FILED
OCT 28 1982
IOWA SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

MARTIN LOVE,)

Defendant-Appellant.)

Filed October 28, 1982

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66421

Appeal from Polk District Court, Harry Perkins, Judge.

Defendant appeals from his conviction, after a jury trial, of first-degree robbery in violation of Iowa Code §§ 711.1 and 711.2 (1979). On appeal, defendant challenges the admission into evidence of testimony regarding the location of two eyewitnesses to the robbery who did not testify at trial, and of bullets taken from defendant's car after his arrest. AFFIRMED.

Scott D. Rosenberg, Assistant Appellate Defender, for defendant-appellant.

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

Considered en banc.

PER CURIAM

Defendant Martin Love was apprehended outside the Vickers gas station in Clive, Iowa, on September 26, 1980, just after the station was robbed at gunpoint. The robber had reached through the cashier's window to take the accessible money when his attempt to get the cashier to open the door to the cashier's cage by firing several shots failed. A woman named Jerri Wolf, who had driven into the station with two friends during the robbery, was present when defendant was arrested. She identified defendant as the armed robber, and stated that she had observed him in the gas station with a gun in his hands about the time the shots were heard.

At defendant's jury trial, the State called Wolfe, but not the two friends who had been with her that night. The State's counsel asked Wolfe if she had seen the other two lately. Over defendant's relevancy objection, she testified that she had not seen them and that both had moved out of the State.

The State then introduced into evidence a .38 caliber gun found under the front seat of defendant's car and allegedly used in the robbery. The State also introduced the expended cartridges and live rounds which were in the gun, and several expended cartridges which were found at the scene of the robbery. All were .38 caliber. Finally, over defendant's relevancy objection, the State introduced four .38 caliber bullets found in the trunk of defendant's car. It is from the admission into evidence of these bullets, as well as of the testimony regarding the location of the eyewitnesses, that defendant appeals.

Since this action is a proceeding at law, our scope of review is on assigned errors only. State v. Cullison, 227 N.W.2d 121, 126-27 (Iowa 1975).

Whether evidence is material and relevant are matters within the sound discretion of the trial court. Hagenson v. United Telephone Co., 209 N.W.2d 76, 80 (Iowa 1973). Reversal is appropriate only when the trial court clearly abuses its discretion, and when this error prejudices the defendant:

> A common test to determine whether a ruling on the admission of evidence was prejudicial is whether, upon a review of the record, it sufficiently appears the rights of the complaining party have been injuriously affected by the error or he has suffered a miscarriage of justice.

State v. Mayhew, 170 N.W.2d 608, 619 (Iowa 1969).

In this case we cannot conclude that the admission of Wolfe's testimony regarding the location of the two witnesses who were present at the scene of the robbery but who did not testify at trial, was prejudicial error. The State had the right to explain the absence of the witnesses, and thereby to attempt to dispel any inference the jury might make that they purposely were not called because their testimony would have contradicted Wolfe's. See State v. Furley, 239 N.W.2d 544, 545 (Iowa 1976). We believe that this was the purpose of the testimony, rather than to lend credibility to Wolfe's testimony "by promoting an inference that if the two persons were present they would testify to the same thing as Ms. Wolfe," as defendant contends.

Neither can we conclude that the trial court erred in allowing into evidence the .38 caliber bullets found in the trunk of defendant's car. Defendant claims that the evidence was irrelevant and immaterial, and that in admitting it the court was admitting evidence of another offense. We disagree. The bullets constituted evidence surrounding the burglary offense, not evidence of other offenses or of defendant's bad character. The Iowa Supreme Court has frequently stated that in criminal prosecutions, evidence regarding all the facts and circumstances surrounding the offense is generally admissible. State v. Duncan, 312 N.W.2d 519, 522 (Iowa 1981); State v. Drake, 219 N.W.2d 492, 494 (Iowa 1974); accord, Battese v. State, 425 P.2d 606, 610 (Alaska 1967); 22A C.J.S. Criminal Law § 603 (1961). Such evidence is admissible even if it is indicative of another crime or unfavorable circumstances. State v. Drake, 219 N.W.2d 492, 494 (Iowa 1974).

Finding no merit in either of defendant's contentions on appeal, we hereby affirm the decision of the trial court.

AFFIRMED.