the record lacks substantial evidence to support such a finding. *State v. Bush*, 518 N.W.2d 778, 779 (Iowa 1994). We review the record in the light most favorable to the State. *State v. Taft*, 506 N.W.2d 757, 762 (Iowa 1993).

Armstrong argues the evidence was insufficient to support his conviction. We disagree.

At trial, Armstrong presented witnesses who testified that he and Jarnigan had fought on the Sunday before Thanksgiving 1995, that Jarnigan had pulled out a handful of Armstrong's hair and placed it in a picture frame. Armstrong's witnesses also testified Armstrong was at their home at 7:00 a.m. on November 22, 1995.

However, the State's witness, Faye Jarnigan, testified that on November 22, 1995, defendant returned home and "had some hair ripped out." Armstrong told Jarnigan that an old man had pulled out his hair. Jarnigan identified the .410 shotgun and stated Armstrong also told Jarnigan that he and two others had committed a robbery and had taken the gun. Jarnigan testified that she sold the gun to her grandfather, Ron Miller. Ron Miller testified that he had bought the .410 shotgun from Jarnigan on Thanksgiving Day 1995.

Darrell Pratt, Jarnigan's step-father, also testified that Armstrong had told him that he had committed a robbery during which he beat up an old man and had a piece of hair ripped out of his head. Armstrong also told Pratt he had taken a shotgun.

Moreover, Paul Bush, a criminalist with the Iowa Division of Criminal Investigation, offered compelling evidence. He compared a known hair sample from Armstrong with the wad of hair found at the Runner residence, and analyzed a strand of hair taken from the stocking cap. He also performed DNA testing on the hair to determine if the genetic characteristics matched the known blood sample from Armstrong. Mr. Bush found Armstrong's blood was consistent with the

characteristics of the hair root on six different DNA typing systems. He concluded only one in 9,600 members of the Caucasian population would have those six combined DNA types.

The jurors were entitled to disbelieve the defense witnesses in favor of the State's witnesses. *See State v. Knox*, 536 N.W.2d 735, 742 (Iowa 1995) ("[T]he jury [is] in the best position to judge whom and what to believe."). Cumulatively, the consistent and compelling findings of the State's witnesses convince us the trier of fact could reasonably find that substantial evidence existed from which they could determine Armstrong was guilty beyond a reasonable doubt. *Cf. State v. Smith*, 508 N.W.2d 101, 103 (Iowa App. 1993) (noting State's witnesses were inconsistent, self-contradictory, and lacking in detail that the jury was not reasonable in finding substantial evidence). We find there was substantial evidence Armstrong committed robbery, burglary, and terrorism; we affirm on this issue.

III. Ineffective assistance of counsel. Armstrong maintains his counsel provided ineffective assistance by failing to timely file a notice of alibi defense and by failing to properly prepare for the questioning of the State's witnesses, Rhonda Pratt and Jarnigan.

In order for Armstrong to prevail on an ineffective assistance of counsel claim, he must prove by a preponderance of the evidence that 1) counsel failed to perform an essential duty; and 2) prejudice resulted. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa

1994). Armstrong must establish under the first prong of this test that counsel's performance was not within the normal range of competency. *Irving v. State*, 533 N.W.2d 538, 540 (Iowa 1995). Under the second prong of the ineffective assistance of counsel test, Armstrong must prove but for counsel's error, the outcome of the trial would have been different. *Ray*, 516 N.W.2d at 865; *see Strickland v. Washington*, 466 U.S. 668, 694 104 S.Ct. 2052, 2069, 80 L.Ed.2d 674, 699 (1984).

Although Armstrong claims his counsel was ineffective for failing to file a timely notice of alibi defense, Armstrong cannot claim prejudice for this error. The court overruled the State's resistance to the untimely notice and Armstrong was allowed to fully pursue the alibi defense. After thoroughly considering Armstrong's additional claims of ineffective assistance of counsel, we are unable to conclude that defense counsel breached an essential duty in any of the instances Armstrong cites. We find counsel functioned within the range of normal competency. We further conclude that Armstrong was not prejudiced by counsel's conduct. We are not convinced that but for counsel's actions, the outcome of the trial would have been different in light of the overwhelming evidence militating in the State's favor. We therefore reject Armstrong's ineffective assistance of counsel claims.

Having carefully considered all arguments before us on appeal, we affirm the decision of the trial court and uphold Armstrong's convictions.

AFFIRMED.