IN THE COURT OF APPEALS OF IOWA

No. 9-472 / 08-0509
Filed August 6, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

GREGORY EARL JORDAN,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Jon C. Fister, Judge.

Gregory Earl Jordan appeals the district court's denial of his motion to extend the deadline for filing pretrial motions and notice of diminished responsibility defense. **AFFIRMED.**

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

Gregory Jordan, Fort Madison, pro se.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and James J. Katcher and Sue Swan, Assistant County Attorneys, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Doyle, JJ.

DOYLE, J.

Gregory Earl Jordan appeals the district court's denial of his motion to extend the deadline for filing pretrial motions and notice of diminished responsibility defense. Upon our review, we affirm.

***I. Background Facts and Proceedings*.**

On February 2, 2006, Jordan was charged by trial information with theft in the second degree as a habitual offender, in violation of Iowa Code sections 714.1(1), 714.2(2), and 902.8 (2005). The minutes of testimony, which accompany the trial information, allege that on January 26, 2006, Jordan concealed over $1000 worth of J.C. Penney merchandise in two bags and fled the store without paying. The minutes further allege that Jordan confessed he and another person conspired to steal the merchandise to sell for rent money.

On January 30, 2006, attorney Kelly Smith was appointed to represent Jordan. Smith filed her written appearance on Jordan's behalf on February 6, 2006. On February 13, 2006, Jordan filed his written arraignment, pleading not guilty to the charges and demanding a speedy trial. Based upon the date of the filing of Jordan's written arraignment, pretrial motions and notices of defenses were to be filed no later than March 27, 2006, forty days after Jordan's arraignment.[1] *See* Iowa Rs. Crim. P. 2.11(4), (11)(*b*)(1).

On March 21, 2006, Smith filed a motion to withdraw stating Jordan expressed a desire to have new counsel appointed, as Jordan did not believe that Smith was representing his interests and following his directives effectively

[1] The fortieth day after Jordan's arraignment was actually Saturday, March 25, 2006, causing the deadline to be extended to Monday, March 27, 2006. *See* Iowa Code § 4.1(34).

and efficiently. The motion further stated that Jordan repeatedly requested that counsel inquire into matters beyond the scope of counsel's court appointment. A hearing on Smith's motion was held March 24, 2006. The court denied Smith's motion to withdraw, and the following exchange occurred:

> THE COURT: Okay. I'm not going to appoint another attorney for you, Mr. Jordan. You've been around long enough and this strikes me as nothing more than game playing. You've not told me anything that she doesn't want to do whatever it is you want done, and as I've said, this is not a complicated case. This is a case where allegedly you were seen—you alleged—
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> [JORDAN]: I have more issues than that.
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> THE COURT: I don't want to get into that. That's for your attorney, but I don't know. I've tried several cases like this over the many years that I've been around, and there are not lots more issues that at least comes to mind—come to my mind readily. Either you were observed or you were not observed. Either you gave a confession or you did not give a confession. So you call your witnesses. The State will call their witnesses. The jury will make its determination, and we'll all live with that.

On March 27, 2006, Jordan filed a pro se motion requesting Smith be dismissed as his counsel. A pretrial conference was held on April 7, 2006, before a different district court judge. There, Smith renewed her motion to withdraw, explaining:

> I have attempted to discuss a number of things with Mr. Jordan, all to no avail. Those things include his trial rights, his proposed defenses, his potential witnesses to be called on his behalf. . . . Mr. Jordan is and has been refusing to communicate with me in a productive way and, in fact, refused earlier this week to meet with me. This is not an isolated incident. These are ongoing issues and they are getting worse. Again, Your Honor, I have attempted on a number of occasions to discuss these and other issues. It is clear that Mr. Jordan does not trust me at all. It is clear he's made repeated accusations that I am in collusion with the State. . . . At this point, it appears to me that the attorney-client relationship is nonexistent. It is virtually impossible to prepare for trial when I can't discuss even basic issues, let alone trial rights, proposed defenses, and potential witness with Mr. Jordan. So I would ask the court that

> the motion for dismissal of counsel and appointment of new counsel be granted.

Jordan then agreed to waive his right to a speedy trial and his right to be tried within ninety days. On April 10, 2006, the court filed an order granting Jordan and Smith's motions and allowing Smith to withdraw as Jordan's attorney of record. The court then appointed Michael Bandy to represent Jordan. On April 21, 2006, Bandy entered his appearance on Jordan's behalf.

On May 2, 2006, Jordan, through Bandy, filed a notice of diminished responsibility defense and a request that an expert be appointed at State expense. The request stated that Jordan had suffered from paranoid schizophrenia since 1996, that he was currently being treated for the condition, and that he was suffering from this illness at the time the alleged offense occurred. Jordan requested the court allow him to hire an expert at State expense to testify regarding Jordan's ongoing mental illness and how the illness would have had an effect on his ability to form the specific intent requirement of Iowa Code section 714.1(1). Because the deadline to file pretrial motions and notice of diminished responsibility had passed, Jordan also filed a request for an extension of time to file his pretrial motions and notices.

The State resisted Jordan's motions, and a hearing was held on June 8, 2006. There, Bandy argued that the court could grant an extension of time for the late filings for good cause. Bandy argued:

> [I]n this case, I guess the good cause would be . . . that I am a new attorney to Mr. Jordan and that in my talks with him, it became obvious to me that this was something that needed to be filed. I have no explanation as to why Miss Smith didn't do that or didn't perceive it. I mean she just might not have came to the same conclusion that I did.

Bandy further argued there was no prejudice to the State by granting the motion.

On June 8, 2006, the district court entered its order denying Jordan's motions. The court found that Jordan failed to show why the notice of defense and request for expert were not filed within forty days after arraignment and that Jordan failed to show good cause for extending the time. The court noted that the time to file pretrial motions and notices of defense expired while Jordan was represented by a different attorney whose trial strategy may have been different than that of his present attorney. The court concluded that "[t]he deadline for filing of pretrial motions and notices of defense can be waived for good cause but a change in attorneys and trial strategies has never been recognized as such." The court further explained:

> [T]he diminished capacity appears to be based on a mental illness for which [Jordan] has taken medication for some number of years after being diagnosed in 1996. He was, however, convicted in October 1998 and August 2002 and there is no evidence that this defense was raised or played a part in his commission of those offenses. Moreover, [Jordan] makes no showing that suffering from paranoid schizophrenia has any affect on a person's ability to form the specific intent to commit a theft. In the minutes of testimony, [Jordan] stated that he and another person needed money to pay their rent and this was the reason that they committed the theft of property for which they have been charged.
>
> Absent a showing of good cause for failure to timely file notice of defense, and in the absence of any showing that the defense would have any merit, if proven, the court is unable to find good cause for waiving the timely filing of the notice.

On June 9, 2006, Jordan requested a competency evaluation which was later completed at the Iowa Medical and Classification Facility at Oakdale. On January 26, 2007, Jordan stipulated he was competent to stand trial and waived his right to speedy trial within one year. On January 31, 2007, Jordan re-filed his

notice of diminished responsibility defense based upon the report from Jordan's competency evaluation containing a history of Jordan's psychiatric illness and his illness's treatment. The State again resisted the defense.

On April 6, 2007, Jordan waived jury trial, and the case proceeded to a bench trial on the stipulated minutes of testimony. The court did not rule upon Jordan's renewed notice of diminished responsibility defense. Jordan was found guilty of theft in the second degree as a habitual offender, in violation of Iowa Code sections 714.1(1), 714.2(2), and 902.8. He was sentenced to a term of imprisonment not to exceed fifteen years with a three-year minimum sentence.

Jordan appeals. He contends the district court abused its discretion when it refused to extend the deadline for filing pretrial motions and notices. Jordan argues a proper balancing of the relevant factors would have weighed in favor of allowing the untimely diminished responsibility notice. Jordan contends the ruling significantly prejudiced him and he is therefore entitled to a new trial. Jordan does not assert an ineffective-assistance-of-counsel claim.

***II. Discussion*.**

Iowa has recognized the defense of diminished responsibility as a matter of common law. *Anfinson v. State*, 758 N.W.2d 496, 502 (Iowa 2008); *State v. Collins*, 305 N.W.2d 434, 436 (Iowa 1981).

> "[D]iminished responsibility may be offered as a defense where an accused, because of a limited capacity to think, is unable to form a necessary criminal intent." The diminished responsibility defense allows a defendant to negate the specific intent element of a crime by demonstrating due to some mental defect [the defendant] did not have the capacity to form that specific intent.

Anfinson, 758 N.W.2d at 502 (internal citations omitted).

Iowa Code section 714.1(1) provides that "[a] person commits theft when the person . . . [t]akes control of the property of another . . . *with the intent to deprive the other thereof*." (Emphasis added.) Thus, section 714.1(1) is a crime of specific intent. *See State v. Fluhr*, 287 N.W.2d 857, 868 (Iowa 1980), *overruled on other grounds by State v. Kirchoff*, 452 N.W.2d 801, 804-05 (Iowa 1990). Consequently, diminished responsibility may be offered as a defense to section 714.1(1) where the defendant, because of a limited capacity to think, was unable to form the intent "to deprive the other thereof."

> If a defendant intends to rely upon the defense of . . . diminished responsibility at the time of the alleged crime, the defendant shall, within the time provided for the filing of pretrial motions, file written notice of such intention.

Iowa R. Crim. P. 2.11(11)(*b*)(1). Pretrial motions "shall be filed when the grounds therefor reasonably appear but no later than [forty] days after arraignment." Iowa R. Crim. P. 2.11(4). However:

> The court may *for good cause shown*, allow late filing of the notice [of the defendant's intent to rely upon the defense of diminished responsibility] or grant additional time to the parties to prepare for trial or make other order as appropriate.

Iowa R. Crim. P. 2.11(11)(*b*)(1) (emphasis added). Absent a showing of good cause, the defendant "may not offer evidence on the issue of . . . diminished responsibility," except through the defendant's own testimony. Iowa R. Crim. P. 2.11(11)(*d*).

What constitutes good cause for filing belated notice under rule 2.11(11)(*d*) is a discretionary decision of the trial court. *State v. Lewis*, 391 N.W.2d 726, 728 (Iowa Ct. App. 1986); *see also State v. Taylor*, 336 N.W.2d 721, 724 (Iowa 1983). The defendant has the burden to show the court abused

its discretion. *Taylor*, 336 N.W.2d at 724. An abuse of discretion will not be found unless it is shown that "such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *State v. Christensen*, 323 N.W.2d 219, 222 (Iowa 1982). However, preclusive sanctions against a defendant in a criminal case should not be imposed lightly. *See Lewis*, 391 N.W.2d at 729.

"Rules requiring advance notice of such defenses as alibi and diminished responsibility are justified by the need to balance the interest of the defendant in a full and fair trial against the interest in protecting the State from unfair surprise and delays." *Taylor*, 336 N.W.2d at 724. Factors considered in the application of this standard include the adequacy of the defendant's reasons for failure to comply with the applicable rules of procedure and whether the State was prejudiced as a result. *See Christensen*, 323 N.W.2d at 223-24.

We fail to see how the State's interest in avoiding surprise and unnecessary delay was advanced by the district court's refusal to allow Jordan to file the diminished responsibility notice. The purpose of the diminished responsibility notice rule is to give the prosecution time and information to investigate the merits of such defense. *See Lewis*, 391 N.W.2d at 729 (advancing same purpose for alibi notice rule). Jordan had waived his right to speedy trial before he filed the untimely notice on May 2, 2006, shortly after his second attorney was appointed. After the notice was filed, the trial that had been scheduled for May 23 was continued to June 27, 2006.[2] Under these

[2] We note the trial was continued several more times and did not actually occur until April 6, 2007.

circumstances, we believe Jordan's interest in a full and fair trial could have reasonably been accommodated without any resulting prejudice to the State's interest. *See State v. Eldridge*, 590 N.W.2d 734, 737 (Iowa Ct. App. 1999) (finding untimely motion to suppress resulted in no prejudice to State where defendant was granted six-week continuance after filing the motion); *Lewis*, 391 N.W.2d at 729 (concluding State would not have been prejudiced by belatedly filed alibi notice, "even if a continuance was required," where defendant had previously waived speedy trial right).

This is especially so in light of the fact that in resistance to Jordan's untimely defense, the State did not assert it would suffer any prejudice if the district court allowed late filing of the notice. Nor did the court consider whether the State would be prejudiced. Instead, the court based its decision in part on the merits of the proffered defense, stating, "Defendant makes no showing that suffering from paranoid schizophrenia has any affect on a person's ability to form the specific intent to commit a theft." We do not believe that was a proper factor for the court to consider in making its good-cause determination. *See Christensen*, 323 N.W.2d at 223-24 (discussing factors that should be considered in good cause analysis). Although the State correctly asserts that it is a defendant's burden to generate a fact question to warrant submission of a particular instruction or theory of defense, *see*, *e.g.*, *State v. Walton*, 311 N.W.2d 113, 115-16 (Iowa 1981), the issue here is not the submission of the theory of defense, but the right to assert the defense at all.

We also do not think the district court gave sufficient weight to Jordan's reasons for failing to timely file notice of his diminished responsibility defense.

See Eldridge, 590 N.W.2d at 737 (finding defendant's reasons for failing to timely file motion to suppress were entitled to considerably more weight than the district court allowed). In denying Jordan's request for late filing of the notice, the court stated, "The deadline for filing of pretrial motions and notices of defense can be waived for good cause but a change in attorneys and trial strategies has never been recognized as such." However, in *State v. Grimme*, 338 N.W.2d 142, 145 (Iowa 1983), our supreme court recognized that "[t]he length of time an attorney has been in the case is . . . one of the several factors which the trial court should weigh in the balance before determining whether good cause has been shown." Although not determinative, we believe the change in Jordan's representation should have at least been considered by the district court in its good-cause analysis.

After considering the proper factors involved in balancing Jordan's interest in a full and fair trial against the interest in protecting the State from unfair surprise and delay, we conclude Jordan established good cause for the untimely filing of his diminished responsibility defense notice. *See, e.g.*, *Eldridge*, 590 N.W.2d at 737 (determining defendant showed good cause for not timely filing a motion to suppress); *Lewis*, 391 N.W.2d at 729 (finding good cause existed excusing untimely alibi notice). This does not end our inquiry, however, as not all errors require reversal.

"An abuse of discretion will not generally be found unless the party whose rights have been violated suffered prejudice." *State v. Babers*, 514 N.W.2d 79, 82 (Iowa 1994) (reviewing district court's discretionary discovery sanction excluding a defense witness); *see also State v. Froning*, 328 N.W.2d 333, 335-36

(Iowa 1982) ("Error in the administration of discovery rules is not reversible absent a demonstration that the substantial rights of the defendant were prejudiced."). Jordan has made no showing that he was prejudiced by the district court's refusal to extend the deadline for the filing of the diminished responsibility notice, beyond a conclusory assertion to that effect. Considering the strength of the evidence against Jordan, we conclude that he was not, in fact, prejudiced. *See Christensen*, 323 N.W.2d at 224 (finding it proper to consider the strength of the evidence against defendant when reviewing action of trial court in weighing and balancing the interest of the parties).

According to the minutes of testimony attached to the trial information, Jordan told the officers who arrested him that he intended to sell the items he stole from the store in order to pay his rent. The security guard at the store watched Jordan try "to stick a few pairs of pants up his shirt" and "shove[ ] a few more pairs of pants, and a few dress coats" in bags from the store. Jordan then ran out of the store without paying for the merchandise. Given this evidence against Jordan, it is doubtful a diminished responsibility defense would have been successful in negating the specific intent element of the crime with which he was charged. *See id.* (determining it was "doubtful that the jury would have believed the testimony of an [excluded] alibi witness" where defendant was identified as the assailant by the victim); *see also United States v. Smith*, 524 F.2d 1288, 1291 (D.C. 1975) (stating testimony of excluded alibi witness would have been offset by "strong evidence on identification" presented at trial). We therefore conclude Jordan's substantial rights were not prejudiced by the

exclusion of the defense at trial. *See Babers*, 514 N.W.2d at 82; *Froning*, 328 N.W.2d at 335-36.

III. Conclusion.

Although we believe Jordan established good cause for the untimely filing of his diminished responsibility notice, he did not show he was prejudiced by the district court's ruling refusing to extend the deadline for filing pretrial motions and notices. The judgment of the district court is accordingly affirmed.

AFFIRMED.