FILED
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CLERK SUPREME COURT

**IN THE COURT OF APPEALS OF IOWA**

No. 0-545 / 89-1265

415

**STATE OF IOWA,**

Appellee,

vs.

**CRAIG RICHARD RUMMELHART,**

Appellant.

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Appeal from the Iowa District Court for Polk County, M.C. Herrick, Senior Judge.

The defendant appeals his conviction, following a jury trial, for the crime of willful injury. **REVERSED AND REMANDED FOR NEW TRIAL.**

Linda Del Gallo, Acting State Appellate Defender, B. John Burns, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, James Smith, Polk County Attorney, and Daniel Vooght, Assistant Polk County Attorney, for appellee.

Heard by Schlegel, P.J., and Hayden and Sackett, JJ.

**HAYDEN, J.**

Craig Rummelhart was accused of inflicting serious injuries on another man during a fight in a gas station parking lot. In his defense Rummelhart alleged (1) the victim had started the fight, (2) Rummelhart had participated in the fight only to defend himself, and (3) some of the blows suffered by the victim had been struck by Rummelhart's brother in defense of Rummelhart.

Rummelhart was charged with the crime of willful injury. At his jury trial the primary factual issues concerned who had started the fight and to what degree Rummelhart had participated. A clerk at the gas station where the fight occurred testified Rummelhart had started the fight and had struck most or all of the blows. Rummelhart and his brother testified otherwise.

The jury found Rummelhart guilty of willful injury. He has appealed.

Rummelhart contends the district court erred by excluding a proposed defense witness on the ground Rummelhart had failed to disclose the witness prior to trial, as required by Iowa Rule of Criminal Procedure 12(3). Rummelhart asserts he could not have disclosed the witness earlier because he did not learn of the witness until trial was already in progress.

The proposed witness apparently was prepared to question the impartiality of the gas station clerk who witnessed the fight. Defendant claims this witness would

have testified the clerk knew the victim prior to the fight and owed him money. The clerk had previously denied, under oath, having any more than a cursory clerk-customer relationship with the victim.

Rummelhart also contends the district court abused its discretion by refusing to grant him a new trial on the basis of newly discovered evidence. He asserts another eyewitness to the fight, who would have supported Rummelhart's version of events, had previously been unwilling to testify but became willing to testify after trial. Apparently, the witness had previously been uncooperative because his testimony would have disclosed to his wife he had been with another woman on the night in question. This witness became willing to testify following a marital separation.

Finally, Rummelhart contends the district court abused its discretion by refusing to let him cross-examine the victim about a specific instance of prior aggressive behavior by the victim. Rummelhart contends this evidence was admissible under Iowa Rule of Evidence 404(a)(2) to show a character trait of the victim.

Our scope of review for this case is for corrections of errors at law. Iowa R. App. P. 4.

We first address the trial court's denial of the defendant's request to introduce testimony of a newly discovered witness during trial. The evidence shows a private investigator employed by Rummelhart's attorney

discovered a witness the last day of trial. The witness allegedly would impeach one of the State's main witnesses, Patty Nichols. Rummelhart's attorney offered the State the opportunity to depose the newly-discovered witness. In fact, Rummelhart's attorney had the newly discovered witness ready to be interviewed over the noon hour that very day.

The assistant county attorney objected to the offer of the new witness. He objected on the basis of surprise. He also objected "There is no hard information . . . that this witness can testify to any admissible evidence." The State further asserted both at trial and on appeal Rummelhart's attorney failed to use due diligence in discovering additional witnesses. However, the State offered no evidence to support its assertion.

In overruling Rummelhart's request, the trial court did not conduct an in-chambers hearing to decide the relevancy of the testimony. We note the trial court itself found the testimony of the State's witness critical to Rummelhart's conviction. At the hearing on Rummelhart's motion for a new trial and sentencing, the trial court stated, "[T]he jurors chose to believe the testimony of the disinterested witness Patty Nichols as to what she saw at the scene."

The Iowa Rules of Criminal Procedure are controlling on the issue of preclusion of defendant's witnesses.

> At or before the time of the taking of a deposition under subsection 1 or 2 of this rule, the defendant shall file a written list of the names and addresses of all witnesses expected to

> be called for the defense (except the defendant and surrebuttal witnesses), and the defendant will have a continuing duty before and throughout trial promptly to disclose additional defense witnesses. Such witnesses shall be subject to being deposed by the state.

Iowa R. Crim. P. 12(3).

> If the defendant has taken depositions under section 1 of this rule and does not disclose to the prosecuting attorney all the defense witnesses (except the defendant and surrebuttal witnesses) at least nine days before trial, the court may order the defendant 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 state from undue prejudice, order the exclusion of the testimony of any such witness.

Iowa R. Crim. P. 12(4).

Iowa R. Crim. P. 12(3) clearly implies the defendant has the opportunity "throughout trial" to disclose newly-discovered defense witnesses. Further, out of concern for justice and fairness, the Iowa Supreme Court has mandated a public policy in favor of the introduction of relevant evidence by a defendant.

> The court should, after hearing, select an alternative which will encourage compliance with the rules, yet result in a minimum restraint of the presentation of evidence; radical surgery should not be performed on the defendant's case if if conservative therapy will bring about a cure. Because discovery standards are designed to implement, not to impede, fair and speedy determinations of cases, it is suggested "that the court should seek to apply sanctions which affect the evidence at trial and the merits of the case as little as possible ...."

State v. Marchellino, 304 N.W.2d 252, 257 (Iowa 1981). See also State v. Walker, 304 N.W.2d 193 (Iowa 1981); State v. Lewis, 391 N.W.2d 726 (Iowa App. 1986).

We do recognize Iowa R. Crim. P. 12(4) has been amended since the Marchellino case. The trial court may now exclude witnesses where the disclosure rules are not complied with by the defendant. However, the rule specifically states exclusion of the witness's testimony may be ordered only if the trial court "finds no less severe remedy is adequate to protect the state from undue prejudice." Iowa R. Crim. P. 12(4).

In this case, the trial court made no finding a less severe remedy was inadequate. No reason was given why depositions or a continuance would not have provided the State with opportunity to protect its interest. The rule clearly requires such a finding before exclusion may be ordered.

We determine the trial court abused its discretion in applying the most severe remedy of exclusion of a possibly crucial defense witness simply because the witness was not discovered prior to trial. Upon review of the record, we can discern no adequate reason why the State would not be able to amply protect itself simply by deposing the newly-discovered witness. No evidence was offered showing Rummelhart's attorney was dilatory in investigating the case.

We reverse the trial court on this issue and remand for a new trial. Because of our holding on the first issue, we need not address the trial court's denial of a motion for a new trial on the basis of newly discovered evidence.

We address the third issue for instructional purposes only, as it may arise again if Rummelhart is retried. The Iowa Supreme Court has spoken on the admissibility of the defendant's subsequent acts as showing a propensity for violence. State v. Dunson, 433 N.W.2d 676, 679-81 (Iowa 1988).

> [T]here is no difficulty from the point of view of the relevancy of character, a man's trait or disposition a month or a year after a certain date is as evidential of his trait on that date as his nature a month or a year before that date; because character is a more or less permanent quality ... we may make inferences from it either forward or backward.
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> Id. (quoting 5 J.H. Wigmore, Evidence, § 1618, at 595 (Chadbourn ed. 1974).
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> Applying this rule in [the defendant's] case, we think that the evidence in question was material to several elements of his defense. See Iowa R. Evid. 405(b). Because the evidence of [the victim's] subsequent act was consistent with her earlier violent behavior, the evidence might, to the jury, have shown that [the defendant] reasonably believed he needed to defend himself at the earlier time, .... See Iowa Code §§ 704.3, 704.6.
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> For example, the evidence gave credence to [the defendant's] belief that he was, at the earlier time, in imminent danger of serious injury. [The victim's] act with the automobile was consistent with her violent behavior toward [the defendant] at other times.... We think the jury could have seen the evidence in question as part of the pattern of aggressive, even violent, behavior that apparently was a way of life to [the defendant and the victim].

Dunson, 433 N.W.2d at 681.

Like the court in the Dunson case, we do not now decide the admissibility of Rummelhart's evidence on the violent acts of the victim.

We reverse this case due to the trial court's exclusion of the defendant's newly discovered witness. Upon retrial the court shall consider the admissibility of the victim's violent acts under Dunson, id., if proffered.

**REVERSED AND REMANDED FOR NEW TRIAL.**