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IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,) Filed February 5, 1980

vs.)

GLENN S. NUCKOLLS, JR.,) 189
62455

Defendant-Appellant.)

Appeal from Polk District Court - Ray Hanrahan, Judge.

Defendant appeals from jury conviction for sexual abuse in the second degree in violation of section 709.3, supplement to the Code 1977, asserting trial court erred: 1) in overruling his motion for severance; 2) in denying his motion for new trial based on the State's failure to disclose exculpatory evidence; and 3) in overruling his requests to further cross-examine a rebuttal witness or to call the witness as an adverse or rebuttal witness for the defense. AFFIRMED.

J. Michael Mayer of Des Moines for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa; Richard L. Cleland, Assistant Attorney General; and Dan L. Johnston, Polk County Attorney; for plaintiff-appellee.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Defendant, Glenn Nuckolls, appeals from jury conviction for sexual abuse in the second degree in violation of section 709.3, supplement to the Code 1977, asserting trial court erred: 1) in overruling his motion for severance; 2) in denying his motion for new trial based on the State's failure to disclose exculpatory evidence; and 3) in overruling his requests to further cross-examine a rebuttal witness or to call the witness as an adverse or rebuttal witness for the defense. We affirm.

The facts are undisputed that Sharon Johnson and a girlfriend, Mary Kennedy, were in downtown Des Moines "scooping the loop" in Mary's car before dawn, January 8, 1978. The three defendants were engaged in the same activity in a decorated van belonging to defendant Adcock. After some conversation, and the exchange of a couple of cans of beer, the five young people ended up in an area known as "reefer Road" where they smoked marijuana. Subsequently, Mary left the van and drove away in her car. Sharon remained in the van. Mary became concerned and notified the police, describing Sharon, the van and her perceptions of the situation. Sometime later Sharon was let out of the van in a fairly deserted area on the far nothwest side of the Des Moines metropolitan area. She ultimately reached a residence and phoned friends to pick her up. As a result of Mary's communication, the police located Sharon and the defendants. After Sharon told her story to the police, defendant Nuckolls and co-defendants David Adcock and Jack Eldridge were arrested and charged with sexual abuse in the second degree in violation of section 709.3, supplement to the Code 1977, for committing a sex act[1] upon the person of Sharon Johnson by force and against her will on January 8, 1978. The defendants were tried jointly in July 1978. Each was convicted by the jury and sentenced to a term not to exceed twenty-five years.[2]

I. Severance. On March 28, 1978, the State filed a motion to consolidate the trials of Nuckolls, Adcock and Eldridge. This motion was resisted by defendant

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[1] Under the supplement to the Code 1977, " 'sex act' or 'sexual activity' . . . means any sexual contact between two or more persons, by penetration of the penis into the vagina or anus, by contact between the mouth and genitalia or by contact between the genitalia of one person and the genitalia or anus of another person, or by use of artificial sexual organs or substitutes therefore in contact with genitalia or anus." Section 702.17, supplement to the Code 1977.

[2] Appeals on similar issues for all defendants are before this court. See State v. Adcock, No. 62436, and State v. Eldridge, No. 62456, decisions filed this date.

Eldridge,[3] but the trial court overruled the resistance, found the defendants would not be prejudiced by a joint trial on charges arising out of the same occurrence, and ordered the trials to be held jointly. At trial, the three defendants joined in a motion for severance, which was overruled. On appeal, defendant contends he was prejudiced by the joint trial because his defense was inconsistent with those of the other co-defendants and the testimony tended to confuse the jury as to the individual defendants. He further claims trial court's admonishments to the jury to disregard certain hearsay statements were not sufficient to prevent prejudice.

Rule 6(4)(b) of the Iowa Rules of Criminal Procedure provides for a joint trial, "... if in the discretion of the court a joint trial will not result in prejudice to one or more of the parties." That rule also provides "[w]here jointly tried, each defendant shall be judged separately on each count." While there is no case law interpreting this rule, the Iowa Supreme Court stated, after the effective date of the new criminal code, a separate trial of defendants who have been jointly indicted "may be had only when the court determines a joint trial would result in prejudice to one or more of the parties." State v. Berry, 247 N.W.2d 263, 265 (Iowa 1976).

In the federal courts, granting or denying a motion for severance rests in the sound discretion of the court and a clear abuse of that discretion must be shown by defendant to warrant reversal of trial court's denial of a motion to sever. See United States v. Runge, 593 F.2d 66, 73 (8th Cir. 1979); United States v. Rochon, 575 F.2d 191, 197 (8th Cir. 1978). See also 75 Am. Jur. 2d Trial § 17 (1974). Federal cases also have held a defendant's failure to renew a pretrial motion for separate trial at the close of the government's case or at the close of the evidence results in a waiver of any right to a separate trial. Rochon, 575 F.2d at 197. See also United States v. Lewis, 547 F.2d 1030, 1032 (8th Cir. 1976), cert. denied 429 U.S. 1111, 97 S.Ct. 1149, 51 L.Ed.2d 566 (1977). In the instant case, the pretrial motion was in the form of a resistance and the motion for severance made at the opening of trial was not renewed thereafter. Without expressly finding a waiver, however, we conclude defendant failed to show any prejudice or confusion resulted from the joint trial that would require reversal. The charges

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[3] Counsel for defendant Eldridge filed and argued a resistance to the motion. Although defendants Adcock and Nuckolls did not formally join in the motion and argument, apparently their counsel were present in the court when the motion was argued.

against the three defendants involved common questions of law and facts. There is no showing the defenses of the three defendants were inconsistent, antagonistic, or irreconcilable. See United States v. Ehrlichman, 546 F.2d 910, 929 (D.C. Cir. 1976), cert. denied, 429 U.S. 1120, 97 S.Ct. 1155, 51 L.Ed.2d 570 (1977); Brady v. United States, 39 F.2d 312, 313 (8th Cir. 1930). There was clear testimony as to the actions of each defendant; specific behavior or acts were attributed to each defendant; and each defendant took the stand in his own behalf. See Rochon, 575 F.2d at 197; United States v. Graham, 548 F.2d 1302, 1311 (8th Cir. 1977).

We also find defendant's argument regarding the prejudicial effect of alleged hearsay statements to be unpersuasive. This is not a Bruton situation wherein the United States Supreme Court held a cautionary instruction is inadequate to erase the prejudicial effect of trial court's admission into evidence of a non-testifying co-defendant's confession implicating defendant in the crime. See Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). A defendant's right to confrontation is abridged in such a circumstance. Id. See also Parker v. Randolph, 442 U.S. ___, 99 S.Ct. 2132, 60 L.Ed.2d 713 (1979). In the instant case, none of the alleged hearsay statements of the co-defendants implicated defendant. We conclude defendant has established no prejudice.

II. Disclosure of Exculpatory Evidence. Shirley Reynolds, a Polk County Deputy Sheriff, was called as a witness for the State in its case-in-chief. She had been one of the investigating officers and testified to that effect. After the State's direct examination of the witness, only counsel for defendant Eldridge proceeded to cross-examine. Deputy Reynolds was recalled as a rebuttal witness for the State after the defense rested. At that time, she gave testimony regarding supplemental police reports that she had filed.[4] After Reynolds' rebuttal testimony, defense counsel were furnished copies of the supplemental reports. Counsel for defendant Eldridge called the court's attention to paragraph 28 of one of the reports, which read: "At one time, while one was having intercourse with her, the other two subjects got out of the van. This was while the blonde was having intercourse (Glenn Nuckolls)."

On appeal, defendant contends his right to a fair trial was abridged due to breach of the prosecutorial duty to disclose this allegedly exculpatory evidence which was material to his defense. The thrust of his argument focuses on the issue of credibility. The State's theory of the case was that one of the defendants actually had sexual intercourse with Sharon Johnson and two attempted to do so. At the preliminary

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[4] The defendant's pretrial request for discovery, inter alia, of any, and all, police reports containing statements of any witnesses, was denied.

hearing and at trial, Sharon Johnson identified David Adcock as the person who had intercourse with her. Deputy Reynolds' supplemental report, based on statements made by the prosecutrix, Sharon Johnson, as quoted above, identified defendant Nuckolls as the individual who actually had intercourse with Ms. Johnson. The State may not suppress requested statements which are materially exculpatory and is responsible for seeing important evidence is not suppressed so as to deny a defendant a fair trial. State v. Peterson, 219 N.W.2d 665, 674 (Iowa 1974). To be materially exculpatory, evidence "must be material either to the guilt or punishment of the defendant, not merely potentially or inferentially helpful to the defense." State v. Hicks, 277 N.W.2d 889, 898 (Iowa 1979) (quoting Brady v. Maryland, 273 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215, 218 (1963)). See also, United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

In this case, the evidence which defendant claims is exculpatory was made available to the defense after Deputy Reynolds testified as a State's rebuttal witness. Unlike the circumstances in Peterson, supra, and Galloway,[5] wherein the exculpatory material went to identification of another as a possible perpetrator of the crime for which defendant was charged, the only value of the evidence in this case is in attacking the credibility of the prosecutrix, Sharon Johnson. We believe this evidence is unnecessary for purposes of identification and merely cumulative on the issue of credibility. There is substantial evidence in the record to corroborate Sharon Johnson's testimony she did not consent to sexual intercourse or genital contact with any of the three defendants. To sustain a conviction under section 709.3, it must be proven only that the accused, aided and abetted by one or more persons, committed a sex act constituting sexual abuse on a person in a threatening manner, by force or against the will of the other participant, that is, without consent.[6] The question of actual penetration, or which defendant may have made such penetration, does not have to be proven, if all other elements of the offense are proven beyond a reasonable doubt. The uncontroverted testimony illicited from the victim at trial established her perceptions of the events of the evening were confused and distorted. Further, defendant had an opportunity to question both Sharon Johnson and Deputy Reynolds when they testified in the State's case-in-chief and, with due diligence, could have discovered at that time the

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[5] State v. Galloway, 275 N.W.2d 736 (Iowa 1979).

[6] See footnote 1, supra.

extent of Reynolds' investigation. In any event, the substance of the supplemental report in this case is not of a nature which would be material or change the results. Bizzett v. Brewer, 262 N.W.2d 273, 278 (Iowa 1978). The relevant issue is whether "... the jury has been deprived of a satisfactory basis for evaluating the truthfulness of the prosecution witness' testimony." State v. Ege, 274 N.W.2d at 356. There has been no deprivation in this case and no denial of a fair trial.

III. Limitation of Cross-Examination and Denial of Defendant's Motion To Call Adverse or Rebuttal Witness. Defendant finally asserts trial court erred by limiting his cross-examination of Deputy Reynolds and by refusing to allow him to call her as an adverse or rebuttal witness following discovery of the prosecutrix's inconsistent statements in Reynolds' supplemental report. The Iowa Supreme Court often has reiterated the principle that the scope of cross-examination is a matter which lies within the sound discretion of the trial court. State v. Ege, 274 N.W.2d 350, 357 (Iowa 1979); State v. Jackson, 259 N.W.2d 796, 800 (Iowa 1977); State v. Everett, 214 N.W.2d 214, 219 (Iowa 1974). Likewise, the trial court has wide discretion in reopening a case for the reception of additional testimony, Davidson v. Van Lengen, 266 N.W.2d 436, 440 (Iowa 1978), State v. Mason, 203 N.W.2d 292, 295 (Iowa 1972), and in determining what is proper rebuttal testimony. State v. Proulx, 252 N.W.2d 426, 432 (Iowa 1977); State v. McCullough, 226 N.W.2d 216, 217 (Iowa 1975); State v. Walker, 218 N.W.2d 915, 919 (Iowa 1974); State v. Willey, 171 N.W.2d 301, 302-03 (Iowa 1969). The trial court's rulings in these areas will not be disturbed except for a clear abuse of discretion. McCullough, 226 N.W.2d at 217; State v. Harrington, 178 N.W.2d 314, 316 (Iowa 1970).

As noted above, the jury heard uncontroverted testimony showing the prosecutrix's disorientation on January 8, 1978, and her confusion at trial regarding the specific details of the events. We conclude the evidence contained in the supplemental report was merely cumulative and not material to impeach the prosecutrix's credibility. Trial court did not abuse its discretion in limiting cross-examination of the State's rebuttal witness or in overruling defendant's request to call Deputy Reynolds as a rebuttal or adverse witness.

Judgment of trial court is affirmed.

AFFIRMED.