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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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4-350
83-731

STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

JAMES B. STEELE,)

Defendant-Appellant.)

Appeal from the Iowa District Court for Polk County—Rodney J. Ryan, Judge.

Defendant appeals from his conviction of robbery in the first degree. On appeal he asserts that there was insufficient evidence to support the jury verdict. AFFIRMED.

Charles Harrington, Appellate Defender, and Raymond E. Rogers, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General and Steven K. Hansen, Assistant Attorney General, for plaintiff-appellee.

Considered by Oxberger, C.J., and Snell and Sackett, JJ.

Nature Of The Case

Defendant, James B. Steele, appeals from a jury verdict of guilty to charges of robbery. He was charged by trial information with Robbery in the First Degree, in violation of sections 711.1 and 711.2 of the 1981 Iowa Code.

On June 15, 1982, the Polk County Attorney filed a trial information in which he charged the defendant and one Robert Van Dorn with First Degree Robbery for an armed robbery which occurred at a Dahl's grocery store on May 6, 1982. The defendants were tried jointly and the jury found both to be guilty as charged, with an additional finding that a firearm was used to commit the crime. The trial judge sentenced the defendant to prison for a term not to exceed twenty-five (25) years. Further, the defendant was to serve a minimum of five (5) years before becoming eligible for parole.

Statement Of Facts

The State of Iowa put on evidence to show that on May 6, 1982, at or about 9:00 p.m., three individuals committed armed robbery at the Dahl's store on Beaver Avenue in Des Moines. One of the three remained at the front entrance to the store, while the other two approached the courtesy counter and demanded money. One of the robbers wore designer jeans and a jacket and had black curly hair. The second individual to approach the courtesy counter, allegedly the defendant, wore a fringed, buckskin-type jacket, a blue T-shirt with white lettering across the front, and denim jeans. This person also had shiney-capped teeth. All three of the robbers wore nylon stockings over their heads.

An eye-witness testified that, upon leaving the store, the three robbers ran east on Franklin Avenue. One of the three separated from the other two and headed in a southern direction, while the other two continued to head east on Franklin Avenue and went behind a house. Witnesses heard a dog barking and the

sound of two gunshots. A short time later, the co-defendant, Robert Van Dorn was arrested by a Des Moines police officer after Van Dorn jumped a fence at 1723 - 38th Street. At approximately the same time, another police officer arrested the defendant while he was running through the backyards of some homes located along the 3600 block of Nierob Court. In a pat-down at the arrest scene, the defendant was found to be unarmed, but had eighty dollars in paper currency on his person. At the time of his arrest, Mr. Van Dorn was observed to be wearing a black T-shirt, denim jeans, and a pair of tan boots. Clothing confiscated from the defendant included denim jeans, tennis shoes and a blue T-shirt with the words "It's Better In The Bahamas" written across the front. Both co-defendants were returned to the Dahl's store where witnesses to the robbery attempted to identify them. These witnesses testified that the defendant's clothing was similar to that worn by one of the robbers, although none of the witnesses could identify the defendants, by facial characteristics alone, as the robbers.

The State introduced into evidence various items that were found in the vicinity of the Dahl's store and the locations where police apprehended the defendants. Included among these exhibits were: A Dahl's grocery sack containing cash, checks and coupons inside, a pistol, several pairs of gloves, two coats, nylon stocking and two .22 caliber shell casings. An agent from a criminalistics laboratory testified that, in his opinion, the two shells had been fired from the pistol discovered in the area where police captured the defendants. The agent also testified that fibers discovered on the pistol were similar to fibers taken from a guncase discovered in Mr. Van Dorn's automobile, which was parked in the area.

A customer of the store, at the time of the robbery, testified that he had known Robert Van Dorn for some ten years. When police returned the co-defendant to the store for identification, this customer recognized him, from his voice, as being one of the two people who entered the store and took money from the courtesy counter.

After the arrest, police took tests of both defendants' hands to check for gunshot residue. A criminalist with the Iowa D.C.I. testified that, in his opinion, the defendant had had contact with a firearm and very possibly could have fired the weapon. The agent also testified that Mr. Van Dorn could also have had such contact.

The State called a clerk from the 1/2 Price Store in Des Moines as a witness. She testified that on the night the robbery occurred, between 7:00 and 7:30 p.m., two or three individuals came through her check-out lane and purchased gloves. One of the individuals was wearing a T-shirt with the words "It's Better In The Bahamas" printed on it.

After his arrest, the defendant told police that, although he knows Mr. Van Dorn, he had not been with him that day. He further stated that he was jogging to his grandmother's house, or a girl friend's, when he was arrested by police. Defendant, James B. Steele, testified that he did not commit the robbery for which he was charged, that he had not fired a gun that day, but that he had fired a gun the day before.

Law And Application

This case was tried pursuant to the criminal statutes of the State of Iowa and, therefore, is a law matter. Our review is not de novo, but rather we will only correct errors in the application of the relevant law. Iowa R. of App. P. 4 (1983).

In the appeal of his conviction, the defendant claims that the State presented insuffucient evidence to sustain the jury's verdict. He asks that the jury's verdict be reversed on appeal. The defendant bases his claim on the fact that not one of the eyewitnesses could positively identify him as one of the participants in the robbery. Also, that although the defendant's T-shirt, with the phrase "It's Better In The Bahamas" emblazened across the front, and silver toothcaps were similar to those of one of the robbers, such clothing and dental work is of such common useage that this fact is of little probative value. In his

further defense he claims that the criminalist's opinion that the defendant had recently handled a firearm does not conclusively prove that he handled a gun during the commission of this robbery. Finally, he avers that his mere presence in the vicinity of the Dahl's store does not constitute the substantial evidence required for a conviction.

In its most recent case on a similar issue, the Iowa Supreme Court applied a deferential standard when reviewing a question of the sufficiency of the evidence. "Substantial evidence" is "evidence which could convince a rational trier of fact the defendant is guilty beyond a reasonable doubt." State v. Doss, No. 83-477, slip op. at 6 (filed Sept. 19, 1984). The evidence is viewed in the light most favorable to the prosecution, with a consideration for "all the evidence." State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980)(emphasis in the original). Defendant grounds his appeal on the fact that no positive identification was made of him, based on his facial characteristics. However, in State v. O'Connell, 275 N.W.2d 197 (Iowa 1979), the supreme court eliminated the distinctions between direct and circumstantial evidence in testing evidence sufficiency. Id. at 204-05. "Direct and circumstantial evidence are equally probative." Iowa R. of App. P. 14(f)(16)(1983). Whether the evidence is direct or circumstantial, however, it must raise a fair inference of guilt. State v. Schrier, 300 N.W.2d 303, 308 (Iowa 1981). The evidence must do more than create speculation, suspicion or conjecture. Id. (citing State v. Lewis, 242 N.W.2d 711, 724 (Iowa 1976)).

The evidence presented to the jury clearly amounted to more than that which would merely create speculation, suspicion or conjecture. Witnesses testified that one of the robbers wore a blue T-shirt with "It's Better In The Bahamas" written across the front. The 1/2 Price Store clerk sold gloves to someone wearing a like T-shirt. Similar gloves were recovered near the place where the defendant was arrested. The defendant was apprehended wearing a T-

shirt with this same lettering. The robbers were seen fleeing on foot east of the Dahl's store. Defendant was arrested in a wooded area in this same vicinity. Several witnesses testified that one of the robbers who came into the Dahl's store had metallic dental caps on his teeth. The defendant has similar capped front teeth. This same robber wore white tennis shoes with blue stripes. Defendant was wearing white and blue striped tennis shoes when caught by police. The same robber wore a nylon stocking over his head, wore a fringed leather coat, and brandished a handgun. Stockings, a fringed leather coat, and a handgun were found in the wooded area where defendant, coatless, was apprehended, and defendant had residue from a firearm on his hand.

It is for the fact finder, not the appellate court, to decide questions of fact and determine what weight to give to the testimony of witnesses. State v. Jellema, 206 N.W.2d 679, 681 (Iowa 1973). A finding of guilt is binding on this court unless it is without substantial evidentiary support in the whole record. Id. We recognize that the presence of the defendant in the vicinity where the crime was committed is not enough to prove the defendant committed the crime. See Jellema at 682.

After reviewing all the evidence in the light most favorable to the prosecution, we conclude the record contains substantial evidence to support the verdict of guilty. Rational jurors could be convinced of the fact the defendant was guilty beyond a reasonable doubt.

AFFIRMED.