FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 1-002 / 89-1665

STATE OF IOWA,

Appellee,

vs.

RICHARD WHITMORE,

Appellant.

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Appeal from the Iowa District Court for Woodbury County, Joseph J. Straub, Judge.

The defendant appeals his conviction, following a jury trial, for first-degree burglary. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Ahmet S. Gonlubol, Assistant Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Richard J. Bennett, Assistant Attorney General, Thomas S. Mullin, County Attorney, and Connie Anstey, Assistant County Attorney, for appellee.

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

HAYDEN, J.

Richard Whitmore was convicted of first-degree burglary in a joint trial with a co-defendant, John Torres. The two allegedly broke into an apartment formerly occupied by Torres, and assaulted the present occupant, Torres' former roommate.

At the request of his roommate, Kevin Counter, Torres moved out of the apartment the two had shared. A few days after he moved out of the apartment, Torres and Whitmore returned to the apartment to retrieve some of Torres' belongings. It is disputed whether Kevin Counter admitted them into the apartment or whether they forced their way in. Once the two were inside the apartment an altercation occurred. Whitmore asserts he participated in this altercation only to defend himself and Torres against an attack by Counter.

On the basis of these events, Whitmore was charged with first-degree burglary. The State's theory was Whitmore had entered the apartment without any right or permission and with the intent to commit an assault therein. A jury found Whitmore guilty of first-degree burglary, and he has appealed the resulting conviction.

Whitmore challenges the sufficiency of the evidence to support the conviction. He contends the State failed to prove he had no right, license or privilege to enter the apartment. Whitmore argues Torres still had a tenancy interest in the apartment and Whitmore was entitled to accompany Torres at Torres' invitation.

Whitmore also challenges the district court's instruction concerning the landlord-tenant law applicable to the question whether Torres still had a tenancy interest in the apartment. The instruction told the jury a three-day notice to quit does not by itself terminate the tenancy, but following such a notice the tenant can terminate the tenancy by voluntarily leaving the premises. Whitmore contends the instruction should have omitted any reference to voluntary termination by the tenant. Instead, Whitmore claims the instruction should have listed all the steps a landlord must take to complete the termination of a tenancy.

Finally, Whitmore contends the district court erred by excluding evidence of threats made by Kevin Counter to Whitmore and Torres some five months after the incident involved here. Whitmore contends this evidence was relevant to show Counter's pugnacious character and to bolster Whitmore's theory he acted in self-defense. He also argues this evidence could have been used for impeachment purposes.

Our scope of review is on assigned errors of law. Iowa R. App. P. 4.

Whitmore was jointly tried with Torres. Torres also appealed his conviction. State v. Torres, No. 0-561/89-1718 (Iowa App. January 29, 1991). Torres premised his appeal on the first two grounds cited above, relating to termination of Torres' tenancy and the jury

instruction on landlord-tenant law. We affirmed the trial court on both those issues. We determined (1) there was sufficient evidence to support a finding Torres had terminated his tenancy, id. slip op. at 6-8, and (2) the jury instructions, taken as a whole, correctly stated the applicable law, id. slip op. at 3-6. These rulings comprise the law of the case. The trial court is affirmed on these issues. Whitmore's first two assignments of error are affirmed.

The third issue raised by Whitmore concerns an incident occurring subsequent to the alleged burglary. Whitmore alleges Counter threatened himself and Torres some five or six months after the burglary. Whitmore wished to introduce this evidence into testimony to show the victim's, Counter's, violent character traits and also to impeach Counter. The State filed a motion in limine. The trial court sustained the motion. Whitmore contends the trial court abused its discretion in sustaining the motion in limine. Whitmore relies on State v. Dunson, 433 N.W.2d 676, 680 (Iowa 1988).

In Dunson, the defendant urged the trial court abused its discretion in excluding evidence of the victim's violent actions immediately subsequent to the charged assault as evidence of the victim's violent character. This evidence was offered in support of the defendant's defense of justifiable self-defense. Reversing on other grounds, the Iowa Supreme Court directed the district court

on remand to exercise its discretion under Iowa R. Evid. 403 as to the admissibility of evidence regarding the victim's subsequent violent acts. Thus, we must examine whether the trial court abused its discretion in excluding evidence of Counter's alleged threats against Whitmore and Torres.

"[T]he decision as to admissibility of [] testimony rests in the trial court's discretion, and we will reverse only on a clear showing of abuse of discretion. This is a difficult standard to meet." State v. Halstead, 362 N.W.2d 504, 506 (Iowa 1985) (citations omitted). "Abuse of discretion is shown only when it is demonstrated that such discretion was exercised on grounds or for reasons clearly untenable or to extent clearly unreasonable." State v. Trudo, 253 N.W.2d 101, 106 (Iowa 1977) (citations omitted).

> An objection based on remoteness essentially raises an issue of relevancy. While remoteness in point of time does not necessarily render evidence irrelevant, it may do so where the elapsed time is so great as to negate all rational or logical connection between the fact sought to be proved and the remote evidence offered in proof thereof. * * The basic test of relevancy is whether the evidence offered would make the desired inference more probable than it would be without the evidence. * * The question of relevancy, and thus the effect of remoteness, is determined by the sound discretion of the trial court.
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> And depending upon the circumstances shown in the evidence remoteness in time is committed to discretion of the trial court, and the length of time affects the weight rather than the admissibility.

State v. Maestas, 224 N.W.2d 248, 251 (Iowa 1974) (citations omitted).

In the present case, when the trial court sustained the State's motion in limine, it stated:

> The court is going to sustain the objection based mostly on the fact's too remote in point of time from the happening on the event on February 2, 1989, and at the present state of the record, there is no reason for admitting it for impeachment purposes. The witness has admitted that he's been in about 40 fights since he was six years old. That's indicating, perhaps in counsel's words, that it's a pugnacious character. He [Counter] didn't deny this on the stand.

Additionally, defense counsel apparently made no offer of proof as to the exact circumstances and content of the threat. Defense counsel did offer a professional statement indicating Counter told the defendant "just wait until court is over." We point out this alleged threat was made five to six months after the charged burglary.

Based on the record before us, we hold the trial court did not abuse its discretion in excluding the proffered testimony. The trial court considered both the remoteness in time and the other evidence in the record in making its decision. Its decision is thoughtful and well-reasoned. We affirm the trial court on this issue.

The trial court is affirmed on all issues.

AFFIRMED.