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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	**Filed November 30, 1983**
vs.	)	
RICHARD LEE DICK,	)	3-335 69362
Defendant-Appellant.	)	

Appeal from Woodbury District Court - James P. Kelley, Judge.

Defendant appeals from his conviction of second-degree robbery as defined in Iowa Code sections 711.1(2) and 711.3 (1981), asserting that the trial court should have allowed him to introduce for impeachment purposes evidence of prior inconsistent statements allegedly made by the victim of the robbery. The State asserts that defendant has failed to preserve error on this issue because he did not make an offer of proof of the excluded evidence. AFFIRMED.

Charles Harrington, Appellate Defender, and Linda Del Gallo, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Steven M. Foritano, Assistant Attorney General, for plaintiff-appellee.

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

HAYDEN, J.

On March 3, 1982, Elmer Bettis, the manager of a grocery store in Sioux City, Iowa, saw defendant Richard Lee Dick walk out of the store carrying a carton of cigarettes and two packs of beer he had not paid for. Bettis ran after defendant and told defendant he wanted the items back. Defendant dropped them and Bettis reached down to pick them up. When Bettis straightened up, he saw defendant take out a knife and start to open it. Bettis then swung one of the packs of beer at defendant, knocking the knife from his hand. Bettis picked up the knife and, with the assistance of two bystanders, took defendant back into the store. Defendant was later arrested and charged with second-degree robbery. Defendant's first attorney, Mayer Kanter, talked to Bettis several times when investigating the case.

At defendant's jury trial, Bettis testified on direct examination by the prosecutor that he was afraid when he saw the knife and also that defendant had threatened to "stick" him with the knife before it had been knocked to the ground. On cross-examination by defense counsel, Bettis stated that in one of the conversations with Kanter, Bettis had said defendant had made the statement about "sticking" him with the knife after the knife had been knocked to the ground.

Defense counsel called Kanter as a witness in order to impeach Bettis with his prior inconsistent statements to Kanter. The prosecutor objected to several of defense counsel's questions on the ground the answer elicited would be hearsay. The questions were essentially: (1) whether Bettis had said defendant had threatened him with the knife; (2) where Bettis had said the knife had been when the threat was made (whether Bettis had had the knife); and (3) whether Bettis had said he had thought defendant was capable of carrying out the threat. The trial court sustained the objections. Defense counsel did not make an offer of proof of Kanter's answers.

Our review of criminal cases is on assigned error. State v. Cullison, 227 N.W.2d 121, 126-127 (Iowa 1975).

The sole issue presented in this appeal is whether the trial court erred in refusing to admit defendant's evidence of prior inconsistent statements made by the State's witness, Bettis, for impeachment purposes.

It is proper for a party to contradict and discredit an adverse witness by showing the facts to be other than as testified to by such witness. State v. Odem, 322 N.W.2d 43, 45 (Iowa 1982). Additionally, a prior, inconsistent, out-of-court statement, offered for impeachment purposes, does not come within the definition of hearsay. State v. Hill, 243 N.W.2d 567, 570 (Iowa 1976). However, before a witness's testimony may be impeached, certain procedures must be followed.

> If the examiner believes that the witness is testifying at trial in a manner at variance with some prior statement, he must lay a proper foundation before being able to introduce the prior statement. The laying of this foundation is necessary in order to warn the witness that some other statement is intended to be used so that the witness may be ready to deny or explain the prior statement.

State v. Wolfe, 316 N.W.2d 420, 422 (Iowa App. 1981). If the witness denies making the prior statement, is evasive in his answer, or cannot remember making it, then the statement may be admitted into evidence for impeachment purposes. State v. Wolfe, 316 N.W.2d 420, 422 (Iowa App. 1981); State v. Gilmore, 259 N.W.2d 846, 857 (Iowa 1977). However, the subject of the inconsistent statement, to be admissible, must be relevant and material and not collateral to the facts and issues of the case. State v. Fowler, 248 N.W.2d 511, 520 (Iowa 1976).

A proper foundation had been laid by defense counsel, calling Bettis's attention to the time, place, and circumstances of the inconsistent statements. The record also reveals that when this was done, Bettis was not certain as to having made the statement, was evasive in his answer, and at other times, in effect denied making the statement. It was proper for the defendant to present Kanter's testimony to contradict the statements made by Bettis.

In addition, the evidence sought to be presented through Kanter was material to the facts and issues of the case and not collateral. The State specifically alleged that defendant had committed robbery pursuant to Iowa Code section 711.1(2) (1981), that is, by threatening another with or purposely putting another in fear of immediate serious injury. Bettis had testified on direct examination that he was threatened by defendant and placed in fear, and that he related these matters to Kanter. Kanter's contradictory testimony concerning Bettis's statements to him about being threatened with immediate serious injury were relevant in defendant's attempt to impeach and contradict Bettis's testimony. Kanter's proposed testimony concerning Bettis' statements as to whether defendant had possession of the knife at the time he said he was "going to stick" the store manager, was likewise material and relevant to the issue of whether defendant threatened Bettis or placed him in fear of immediate serious injury.

At no time did defendant make an offer of proof showing what Kanter would have testified to had the objections not been sustained. "[A] reviewing court cannot predicate error upon speculation as to answers which would have been given to questions had objections thereto not been sustained." State v. Ritchison, 223 N.W.2d 207, 213 (Iowa 1974); State v. Hahn, 259 N.W.2d 753, 759 (Iowa 1977). Nor has defendant shown that he attempted to make an offer of proof and was denied the opportunity. See State v. Cook, 330 N.W.2d 306, 313 (Iowa 1983).Absent such a showing defendant has failed to preserve error, and thus, has provided no basis for the court to grant a new trial. State v. Johnson, 312 N.W.2d 144, 147 (Iowa App. 1981). In the absence of an offer of proof, we lack an adequate record to review the ruling. Ritchison, 223 N.W.2d at 213; Hahn, 259 N.W.2d at 759.

AFFIRMED.