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**IN THE
COURT OF APPEALS OF INDIANA**

JACOB MALONE,)

Appellant-Defendant,)

vs.)

STATE OF INDIANA,)

Appellee-Plaintiff.)

No. 85A02-0605-CR-423

APPEAL FROM THE WABASH CIRCUIT COURT
The Honorable Robert R. McCallen III, Judge
Cause No. 85C01-0511-MR-126

March 7, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant Jacob Malone (“Malone”) appeals his conviction for Murder, a felony.¹ We reverse and remand.

Issue

Malone presents several issues, the following of which is dispositive: Did the trial court err in excluding Malone’s alibi evidence?

Facts and Procedural History

Having knowledge that Leodegario Rodriguez (“Rodriguez”) had a large amount of money in his trailer, Kristie West (“West”), Steve Dickerhoff (“Steve”), Harrison Shane Dickerhoff (“Shane”), and Samuel Sims (“Sims”) discussed the possibility of robbing Rodriguez. At approximately 1:00 a.m. on the morning of July 12, 2005, West, Steve, and Shane drove to Sims’ house, picked up Sims as well as Malone, and proceeded to drive to Rodriguez’s trailer in North Manchester. When the group arrived at Rodriguez’s trailer, everyone exited the car except West. According to the testimony of West, Steve, Shane and Sims, Malone grabbed a baseball bat from the trunk of the car, and Sims took the tire iron. Shane, Sims, and Malone gained entry to Rodriguez’s trailer. Shane testified that he saw Malone approach Rodriguez, who was sleeping in his bedroom, and raise the baseball bat over his head. Subsequently, Shane and Sims heard a loud, hard crack, a pause, and then four or five more cracks.

In the afternoon of July 12, 2005, Rodriguez’s roommate found Rodriguez dead in his bedroom. After months of investigation into the murder by the Indiana State Police, the

investigators received a tip leading them to West, Steve, Shane, Sims, and Malone. After the investigators conducted interviews with Steve, West, Shane, Sims, and Malone, Malone was arrested and charged on November 1, 2005, with Murder, a felony,² Robbery as a Class A felony,³ and Burglary as a Class A felony.⁴ The charging information specified that the crimes allegedly committed by Malone happened “on or about the 11th day of July or 12th day of July, 2005.” Appellant’s Appendix at 8.

On January 30, 2006, Malone timely filed his Notice of Alibi Defense (“Notice”), asserting that he “was not at the location as alleged by the State in the information submitted in the above matter and was at his residence.” Appellant’s App. at 9. The Notice also requested the State to allege a more specific date and time in which the acts occurred in order to prepare his alibi defense. *Id.* On March 7, 2006, the State filed its Answer to Notice of Alibi Defense (“Answer”), which specified that the alleged crime took place between “12:00 a.m. and 5:45 a.m. on July 12, 2005.” Appellant’s App. at 11.

Prior to the start of Malone’s jury trial on March 21, 2006, the State objected to Malone presenting his alibi defense, contending that Malone failed to submit a second notice as required by statute. The trial court ruled in favor of the State, excluding such evidence. Malone moved to have the question as to whether a second alibi defense notice was required certified for interlocutory appeal, but the trial court denied the motion. In order to preserve the issue for appeal, Malone made an offer of proof as to his intended alibi evidence.

¹ Ind. Code § 35-42-1-1.

² I.C. § 35-42-1-1.

³ I.C. § 35-42-5-1.

⁴ I.C. § 35-43-2-1(2).

Following his jury trial, Malone was found guilty as charged. In sentencing Malone, the trial court merged the counts of robbery and burglary into the murder conviction and sentenced Malone to sixty years at the Indiana Department of Correction. This appeal ensued.

Discussion and Decision

Malone argues on appeal that the trial court erred in excluding his alibi defense evidence, because he was not required by statute to file a second alibi notice. Indiana Code Section 35-36-4-1 requires a defendant, within certain time limits, to file with the court and serve upon the prosecutor a written statement indicating his intention to offer evidence of an alibi. If a defendant desiring to offer such evidence fails to submit the requisite notice, the trial court is required to exclude the alibi evidence, unless the defendant shows good cause for the failure to file. Ind. Code § 35-36-4-3(b).

Once a defendant files an alibi defense notice, the prosecutor is required to file a response, specifying the date and exact place of the crime allegedly committed by the defendant, only if the date or place relied upon is different than that contained in the charging information. Ind. Code § 35-36-4-2(a). If the prosecutor's response "contains a date or place other than the date or place stated in the defendant's original statement, the defendant shall file a second statement of alibi." Ind. Code § 35-36-4-2(c).

The General Assembly enacted the alibi defense statute to serve two main purposes. First, the statute protects the defendant's ability to establish an alibi defense by requiring the State to commit to a particular place and time as to when the alleged crime took place.

Kroegher v. State, 774 N.E.2d 1029, 1032 (Ind. App. 2002), trans. denied. Recognizing that some defendants will fabricate an alibi, the second purpose of the statute is to allow the State to receive notice before trial regarding the place the defendant claims to have been when the crime was committed. Id. “The purpose of the Indiana alibi statute is not to compel the exclusion of evidence or mandate retrials for purely technical errors.” Baxter v. State, 522 N.E.2d 362, 368 (Ind. 1988), reh’g denied. The sanction for the defendant’s non-compliance is designed to protect the State from fabrication of defenses and enable prosecutors to prepare adequately for trial. Id.

The issue in the case before us is whether Malone was required to file a second notice of his intent to present evidence of an alibi in response to the prosecutor’s Answer to Malone’s first Notice. Based on Indiana Code Section 35-36-4-2(c), we turn to the date and place stated in Malone’s Notice and compare it to the prosecutor’s Answer. The State concedes that there was no change in the place, so we need only examine the specified date in these documents.

Malone’s Notice asserted that “[t]he Defendant was not at the location as alleged by the State in the information submitted in the above matter and was at his residence.” Appellant’s App. at 9. Based on the reference to the charging information, Malone would only be required to file a second alibi notice if the date in the charging information is different from that specified in the prosecutor’s Answer. In comparing these documents, there is no change in the date alleged. The Answer simply narrows the timeframe to “between approximately 12:00 a.m. and 5:45 a.m. on July 12, 2005” from the charging

information's broad window of "on or about the 11th day of July or 12th day of July, 2005." Appellant's App. at 11 and 8. Therefore, Malone was not required to file a second notice of his alibi defense, because the date of the alleged crime in the prosecutor's Answer did not differ from the date(s) referred to in Malone's original Notice.

The State argues that even if the trial court did abuse its discretion in excluding the alibi evidence, any such error is harmless. An error in the exclusion of evidence is harmless if its probable impact on the jury, in light of all of the evidence in the case, is sufficiently minor so as not to affect the defendant's substantial rights. Washington v. State, 840 N.E.2d 873, 885 (Ind. Ct. App. 2006), trans. denied.

A crucial issue for the jury in this case was the credibility of West, Steve, Shane, and Sims. The State did not present any forensic evidence placing Malone at the scene of the crime. Instead only the testimony of West, Steve, Shane, and Sims implicated Malone. As his alibi witness, Malone intended to have his girlfriend testify that Malone was home at their common residence the night Rodriguez was murdered. This testimony was crucial to Malone's defense and its exclusion cannot be considered harmless. Due to the exclusion of Malone's alibi evidence, his conviction must be reversed and remanded for a new trial.

Reversed and remanded.

VAIDIK, J., and BARNES, J., concur.