

IN THE COURT OF APPEALS OF IOWA

No. 1-145 / 10-0218
Filed July 27, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DENNIS DUANE RICHARDS,
Defendant-Appellant.

Appeal from the Iowa District Court for Des Moines County, Mary Ann Brown, Judge.

Defendant appeals his convictions for second-degree murder and second-degree arson. **REVERSED AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Nan Jennisch, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl Soich, Assistant Attorney General, Patrick C. Jackson, County Attorney, and Tyson Rogers and Jennifer Slocum, Assistant County Attorneys, for appellee.

Considered by Sackett, C.J., Potterfield, J., and Huitink, S.J.* Tabor, J., takes no part.

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

HUITINK, S.J.

Dennis Duane Richards (Richards) was convicted of second-degree murder and second-degree arson. On appeal Richards challenges several trial court rulings admitting evidence against him. He also argues the trial judge abused her discretion by excluding expert testimony supporting his defense. Because we find the trial judge abused her discretion by excluding expert testimony critical to Richards's defense, we limit our consideration to that issue, reverse Richards's convictions, and remand for a new trial.

I. Background Facts & Proceedings.

On January 4, 2009, Burlington firefighters found Cyd Richards's body lying on the floor of her burning home. Autopsy results indicated the cause of death was asphyxiation by manual strangulation and her death was unrelated to the fire. The state fire marshall's office determined the fire was intentionally set. Subsequent investigative findings by state and local law enforcement implicated Cyd's former husband, Dennis Duane Richards, in both her death and the fire at her residence. According to the State's theory, Richards manually strangled Cyd and set fire to her residence to destroy the evidence.

On January 16, 2009, the State filed a two-count trial information charging Richards with murder in the second degree, in violation of Iowa Code sections 707.1 and 707.3 (2009), and arson in the second degree, in violation of section 712.1 and 712.3. Richards denied the State's allegations and pleaded not guilty to both counts.

Richards's defense was premised on claims he was not present when Cyd was murdered or when the fire at her home was set. He also claimed he was physically incapable of strangling Cyd in the manner claimed by the State. After significant delays attributable to extensive discovery and defense counsel's serious illness, trial was set for December 1, 2009. On November 23, 2009, defense counsel filed a notice of an additional witness, Dan Miller-Jacobs, a physical therapist, whose expert testimony would support Richards's claims that he was physically unable to strangle Cyd in the manner claimed by the State.

The State moved to strike Miller-Jacobs's testimony because the notice of additional witness was filed one day after the time for filing the notice expired, and the resulting prejudice necessitated exclusion of Miller-Jacobs's testimony. Defense counsel's resistance to the State's motion to strike stated that the need for an identity of the challenged expert testimony was not discovered until on or after November 13 and counsel promptly alerted the State to the identity and availability of the designated expert for discovery purposes. Defense counsel also disputed the State's claims concerning resulting prejudice to the State.

The trial court's resulting ruling provides:

THE COURT: Well, I'm not going to change my earlier ruling which granted the State's motion to strike this witness for several reasons. I recognize that Rule 2.13(4) provides that the Court may, if no less severe remedy is adequate to protect the State from undue prejudice, order the exclusion of such witnesses if they're not disclosed at least nine days before trial.

And I recognize that that looks at exclusion as an ultimate sanction and that the Court should try to fashion some other remedy short of that if possible. And I want to explain for the record why I determined that there was no other remedy short of that that was adequate to protect and not create undue prejudice to the State in this case.

First of all, you need to look at this history of this case. The charges were filed in January of 2009. Trial was originally scheduled to start in October of 2009. Through various reschedules because of counsel's unavailability due to health problems and then the State having one of its attorneys at a conference, I rescheduled the case to the last two weeks, being the first two weeks of December.

This case has to be tried—started, I should say, started by January 16, 2010. We have a Christmas holiday, we have a New Year's holiday, and we now have three furlough days in the month of December and one furlough day in the month of January in that time frame.

I concluded that it was impossible to continue this trial to allow the State any flexibility in connection with this witness. So one of the first options I would have had short of the sanctions of excluding the witness was to reschedule trial and continue it. And I concluded that we just could not reschedule this trial and allow and still provide that Mr. Richards have his case tried within one year of the Trial Information being filed. So, first of all, that option I didn't think was available to me.

The second one was, of course, I could order discovery reopened and allow the State to depose this witness and commence its own discovery in the midst of the case and long after it was closed. But discovery of what Mr. Miller-Jacobs had to say was only the beginning of what the State would have to do.

If Mr. Miller-Jacobs had merely been a lay witness, a friend of Mr. Richards, someone who observed Mr. Richards, I would not have struck him. I did not strike the late notice of his mother as a witness. But Mr. Jake—Miller-Jacobs is an expert witness and I believe that any time a party calls and anticipates having an expert witness testify, the other side has its—a right to get its own expert and I concluded that it was not practicable for the State to with, as Mr. Richards—Mr. Rogers has talked about, just four or five business days before trial to locate, get a commitment that the person would work for them, and then have that person conduct whatever independent investigation, research that they wanted to have done to be able to testify in this case.

And because this witness was an expert witness, I concluded that the late notification of not only his proposed testimony but the issue itself was clearly prejudicial to the State and that the only way that we could protect and create—and not provide for that prejudice was to exclude the testimony of the witness.

A jury returned a verdict finding Richards guilty of second-degree murder and second-degree arson. The court denied his motion for new trial. Richards

was sentenced to a term of imprisonment not to exceed fifty years on the charge of second-degree murder, and a term not to exceed ten years on the second-degree arson charge, to be served consecutively.

II. Expert Testimony.

Richards claims the trial judge abused her discretion by excluding Miller-Jacobs's expert testimony. He points out that his disclosure of Miller-Jacobs was only one day late under the rule. He asserts the disclosure was not made earlier due to the extended illness of his first counsel. Richards states a lesser remedy would have been adequate to prevent undue prejudice to the State. He alleges he was prejudiced by his inability to present evidence that he was not physically capable of strangling someone to death. Richards additionally contends that the court's ruling denied him his constitutional right to present a defense.¹

Iowa Rule of Criminal Procedure 2.13(4) provides:

If the defendant has taken depositions under rule 2.13(1) and does not disclose to the prosecuting attorney all of 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 other 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 witnesses.

¹ A constitutional issue, such as that a defendant was deprived of his due process right to present a defense, may not be raised for the first time on appeal. *State v. Delap*, 466 N.W.2d 264, 268 (Iowa Ct. App. 1990). For an issue to be preserved for appeal, it must be presented to and passed upon by the district court. *State v. Manna*, 534 N.W.2d 642, 644 (Iowa 1995) (noting an issue had arguably been raised in a motion to suppress, but the district court did not rule on it, and error had not been preserved). Because the district court did not rule on Richards's constitutional claims, they are not preserved for our review.

The rule is applicable here because Richards took depositions under rule 2.13(1) and failed to disclose Miller-Jacobs at least nine days prior to trial.

“Under the rule, the court may exercise its discretion in fashioning an appropriate sanction under the circumstances.” *State v. Babers*, 514 N.W.2d 79, 82 (Iowa 1994). The purpose of the rule is to protect the State from undue prejudice. *State v. Braun*, 495 N.W.2d 735, 742 (Iowa 1993). We will reverse only if the court abused its discretion. *Id.* “An abuse of discretion will not generally be found unless the party whose rights have been violated suffered prejudice.” *Id.* An abuse of discretion occurs when the trial court exercises discretion on grounds that are clearly untenable or unreasonable. *State v. Cox*, 757, 760 (Iowa 2010). To determine if Richards suffered the requisite prejudice, we consider whether his rights were injuriously affected or he suffered a miscarriage of justice. *State v. Sullivan*, 679 N.W.2d 19, 29 (Iowa 2004).

The State’s theory of prejudice adopted by the trial judge was the impossibility of deposing Miller-Jacobs or obtaining a rebuttal expert within the time remaining before trial. There is, however, nothing in the record to suggest the State made any serious effort to accomplish either or to determine whether it was even necessary to do so. Moreover, had the notice been filed a day earlier, the additional imposition on the State would not have been consequential, let alone unduly prejudicial.

The record also fails to support the trial court’s conclusion that a continuance would likely result in dismissal of the charges against Richards because his case could not be reached for trial within one year of his

arraignment. See Iowa R. Crim. P. 2.33(2)(c). Although the rule provides for dismissal under those circumstances, there are exceptions. These exceptions include defendant's waiver of speedy trial rights, delays attributable to the defendant, and good cause for the delay. See *State v. Winters*, 690 N.W.2d 903, 908 (Iowa 2005); see also *State v. Magnuson*, 308 N.W.2d 83, 86 (Iowa 1981) (finding waiver of one-year speedy trial right where defendant waived ninety-day speedy trial right under Iowa Rule of Criminal Procedure 2.33(2)(b) and obtained continuances). Because Richards had earlier waived his ninety-day speedy trial rights and obtained a continuance, the trial judge had the option to continue the trial to accommodate the State's needs without risking dismissal under rule 2.33(2)(c). See *Magnuson*, 308 N.W.2d at 85-86. Based on the record before us, we conclude the trial court's stated reasons for excluding Miller-Jacobs's testimony are at best overstated and at worst speculative.

The remaining question is whether Richards was prejudiced by the trial judge's ruling excluding Miller-Jacobs's testimony. See *Sullivan*, 679 N.W.2d at 29. As noted earlier, the State claimed Richards manually strangled Cyd Richards and presented evidence explaining the mechanics of asphyxiation by strangulation. The gist of Miller-Jacobs's opinion was Richards lacked the hand strength to do so. If believed, there is a reasonable probability the jury could have found a reasonable doubt and acquitted Richards on both counts. The trial judge's ruling was therefore prejudicial because exclusion of Miller-Jacobs's testimony substantially impaired Richards's ability to present his defense. See, e.g., *State v. Schluter*, 548 N.W.2d 591, 593 (Iowa Ct. App. 1996).

In reaching our decision, we do not intend to be unfairly critical of the trial judge. Chronic budget shortfalls and resulting furlough days have and continue to impede the orderly administration of justice in Iowa's trial courts. However, the fiscal challenges facing the Iowa judiciary do not outweigh the defendant's right to present a defense, and the trial judge abused her discretion by concluding otherwise. We therefore reverse Richards's convictions and remand to the district court for a new trial.

REVERSED AND REMANDED.