FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

Plaintiff-Appellee,

vs.

JAMES LEE LEISINGER,

Defendant-Appellant.

Filed September 29, 1981

1-14
64506

Appeal from Black Hawk District Court - Frank D. Elwood, Judge.

Defendant appeals from his jury conviction of robbery in the first degree in violation of section 711.2, The Code 1979, asserting 1) that rebuttal evidence concerning his alleged prior theft of a gun should not have been admitted for impeachment purposes when no conviction resulted, 2) that the evidence was insufficient to support the jury's guilty verdict, and 3) that a continuance should have been granted to enable preparation of a defense to the allegation of the prior theft. AFFIRMED.

Paul T. Shinkle of Ackerman & Shinkle, Cedar Falls, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa; Merle Wilna Fleming, Assistant Attorney General; and David Correll, Black Hawk County Attorney; for plaintiff-appellee.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Defendant, James Lee Leisinger, appeals from his jury conviction of robbery in the first degree in violation of section 711.2, The Code 1979. He asserts 1) that rebuttal evidence concerning his alleged prior theft of a gun should not have been admitted for impeachment purposes when no conviction resulted, 2) that the evidence was insufficient to support the jury's guilty verdict, and 3) that a continuance should have been granted to enable preparation of a defense to the allegation of the prior theft. We affirm.

At approximately 10:30 p.m., May 6, 1979, a tall, masked, white male, armed with a handgun, robbed the Franklin Street Quik Trip in Waterloo, Iowa. The victim and two teen-aged boys identified defendant, at trial, as the robber. The victim earlier picked defendant's photo from a photo array on two occasions and identified him as the perpetrator. He also picked defendant from a live lineup at the Black Hawk County Jail. Each teen-age boy also individually chose defendant's photo from a photo array and selected defendant from a live lineup. Defendant and nine alibi witnesses testified that he was drinking at a "kegger" at another location at the approximate time of the robbery. The jury returned a guilty verdict; this appeal followed.

**I. Scope of Review.** Since this is an action at law, our review is on assigned error only. Iowa R. App. P. 4.

**II. Admission of Rebuttal Evidence of Defendant's Prior Illegal Conduct.** Defendant asserts that trial court erred in admitting into evidence testimony of a State rebuttal witness which indicated defendant had committed another crime. We disagree.

We begin by discussing the relevant factual circumstances. The victim initially described the gun used by the robber as "probably a Smith & Wesson, a 38 or 3-58 regular bluing." At trial, the State introduced into evidence a nine-shot 22 Magnum, high standard revolver seized on May 9, 1979, as a result of an unrelated incident, from the residence defendant shared with his girlfriend, Kathy Kelly. The victim testified that the gun was similar in appearance to the gun used by the robber. On both direct and cross-examination, defendant testified, in reference to the May 9th incident, that he did not know who owned the gun or where it had come from. On rebuttal Brite Hanna identified the gun as one stolen from his home and another witness identified it as one sold and registered to Hanna. Further, over defendant's objection, the State's rebuttal witness, Carol Easton, testified that defendant acquired the gun in question when she and defendant burglarized Hanna's home on December 7, 1978. Defendant was

charged with the burglary but was never convicted. For the reasons which follow, we believe Easton's testimony was properly admitted.

Admissibility of rebuttal evidence is within trial court's broad discretion and will not be disturbed absent the showing of clear abuse. State v. Webb, no. 65028, slip op. at 10 (Iowa Aug. 26, 1981). Such evidence has been defined as "that which explains, repels, controverts, or disputes evidence produced by the other side." State v. Bakker, 262 N.W.2d 538, 543 (Iowa 1978), (quoting State v. Miller, 229 N.W.2d 762, 770 (Iowa 1975)). We believe Easton's testimony clearly refuted defendant's testimony that he did not know where the gun came from and that it was not his.

An additional problem, however, is presented by Easton's testimony since it showed evidence of another crime. Although such evidence is generally inadmissible,[1] relevancy is the basic standard by which such evidence is measured. "If the evidence tends to prove some fact relevant to the crime charged it is properly received even if it necessarily establishes another offense." State v. Gibb, 303 N.W.2d 673, 682 (Iowa 1981). See also State v. Kern, 307 N.W.2d 22, 27 (Iowa 1981); State v. Cuevas, 282 N.W.2d 74, 80 (Iowa 1979). " 'Relevant evidence' [as defined by rule 401, Federal Rules of Evidence, and rule 401, Uniform Rules of Evidence] means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." State v. Ivory, 247 N.W.2d 198, 204 (Iowa 1976).

Under the facts of this case, we conclude the testimony was relevant. There is no dispute that an armed robbery occurred; defendant simply denied being the perpetrator. Defendant testified at length about the incident resulting in seizure of the gun which was introduced into evidence, but denied the gun was his. Whether defendant owned or had access to a gun was clearly material to a charge of armed robbery involving a gun which was at least similar to the one obtained from defendant's residence.

Before ending our inquiry on this issue, we must also determine whether the evidence's probative value is substantially outweighed by the danger of unfair prejudice. State v. Cott, 283 N.W.2d 324, 329 (Iowa 1979). This determination is also within trial

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[1] Inadmissibility is based on the principal that defendant must be convicted only by proof that he or she committed the crime charged, not because defendant is a bad person. See State v. Belieu, 288 N.W.2d 895, 901 (Iowa 1980).

court's discretion and will be reversed "only when a clear and prejudicial abuse of that discretion is shown." Webb, slip op. at 12. In balancing the probative value against alleged prejudice in this case, we cannot lose sight of the fact that defendant himself raised the issue as to his knowledge about the gun. Since the veracity of a witness may be challenged by evidence which reveals material facts are other than stated by the party's testimony, State v. Flesher, 286 N.W.2d 218, 221 (Iowa App. 1979), affirmed, State v. Flesher, 286 N.W.2d 215 (Iowa 1979), we cannot label trial court's ruling unreasonable or an abuse of discretion. We thus conclude trial court committed no error in admitting the challenged testimony.

**III. Sufficiency of the Evidence.** Defendant asserts that, although the robbery is not in dispute, there is insufficient evidence to support the verdict. Several principles are important in our review on this issue. When the sufficiency of the evidence is challenged, we view the evidence in the light most favorable to the State, taking into consideration all evidence in the record. Kern, 307 N.W.2d at 28; State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980). On factual issues, the credibility of witnesses and the weight to be given to their testimony is for the jury. Cott, 283 N.W.2d at 329. Whether a witness or witnesses have correctly identified a defendant also is a question of fact for the jury to decide. State v. Harrington, 178 N.W.2d 314, 316 (Iowa 1970). When an alibi issue exists, the burden remains on the State to prove defendant was present as one of the regular elements of the offense. State v. Fallis, 238 N.W.2d 799, 801 (Iowa 1976).

Applying these principles to the evidence in this case, we conclude that trial court correctly overruled defendant's motion for a directed verdict of acquittal. The victim of the robbery, who saw the robber from a distance of approximately two to two and one-half feet, gave a description to the police. He later selected defendant's photo and stated that he was "reasonably sure" that the person was the robber. Approximately a month later, the victim was working in another Quik Trip store in Waterloo when an individual came in and asked for a book of matches. The victim identified that man as the same person who had robbed him on May 6th based on such characteristics as the man's voice, his height, his build, the way his eyes were set, his head, the color of his eyes, the color of his hair, his forehead, and the length of his hair. The victim also believed that the man who came into the store on July 9th was wearing the same red plaid flannel shirt the robber was wearing on the night of May 6th. He also expressed a belief that the man recognized him and, when the man left, the victim called the police.

The two teenage boys described the robber as "real tall" and chose the defendant's photo as a robber from a photo lineup. They also both picked defendant from the live lineup at the Black Hawk County Jail. The record shows that the identification witnesses were alone when each viewed the pictures and when each viewed the live lineup.

Although there is no fingerprint or palmprint in evidence in the case, the victim testified that, when the robber left the store with the money in one hand and the gun in the other hand, he pushed the door open with his arms. Thus, we conclude defendant's claim that the absence of any identifying prints linking defendant to the robbery is decisive is without merit.

We further are not persuaded that the mere number of alibi witnesses, alone, makes it impossible for a rational trier of fact to believe defendant nonetheless committed the robbery. We believe that the record would permit a rational jury to conclude the alibi was contrived. There also is a basis for the jury to reject the testimony because of the intoxicated condition of the witnesses during the period described in their testimony. In this regard, several witnesses testified that defendant could not have left the party to commit the robbery because he was "stumbling drunk" at the time of the robbery. Other witnesses specifically identified defendant as being in the living room of the home where the "kegger" was held at the exact time the robbery was committed, although these same witnesses were unable to state whether or not other persons allegedly in attendance at the kegger were present at that time. Further, in light of the fact that some 25 or 30 keggers had been held at this residence during the year in question, the record reflects substantial possibility that some alibi witnesses were confused as to the date in question.

In summary, we conclude that a rational jury could believe beyond a reasonable doubt on this record that defendant was the perpetrator of the robbery committed on May 6, 1979, and that trial court did not err in overruling defendant's motion for directed verdict of acquittal.

**IV. Denial of Continuance.** As his third assignment of error, defendant contends trial court abused its discretion in denying his request for a two week continuance to permit his counsel time to prepare for Easton's rebuttal testimony. We reject defendant's assertion.

The record shows that defense counsel asked for a two weeks' continuance if Carol Easton would be permitted to testify. Trial court overruled the motion but stated "I will take a look at that after the evidence today to see where we are on it or before we

dismiss the jury for the day." Ms. Easton testified that afternoon and, immediately after her testimony, trial court raised defendant's request for a continuance. At this point defense counsel stated "I won't need as long as I originally requested it" and "[i]f I could have until tomorrow afternoon at 1 o'clock that would be sufficient." Trial court granted defendant's request by stating "[t]o this extent, . . . we will recess the jury until 1:30 tomorrow afternoon." A few minutes later defense counsel stated:

> Your Honor, when we go into the courtroom, I am just wondering, the more I think about it, I need a couple—I need to use this evening to look for the one witness. I don't need to use all of tomorrow morning to get them ready. Possibly I could be ready by 10 o'clock, 10:30, and we could be done with one witness by noon if the court wants to do it that way.

On this record, we conclude defendant's request for a two-week continuance was waived and there is no basis for assertion of error. Trial court's judgment is affirmed.

AFFIRMED.