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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed August 26, 1987
vs.	)	
JACK RAYMOND SCOTT,	)	7-149 86-1522
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Warren County (No. 9623), Thomas S. Bown, Judge.

The defendant appeals from his conviction, following a jury trial, for the crime of burglary in the second degree and being an habitual offender. **AFFIRMED.**

Mark S. Pennington and William L. Kutmus of Kutmus & Pennington, P.C., Des Moines, for defendant-appellant.

Thomas J. Miller, Attorney General; Bruce Kempkes, Assistant Attorney General; and John W. Criswell, Warren County Attorney, for plaintiff-appellee.

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

DONIELSON, P.J. 357

The defendant appeals from his conviction and sentence, following a jury trial, for the crime of burglary in the second degree and being an habitual offender. He challenges the sufficiency of the evidence to support the conviction. He also challenges several evidentiary rulings. We affirm.

The defendant, Jack Raymond Scott, was charged on June 9, 1986, by trial information with burglary in the second degree and being an habitual offender. The information alleged that defendant, along with two others, "on or about the 29th day of April, 1986, in Warren County, Iowa, did break and/or enter the South Central Coop Elevator building with the intent to commit a theft therein," having been previously convicted of various felonies.

Three agents from the Department of Criminal Investigation had a farm elevator located in Milo, Iowa, under surveillance during the early morning hours of April 29, 1986. For approximately an hour commencing at 3:00 a.m., they observed three men load farm chemicals onto a truck. When the three agents rushed the intruders, one of the men fled on foot. The other two men were caught and arrested. Approximately 5:00 a.m., the defendant was arrested about three to four miles from the crime scene as he was approaching his truck. He was accused of being the third burglar.

At his jury trial the defendant did not testify, but presented a defense of mistaken identity. He alleged that the third burglar was another person, Paul Caldwell, who was reputed to be a professional burglar and who was similar in size, shape, and appearance to defendant. An investigator working for defendant testified regarding a signed statement he obtained from Caldwell which the investigator had prepared after Caldwell had informed him of his involvement in the Milo burglary. The statement asserted that Caldwell had participated in the burglary and that the defendant had not been involved. Caldwell did

not testify before the jury. A defense witness, a vehicle repairman, testified that defendant had been having ignition problems with his truck; and that while en route to Otley, Iowa, to his vehicle repair business on April 29, 1986, defendant had trouble with his truck, attempted to get help at a nearby farmhouse, and returned to his truck at which time he was arrested.

The jury found the defendant guilty of burglary in the second degree. Defendant stipulated to the status of habitual offender. Defendant was sentenced to imprisonment not to exceed fifteen years. The defendant appeals from the conviction and sentence rendered in its entirety. The defendant contends that (1) the trial court erred in overruling his motions for judgment of acquittal when insufficient evidence was presented to allow the jury to find him guilty and where the verdict was clearly against the greater weight of the evidence; (2) the trial court committed an abuse of discretion in permitting State's witness, Special Agent Smith, to testify that he had known the defendant since 1975; (3) the trial court abused its discretion in overruling defendant's motion to strike Special Agent Smith's answer to the question "What were you looking for?" where the answer, "I was looking for Mr. Scott," impermissibly invaded the province of the jury, thereby creating a mandatory presumption violating the defendant's rights under the due process clause of the fourteenth amendment of the United States Constitution; (4) the trial court abused its discretion in permitting leading questions of State's witness Smith over timely and proper objections by defendant; and (5) the trial court abused its discretion in admitting a State's exhibit, a diagram, into evidence over defendant's timely and proper objection that the exhibit was not drawn to scale.

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

We first address defendant's argument that the trial court erred in denying his motions for judgment of acquittal. Defendant bases his claim on the fact that there was insufficient evidence presented to allow the jury to find him guilty. Defendant claims there was a substantial likelihood of irreparable identification by the two agents who identified him as the third burglar. In support thereof he states that (1) the viewing conditions were not ideal, and (2) Paul Caldwell, who admitted his involvement, is physically similar to the defendant. Defendant alleges the State's case rests solely on circumstantial evidence, which needs to be so conclusive and compelling that it excludes every reasonable hypothesis of the presumption of innocence of the defendant. Defendant also alleges there should have been certain forensic tests conducted the State.

In reviewing cases where a defendant claims there is insufficient evidence to support a conviction for a criminal offense, we view the evidence in a light most favorable to the State. State v. Wilkens, 346 N.W.2d 16, 20 (Iowa 1984). All inferences that are fairly and reasonably deduced from the evidence are accepted. Id. All the evidence is considered, not just that evidence supporting the verdict. Id. The verdict will be upheld if supported by substantial evidence. Id. Substantial evidence means such evidence as could convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt. Id.

Examining the evidence in a light most favorable to the State, we find there was substantial evidence for a rational jury to conclude defendant was the third intruder involved in the burglary. The elevator manager and Special Agent Hensen both testified the entire area of the elevator was well lit. The elevator manager stated that there was a light about forty feet away. Agent Hensen testified that the lighting was so good that his vision was not obstructed with the cloudy and rainy weather conditions. The other two DCI agents also testified as to the adequate lighting.

There were two eyewitnesses, DCI Agents Smith and Hensen, who could positively identify the defendant as being the third intruder who fled. Both agents had known the defendant for years. Both testified they had seen defendant at least ten times during March and April of 1986 and fewer times before then. Smith also knew Caldwell and could distinguish between the two men. He testified the build of the two men was dissimilar: defendant was muscular and Caldwell was not. The three intruders were watched for about an hour from 100 feet away. When they were rushed, Agents Smith and Hensen could see them at a closer range of 30 feet at which time they could identify the defendant.

Further evidence corroborated the eyewitness testimony: the defendant was found an hour after arrest of the other two men approximately three miles from the crime scene walking toward his truck.

The defendant's evidence consisted of (1) a witness, an auto repairman, testifying defendant told him defendant's truck had broken down on the way to his repair shop on the morning of April 29, 1986, and (2) a defense investigator testifying as to a statement made by Paul Caldwell that it was he who was involved in the burglary, not defendant.

It is for the jury to determine the weight of the evidence and the credibility of the witnesses. State v. Robinson, 288 N.W.2d 337, 341 (Iowa 1980). The trier of fact is not bound to accept testimony as true, even where such testimony is uncontroverted. In Interest of G.R., 348 N.W.2d 627, 632 (Iowa 1984). The jury is not bound to accept testimony as conclusive but is free to accept or reject such evidence in whole or in part, or not at all. State v. Nunn, 356 N.W.2d 601, 604 (Iowa App. 1984).

Thus, the jury was free to evaluate the credibility of both the State's and defendant's witnesses and accord such weight to the evidence as it determined appropriate. There was sufficient evidence presented from which the

jury could find the defendant guilty of the crime charged. The State was not required to perform any forensic tests; we note that defendant made no such request either.

Due process requires the State prove all the elements of a crime beyond a reasonable doubt. Wilkens, 346 N.W.2d at 20. We find from the evidence presented that the State met its burden in proving the elements of the crime charged. Therefore, we affirm the district court in overruling defendant's motions for judgment of acquittal.

We next address defendant's evidentiary objections. The first objection deals with Agent Smith's testimony that he had known defendant since 1975. Defendant alleges that this testimony had the impact of inferring that defendant had a prior criminal record based on the fact that the DCI agent presumably knew the defendant through his professional capacity. Defendant argues that the jury was left to speculate as to how Agent Smith knew defendant since this was never explained to them. Yet during defendant's in camera objection at trial, he agreed to Agent Smith testifying in a restricted manner, such as Smith saying, "Yes, I have on numerous times seen defendant." The trial court ruled in camera that no testimony could be elicited to the effect Smith saw defendant in the company of another agent. The court specifically laid out the limitations to which defendant agreed and to which the prosecutor adhered, as shown by the following excerpt:

> Q. Now, Agent Smith, how long have you known Defendant in this case, Jack Raymond Scott? A. Since approximately 1975.
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> Q. And, Agent Smith, would that be until the present time, from '75 until the present time? A. Yes, sir, that's correct.
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> Q. Have you seen him on numerous occasions over these 11 years? A. Yes, sir, I have.
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> Q. Now, during the time period of the latter part of March, 1986 to the latter part of April, 1986, from your best estimate, how many times did you see or have contact with Defendant Jack Raymond Scott? A. At least 20 times.

Furthermore, there was no timely objection during trial to any answers in this line of inquiry, thereby waiving error on this issue. State v. Johnson, 272 N.W.2d 480, 483 (Iowa 1978). Defendant could have objected, alleging that the prosecutor did not follow the court's directions in the type of questions allowed. Therefore, we find the trial court did not abuse its discretion in allowing Agent Smith to testify that he had known defendant since 1975.

Defendant's next objection concerns Agent Smith's answer to the question, "What were you looking for?" wherein defendant timely objected to the question as calling for an opinion and conclusion of the witness and invading the province of the jury. The objection was overruled; and defendant then moved to strike the answer, "I was looking for Mr. Scott," which was also overruled.

We disagree with defendant's contention that the question invades the province of the jury. Agent Smith's testimony that he was looking for defendant certainly is not usurping the jury's role as a fact finder. The jury was free to disregard the statement. Furthermore, the witness was not stating an opinion or conclusion. Here, Smith was only going through the sequence of events in the investigation. He was not commenting on defendant's guilt or innocence. We find defendant's objection to be without merit and therefore find the trial court did not abuse its discretion in allowing Agent Smith to state what he was looking for.

Defendant's next contention is that the trial court permitted leading questions of State's witness, Agent Smith. A trial court has considerable discretion in admitting or excluding answers to leading questions; there must be a clear abuse of discretion to justify a reversal. State v. Leonard, 243 N.W.2d 887, 891 (Iowa 1976). We find upon review of the transcript that the trial court did not abuse its discretion.

Lastly, defendant argues that a State's exhibit, a diagram, should not have been admitted into evidence because it was not drawn to scale, therefore failing to accurately represent the area involved. We find no merit in defendant's allegation that this diagram was prejudicial because it placed defendant's truck too close to the scene of the crime. Agent Smith testified the diagram reasonably and accurately showed the elevator complex and surrounding area. The diagram was an aid to the jury. We find there was ample foundation laid to admit the diagram. Thus, we find that the trial court did not abuse its discretion in admitting the diagram as an exhibit.

Based on both the direct and circumstantial evidence in this case, we find that the State proved the elements of its case beyond a reasonable doubt and that a reasonable jury could find defendant guilty of burglary in the second degree. We find that the trial court did not err in overruling defendant's motions for acquittal nor did the trial court abuse its discretion with regard to the evidentiary objections made.

AFFIRMED.