

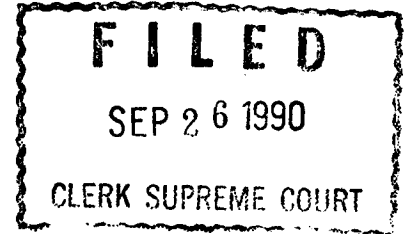
STATE OF IOWA,

Plaintiff-Appellee,

vs.

RICKY LEE THEELER,

Defendant-Appellant.



Appeal from the Iowa District Court for Woodbury County, Richard J. Vipond, Judge.

Theeler appeals his conviction, following a jury trial, for robbery in the first degree. **AFFIRMED.**

Richard L. McCoy, Sioux City, for appellant.

Thomas J. Miller, Attorney General, Mark Joel Zbieroski, Assistant Attorney General, Thomas W. Mullin, County Attorney, and Brian E. Buckmeier, Assistant County Attorney, for appellee.

Considered by Schlegel, P.J., and Sackett and Habhab, JJ.

SACKETT, J.

Defendant appeals his conviction of first-degree robbery. He contends (1) there was insufficient evidence to support his conviction, (2) the trial court erred in refusing to order certain witnesses from the courtroom, and (3) there was prejudicial conduct by the prosecutor. We affirm.

Defendant was charged following an incident where a masked man carrying a gun entered a bar, ordered the patrons to lie down, and forced the bartender to show him the back areas of the bar. The intruder allegedly tried but failed to open the cash register. One patron testified she heard the intruder ask for money, but the other witnesses did not remember this comment. The intruder eventually fled without taking any money.

Theeler challenges the sufficiency of the evidence to establish that he possessed the requisite intent to commit a theft. A verdict will be upheld where there is substantial evidence to support the charge. State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984). Substantial evidence means such evidence as could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. Id. The evidence is viewed in the light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the record. State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984). We consider all the evidence at trial,

not just the evidence that supports the verdict. State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980). The testimony of two separate witnesses support the contention that Theeler intended to commit a theft when he entered the bar. One of the witnesses related Theeler's own statement that he tried to get into the cash register, but it wouldn't open. The second witness, present during the robbery, testified she heard Theeler ask where the cash was kept. This testimony, coupled with the other circumstantial evidence surrounding the robbery, supports the conviction.

Defendant next contends he was denied the right to take the witness stand because of the trial court's failure to sequester witnesses. He claims the presence of the witnesses in the courtroom prevented his taking the stand because they would have recognized his voice. (Theeler did not actually testify in his own behalf, allegedly because the request involved here was denied.) This issue is apparently based on a claim that Theeler has a distinctive and easily identifiable voice. Theeler notes that the bar's occupants were unable to identify the intruder visually due to the mask. He states that if the bar's occupants heard him testify, they might return to the stand on rebuttal and identify him as the intruder due to his distinctive voice. He argues that the court's refusal to exclude the bar occupants from the courtroom impermissibly

abridged his constitutional right to testify in his own defense. Theeler's failure to take the witness stand prevents us from determining if he would have been prejudiced by the trial court's adverse ruling. A defendant must take the stand to testify before the defendant can raise a constitutional claim. State v. Davis, 328 N.W.2d 301, 306 (Iowa 1982). To hold otherwise would permit an accused to create an alleged error by merely announcing he would have taken the stand but for the trial court's prior finding. Id. We affirm the trial court on this issue.

Finally, Theeler contends the prosecutor committed prejudicial misconduct by referring to the incident at the bar as a "robbery" and by referring to the masked intruder as a "robber" or a "would-be-robber." He argues these designations assume a fact not proven by the State, namely that the incident at the bar fell within the legal definition of a robbery.

It is not the prosecutor's misconduct which entitles a defendant to a new trial, but rather any resulting prejudice which prevents the trial from being a fair one. State v. Anderson, 448 N.W.2d 32, 33 (Iowa 1989). Trial courts are vested with broad authority to determine whether prejudice actually results from misconduct. Id. The use of the words "robber" and "would-be-robber" may not have been well chosen. However, the trial court considered the

effect these words would have on the jury. We find no abuse of discretion in its decision denying Theeler's motion.

AFFIRMED.