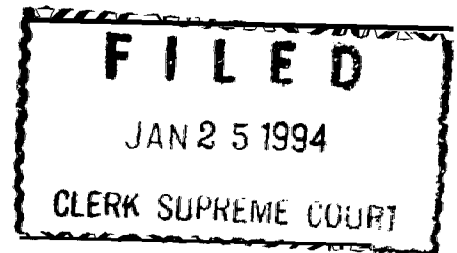


IN THE COURT OF APPEALS OF IOWA

No. 3-522 / 92-1781



STATE OF IOWA,

Appellee,

vs.

ROBERT ELMER BOWIE,

Appellant.

Appeal from the Iowa District Court for Jasper County,
John P. Crouch and Thomas W. Mott, District Associate
Judges.

Defendant appeals from his conviction, following a jury
trial, for assault causing bodily injury. **AFFIRMED.**

Robert W. Conrad, Knoxville, for appellant.

Bonnie J. Campbell, Attorney General; Robert P. Ewald,
Assistant Attorney General; James Wilson, County Attorney;
and Richard J. Scieszinski, Assistant County Attorney, for
appellee.

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

HABHAB, J.

The defendant, Robert Elmer Bowie, appeals from his conviction, following a jury trial, for assault causing bodily injury. He contends the trial court erred in: (1) permitting the State to introduce prejudicial rebuttal testimony, and (2) not ordering a new trial based on new evidence. He contends the sentencing court: (1) abused its discretion in not granting him probation, and (2) erred in failing to state its reasons for the sentence imposed.

On the evening of August 25, 1991, Betty Bowie drove her sixteen-year-old daughter, Susan, to visit a friend. Betty did not approve of this friend because he was a drug addict. They fought on the way home. When they got home the screaming and yelling continued and the two hit each other. Susan called her friend, Geri James, to ask for help in dealing with her parents. Betty attempted to prevent the call, but Susan was able to say that she needed help.

When Robert Bowie returned home, Betty told him about the fight. While he was confronting Susan in the living room, Geri pulled into the driveway. Betty went outside and tried to get Geri to leave. Susan then says her father beat her with a leather belt before she ran to the window and knocked on the glass to get Geri's attention. She says her father then grabbed her hair, threw her to the floor, and resumed beating her as one of his dogs bit her legs. Robert admits to slapping Susan twice and sitting on her,

but claims he did so because she was "completely beserk." After the fight had ended, Susan escaped from the house by jumping from the window of her room upstairs. She met Geri, who took her to the hospital.

The State filed a trial information charging Robert and Betty with child endangerment. The State amended the trial information to charge the couple with assault with intent to commit serious injury. Robert and Betty pleaded guilty to the amended charge. After each later denied their guilt, the district court vacated the pleas.

At a consolidated trial, the jury found Robert guilty of assault causing bodily injury in violation of Iowa Code section 708.1 (1991). The jury found Betty not guilty. Robert moved for new trial. The district court denied his motion. The court sentenced Robert to one year in jail. Robert appeals. We affirm.

I. Rebuttal Evidence.

Robert contends the district court erred in allowing the victim's older sister to testify as a rebuttal witness regarding whether Robert was a "peaceful" person. He contends that Betty's testimony concerned his disability and not whether or not he was a violent person.

"Rebuttal testimony is 'that which explains, repels, controverts, or disproves evidence produced by the other side.'" Evidence that has no direct tendency to do this is inadmissible on rebuttal. However, the trial court has considerable discretion in admitting rebuttal evidence, and its ruling will be disturbed only upon a showing of clear abuse of discretion.

State v. Webb, 309 N.W.2d 404, 411 (Iowa 1981) (citations omitted).

Under Rule 404(a)(1), an accused may put a pertinent trait of his character into evidence. Iowa R. Evid. 404(a)(1). The prosecution may rebut the same. Id.

The defense called Betty as a witness. On direct examine Robert's attorney asked the following question:

Q. If you know, is there some reason why Bob may not want to get involved in any kind of a physical altercation with anybody? A. Well, he isn't healthy. His back bothers him all the time, and he just physically is not well at all, and he just avoids things like that.

After the defense rested, the State requested leave to call one of Susan's older sisters, Rebecca Jones, to rebut the implication that Robert, was a person who "avoided physical altercations" and was a "peaceful" person.

The court allowed the rebuttal testimony, but severely limited its scope. It prohibited the victim's sister from testifying to specific acts because it found such testimony would be unduly prejudicial. It allowed her only to express her opinion as to Robert's peacefulness.

We find the intent of the defendant in asking the above question was to show the jury he was a nonviolent person, who would not have beaten his daughter. We find Robert placed his character in issue by presenting evidence of his nonviolent nature. We find the district court did not abuse its discretion in allowing Rebecca Jones to testify, especially where it did not allow her to testify to any

specific acts, but only allowed her to testify to her opinion of Robert's peacefulness.

II. Motion for New Trial.

Robert next contends the district court erred in not ordering a new trial based on new evidence. Robert contends that four days after her father was convicted for assaulting her, Susan told Bob Gomez she was under the influence of intoxicants at the time of the alleged assault and she had "little or no recollection" of the events surrounding the assault.

To prevail on a motion for a new trial based upon newly-discovered evidence, a defendant must show: (1) that the evidence could not have been discovered earlier in the exercise of due diligence; (2) that the evidence is material to the issues in the case and not merely cumulative or impeaching; and (3) that the evidence probably would have changed the result of the trial. State v. Whitsel, 339 N.W.2d 149, 156 (Iowa 1983). In passing on motions for new trial based on evidence newly discovered, the trial court is vested with wide discretion. State v. More, 382 N.W.2d 718, 723 (Iowa App. 1985). Motions for new trials based upon newly-discovered evidence are not favored and should be closely scrutinized and granted sparingly. State v. Farley, 226 N.W.2d 1, 3 (Iowa 1975).

We find the allegations in the affidavit are merely cumulative or impeaching and that Robert has failed to show

the evidence probably would have changed the result of the trial.

At several points in her trial testimony Susan admitted there were specific events about the assault she could not remember. Robert testified Susan was on drugs at the time of the assault. Susan denied this. Dr. Patrick Edwards examined Susan after the incident. He testified he found Susan "emotionally upset" and "shaken," but "alert" and "cooperative." He also testified Susan told him her version of what had occurred. Susan's bruises and abrasions were consistent with the history she had given him.

Given the trial testimony, the trial court did not abuse its discretion in refusing to grant a new trial.

III. Sentencing.

Robert also contends the district court failed to state its reasons for the sentence imposed. Iowa Rules of Criminal Procedure 22(3)(d) requires a trial court to state on the record its reason for a particular sentence. A sentencing court can be "terse and succinct in stating reasons for the sentence it selected." State v. Victor, 310 N.W.2d 201, 205 (Iowa 1981).

The sentencing transcript shows, after questioning the defendant about counseling and the crime, the district court agreed with the presentence investigation report that it was unlikely that counseling would be effective. The district court then stated:

Considering the objectives of sentencing, that is to deter the defendant from further similar acts, to deter the defendant--or to deter the general public from similar acts, considering the objectives of rehabilitation and realizing that that's not such an important factor here, the Court will follow the reasons of the presentence investigation report and impose a sentence recommended by the State and presentence investigator. The Court will impose a sentence of one year in the County Jail and the Court costs.

We find the district court complied with the requirements of Rule 22(3)(d).

Robert also claims the district court abused its discretion in refusing to grant him probation because he would not admit he was guilty of assault.

Lack of admission of wrongdoing can be considered by the sentencing court, along with other relevant factors. State v. Bragg, 388 N.W.2d 187, 192 (Iowa App. 1986). It is evident from a review of the sentencing proceedings that it was not the only factor considered by the court. In addition to the above quoted statement by the court, the defendant's attitude was considered by the court in its determination that it was unlikely that counseling would be effective in rehabilitating the defendant because of defendant's unwillingness to make any positive changes in his attitudes or conduct.

We find the district court did not abuse its discretion in refusing to grant Robert probation.

AFFIRMED.

Oxberger, C.J., concurs; Sackett, J., dissents without opinion.