

**IN THE COURT OF APPEALS OF IOWA**

No. 7-655 / 96-1690

000427

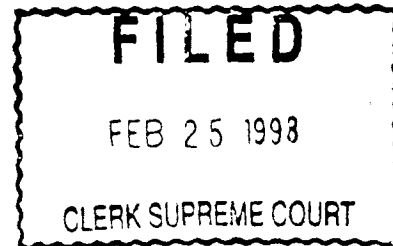
**STATE OF IOWA,**

Plaintiff-Appellee,

vs.

**DARRELL LEE DeVRIES,**

Defendant-Appellant.



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Appeal from the Iowa District Court for Wapello County, E. Richard Meadows, Jr., Judge.

Defendant appeals his conviction for serious domestic assault. **AFFIRMED.**

Philip K. Ferren of Ferren Law Office, Wapello, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, Victoria Siegel, County Attorney, and Rose Anne Mefford, Assistant County Attorney, for appellee.

Considered by Cady, C.J., and Sackett and Vogel, JJ.

**SACKETT, J.**

Defendant-appellant Darrell Lee DeVries appeals following his conviction of domestic assault in violation of Iowa Code section 708.1 and 708.2A (1995), a serious misdemeanor. Defendant contends the trial court erred in not dismissing the charge and in not allowing him to call an alibi witness. We affirm.

On February 26, 1996, a trial information was filed charging defendant with domestic assault in violation of Iowa Code section 708.2A(2)(b).<sup>1</sup>

On April 4, 1996, a second trial information was filed charging defendant with domestic assault in violation of Iowa Code section 708.2A(2)(c),<sup>2</sup> alleging the same facts as included in the earlier information. On April 9, 1996, on the State's application, the trial court dismissed the first information. On May 6, 1996, defendant pled not guilty to the remaining charge.

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<sup>1</sup> Iowa Code section 708.2A(2)(b) provides:

(2) On a first offense of domestic abuse assault, the person commits:

....  
b. A serious misdemeanor, if the domestic abuse assault is committed without the intent to inflict a serious injury upon another, and the assault causes bodily injury or disabling mental illness.

<sup>2</sup> Iowa Code section 708.2A(2)(c) provides:

(2) On a first offense of domestic abuse assault, the person commits:

....  
c. An aggravated misdemeanor, if the domestic abuse assault is committed with the intent to inflict a serious injury upon another, or if the person uses or displays a dangerous weapon in connection with the assault. This paragraph does not apply if section 708.6 or 708.8 applies.

A trial was held. On the day of trial, defendant made an oral motion to dismiss contending Iowa Rules of Criminal Procedure barred the filing of the remaining charge. The trial court did not then rule on the motion. Defendant made no response to the trial court's failure to rule. On August 28, 1996, defendant was found guilty of assault, a simple misdemeanor.<sup>3</sup>

On September 4, 1996, defendant moved to dismiss contending Iowa Rule of Criminal Procedure 27(1) barred the filing of the second information. Defendant on appeal advances this motion should have been sustained. The State contends error on this issue was not preserved.

Iowa Rule of Criminal Procedure 27(1) states, in relevant part:

The court . . . may order the dismissal of any pending criminal charge . . . . Such dismissal is a bar to another prosecution for the same offense if it is a simple or serious misdemeanor; but it is not a bar if the offense charged be a felony or an aggravated misdemeanor.

Defendant contends that because the first charge was a serious misdemeanor, once the charge was dismissed no further charge could be filed based on the same circumstances.

The State first advances the failure of defendant to request a ruling on the motion prior to trial waived the error. The State supports its position by citing *State*

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<sup>3</sup> The jury found defendant guilty of assault, a simple misdemeanor. The trial court found, "based on the guilty verdict and prior stipulations and agreements by defendant, defendant is guilty of domestic abuse/assault, a serious misdemeanor, in violation of sections 708.1 and 708.2A of the Code of Iowa." The actual agreement was defendant had agreed it could be enhanced to an aggravated misdemeanor.

v. *Schiernbeck*, 203 N.W.2d 546 (Iowa 1973). In *Schiernbeck*, the court held that a defendant had not preserved error on his challenge to the trial court's refusal to dismiss the action where there was no ruling on either motion. *Id.* at 547. The court went on to explain it would violate its function as a court of review if it were to pass on the merits of a motion without at least a showing in the record that the trial court's ruling was specifically requested, after which it failed or refused to rule. *Id.* In this case, the issue did not present itself until the trial court made its findings of guilt. The trial court then ruled on the issue presented. We disagree with the State's premise *Schiernbeck* supports its position.

The State further advances error was not preserved because defendant failed to object to the trial information when it was filed on April 4, 1996. The State supports this proposition by citing *State v. Smith*, 223 N.W.2d 223, 225 (Iowa 1974). *Smith* is distinguishable. In *Smith*, the defendant was challenging a code section that provided if an amendment was made to the trial information before trial, a copy was required to be served on defendant or his attorney to give him an opportunity to resist it. The amendment was not served, but when defendant's attorney first saw the application for amendment and amending order just before trial started, no objection or exception or motion for continuance was lodged. There was no issue until the trial court found defendant guilty of a serious misdemeanor. Defendant's objection was timely. *Smith* is not instructive.

Finding no basis to the State's preservation of error arguments, we address the issue presented.

It is undisputed the charge dismissed was a serious misdemeanor and it was based on the same facts as the second charge filed, an aggravated misdemeanor. Defendant, however, was convicted of a serious misdemeanor.

Defendant contends the language of Iowa Rule of Criminal Procedure 27 allows no further prosecution for a serious misdemeanor based on the same facts as a dismissed charge.

The State's position is it had the right to file the second charge because the rule allowed the filing of an aggravated misdemeanor after a misdemeanor is dismissed when it states "if the offense charged be a felony or aggravated misdemeanor."

Though defendant was only found guilty of a serious misdemeanor, the charge filed was an aggravated misdemeanor. Defendant's argument is not well taken. We affirm on this issue.

Defendant next contends the trial court abused its discretion in failing to allow him to call his mother as an alibi witness. It is agreed defendant failed to file a written notice of his intent to offer evidence of an alibi defense under the dictates of Iowa Rule of Criminal Procedure 11(a). The only question is whether the trial court abused its discretion in not granting defendant leave to file a later notice of alibi defense. *See State v. Lewis*, 391 N.W.2d 726, 728 (Iowa App. 1986).

Defendant did not disclose his intention to call the alibi witness until opening statements. Defendant's attorney attempted to obtain leave by advancing she was not notified of defendant's defense until the evening before trial. The trial court found no good cause for the delay, and we agree. See *State v. Garrett*, 516 N.W.2d 892, 894 (Iowa 1994); *State v. Christensen*, 323 N.W.2d 219, 222-24 (Iowa 1982).

**AFFIRMED.**