

IN THE COURT OF APPEALS OF IOWA

No. 0-623 / 89-1955

FILED

APR - 2 1991

CLERK SUPREME COURT

STATE OF IOWA,

Plaintiff-Appellee,

vs.

IRVING LEE JONES,

Defendant-Appellant.

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Appeal from the Iowa District Court for Scott County,
J.L. Burns, Judge.

Defendant appeals his conviction, following a jury
trial, for first-degree robbery. **AFFIRMED.**

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

Bonnie J. Campbell, Attorney General, Bruce Kempkes,
Assistant Attorney General, William E. Davis, County
Attorney, and James D. Hoffman, Assistant County Attorney,
for appellee.

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

SACKETT, J.

Defendant Irving Lee Jones appeals his conviction of first degree robbery. He contends the trial court erred in allowing certain rebuttal evidence and his trial counsel should have requested instructions on lesser included offenses. We affirm.

Two men robbed a bar in Davenport at about 1:40 a.m. on July 13, 1989. The men had a gun. Defendant was identified by a bar employee as one of the robbers.

Defendant sought to establish an alibi defense. He testified in his own behalf and attempted to outline his activities during the time frame when the robbery was committed. He placed himself with a companion at the home of a friend, William Graves. Defendant described a fight his companion had at the Graves' home with a man defendant later identified as Gerald McLemore.

Over the defendant's objection, the State called McLemore as a rebuttal witness. McLemore testified he was in his own home when he was awakened in the early morning hours of July 13th by a noise in the downstairs of the house. He went down stairs and found a man he had never met sitting in his living room. The men went outside. While they were outside, a man McLemore identified as the defendant approached and asked McLemore who he was. McLemore testified defendant was fifteen feet away from him when defendant drew a gun because their discussion

escalated and defendant did not believe McLemore lived there. McLemore testified defendant then struck him on the side of the head with the gun.

Defendant contends it was error to allow McLemore to testify on rebuttal defendant hit him with a gun. He argues it was a collateral matter and was prejudicial to him. McLemore's testimony contradicted defendant's testimony as to defendant's whereabouts that evening and how McLemore came to be injured. The evidence was relevant and probative. See State v. Odem, 322 N.W.2d 43, 45 (Iowa 1982); State v. Goff, 315 N.W.2d 768, 769 (Iowa 1982). It is relevant and material to a legitimate issue other than defendant's general propensity to commit wrongful acts. State v. Barrett, 401 N.W.2d 184, 187 (Iowa 1987).

Defendant also argues the prejudicial effect of the evidence far outweighs any probative value. We disagree. See State v. Plaster, 424 N.W.2d 226, 231 (Iowa 1988). The trial court did not abuse its discretion in allowing McLemore's testimony. See State v. Mayberry, 411 N.W.2d 677, 684 (Iowa 1987).

II.

Defendant next contends his trial counsel was ineffective in failing to request instructions on assault with a dangerous weapon and assault with intent to inflict serious injury. Our review of issues of ineffective counsel is well established and need not be reiterated.

See Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674, 694 (1984); State v. Bass, 385 N.W.2d 243, 245 (Iowa 1986); Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981).

The State does not respond to this argument in its brief. The State filed a reply brief where it did not deny the instruction should have been given but argued the failure to request the instructions was not prejudicial. The record before us is not sufficient to address this issue. It is best addressed in postconviction proceedings. We affirm.

AFFIRMED.