IN THE COURT OF APPEALS OF IOWA

No. 9-512 / 88-1232

FILED
JAN 25 1990
CLERK SUPREME COURT

366

STATE OF IOWA,

Appellee,

vs.

EURIC ABRY FOUNTAIN, JR.,

Appellant.

Appeal from the Iowa District Court for Polk County, Dick Strickler, Judge.

Defendant appeals his conviction, following a jury trial, for first-degree murder. **AFFIRMED.**

Raymond E. Rogers, State Appellate Defender, and Linda Del Gallo, Assistant Appellate Defender, for appellee.

Thomas J. Miller, Attorney General; Richard J. Bennett, Assistant Attorney General; and Odell McGhee and William Thomas, Assistant County Attorneys, for appellee.

Considered by Oxberger, C.J., and Donielson and Habhab, JJ.

HABHAB, J. 367

Defendant Euric Abry Fountain, Jr. appeals his conviction, following a jury trial, for first-degree murder. We affirm.

Defendant and William Ridley were charged with first-degree murder in connection with the death of Ted Wilt, who had been found beaten in the basement of the apartment building which he owned. The cases against the two men were severed prior to trial.

On June 21, 1988, the day before defendant's trial was to commence, the State filed written notice it intended to call Blanch Carr as a witness. Defendant was well aware of Carr's existence prior to this date and had in fact deposed her on April 8, 1988. The trial court gave defendant the opportunity to further depose Carr, but this invitation was rejected.

At defendant's trial Ridley testified that on the night in question he, Fountain, and Will Howard had been drinking at Mickey's Lounge when they decided to rob a man named Joe who lived in an apartment building owned by Ted Wilt. Upon entry through the basement door of the apartment building, the three men encountered Wilt. Ridley testified that a scuffle ensued, and that he, defendant, and Howard all beat Wilt on the head, face and chest with bricks. The men then left Wilt's apartment leaving behind the bloody bricks and footprints but took with them a television set. They then

proceeded to the home of Ethel Sloane and while there Ridley further testified he changed his shoes, putting on a pair of defendant's. The next day Ridley went to a friend's home and told what had happened. The girlfriend of Ridley's friend subsequently called the police.

Over defense counsel's objections, Carr, the bartender at Mickey's Lounge and the witness whose testimony is in dispute, testified that she saw Fountain at the bar on the evening of the murder. Carr testified that Ridley, Fountain, and Howard left the bar earlier and returned sometime after midnight. She stated that Howard told her what had happened. Carr testified she saw defendant and Ridley leave together.

Defendant took the witness stand on his own behalf and testified that he did not know Howard, nor did he participate in the killing. He further testified that although he was with Ridley earlier that evening, he had later been with his brother barhopping around town. Defendant also stated that the shoes he was wearing at the time of his arrest were Ridley's.

During the police investigation, detectives discovered footprints at the crime scene. Eight of the footwear impressions were similar in tread design with Ridley's shoes, and six were similar to those seized from defendant. Two footwear impressions matched those of Howard. Upon the close of all the evidence the case was submitted to the jury, which returned a verdict of guilty.

I.

Our review here is for errors of law. Defendant initially asserts the trial court erred in permitting the testimony of Blanch Carr. It is undisputed that the State under rule 18(2), Iowa Rules of Criminal Procedure, failed to provide a minute of Carr's expected testimony to defendant's attorney at least ten days before trial. Rule 18(3), Iowa Rules of Criminal Procedure, which governs such circumstances, provides:

> If the prosecuting attorney does not give notice to the defendant of all prosecution witnesses (except rebuttal witnesses) at least ten days before trial, the court may order the State to permit the discovery of such witnesses, grant a continuance, or enter such other order as it deems just under the circumstances. It may, if it finds that no less severe remedy is adequate to protect the defendant from undue prejudice, order the exclusion of the testimony of any such witnesses.

Upon our review of the record in this case, we conclude the trial court did not abuse its discretion in ruling not to exclude the testimony of Carr. See State v. Ellis, 350 N.W.2d 178, 182 (Iowa 1984). The State's failure to abide by the dictates of rule 18(2) does not necessitate an automatic exclusion of witnesses pursuant to rule 18(3). See State v. Bedwell, 417 N.W.2d 66, 69 (Iowa 1987).

Rule 18(3) provides the trial court with several options, exclusion being the most drastic. The exclusion option should only be selected "if [the trial court] finds that no less severe remedy is adequate to protect the defendant from undue prejudice . . . ." Iowa R. Crim.

P. 18(3). We discern no prejudice befell defendant in permitting the testimony of Carr.

It is clear defendant knew of Carr's existence early on from discovery. Additionally, defendant had already had the opportunity to depose her once and was twice given the option to depose her again. These invitations were both declined by defendant.

From the record before us, we conclude defense counsel knew the substance and importance of Carr's testimony to the State's case and realized that, but for the State's inadvertency, she would have been listed as a witness in the minutes of testimony. We find the trial court did not abuse its discretion in permitting the testimony of Carr.

II.

Defendant next argues Ridley's testimony was not sufficiently corroborated by other evidence. Iowa Rule of Criminal Procedure 20(3) provides:

> A conviction cannot be had upon the testimony of an accomplice or a solicited person, unless corroborated by other evidence which shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

The issue of whether corroboration evidence exists is a question of law, but its sufficiency is a question of fact which falls within the purview of the jury. State v. Brown, 397 N.W.2d 689, 694 (Iowa 1986).

As the Iowa Supreme Court pointed out in State v. Horn, 282 N.W.2d 717, 731 (Iowa 1979):

> We have said that corroborating evidence need not be strong. All that is necessary is that the accomplice(s) be corroborated in some material fact, which tends to connect the defendant with the crime, and therefore supports the credibility of the accomplice(s)' testimony. It is not necessary that the evidence corroborating the accomplice(s)' testimony relate to all of the elements material to the defendant's commission of the crime.

Ridley's testimony was corroborated in two respects. First, Carr's testimony places defendant with Ridley and Howard at Mickey's Lounge on the evening of the murder. She recalled that the three men were at the bar earlier in the evening, left for a period, and then returned to the bar. This testimony corroborates Ridley's testimony that the three planned a robbery while at the bar, left to commit the crime, and returned subsequent to the crime's commission. See State v. Gill, 261 Iowa 522, 528, 154 N.W.2d 722, 726 (1967). Second, the shoes which defendant was wearing at the time of his arrest were found to match six shoe impressions found at the murder scene. This evidence placed defendant at the scene of the murder. We find sufficient corroborative evidence was produced at trial to satisfy the requirements of Iowa Rule of Criminal Procedure 20(3).

AFFIRMED.