IN THE COURT OF APPEALS OF IOWA

No. 9-321 / 88-1062

FILED
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CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

593

vs.

RICHARD WILLIAM BASART,

Appellant.

Appeal from the Iowa District Court for Polk County, Dick Strickler and Anthony M. Critelli, Judges.

Defendant appeals from his conviction, following a jury trial, of first-degree robbery. **AFFIRMED.**

William L. Wegman, State Public Defender, and James F. Whalen, Assistant State Public Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Amy M. Anderson, Assistant Attorney General; and Catherine H. Thune, Assistant County Attorney, for plaintiff-appellee.

Considered by Oxberger, C.J., and Hayden and Habhab, JJ.

HAYDEN, J.

A jury convicted Richard William Basart of first-degree robbery. He appeals, contending the prosecutor failed to disclose a substantial change in the testimony of an eyewitness which occurred between the time of her deposition and the trial. Defendant raises as error the district court's refusal to impose appropriate sanctions pursuant to Iowa Rule of Criminal Procedure 13(6)(c). We affirm.

On February 24, 1988, a man wearing a mask, socks on his hands, and carrying a gun, walked into a Hardee's restaurant at approximately 2:15 a.m. He never spoke during the robbery, but motioned the employees to enter the restaurant office. The defendant was spotted by police responding to a radio call regarding the robbery. He was running in the neighborhood of the fast-food restaurant shortly after the police received the call. Their suspicions were aroused because defendant was only wearing a plaid shirt, jeans, and tennis shoes although the temperature had only been about 1 degree that morning. The police brought defendant to the restaurant. None of the witnesses could identify the defendant as the robber, but they thought his clothes were similar and he was the same height and build.

A second patrol car responded to the radio call on the robbery and saw a blue Ford Pinto parked in a parking lot

about one and a half blocks from the restaurant. A check on the license plate number revealed the car was registered to a Michael Basart, who later testified the defendant used his car. Michael also testified he was at home, in Minburn, that night.

When the police searched the car, they seized a shotgun, a shotgun case, a green jacket, a mask, and socks. This clothing was identified as similar to that worn by the robber.

Only one witness could specify the robber was white. At a pretrial deposition, this witness also testified she had been able to see through holes cut out of his mask that his eyes were brown. At trial, when cross-examined, she explained she meant to say the eye lashes or eyelids were brown.

In chambers, the defendant alleged unfair surprise and moved to either dismiss the case or declare a mistrial. The next day the defendant withdrew his motion for a mistrial, but requested the court instruct the jury to disregard the witness's testimony or strike it and substitute her deposition transcript, which stated the robber's eyes were brown. The trial court denied these motions. The jury found the defendant guilty of first-degree robbery.

On appeal, the defendant argues the prosecutor knew for approximately a month before trial the witness intended to

change her deposition testimony. Because of the prosecutor's violation of her continuing duty to disclose this information under Iowa Rules of Civil Procedure 121(a) and (b) and 122(d)(2)(a) and Iowa Rule of Criminal Procedure 13(5), defendant maintains the trial court abused its discretion by denying the requested sanctions pursuant to Iowa Rule of Criminal Procedure 13(6)(c).

Remedies under Iowa Rule of Criminal Procedure 13(6)(c) are discretionary and will be reversed only if the trial court abuses its discretion. State v. Brown, 397 N.W.2d 689, 698 (Iowa 1986), citing to State v. Leto, 305 N.W.2d 482, 489 (Iowa 1981).

Rule 13 states:

> If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may upon timely application order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing any evidence not disclosed, or it may enter such other order as it deems just under the circumstances.

Thus, the rule allows the trial court latitude in determining the appropriate way to enforce discovery rules. State v. Leto, 305 N.W.2d at 489. The supreme court referred to the ABA Standards for Criminal Justice, Discovery and Procedure Before Trial § 4.7, Commentary at 107 (1970); Fed. R. Crim. P. 16(d)(2), Advisory Committee Note, to clarify the trial court's discretion under rule 13(6)(c).

> Such discretion will permit the court to consider the reasons why disclosure was not made, the extent of the prejudice, if any, to the opposing party, the feasibility of rectifying that prejudice by a continuance, and any other relevant circumstances.

We conclude, after reviewing the record, the trial court did not abuse its discretion in refusing to impose the sanctions requested by defendant.

The prosecutor stated she was unaware the witness was going to change her testimony. Although the defendant urges this court to accept its argument the prosecutor was specifically told of this change immediately after the witness gave her deposition, we cannot do so. The witness's testimony at trial does not clearly support the defendant's position. The trial court did not state its reasons for denying the defendant's request for sanctions. However, the trial court is in a better position to assess the witness's sincerity and credibility. It is reasonable the trial court could have concluded either the witness did not tell the prosecutor of her intention to change her testimony or the failure to disclose was merely an oversight.

An abuse of discretion will not be found from a trial court's failure to impose a sanction for violation of a discovery rule unless the party alleging a violation of their rights suffers a prejudice which is not cured by a suitable sanction. State v. Thompkins, 318 N.W.2d 194, 198 (Iowa 1982). Even if a violation of rule 13(5) had

occurred, two jury instructions rectified any potential prejudice.

Instruction 15 provided:

> You have heard evidence claiming Tracy Kelly made statements before this trial while under oath which were inconsistent with what the witness said in this trial. If you find these statements were made and were inconsistent, then you may consider them as if they were made at this trial. Decide whether to consider the earlier statements for any purpose and what weight to give them.

Instruction 16 stated, in part:

> You will decide the facts from the evidence. Consider the evidence using your observations, common sense and experience. You must try to reconcile any conflicts in the evidence; but, if you cannot, you will accept the evidence you find more believable.
>
> In determining the facts, you may have to decide what testimony you believe. You may believe all, part or none of any witnesses' testimony.

These instructions allowed the jury to do what the defendant requested in his motions--disregard the witness's testimony or strike it and substitute the statement she made at deposition. There was no abuse of discretion and, thus, no error.

AFFIRMED.