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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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STATE OF IOWA,	)	
Plaintiff-Appellee,	)	
vs.	)	
SCOTT M. LYNCH,	)	9-51 87-1650
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Black Hawk County (0502), L.D. Lybbert, Judge.

The 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 Public Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Sarah J. Coats, Assistant Attorney General; and Timothy Gallagher, Assistant County Attorney, for plaintiff-appellee.

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

OXBERGER, C.J. 262

Defendant Scott M. Lynch appeals from his conviction and sentencing, following a jury trial, for first degree robbery of the Heartland Inn on October 13, 1986. He contends (1) his right to speedy trial under Iowa R. of Crim. P. 27(2)(b) was violated and his motion to dismiss based on this violation was improperly overruled, (2) his wife, Dana Lynch, was intimidated during a deposition taken without notice to him, and absent him or his counsel's presence in violation of Iowa R. Crim. P. 13(1), and the trial court's sanction of prohibiting any use of the deposition did not cure the error; (3) the trial court erred in allowing two rebuttal witnesses to testify to matters beyond the scope of proper rebuttal, and (4) the trial court abused its discretion by imposing consecutive rather than concurrent sentences on defendant's two first-degree robbery convictions.

The first two claims of error were ruled upon in defendant's appeal of his conviction for the second robbery of a Little Caesar's Pizza Shop on October 24, 1986. Separate trials were held for each robbery but all pretrial filings relevant to the speedy trial and his wife's deposition issues are the same. We shall repeat the analysis of those rulings.

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I. Speedy Trial.

The trial court's order overruling defendant's motion to dismiss based on his statutory right to speedy trial was proper. After a hearing during which defendant and his second counsel testified, the trial court made specific fact findings adopting counsel's version of the events leading to a continuance and rescheduling of the trial beyond the time limits found in Iowa Rule of Criminal Procedure 27(2)(b). The trial court found defendant had orally authorized counsel to seek the continuance and waived his right to speedy trial. A written waiver signed by the defendant was not filed until later. The trial court's findings of fact upon conflicting evidence are binding upon us if supported by substantial evidence. State v. Phelps, 379 N.W.2d 384, 387 (Iowa App. 1985) (citing State v. Bond, 340 N.W.2d 276, 279 (Iowa 1983)).

We find no reason to disturb these fact findings and also affirm the trial court's application of the law to the facts. Defendant's trial counsel was acting within his authority and in compliance with his client's wishes when he sought the continuance and in effect waived defendant's right to speedy trial. State v. Leflore, 308 N.W.2d 39, 41 (Iowa 1981).

Since the court did not receive a written waiver and no trial was held before expiration of the ninety-day statutory period, we must still determine whether dismissal

was required. State v. Bond, 340 N.W.2d 276, 279 (Iowa 1983). Three exceptions to the dismissal rule are (1) waiver, (2) delay attributable to the defendant, and (3) good cause. Id. We agree with the trial court the State carried its burden in proving failure to have a timely trial or file the waiver falls within either exception (2) or (3) in this case. Defendant asked counsel to delay trial as long as possible. Counsel had difficulty scheduling and completing discovery depositions prior to the first trial date. Defendant made no objections to the continuance when he became aware of it, and he later signed the written waiver which was filed. See generally State v. Moehlig, 250 N.W.2d 42, 46 (Iowa 1977); State v. LaMar, 224 N.W.2d 252, 254 (Iowa 1974).

II. Deposition.

We also find the trial court did not abuse its discretion in ruling defendant's wife's deposition inadmissible in light of the State's violation of notice procedures. State v. Brown, 397 N.W.2d 689, 698 (Iowa 1986); State v. Thompkins, 318 N.W.2d 194, 198 (Iowa 1981).

III. Consecutive Sentencing.

Defendant's conviction for the Little Caesar's robbery was reversed and remanded for trial. His claim of error regarding the trial court's abuse of discretion when ordering consecutive sentences for the two robbery convictions need not be addressed. Should defendant be

convicted for this robbery on remand, it will again be up to the sentencing court whether or not to make defendant's sentences run concurrently or consecutively. Based on the record and circumstances, we will not rule as a matter of law that consecutive sentences would be an abuse of discretion as the legislature has clearly made this an option for the court. Iowa Code § 901.2 - .8 (1989).

IV. Rebuttal Witnesses.

Defendant contends two rebuttal witnesses, Shannon Leppert and Richard Delaney, testified to matters beyond the scope of proper rebuttal when testifying defendant told them he had robbed the Heartland Inn. The only witness defendant called in his defense was an optometrist who testified defendant is legally blind without his glasses. A review of these witnesses' testimony shows they also testified regarding their observations of defendant's ability to play football without his glasses.

The trial court has a good deal of discretion in determining what is proper rebuttal testimony. State v. Bakker, 262 N.W.2d 538, 543 (Iowa 1978). Rebutting evidence is that which explains, repels, controverts, or disproves evidence produced by the other side. State v. Hickman, 337 N.W.2d 512, 516 (Iowa 1983); State v. Webb, 309 N.W.2d 404, 411 (Iowa 1981); State v. Prouly, 252 N.W.2d 426, 432 (Iowa 1977). One of the rebuttal witnesses, Richard Delaney, did not come forward with his

testimony until the day before he actually testified. Trial courts also have wide discretion to permit or deny a party to reopen its case and introduce evidence previously omitted. State v. Conner, 241 N.W.2d 447, 461 (Iowa 1976); State v. Moreland, 201 N.W.2d 713, 714-15 (Iowa 1972). Mr. Delaney's testimony regarding defendant's admissions would have been properly admitted on this ground. The State contends both witnesses' testimony regarding defendant's statements was admissible because other parts of their statements were proper rebuttal and cite State v. Kile, 313 N.W.2d 558 (Iowa 1981) as support for this proposition. A review of that case indicates the fact that testimony could have been admitted in the State's case in chief does not render it inadmissible on rebuttable as long as it is proper rebuttal evidence under the standard set forth above. Kile, at 563. See also Hickman, 337 N.W.2d at 516; Prouly, 252 N.W.2d at 432.

Even if the testimony regarding defendant's admission of the remaining rebuttal witness, Shannon Leppert, was not proper rebuttal, it was harmless error to admit it when one considers the multiplicity of substantially the same evidence in the record. State v. Webb, 309 N.W.2d 404, 411 (Iowa 1981). Four other witnesses also testified defendant had admitted robbing the Heartland Inn. Defendant's accomplice, John Kluesnen, testified at length about how they robbed the hotel.

For the reasons stated above, defendant's conviction and sentence for the robbery of the Heartland Inn is affirmed.

AFFIRMED.