IN THE COURT OF APPEALS OF IOWA

No. 7-308 / 96-1390

JUN 26 1997

STATE OF IOWA,
Plaintiff-Appellee,

000697

vs.

ADRIAN ROMAL LOMAS,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, James E. Kelley, Judge.

Defendant appeals from judgment and sentences entered, following a jury trial, for first-degree robbery and second-degree theft. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Dennis D. Hendrickson, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Susan M. Crawford, Assistant Attorney General, William E. Davis, County Attorney, and Robert Weinberg, Assistant County Attorney, for appellee.

Considered by Habhab, C.J., and Cady and Streit, JJ.

STREIT, J.

Defendant appeals from judgment and sentences entered, following a jury trial, for first-degree robbery and second-degree theft. He argues the trial court violated his sixth amendment right to compulsory process and his fifth and fourteenth amendment rights to due process of law when it refused to allow him to explore the availability of a proposed witness. He alternatively contends, if the court finds error was not preserved on this issue, his trial counsel was ineffective.

The defendant, Adrian Romal Lomas, and Kenneth Lovell Morning were arrested for first-degree robbery and second-degree theft, at knife point, of a pizza delivery man in violation of Iowa Code sections 711.1, 711.2, 714.1(4), and 714.2(2). The men were charged under the theory of aiding and abetting.

Deposition testimony was taken during the discovery process. Over three to four weeks before Lomas's trial, Morning pleaded guilty to second-degree robbery and second-degree theft. About one week before trial, Morning was sentenced.

Lomas's trial began on June 24, 1996. Three of the State's witnesses testified that afternoon. After the jury was excused for the day, defendant requested Morning be transported from Oakdale to the trial to testify as a defense witness. The State resisted the request, stating it had no notice Morning would be called as a witness. The defense did not present any evidence of Morning's possible testimony. The court denied the request.

The jury returned guilty verdicts. The court sentenced Lomas to indeterminate twenty-five and five-year sentences.

Lomas appeals. He argues the trial court erred in refusing his request to explore the availability and content of Morning's testimony in violation of his sixth amendment right to compulsory process and his fifth and fourteen amendment rights to due process. He alternatively argues his trial counsel was ineffective for failing to properly preserve error.

I. Preservation of Constitutional Claims. The State asserts Lomas did not preserve error regarding his compulsory process claim because he did not raise it at trial. It argues the scope of review is for an abuse of discretion, rather than de novo. Claims of constitutional errors must be preserved in the same manner as any other claims. *State v. Rinehart*, 283 N.W.2d 319, 324 (Iowa 1979), *cert. denied*, 444 U.S. 1088, 100 S. Ct. 1049, 62 L. Ed. 2d 775 (1980) (failure to preserve denial of due process claim precludes application of discretionary plain error rule). Upon review of the record we find error was not preserved on the constitutional claim, but was preserved on the defendant's claim the district court abused its discretion in denying his request to have a potential witness transported to trial.

II. Exclusion of Defense Witness. An abuse of discretion will not generally be found unless the party whose rights have been violated suffered prejudice. *State v. Thompkins*, 318 N.W.2d 194, 198 (Iowa 1982). In denying the request, the district

court considered how long ago Morning plead and was sentenced; whether a motion to sever the trials had been made by counsel; and what Morning entered a plea to. The court found the State had no notice of the witness within the time limits of the Rules of Criminal Procedure, and there was no showing of the substance of the proposed testimony by Morning.

Iowa Rule of Criminal Procedure 12 imposes a notice requirement on a defendant who deposes a State witness. In a criminal case the defendant may depose all witnesses listed by the State on the indictment or trial information. Iowa R. Crim. P. 12(1). At or before the taking of a deposition, the defendant must file a written list of the names and addresses of all witnesses expected to be called, except the defendant and rebuttal witnesses. Iowa R. Crim. P. 12(3). The defendant has a continuing duty to promptly disclose additional defense witnesses. *Id.*

If the defendant fails to comply with rule 12, section 12(4) states:

> **Failure to comply**. If the defendant has taken depositions under section 1 of this rule and does not disclose to the prosecuting attorney all of the defense witnesses (except the defendant and surrebuttal witnesses) *at least nine days before trial*, the court may order the defendant to permit the discovery of such witnesses, grant a continuance, or enter such other order as it deems just under the circumstances. It may, if it finds that no less severe remedy is adequate to protect the state from undue prejudice, order the exclusion of the testimony of any such witnesses.

Iowa R. Crim. P. 12(4) (emphasis added).

The district court is not required to make a specific finding "that no less severe remedy is adequate to protect the State from undue prejudice" prior to excluding the testimony of the nondisclosed witness. *Babers,* 514 N.W.2d at 82. Under the rule, the court may exercise its discretion in fashioning an appropriate sanction under the circumstances. *Id.*

At trial, the pizza delivery man identified Lomas as one of the men who robbed him. After Lomas and Morning took off in the car, the delivery man walked across the street to a church. The pastor of the church witnessed the robbery. The pastor testified he was in his car in the church parking lot when he saw two African-American men approach the delivery man who was carrying a pizza box. He saw the two men get into the pizza delivery car and drive away. The delivery man came over to the pastor's car and asked to use the phone and told the pastor what happened.

Law enforcement officers chased the delivery man's stolen vehicle, and caught Lomas and Morning after a foot chase. Lomas was carrying a long-blade knife during the chase, and the officers recovered two knives from a yard where Lomas was apprehended. Officers also found the delivery man's wallet and a pizza insulator in the car.

Defendant was charged with aiding and abetting. Given the testimony of the victim, the pastor, and police officers, there is no doubt the defendant participated in the crime. Defense counsel could not say what Morning's testimony would entail,

as he had never interviewed him. The trial court properly weighed this speculative venture against the time it would take to transport Morning and allow the parties to depose him before testifying. The denial of the defendant's motion was just under the circumstances.

Lomas's substantial rights were not prejudiced by the exclusion of Morning's testimony. It was not an abuse of discretion to exclude the testimony of defendant's witness under the circumstances.

AFFIRMED.