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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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| **STATE OF IOWA,** | ) | 439 |
| Plaintiff-Appellee, | ) | |
| vs. | ) | |
| **GARY EVERETTE GROVE,** | ) | 8-675<br>87-1255 |
| Defendant-Appellant. | ) | |

Appeal from the Iowa District Court for Black Hawk County (D7X009684), Alan Pearson, Judge.

The defendant appeals his conviction by a jury of second-degree murder. **AFFIRMED.**

Max Exline and Alfredo Parrish, of Parrish & Kruidenier, Des Moines, for defendant-appellant.

Thomas J. Miller, Attorney General; Julie A. Halligan, Assistant Attorney General; and James M. Metcalf, County Attorney, for plaintiff-appellee.

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

**OXBERGER, C.J.** 440

Defendant, Gary Everette Grove, was charged with first-degree murder for the fatal shooting of Robert Ball on December 15, 1986, in Waterloo, Iowa. Grove filed notice of the defense of self-defense, claiming Ball had attacked him with a knife. The district court ordered various agencies and institutions to produce records concerning the victim's reputation for violent conduct. The Waterloo and Cedar Falls police departments complied but not in a timely fashion. The district court also granted Grove's request for a psychiatric examination and ordered the sheriff to transport him to the doctor's office. Due to an oversight, he was not taken there as scheduled. The trial court denied Grove's motion to dismiss, holding there was no showing of actual prejudice. Subsequently, a jury found Grove guilty of murder in the second degree.

On appeal Grove contends the district court erred in denying his motion to dismiss. He bases his argument on four specific contentions: (1) that the sheriff failed to take him to the doctor's office for his scheduled psychiatric examination; (2) that the State failed to comply with discovery rules when it withheld police records concerning the victim until less than five days before trial; (3) that the State's amended and additional minutes of testimony were untimely and vague and as such denied him

his sixth amendment rights to counsel; and (4) that an erroneous news report on a local television station could have prejudiced prospective jurors, violating defendant's due process. When faced with an alleged constitutional violation, we base our evaluation on the totality of the circumstances. State v. Johnson, 395 N.W.2d 661, 663 (Iowa App. 1986). We affirm the trial court's denial of defendant's motion to dismiss.

Pursuant to court order, defendant was to be taken to a psychiatrist for an examination. Due to a clerical error in the county sheriff's office, Grove's appointment was missed. The doctor with whom the appointment was scheduled, while very busy, made it clear that if it were necessary to reschedule the appointment he would make special arrangements to fit Grove into his schedule. However, a new appointment was not made. Defense counsel admitted they were not going to use any type of psychiatric defense and did not want a psychiatric examination at that time. Further, the court offered a continuance. The defendant refused. The purpose for a continuance is to permit delay in order to protect the defendant from undue prejudice. See Iowa Rules of Criminal Procedure 8.1(2), 4(8)(d), 5(5), 10(10)(d) and 18(3). We find this situation analogous to that in State v. Gillilard, 252 Iowa 664, 670, 108 N.W.2d 74, 78 (1961) where the court said:

> A continuance was available to the defendant; it was his legal right under the statute. But it was his duty to ask it, and this he did not do, and

he cannot now complain.

* * *

> At this point he seems to have been attempting to have his cake and eat it. He had refused, when asked, to move for a continuance; he apparently was willing for the trial to proceed . . . .

We find the defendant has waived any complaint as to failure to receive a psychiatric examination by his refusal to reschedule and refusal of a continuance offered by the court.

Second, Grove based his motion to dismiss partly on the State's failure to produce the police records of the victim until five days prior to trial. Defendant claims his ability to prepare a defense had been limited due to the untimeliness of the records. He refused an offer or continuance. Under the authority cited above, we find defendant cannot claim error in such a manner where a continuance was offered and refused.

Third, defendant urges denial of his motion to dismiss error because the State's additional and amended minutes of testimony were untimely and vague. Iowa Rule of Criminal Procedure 18(2) provides that additional witnesses whose minutes of testimony were not attached to the information must be given to the defendant at least ten days before the commencement of the trial. The purpose of this rule is to inform the defendant of the expected testimony in order to allow adequate time to prepare a defense. See State v. Sevcik, 239 N.W.2d 571, 572 (Iowa 1976). Where requisite notice is not given by the State of additional witnesses,

as in this case, and the defendant had the opportunity for continuance but defendant refused such continuance, defendant has waived any objection to untimely call of additional witnesses. State v. Sevcik, 239 N.W.2d 571 (Iowa 1976). As defendant has waived any objection to the additional witness's testimony, we need not reach defendant's contention such testimony was vague and as such denied defendant effective assistance of counsel under the sixth amendment.

Finally, Grove asserts an erroneous news report on a local television station could have prejudiced prospective jurors by misinformation. On the local evening news it was erroneously stated the court had ordered police to supply any records regarding the defendant's violent behavior rather than the victim's violent behavior. We find that a voir dire can be trusted to expose any possible prejudice.

For the aforestated reasons, we affirm the trial court's denial of defendant's motion to dismiss.

**AFFIRMED.**