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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	Filed June 4, 1986 384
Plaintiff-Appellee	)	
vs.	)	5-701 85-353
LLOYD OFFUTT,	)	
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Scott County (No. 117643-01), James E. Kelley, Judge.

Defendant appeals from his conviction for robbery in the first degree, burglary in the first degree, and sexual abuse in the second degree. **AFFIRMED.**

Thomas J. Miller, Attorney General; Lona Hansen, Assistant Attorney General; and James Hoffman, Assistant Scott County Attorney, for plaintiff-appellee.

Charles Harrington, Chief Appellate Defender, and Deborah A. Goins, Assistant Appellate Defender, for defendant-appellant.

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

OXBERGER, C.J.

Defendant appeals from his conviction for robbery in the first degree, burglary in the first degree, and sexual abuse in the second degree. We affirm.

Defendant's convictions resulted from three incidents all of which occurred on October 3, 1984. In the first of those incidents, defendant (Offutt) and James Devoe entered a service station and, while Offutt, knife in hand, emptied the cash register, Devoe forced the attendant into a back room and beat her. Devoe and Offutt then fled the station and entered an apartment building where they forced their way into an occupied apartment. Linda Morrow, one of the apartment's occupants, testified that Offutt forced her to engage in nonconsensual intercourse while the two were in the apartment.

Defense Of Compulsion

Offutt, at his trial, offered a defense of compulsion alleging that he participated in the events of the night in question under a threat by Devoe. In response, the trial court instructed the jury as follows:

Instruction No. 18

> With regard to any elements of intent under Count I of these instructions, the defendant claims that at the time and place in question he was acting under compulsion.
>
> When a person is compelled to act by another's threat or menace of serious injury, and reasonably believes that such injury is imminent and can be averted only by their doing of the act, then no public offense has been committed, unless such person claiming compulsion, or the person he aids and abets, intentionally or recklessly causes physical injury to another. (emphasis added).

Counsel for Offutt objected to the wording "... or the person he aids and abets," in the jury instruction.

The defendant says the trial court's interpretation of State v. LeCompte, 327 N.W.2d 221 (Iowa 1982) abrogates the statutory defense of compulsion.

The defendant claims that the reason for the statutory defense of compulsion is that the person acting under coercion or threat cannot be said to have a culpable mind. A coerced defendant always knowingly advances the commission of the crime by virtue of his compelled participation.

However, the supreme court in LeCompte, 327 N.W.2d 223 (Iowa 1982) said:

> The defendant also argues that the compulsion defense is available to an aider and abettor even if physical injury is suffered by the victim, if that injury is actually caused by another person.
>
> . . . As an aider and abettor, his use of the compulsion defense is subject to the same limitations as is a principal's. (citations).
>
> The court did not err in its compulsion instruction on either grounds urged.

The supreme court has determined that the legislature in granting a defendant the defense of compulsion limited that defense to cases where the victim is not injured. It does not matter whether the aider and abettor did not have the requisite intent because he was coerced. The trial court correctly applied the rule of law in LeCompte.

The defendant further objects to the language in Instruction No. 18 "or the person he aids and abets," because it suggests that the defendant was actually an aider and abettor.

It would have been more accurate to have included in the instruction "or the person he aids and abets if you so find he did aid and abet," as defined in Instruction Nos. 19 and 20. The jury was instructed correctly in Instructions Nos. 19 and 20 as to the elements to find that the defendant was an aider and abettor. The jury was instructed to read all the instructions as a whole. We find the defendant was not prejudiced by the instruction.

Petitioner further complains that the form of instruction Nos. 19 and 20 (aiding and abetting defined) is inconsistent with the compulsion instruction. Since counsel for Offutt specifically stated that he had no objection to these

instructions, Offutt may not now raise an objection not raised at trial. State v. LeCompte, 327 N.W.2d 221, 223 (Iowa 1982). There is no issue properly before this court regarding the instruction. Id.

Prior Similar Felony Conviction

Defendant claims that the trial court erred in overruling defendant's motion in limine. Defendant objected to the use of a 1971 conviction because the prior conviction is the same type of offense as the present charge. Defendant says the prejudicial effect outweighs the probative value of the evidence. The trial court ruled, "The Court finds that the probative value regarding credibility of the witness outweighs the prejudicial effect of the specific factors admissible under Rule 609, Subparagraphs (a) and (b) of the Iowa Rules of Evidence.

The State did not address this issue in its brief.

The defendant contends that the 1971 burglary with aggravation and the present charge of burglary in the first degree is the same charge. The State at trial did not dispute that the prior charge and the current charge were the same type of charge. The trial court did not specifically rule that the charges were identical.

We find that the State and the trial court apparently assumed that the charges are identical. The State in its brief has not contested the issue. We will assume for purposes of this appeal the charges are identical.

In State v. Martin, 217 N.W.2d 536, 543 (Iowa 1974), the court said:

> That the prior conviction was based on conduct the same or substantially similar to that presently charged militates against admissibility of the prior because it enhances the danger of undue prejudice. There is greater possibility that the jury will convict defendant of the offense charged because he committed the same or similar offense in the past.

Once since Martin the supreme court has faced the issue of the prejudicial effect of allowing the jury to be informed that the defendant has previously been convicted of the same or similar crime he is now standing trial.

In State v. Harlow, 325 N.W.2d 90, 92 (Iowa 1982), the court rejected a per se rule and said:

> Defendant argues the two felony charges are so similar that the danger of unfair prejudice outweighed the probative value of the evidence. The trial judge after stating he had taken all the factors set out in Martin into consideration, ruled otherwise. Defendant's objection is without merit.

In the absence of a per se rule we cannot say the trial court abused its discretion in permitting the evidence of prior similar crime.

Defendant finally claims that his trial counsel was ineffective because he failed to object to the failure of the prosecutor to establish that the prior burglary conviction involved dishonesty.

Since there is insufficient record we do not decide this issue.

AFFIRMED.

All judges concur except Sackett, J., who concurs specially.

SACKETT, J. (specially concurring)

I concur specially in the result only.