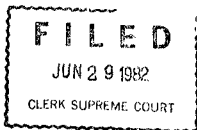


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,

)

180

Plaintiff-Appellee,

)

Filed June 29, 1982

vs.

)

DAVID ROSS WHEELER,

)

2-137
66504

Defendant-Appellant.)

Appeal from Scott District Court - James Havercamp, Judge.

Defendant David Ross Wheeler appeals from his conviction of sexual abuse in the second degree in violation of sections 709.1 and 709.3, The Code. The defendant claims the trial court abused its discretion by refusing to admit testimony of defendant's alibi witnesses on the ground that the defendant failed to give timely notice of the alibi as required by Iowa R. Crim. P. 10(10). AFFIRMED.

Chris Odell, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Lona Hansen, Assistant Attorney General, for plaintiff-appellee.

Heard en banc.

DONELSON, J.

Defendant David Ross Wheeler appeals from his conviction of sexual abuse in the second degree in violation of sections 709.1 and 709.3, The Code. The defendant claims the trial court abused its discretion by refusing to admit testimony of defendant's alibi witnesses on the ground that the defendant failed to give timely notice of the alibi as required by Iowa R. Crim. P. 10(10). We affirm.

Our scope of review is limited to correction of errors at law. Iowa R. App. P. 4.

I.

During the State's case evidence, including defendant's own admissions, was presented implicating defendant in the crime. After the State rested, defendant moved to be allowed to introduce alibi witnesses. Defense counsel claimed that no notice of an alibi defense had been given previously because he did not learn about the witnesses until the night before. The court ruled that to allow the alibi witnesses to testify would place an intolerable burden on the State and that in the absence of notice, the alibi witnesses would not be allowed to testify.

II.

Defendant asserts the trial court's ruling was an abuse of discretion. We disagree. The fact that defendant failed to give timely notice of his alibi defense under Iowa R. Crim. P. 10(10)(1) excludes alibi evidence unless defendant can obtain leave of the court under rule 10(10)(2) for good cause shown.

Exclusion of alibi evidence based upon failure of timely notice is not a penalty. State v. Rourick, 245 Iowa 319, 60 N.W.2d 529, 531 (Iowa 1953). Rather, it is a safeguard which enhances the fairness of the adversary system by reducing the possibility of surprise at trial. Wardius v. Oregon, 412 U.S. 470 (1973), as cited in Johnson v. Miller, 270 N.W.2d 624, 626 (Iowa 1978). Rule 10(10) was promulgated to prevent the type of surprise that defendant would have caused had the alibi evidence been admitted.

In United States v. Walker, 621 F.2d 168 (5th Cir. 1980), the defendant also claimed an abuse of discretion due to the court's exclusion of alibi testimony for failure of notice. In order to obtain a continuance based on the unavailability of witnesses, the circuit court held the defendant must show due diligence had been exercised to obtain the witnesses' presence. Similarly, here, if the defendant claims his absence of knowing about the witnesses establishes good cause he must show that he exercised due diligence in discovering their presence. In the normal course of trial preparation, the witnesses excluded in this case should have been discovered in time to comply with Rule 10(10), and most certainly they should have been discovered before the very eve of defendant's trial. The record shows that defendant's sister was the one who first brought notice of the witnesses to the attention of defendant's counsel and without her, the witnesses would have remained unknown. We fail to see that the defendant acted with any diligence in discovering the presence of the alibi witnesses. Under the facts of this case, we cannot find the trial court abused its discretion when it excluded defendant's alibi witnesses for failure to comply with Rule 10(10) and when the record indicates defendant did not show good cause for noncompliance as required by Rule 10(10)(2). We, therefore, affirm the trial court.

AFFIRMED.