FILED
JUN 15 1989
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	
vs.	)	268
THOMAS MARSHALL,	)	9-159 88-652
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Black Hawk County (D7X012959), Peter Van Metre, Judge.

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

William L. Wegman, State Public Defender, and Barbara M. Anderson, Assistant State Public Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Sheryl A. Soich, Assistant Attorney General, for plaintiff-appellee.

Heard by Donielson, P.J., and Hayden and Sackett, JJ.

HAYDEN, J.

The defendant appeals his conviction, following a jury trial, of first-degree robbery. He contends the trial court erred in several instances, including giving a jury instruction that improperly emphasized a prior felony conviction, failing to instruct the jury on the lesser-included offense of second-degree robbery, and permitting evidence of acts subsequent to the robbery. We affirm.

The defendant, Thomas Marshall, was charged with first-degree robbery in violation of Iowa Code section 711.2, for allegedly taking money from a cash register at a Ben Franklin store in Waterloo while armed with a knife. The cashier said she had seen a knife, but three other witnesses testified they had seen a man flee from the store but had not seen a knife. During deliberations, the jury sent the court a note that read, "Can the defendant be found guilty of a lesser charge than first degree? Lack of evidence of weapon." The defendant had not previously requested an instruction on the lesser-included offense of second-degree robbery, and the trial court declined to give one during deliberations. The jury later found Marshall guilty. Further facts are outlined in the body of the opinion.

Our scope of review is for errors at law. Iowa R. App. P. 4.

I. Jury Instructions. Marshall first contends the trial court erred by giving a separate jury instruction in impeachment by prior felony after having already given a general instruction on witness credibility. He urges this duplication improperly drew the jury's attention to his previous burglary conviction.

We do not find it necessary to determine whether or not the trial court erred in giving the impeachment instruction to the jury because here, regardless of our determination of this issue, the defendant has failed to show he was prejudiced by the complained of instruction.

An error in instructing the jury does not necessarily constitute reversible error. State v. Marsh, 392 N.W.2d 132, 134 (Iowa 1986).

We find Marshall was not prejudiced, even if we determine the instruction regarding his prior felony conviction was improper. The instruction was at least as favorable to the defendant as it was to the State and it prohibited the jury from using the information for any purpose other than impeachment. The instruction was a correct statement of the law and was carefully tailored to limit the jury's consideration to that which was proper, leaving any inferences to be drawn from this evidence to the jury as they consider all of the evidence. In addition Marshall conceded the prior felony conviction during his testimony. The fact defendant had been previously

convicted of a felony was certainly tempered by his testimony and explanation of the events surrounding the conviction. Because this instruction, like the instruction in Marsh, could not have been prejudicial to defendant Marshall, we affirm the trial court regarding this issue.

II. Lesser-Included Offense Instruction. Next, Marshall submits the trial court should have instructed the jury on the lesser-included offense of second-degree robbery. The State argues defendant is not entitled to relief on the grounds he failed to object to the trial court's original instructions. These instructions did not include an instruction on a lesser-included offenses.

Marshall was charged with and convicted of robbery in the first degree. At the close of evidence, the trial court submitted an instruction on first-degree robbery, but not on the lesser-included offense of second-degree robbery. Neither defense counsel nor the State requested instruction for second-degree robbery before the jury began deliberations. Soon after deliberations had begun, the jury sent a note to the trial court judge which stated "Can the defendant be found guilty of a lesser charge than first degree? Lack of evidence of weapon." During trial, conflicting testimony was presented as to whether Marshall had a knife. The presence of the knife was the element which elevated the crime from second-degree robbery to first-degree robbery. Iowa Code §§ 711.2 and 711.3

(1987). The trial court answered the jury's inquiry by stating: "Under the instructions submitted to you, the defendant cannot be found guilty of any lesser charge. Your verdict must either be guilty or not guilty of robbery in the first degree." The trial court also asked the court reporter to read back to the jury portions of the testimony of witnesses regarding their recollections of the defendant possessing a knife.

In response to the court's decision, the defense counsel made the following statement:

> MR. COONRAD [the defense lawyer]: Your Honor, for the defense, if the record--for the record, I know I talked to him informally about it. For the record, one option is to answer the question as the Court has proposed they have no choice, and then to tell the jury to decide the case based upon their best memory of the evidence. I would propose that might be the most appropriate course of conduct at this point in time. Jerry has been through his note. The shorthand reporter. He pulled out the portions of the record and found in each case where the persons mentioned either seeing the weapon or not seeing the weapon. It was covered with each of them at least on one occasion. It may have been covered more than once, but he pulled out the one portion that is part of the problem. It may have been covered, you know, more than once or may have said that the fashion in which they answered the questions. I question whether or not we're causing some undue look by the jury at this part of the oral testimony. I am aware of the exhibits they have got with them, and definitely have that evidence all that time.
>
> Two other options are to instruct on--at this point in time I am not sure the Court can--instruct on the lesser included offense. I guess I would see the first option the one that we would object to the least would be telling them that they have to follow the instructions given and let them grapple witnesses.

> The second choice would be to instruct on the lesser included at this point in time. We would not object to that. And we think the last option would be to reach the portions of the record. The--albeit we're aware the Court has indicated they would be balanced. That would be the order in which we prefer the action be taken.

Trial courts have a duty to instruct the jury on all lesser-included offenses of a charged crime. Iowa R. Crim. P. 6(3). However, the court's duty to so instruct arises only when a request for the instruction is made. State v. Rouse, 290 N.W.2d 911, 914-15 (Iowa 1980); State v. Beeman, 315 N.W.2d 770, 775 (Iowa 1982); State v. Habhab, 209 N.W.2d 73, 74 (Iowa 1973).

The State's position is that Marshall was precluded from raising this ground on appeal because he did not timely raise the issue. Clearly, the record indicates no objection was made before deliberations and we do not deem defendant's counsel's statements after the jury's inquiry to be a proper objection. As the State argues, Marshall's counsel simply acquiesced, listing his preferences in order. It seems that if counsel made any statement at all it was that he preferred not to proffer a lesser-included offense instruction to the jury, gambling on a "all or nothing" strategy. Under this record, we determine the defendant did not preserve error, failing to object to the proper jury instructions prior to deliberations and during deliberations, and we therefore affirm the trial court on this issue.

III. Phone Call Evidence. Finally, Marshall urges the trial court erred by allowing evidence of a phone call he allegedly made to a witness subsequent to the robbery. He contends the evidence of this phone call--which he denies making--was irrelevant and highly prejudicial.

The complained of testimony was given by the defendant's associate, Robert McBride. During trial, McBride testified defendant had told him he robbed the Ben Franklin store with a mask and gun. He further testified while the defendant was in jail awaiting trial, the defendant called him and asked him to change his statement because his statement was one which "got us to trial today."

The trial court admitted the evidence, holding it was relevant and not unduly prejudicial under Iowa Rule of Evidence 403.

When reviewing the trial court's decision on the admission of evidence, we will not ordinarily reverse unless the trial court abused its discretion. State v. Clark, 343 N.W.2d 158, 162-63 (Iowa 1984); State v. Jeffries, 417 N.W.2d 237, 239 (Iowa App. 1987).

Here, Marshall does not demonstrate an abuse of discretion. Clearly, the evidence is relevant on the issue of whether Marshall committed first-degree robbery.

Next we determine the trial court did not abuse its discretion in determining the probative value of the

testimony outweighs its prejudicial effect. Iowa R. Evid. 403. As the trial court found, the testimony represented: ". . . a very serious admission against interest by the defendant. Because what it does, if believed, is state that the prior statement was probably true and now he wants him [McBride] to lie."

We determine the trial court did not abuse its sound discretion.

AFFIRMED.