IN THE COURT OF APPEALS OF IOWA

No. 6-365 / 95-251

STATE OF IOWA,

Appellee,

vs.

JESSE ROBERT COMLY III,

Appellant.

FILED
OCT 25 1996
CLERK SUPREME COURT

Appeal from the Iowa District Court for Adair County, Peter A. Keller, Judge.

Appellant appeals from judgment and sentence, following jury trial, entered upon his conviction of second-degree sexual abuse in violation of Iowa Code section 709.3(2) (1993). **AFFIRMED.**

Joseph R. Cahill of Cahill Law Offices, Nevada, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, and Willard W. Olesen, Special Prosecutor, for appellee.

Heard by Habhab, P.J., Cady, and Vogel, JJ.

CADY, J.

Jesse Robert Comly III appeals his conviction for second-degree sexual abuse. We affirm the conviction on our review and preserve the claims of ineffective assistance of counsel.

Comly was charged by trial information with second-degree sexual abuse. The charge was premised on allegations by his eleven-year-old cousin, Bridget, he forcibly penetrated her vagina with his finger and penis. The trial information alleged the abuse occurred "on or about" July 8, 1994. Comly filed a notice of alibi defense. Trial was set for November 28, 1994.

During a pretrial deposition, Bridget stated she believed the abuse occurred on July 8, but was not certain. On November 18, 1994, the State filed a motion to amend the trial information to expand the time frame of the allegations to "between June 10, 1994 and July 15, 1994." Comly filed a resistance to the motion on the morning of trial. The district court granted the amendment after a hearing just prior to selection of the jury.

Bridget testified at trial she was staying at her grandmother's house one night when Comly offered to take her in his pickup truck to see her parents. After Bridget left with Comly, Comly drove to a secluded area in the country where he raped her. Bridget further testified she told her grandmother about the abuse later the same night. She told her parents several weeks later.

Bridget's mother also testified at trial. Comly's counsel asked her on cross-examination if she had made past allegations Bridget had been sexually abused by other men. In response to an objection by the prosecuting attorney the trial court concluded the question called for inadmissible evidence under Iowa Rule of Evidence 412. Comly's counsel made an offer of proof.

The State also presented evidence Bridget's underwear had been stained by seminal fluid. A medical doctor testified a physical examination of Bridget was consistent with digital or penile penetration. Comly called several witnesses who testified he was not at the grandmother's house on July 8, 1994. The grandmother testified she could not remember Bridget being at her house during the summer of 1994. Comly denied the sexual abuse, and testified Bridget had never been in his pick-up truck.

The State presented rebuttal testimony from Amanda Jensen. She remembered riding in Comly's pick-up truck with Bridget. Additionally, Amanda testified Bridget and Comly were at the grandmother's house during the same period of time Bridget testified the rape occurred.

Comly raises numerous issues on appeal. He claims the district court erred by failing to offer to continue the trial after granting the amendment to the trial information, permitting Amanda Jensen to rebut his alibi defense on rebuttal, and refusing to admit evidence of past allegations of abuse involving Bridget. Comly also claims he was denied effective assistance of counsel based on a variety of grounds.

I. Amendment to Trial Information

We confine our review of Comly's first assignment of error to the narrow issue whether a trial court is required to offer a defendant a continuance of trial after granting a motion to amend a trial information.[1] Our review is at law. Iowa R. App. P. 4.

Comly argues Iowa Rule of Criminal Procedure 4(8)(d) requires the trial court to continue the trial after granting the amendment to the trial information. We disagree.

Rule 4(8)(d) provides:

> When an application for amendment is sustained, no continuance or delay in trial shall be granted because of such amendment unless it appears that defendant should have additional time to prepare because of such amendment.

We find no specific language in the rule to impose a duty on a trial court after an amendment to the trial information is granted to offer to continue or delay the trial when it appears to the court the amendment will require the defendant to perform additional pre-trial preparation. Instead, the rule simply defines a standard for granting a continuance or delay in trial after an application for amendment has been sustained. Furthermore, it implies the need for additional time to prepare for trial due

---

[1] Counsel for Comly did not request a continuance after the trial court granted the amendment. Consequently, Comly failed to preserve error on the underlying issue of whether he was denied a fair trial when the trial court failed to grant a continuance. *State v. Anderson*, 517 N.W.2d 208, 215 (Iowa 1994). We reject Comly's invitation to review this issue based on the "plain error" standard of review. *See State v. Hutchison*, 341 N.W.2d 33, 40 (Iowa 1983).

to an amendment to the trial information is not so much a ground for denying the amendment as a reason for continuing the trial. *See State v. King*, 225 N.W.2d 337, 342 (Iowa 1975). The rule, however, imposes no affirmative duty on the court to offer a continuance.

We acknowledge the trial court may offer a continuance to the defendant as a consideration in deciding to grant an amendment. *See King*, 225 N.W.2d at 342. However, there is no duty to do so. *See State v. Young*, 172 N.W.2d 128, 129 (Iowa 1969) (remedy for inability to prepare for trial following amendment to trial information is to seek a continuance.)

II. Rebuttal Witness

Comly claims Amanda Jensen should not have been permitted to testify as a rebuttal witness because her testimony discredited his alibi defense and the State failed to give written notice of her identity and address as required by Iowa Rule of Criminal Procedure 10(11)(a). We conclude Comly failed to preserve error on this issue.

Rule 10(11)(a) requires a prosecutor to give notice of "witnesses the State proposes to offer in rebuttal to discredit the defendant's alibi" after the defendant files a written notice of alibi defense. This rule is an exception to the general rule the State has no obligation to notify a defendant of rebuttal witnesses. *State v. Fechter*, 397 N.W.2d 711, 713 (Iowa 1986). The failure to comply with the notice requirement

generally mandates exclusion of the alibi testimony. *See State v. Christensen*, 323 N.W.2d 219, 222 (Iowa 1982).

In this case, the record fails to disclose Comly challenged Amanda Jensen as a rebuttal alibi witness or lodged a complaint about the lack of notice. It is generally recognized in criminal prosecutions that error predicated on rights and opportunities involving trial proceedings is waived on appeal unless a complaint was lodged at the trial. *State v. Anderson*, 517 N.W.2d 208, 215 (Iowa 1994). We are a court of review, which generally requires us to confine our consideration to issues presented to the trial court. Accordingly, Comly waived error on this issue. He failed to lodge a complaint at trial that the testimony presented by Amanda Jensen discredited his alibi defense. He also failed to object to the lack of notice.

III. Evidence of Prior Allegations of Sexual Abuse

The trial court excluded Comly's efforts to introduce evidence that Bridget's mother made a prior allegation Bridget was sexually abused. The court based its decision on grounds of relevancy and the "rape shield law." We review a ruling on the admission of evidence by the trial court for an abuse of discretion. *State v. Clarke*, 343 N.W.2d 158, 163 (Iowa 1984).

Iowa Rule of Evidence 412 prohibits evidence of the past sexual behavior of the victim in a criminal trial of a person accused of sexual abuse except under specific exceptions subject to special procedures. In this case, Comly failed to comply with the required pretrial procedures, and failed to show the procedures were inapplicable

because the proffered evidence was newly discovered or the issue supporting the evidence had recently surfaced. *See* Iowa R. of Evid. 412.

We also agree with the trial court the proffered evidence was not relevant. *See State v. Jones*, 490 N.W.2d 787, 791 (Iowa 1992). The allegations were made by Bridget's mother years earlier in the context of a custody dispute. They were not made by Bridget, nor was there any evidence Bridget acquiesced in the allegations. Furthermore, medical examination of Bridget following her allegations against Comly took place on August 4, 1994. The doctor testified her injuries were in a healing stage between three days and six weeks. Thus, the prior allegations provided no alternative explanation for the medical findings. The trial court did not abuse its discretion in excluding the evidence.

IV. Ineffective Assistance of Counsel

We generally reserve ineffective assistance of counsel claims for postconviction proceedings. *State v. Ueding*, 400 N.W.2d 550, 553 (Iowa 1987). This allows counsel an opportunity to fully respond to the claims. *State v. Massick*, 511 N.W.2d 384, 389 (Iowa 1994).

We conclude the Comly's claims of ineffective assistance of counsel should be preserved for postconviction proceedings. The present record fails to fully present the issues raised, and it would be helpful to permit trial counsel to respond to the claims.

Conclusion

We affirm the conviction and preserve the claims of ineffective assistance of counsel for postconviction proceedings.

AFFIRMED.