FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,) Filed August 30, 1983

vs.)

WILLIAM IRWIN DAVIS,) 3-140/68750

Defendant-Appellant.)

Appeal from Polk District Court - Joel D. Novak, Judge.

Defendant appeals from his conviction by a jury of first degree robbery as defined in Iowa Code §§ 711.1 and 711.2 (1981). AFFIRMED.

Garry D. Woodward, Des Moines, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General, and Michael K. Jordan, Assistant Attorney General, for plaintiff-appellee.

Considered by Oxberger, C.J., and Donielson, Snell, Schlegel and Hayden, JJ.

PER CURIAM

Defendant, William Irwin Davis, appeals from his conviction by a jury of first degree robbery as defined in Iowa Code §§ 711.1 and 711.2 (1981). On appeal he complains that (1) the evidence was insufficient to support the verdict and (2) his motion for a new trial based on false trial testimony by the State's rebuttal witness should have been granted. We affirm.

I. Sufficiency of the Evidence. The defendant asserts the evidence was insufficient to establish that the defendant was the person who entered a Dahl's food store in Des Moines on June 5, 1981, and, at gunpoint, took a bag of money containing $29,658.95. The defendant claims the identification evidence introduced by the State was not sufficient to prove beyond a reasonable doubt the defendant, William Davis, was the person who committed the robbery.

In reviewing the defendant's claim, this court views the evidence in a light most favorable to the State. All legitimate inferences that may reasonably be deducted therefrom will be accepted. State v. Freie, ___ N.W.2d ___, ___ (Iowa 1983); State v. Schrier, 300 N.W.2d 305, 306 (Iowa 1981). All the evidence must be considered when determining evidentiary sufficiency. State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980). Furthermore, the verdict will be upheld if supported by "substantial" evidence, i.e., evidence which would convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt. State v. Epps, 322 N.W.2d 288, 289 (Iowa 1982); State v. Robinson, 288 N.W.2d at 339.

A person wearing large mirror sunglasses and a curly wig entered a Dahl's food store in Des Moines, Iowa, on June 5, 1981, shortly after a Lewis Systems security truck delivered a bag of money to the store. The man went to the courtesy counter under the pretense of returning several beer bottles for the deposit. When the clerk, Bonnie Wilson, finished the transaction, the man displayed a gun which had been hidden in another grocery sack and demanded the bag of money. He then left the store with the money and store employees

followed. A male accomplice, Clarence Bryant, stopped pursuit by using verbal threats and indicating he had a gun in his pocket. The employees, however, continued to follow the getaway car to a second car. The person who had robbed the store climbed into the trunk of the second car and the "lookout" man entered the passenger door.

The police, with this information, arrested two persons shortly after the robbery. The first was Clarence Bryant, the "lookout," and the other was Debra Hall, the defendant's stepdaughter and driver of the second car. The second car had been abandoned and the police apprehended these two in the area. Defendant was not arrested until August 28, 1981.

At defendant's jury trial, the courtesy counter clerk, Bonnie Wilson, testified that she had identified defendant in a photographic lineup the day of the robbery. The witness also identified the defendant as the robber at trial. The State further introduced a pretrial fingerprint taken from one of the beer bottles returned by the robber, and a partial palm print taken from the door handle of one of the getaway cars. The State's expert witness, John Kilgore, identified both prints as those of defendant.

Defendant's fingerprint expert, Duane Barton, testified that he did not believe the print on the beer bottle was defendant's, and that even if it was, it was of the type which would have been made while drinking beer rather than while grasping the bottle to pull it out of the sack. Barton also testified that while the palm print from the door handle was defendant's, it was of the type which would have been made by leaning against the door handle, not by opening the door. Barton stated that he had testified in court about fingerprint identifications six or seven times.

The State then called as a rebuttal witness another fingerprint expert, Wilbur Cloyed, who testified that he compared fingerprints and testified about comparisons about 150 times a year. Cloyed testified that the beer bottle print was defendant's. He did not testify about the print on the door handle.

Defendant offered explanations of both prints. The getaway car on which his palm print was found had been stolen from a used car lot shortly before the robbery, and there was testimony that defendant had been on the lot looking at the car for possible purchase before it was stolen. There was testimony that defendant lived with Debra Hall, the owner of the second getaway car; that defendant drank beer; and that Debra Hall took beer bottles to Dahl's. Defendant also presented several alibi witnesses who testified he was in western Iowa near the time of the robbery. Witnesses verified defendant was in Auburn, Iowa, before and after the robbery, but not at the exact time thereof.

When an alibi issue exists, it amounts to a contention by the defendant that he was not present at the time and place of the offense charged. The State's duty to negative the defense of alibi does not become an independent element of the charge. The State's duty to prove the defendant was present inheres in the regular elements of the offense; the State must prove beyond a reasonable doubt the defendant performed the acts alleged. State v. Sallis, 238 N.W.2d 799, 801 (Iowa 1976); see State v. Delay, 320 N.W.2d 831, 834 (Iowa 1982).

The record indicates there was considerable evidence of the defendant's presence at the robbery. The credibility of the witnesses is for the factfinders to determine. State v. Robinson, 288 N.W.2d at 341. We believe there was substantial evidence to support the verdict.

II. Motion for a New Trial. After the jury returned a verdict of guilty, defendant filed a motion for a new trial, asserting that he had been denied a fair trial because the State's second expert witness, Wilbur Cloyed, had lied about how often he had testified at trial about fingerprint identifications. The trial court denied the motion for new trial, stating that "the number of times [Cloyed] testified was a matter of credibility which was to be determined by the jury."

Because defendant has alleged constitutional fair-trial violations under the fifth, sixth and fourteenth amendments, we review this issue under the **de novo** or

totality of circumstances standard. Hamann v. State, 324 N.W.2d 906, 909 (Iowa 1982).

There is considerable dispute as to whether Wilber Cloyed's statements constituted perjury. The defendant, in support of the motion for a new trial, introduced evidence that would indicate the State's expert witness testified in court as to fingerprint identifications approximately thirteen times in 1981 rather than one hundred fifty times. The State asserts that the witness was referring to the number of times he had compared and testified about fingerprint identifications rather than the number of times he had testified in court.

The record reveals the following colloquy concerning this testimony:

(on Direct)

> Q. Do you have any idea, Mr. Cloyed, as to how many fingerprints you have examined during your lifetime?
>
> A. Well, I could say millions and I would be accurate, but if you want a more concrete figure, I would say to give it some understandable dimension it would be—I probably have compared and testified on comparisons at the rate of somewhere around 150 a year in the local courts and Federal District and so forth.

(on Cross-Examination)

> Q. Now, I think you said that you testified about fingerprints approximately 150 times a year over the years?
>
> A. This is a pretty accurate figure.
>
> Q. One hundred fifty times a year you would make comparisons or compare latent prints with known prints in court?
>
> A. That's correct.
>
> * * *
>
> Q. How many cases are tried here in Polk County a year?
>
> A. I have no idea. These identifications have been—this would help you. These identifications have gone into juvenile—I have testified in Federal Courts. They have gone into juvenile hearings, deposition hearings, and so forth. If they all come to jury trial, I don't know what the count would be.

Q. You're testifying to fingerprint trials in Federal and District Court in Polk County run 150 a year?

A. I said I made 150 identifications. Yeah, I probably testified to some degree along that line.

Q. One hundred fifty times in court. Now, if you're going to say you made 150 comparisons and you never went to court, I would go along with that.

A. That probably could happen to a few of them but—

Q. Would you like to cut it down to a hundred times maybe?

A. No, I'm not going to cut it down at all because I don't think it's really important.

There are several prerequisites for finding a constitutional violation. First, however, the prosecution must either introduce or fail to correct false testimony, misrepresent evidence to the jury, or enhance false evidence in jury argument. Hamann v. State, 324 N.W.2d at 909. We have reviewed the above testimony in the context of the record from which it was taken and find that Wilbur Cloyed's somewhat confused answers do not constitute perjury. Perjury or use of false evidence does not occur where questions are vague or equivocal, and, taken in context, the witness truthfully could have given the answers he did. Hamann, 324 N.W.2d at 909. We agree with the trial court's ruling that the number of times Cloyed testified was a matter of credibility for the determination of the jury. State v. Robinson, 288 N.W.2d 337, 341 (Iowa 1980).

We find there was substantial evidence to support the verdict and that the defendant was not denied a fair trial by the testimony of the State's rebuttal witness.

AFFIRMED.