FILED
MAY 30 1980
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

Plaintiff-Appellee,

vs.

JOHN MYRLE VAUGHN,

Defendant-Appellant.

Filed May 30, 1980

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Appeal from Wapello District Court - James D. Jenkins, Judge.

Defendant appeals jury verdict finding him guilty of robbery in the second degree in violation of sections 711.1 and 711.3, supplement to the Code 1977, alleging trial court erred in 1) overruling his motion to dismiss for violation of his right to speedy trial and 2) failing to instruct the jury on the crime of assault as a lesser included offense of the crime of robbery in the second degree. AFFIRMED.

Scott Campbell of Oskaloosa, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa; and Selwyn L. Dallyn, Assistant Attorney General; for plaintiff-appellee.

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

Defendant, John Myrle Vaughn, appeals jury verdict finding him guilty of robbery in the second degree in violation of sections 711.1 and 711.3, supplement to the Code 1977. He alleges trial court erred in 1) overruling his motion to dismiss for violation of his right to speedy trial and 2) failing to instruct the jury on the crime of assault as a lesser included offense of the crime of robbery in the second degree. We affirm.

Defendant originally was charged with robbery in the first degree in violation of sections 711.1 and 711.2, supplement to the Code 1977. Trial was held on this charge on September 19, 1978. A mistrial was declared on September 22, 1978, due to the jury's failure to reach a verdict. Defendant, on December 26, 1978, filed a motion to dismiss alleging the State had failed to re-try him within ninety days as required by Iowa law. Trial court overruled defendant's motion on January 17, 1979. On January 23, 1979, defendant was re-tried and convicted. This verdict was set aside, however, on February 7, 1979, when defendant's motion for a new trial was sustained. On March 12, 1979, a supplemental trial information was filed charging defendant with robbery in the second degree. Defendant was tried a third time and found guilty of the amended charge on May 4, 1979. It is from trial court's January 17, 1979 order overruling his motion to dismiss and his conviction following the third trial which defendant appeals.

I. Right to Speedy Trial. Under Iowa's speedy trial statute, a defendant must be tried within ninety days after indictment, unless 1) the right is waived by defendant, 2) the delay is attributable to defendant, or 3) other good cause to the contrary is shown. Iowa R. Crim. P. 27(2)(b); State v. Ege, 274 N.W.2d 350, 354 (Iowa 1979). Retrial under Iowa R. Crim. P. 18(8)(a) also must be held within ninety days after a mistrial is declared unless good cause is shown. It is the State's duty, not defendant's, to prosecute timely and begin trial within this allowable period. State v. Lybarger, 263 N.W.2d 545, 546 (Iowa 1978).

On review we will not examine trial court's findings regarding delay in bringing defendant to trial **de novo**. State v. Reynolds, 250 N.W.2d 434, 437 (Iowa 1977). To obtain a reversal, defendant must show trial court abused its discretion. Ege, 274 N.W.2d at 354. In determining whether good cause exists, our sole focus is on the reason for the delay. State v. Petersen, 288 N.W.2d 332, 335 (Iowa 1980). In assessing sufficiency of the reasons for the delay, we will consider the surrounding circumstances, including 1) length of the delay, 2) whether defendant asserted his right to speedy trial, and 3) whether he was prejudiced by the delay. Id.

To support his contention trial court abused its discretion in finding good cause for delay, defendant attempts to distinguish State v. Butler, 243 N.W.2d 232 (Iowa 1976), which held delay in retrial occasioned by the time necessary for court reporters to prepare the transcript of testimony given at the first trial, requested by defendant for use at his second trial, constituted good cause for delay attributable to defendant. Id. at 233. Defendant argues his case is different because no record exists to show his retrial was ever scheduled within the ninety day period required by statute. The State argues defendant's case was placed on the top of its list in making its October 1978 criminal assignment, but defendant's request for a transcript on October 12, 1978, occasioned the postponement of trial until January 23, 1979, one week after the requested transcript was completed.

Without deciding whether the record supports either the defendant's or the State's contention, we do not find merit in defendant's position. In focusing on the reason for the delay, we find defendant proximately caused the reason for the delay by requesting the transcript of his first trial. Id. The delay was for defendant's benefit, not the State's, and defendant must accept delay reasonably necessary for action on his own application. State v. Mochlis, 250 N.W.2d 42, 46 (Iowa 1977). The delay also was relatively short; only thirty-three days. Other than his ultimate conviction, defendant has not shown how the delay prejudiced him. In light of these circumstances, we conclude trial court properly exercised its discretion in overruling defendant's motion to dismiss and proceeded with the trial.

II. Assault Instruction. After both sides rested, defendant requested the jury be instructed on both the offense of robbery in the second degree and assault as a lesser included offense. Defendant's objections were overruled by trial court which found the crime of assault was not a lesser included offense of robbery as defined by the test set forth in State v. Furnald, 263 N.W.2d 751, 752 (Iowa 1978). On appeal, defendant argues trial court misapplied the test in making its determination. See also State v. Johnson, No. 63103 (Iowa, filed April 23, 1980); State v. Pierce, 287 N.W.2d 570, 573 (Iowa 1980).

We will not review the propriety of trial court's application of the test, however, since defendant's contention assault is a lesser included offense of the crime of robbery is more directly supported by another line of cases. As early as 1883 in State v. Kegan, 62 Iowa 106, 17 N.W. 179 (1883), the court held assault is a lesser included offense

of the crime of robbery. Id. at 108, 17 N.W. at 179. A catalog of the Iowa cases reaffirming this point include: State v. Duffy, 124 Iowa 705, 707, 100 N.W. 796, 797 (1904); State v. Becker, 159 Iowa 72, 77-78, 140 N.W. 261, 263 (1913); State v. Buchan, 219 Iowa 106, 108, 257 N.W. 586, 587 (1934); State v. Warneke, 219 Iowa 1239, 1243, 260 N.W. 667, 669 (1935); State v. Yanda, 259 Iowa 970, 971, 146 N.W.2d 255, 256 (1966); and State v. Youngbear, 203 N.W.2d 274, 278 (Iowa 1972). We further note prior cases have held failure to instruct on the lesser included offense of assault is nonprejudicial error if the jury has been given a choice to select another lesser included offense. Youngbear, id. at 278; Buchan, 219 Iowa at 108, 257 N.W. at 587. We also are aware our current rules of criminal procedure specifically require trial court to instruct on all lesser included offenses of the major crime charged. Iowa R. Crim. P. 6(3) (emphasis supplied).

Despite the above, however, there must be evidence to justify submission of an included offense to the jury. State v. Conner, 241 N.W.2d 447, 461 (Iowa 1976). In this case, defendant's defense to the crime charged is that he was not present and in support of this alibi, called several witnesses to testify to his whereabouts at the time of the alleged offense. Defendant does not controvert the evidence that shows Ms. Allen was struck on the head several times, the perpetrator stated "I want the money in the cash register," Ms. Allen heard the cash register being opened by the perpetrator, and immediately thereafter, the store owner discovered the cash register open and all the paper money gone. We thus find the following language from State v. Stanley, 109 Iowa 142, 80 N.W. 228 (1899), to be persuasive: "The fact of robbery by some one [sic] was not controverted, save in defendant's denial of having been present." Id. at 143, 80 N.W. at 228. Trial court thus committed no reversible error by refusing to submit the lesser included offense of assault to the jury under the facts of this case.

Judgment of trial court is affirmed.

AFFIRMED.