FILED
JAN 27 1988
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	
vs.	)	Filed January 27, 1988
JOHN LEROY BARRETT,	)	7-325 86-1206
Defendant-Appellant.	)	

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Appeal from the Iowa District Court for Pottawattamie County (No. CR 20091), Paul H. Sulhoff, Judge.

The defendant appeals his conviction for the crime of first-degree murder. **AFFIRMED.**

Gary K. Anderson of Anderson & Wheeler, Council Bluffs, for defendant-appellant.

Thomas J. Miller, Attorney General; Pamela Greenman Dahl, Assistant Attorney General; and Drew Kouris, Assistant Pottawattamie County Attorney, for plaintiff-appellee.

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

OXBERGER, C.J.

John Barrett appeals his conviction of first-degree murder in violation of Iowa Code section 707.2. He challenges the admission of the alleged murder weapon and related evidence. He also asserts the trial court erred by giving the jury a "flight" instruction. We affirm.

Our scope of review is for the correction of errors at law. Iowa R. App. P. 4. The admission or exclusion of evidence rests within the trial court's discretion, and we will interfere with its evidentiary rulings only if an abuse of discretion has occurred. State v. Williams, 367 N.W.2d 310, 312 (Iowa App. 1985).

On the afternoon of February 2, 1986, Barrett and some companions played in a pool tournament in Omaha, Nebraska. After the tournament, Barrett and his friends went to The Bleu Inn tavern. Shortly thereafter, the victim, Bill McKern arrived at the Bleu Inn. After they began arguing, Barrett and McKern went outside. This argument continued at a neighboring bar.

McKern later returned to The Bleu Inn and drank until he passed out. Soon after, Barrett returned and attempted to get McKern on his feet. While doing this, Barrett made several threats, including stating he was going to kill McKern. Barrett eventually got McKern to his feet and the two left together. McKern was not seen again until his body was found with a single bullet wound in the chest.

Barrett traveled home after leaving the bar. A witness on the night of the murder discovered a gun at an intersection along the defendant's route home. Another witness testified he saw the discovered gun in the defendant's possession three months earlier.

After the murder, Barrett was picked up by the police and released after questioning. A warrant was issued for Barrett's arrest on February 6, 1986. Barrett was not apprehended until April 6, 1986. In the interim, he, with the

help of several companions, primarily his girlfriend, avoided capture by registering in various Iowa and Nebraska motels under assumed names.

The bullet removed from McKern's body was from a .22 caliber weapon. Approximately fifty percent of the bullet was destroyed since it hit a bone and had a copper coating. Consequently, the State's ballistics expert was unable to state to a reasonable degree of scientific certainty that the fatal bullet was fired from the gun found.

Barrett challenges the admission of the gun because the State was unable to foundationally connect the defendant and the gun to the fatal bullet. He argues that since the expert was not certain, the gun was inadmissible. He also claims a spent shell casing found in the gun and test results obtained from firing the gun were inadmissible since the gun was inadmissible. Since the admissibility of this latter evidence is dependent upon the admissibility of the gun, we will address the admissibility of all three at once.

In order to establish a proper foundational connection between the gun and the fatal bullet, it was necessary that the State establish that similarities existed between the distinctive characteristics of the fatal bullet and the distinctive characteristics of the gun, as shown by the markings on several test bullets fired from the gun. State v. Mark, 286 N.W.2d 396, 409 (Iowa 1979) (connecting defendant to crime scene footprints). An absolute or positive identification is not required, but there must be a sufficient number of similar identifying characteristics to afford a basis for a reliable comparison. Id.; McDonnell v. United States, 455 F.2d 91, 95 (8th Cir. 1972). Once the evidence is properly admitted, the weight to be given such evidence is for the jury to determine. Mark, 286 N.W.2d at 409; State v. Norman, 220 Iowa 146, 149, 261 N.W. 530, 539 (1907).

After the State's expert testified that he could not to a reasonable degree of scientific certainty state whether the fatal bullet was fired from the gun,

the court informed the State it felt the foundation laid was inadequate to allow admission of the gun. The State persisted and elicited additional testimony regarding the specific similarities between the fatal bullet and the test bullets fired from the gun. The State's next witness then testified that he saw the gun in the defendant's possession in November of 1985. The trial court, over defendant's objections, admitted the gun into evidence.

We hold this ruling was correct. After failing the first time, the State produced additional evidence sufficient to establish a proper foundational connection between the gun and the fatal bullet. The State's expert noted that the fatal bullet and the test bullets exhibited the following distinctive characteristics: (1) the bullets both had six lands; (2) the width of the lands for each was .0378; (3) the test bullet had a groove width of .075, while the fatal bullet had a groove width of .0744; (4) the bullets both had a left-hand twist; (5) both bullets had individual striae that could be matched;[1] and (6) the fatal bullet was the same type of ammunition as the live shell found in the gun.

This evidence, combined with the testimony regarding defendant's possession of the gun, laid a sufficient factual foundation to connect the defendant and the gun to the bullet removed from the victim's body. Once this evidence was admitted, the jury could evaluate it and, while considering the expert's uncertainty, determine what weight, if any, the evidence was entitled to receive. We therefore hold a proper foundation was laid and the admission of the gun was not erroneous. Similarly, since the gun was admissible, so was the evidence derived from the gun.

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[1]The striae are what make a particular gun barrel unique from all other gun barrels.

Barrett next contends that the trial court erred in submitting a flight instruction to the jury. He argues there was no evidentiary foundation for its submission.[2] We disagree.

Under Iowa law, there is no constitutional requirement that the act of flight be found by proof beyond a reasonable doubt. State v. Brokaw, 342 N.W.2d 864, 865 (Iowa 1984). A flight instruction may be proper even though there is no direct evidence the accused fled to avoid a criminal charge. Id. Evidence of this conduct in leaving the scene or locality may be circumstantially relevant to prove both the commission of the act and the intent and purpose for which that act was committed. Id.

Recently, the supreme court has indicated that flight instructions are rarely advised and should be given cautiously. State v. Marsh, 392 N.W.2d 132, 134 (Iowa 1986). However, submission of a flight instruction does not necessarily constitute reversible error. Id.

In this case the evidence is sufficient to warrant a flight instruction. The record reveals that after being questioned by the police, Barrett left the jurisdiction. He subsequently made contact with his girlfriend, who knew a warrant had been issued for his arrest. They discussed the warrant and whether Barrett should turn himself in to the police. They chose, instead, to travel from motel to motel using assumed names in an effort to avoid capture. Based on this record, we hold the trial court did not err in submitting the flight instruction.

AFFIRMED.

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[2]The defendant did not object to the instruction as erroneous because it unduly emphasized his flight and, therefore, has failed to preserve error on that issue.