IN THE COURT OF APPEALS OF IOWA

No. 9-1043 / 09-0244
Filed February 10, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JASON JAMES ALLEN,
Defendant-Appellant.

Appeal from the Iowa District Court for Johnson County, Douglas S. Russell, Judge.

Defendant appeals his conviction and sentence for robbery in the second degree. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Bradley M. Bender, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Mary E. Tabor, Assistant Attorney General, Janet M. Lyness, County Attorney, and Anne Lahey, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Vaitheswaran, and Danilson, JJ.

SACKETT, C.J.

Defendant, Jason James Allen, appeals his conviction and sentence entered after a jury found him guilty of robbery in the second degree, in violation of Iowa Code sections 711.1(2), and 711.3 (2007). He contends the district court erred in admitting an officer's testimony about compressed gas powered guns, and there is insufficient evidence to support the conviction. We affirm.

I. BACKGROUND AND PROCEEDINGS. Allen was charged with robbery in the first degree on September 20, 2007. The trial information alleged that on September 15, 2007, Allen demanded a store clerk, Dorothy Jurgens, give him money from the cash register. When the clerk refused, Allen lifted his sweatshirt displaying what appeared to be a gun in his waistband. Allen then grabbed a bank bag containing rolls of coins that was sitting on the counter and fled. Police arrested Allen after Jurgens identified him as the perpetrator. In their investigation, the police recovered the bag of change and the sweatshirt Allen was purportedly wearing at the time of the robbery. They did not recover a gun during their investigation. On October 26, 2007, Allen entered a plea of guilty and waived his right to file a motion in arrest of judgment. He was sentenced to an indeterminate term not to exceed twenty-five years.

Allen appealed to this court claiming there was no factual basis to support his guilty plea to robbery in the first degree and he received ineffective assistance of counsel when his attorney allowed him to plead guilty to the charge. We agreed, vacated the sentence, and remanded for further proceedings. *See State v. Allen*, No. 07-1969 (Iowa Ct. App. July 30, 2008). We found that to be guilty of robbery in the first degree, under Iowa Code section

711.2, the person must purposely inflict serious injury, attempt to inflict serious injury, or be armed with a dangerous weapon. *Id.* We found no facts or circumstances in the trial information and minutes of testimony to support a finding that Allen inflicted serious injury or attempted to, or displayed a dangerous weapon as defined by section 702.7 to sustain a conviction of robbery in the first degree. *Id.*

On remand, the district court set aside Allen's guilty plea and scheduled a trial on the charge. Trial was held November 24 through November 26, 2008. During trial, the State called as a witness, Steven Patrick Duffy, a police officer specializing in weapons instruction. He testified about how compressed gas guns function, the pellets they eject, and the amount of force propelled by these guns. He also stated that the guns can be used for hunting or assault and can inflict death. He testified as to the federal standards requiring warnings on carbon dioxide guns. Allen's objection to the testimony as irrelevant was overruled. Allen's counsel noted for the record a standing objection to the line of questioning.

The jury returned a verdict finding Allen guilty of the lesser included offense of robbery in the second degree. Allen claimed, in motions for a judgment of acquittal and a new trial, that there was insufficient evidence to support the conviction. The court overruled both motions finding there was sufficient evidence to support a conviction and the jury was permitted to resolve any conflicts in the testimony. Allen appeals.

II. ADMISSION OF EXPERT TESTIMONY. Allen argues the court should not have admitted the police officer's testimony about air guns because it was

irrelevant and prejudicial. He states that since there were no facts in the record linking the offense to a carbon dioxide gun, such testimony was confusing to the jury and prejudicial to Allen.

Our review of evidentiary rulings is generally for abuse of discretion. *State v. Rodriquez*, 636 N.W.2d 234, 239 (Iowa 2001). The party challenging the evidentiary ruling bears the burden of proving the court abused its discretion. *State v. Plaster*, 424 N.W.2d 226, 232 (Iowa 1988). An abuse will be found if the trial court exercises its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *State v. Helmers*, 753 N.W.2d 565, 567 (Iowa 2008). In weighing the probative value of evidence against its prejudicial effect, an appellate court gives great leeway to the trial judge's determination. *State v. Newell*, 710 N.W.2d 6, 20-21 (Iowa 2006).

"Evidence which is not relevant is not admissible." Iowa R. Evid. 5.402; *State v. Sullivan*, 679 N.W.2d 19, 25 (Iowa 2004). Relevant evidence is "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." Iowa R. Evid. 5.401; *State v. Sallis*, 574 N.W.2d 15, 17 (Iowa 1998). Even if relevant, evidence may be excluded if it is unfairly prejudicial, causes confusion of the issues, or is misleading to the jury. Iowa R. Evid. 5.403. Unfairly prejudicial evidence

> "appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action [that] may cause a jury to base its decision on something other than the established propositions in the case."

State v. Henderson, 696 N.W.2d 5, 10-11 (Iowa 2005) (quoting *Plaster*, 424 N.W.2d at 231-32). Under these rules of evidence, we must conduct a two-step

inquiry to determine whether the challenged testimony is admissible. *State v. Thomas*, 766 N.W.2d 263, 270 (Iowa Ct. App. 2009). We first ask whether the evidence is relevant, and if so, we then evaluate whether its probative value is substantially outweighed by the danger of unfair prejudice or confusion. *Id.* Relevancy pertains to whether the evidence has a tendency to make a consequential fact more or less probable whereas a consideration of the probative value gauges the strength of that tendency. *State v. Cromer*, 765 N.W.2d 1, 8 (Iowa 2009). If this analysis shows inadmissible evidence was entered into evidence despite a proper objection, a presumption of prejudice arises. *Shawhan v. Polk County*, 420 N.W.2d 808, 810 (Iowa 1988). Despite this presumption, reversal is not required if the record affirmatively shows a lack of prejudice. *Id.*

We agree with the district court that the officer's testimony was relevant. The evidence was probative on the question of whether a dangerous weapon was used in the crime, an element of robbery in the first degree.[1] The police never recovered a gun during their investigation and no weapon was admitted into evidence. The State relied on the store clerk's testimony to establish that Allen used a gun. The clerk stated she did not know whether the gun she saw was a firearm or air gun or toy gun. The officer's testimony about compressed gas guns assisted the jury in answering whether, if an air gun was used, it could be considered a dangerous weapon for purposes of establishing robbery in the first degree. To answer this question, the jury had to determine whether the

[1] "A person commits robbery in the first degree when, while perpetrating a robbery, the person purposely inflicts or attempts to inflict serious injury, *or is armed with a dangerous weapon*." Iowa Code § 711.2 (emphasis supplied).

alleged gun was designed to inflict death or injury and actually capable of inflicting death on a human being. *See* Iowa Code § 702.7 (defining dangerous weapon); *State v. Tusing*, 344 N.W.2d 253, 255 (Iowa 1984). We also do not believe the probative value of the testimony was outweighed by the danger of unfair prejudice. The officer's testimony about how air guns operate and whether they are capable of causing injury were not likely to provoke emotion in the jurors or distract it from the legitimate issues.

Even if this evidence was found to be improperly admitted, reversal is not required because the record affirmatively shows Allen suffered no harm by its introduction. The jury acquitted Allen of robbery in the first degree. Inherent in this verdict is a rejection of the State's theory that a dangerous weapon was used in the offense. A nonconstitutional error would not require reversal unless it appears that the complaining party has been injuriously affected by the error. *State v. Sullivan*, 679 N.W.2d 19, 29 (Iowa 2004). Only if a substantial right of the party has been affected by an incorrect evidence ruling, may error be found. *See id.* at 30; Iowa R. Evid. 5.103(*a*). Allen cannot show he suffered any prejudice by this testimony since the jury determined the State did not prove Allen used a dangerous weapon during the robbery.

III. SUFFICIENCY OF THE EVIDENCE. Allen also contends there is insufficient evidence to support his conviction of robbery in the second degree. We review a challenge to the sufficiency of the evidence supporting a jury's verdict for correction of errors at law. *State v. Heard*, 636 N.W.2d 227, 229 (Iowa 2001); *State v. Speicher*, 625 N.W.2d 738, 740 (Iowa 2001). We uphold the jury's verdict if substantial evidence supports it. *State v. Williams*, 695 N.W.2d

23, 27 (Iowa 2005). Evidence is substantial if the evidence would convince a rational fact finder that the defendant was guilty beyond a reasonable doubt. *State v. Keeton*, 710 N.W.2d 531, 532 (Iowa 2006); *State v. Quinn*, 691 N.W.2d 403, 407 (Iowa 2005). In evaluating whether there is substantial evidence to support a jury's verdict, it is not for the court to weigh the evidence, determine the credibility of witnesses, or resolve conflicts in the evidence. *Williams*, 695 N.W.2d at 28. In our review we consider the evidence in a light most favorable to the State, including all legitimate inferences that reasonably arise from the record. *State v. Webb*, 648 N.W.2d 72, 76 (Iowa 2002); *Heard*, 636 N.W.2d at 229. We consider all of the evidence in the record, however, not just the evidence supporting guilt. *Speicher*, 625 N.W.2d at 741.

The instruction to the jury provided,

> The State must prove all of the following elements of Robbery In The Second Degree:
>
> 1. On or about the 15th day of September, 2007, the Defendant had the specific intent to commit a theft.
>
> 2. In carrying out his intention or to assist him in escaping from the scene, with or without the stolen property, the Defendant threatened Dorothy Jurgens with or purposely put Dorothy Jurgens in fear of immediate serious injury.
>
> If the State has proved all of the elements, the Defendant is guilty of Robbery in the Second Degree.
>
> If the State has failed to prove any one of the elements, the Defendant is not guilty.

Allen argues there is not sufficient evidence to support a finding that Allen threatened the store clerk with immediate serious injury or purposely put her in fear of immediate serious injury. Serious injury is a disabling mental illness or a bodily injury which creates a substantial risk of death, causes serious permanent disfigurement, or causes protracted loss or impairment of the function of any bodily member or organ. Iowa Code § 702.18; *State v. Phams*, 342 N.W.2d 792,

795 (Iowa 1983). Serious injury is established if there is a real hazard or danger of death. *State v. Anspach*, 627 N.W.2d 227, 232 (Iowa 2001); *State v. Anderson*, 308 N.W.2d 42, 47 (Iowa 1981).

Allen argues the evidence does not show the store clerk was threatened with immediate serious injury or that Allen purposely put the clerk in fear of any serious injury. He notes that the clerk did not exhibit signs of fear because she looked directly into Allen's eyes, twice told him no when he demanded money, and the incident only lasted several seconds. A conviction for robbery in the second degree under Iowa Code section 711.1(2) "may be predicated upon proof of a 'threat' notwithstanding the fact that the threat does not serve to place the victim in fear." *State v. Birch*, 479 N.W.2d 284, 286 (Iowa 1991). In *Birch*, a conviction under this section was affirmed when the facts showed the defendant suggested he had a gun while committing the robbery, but he in fact did not have a gun, and the victim was aware he had no gun. *See id.* at 285-86.

Allen also contends there was not proof that he threatened Jurgens with immediate serious injury or that he purposely put her in fear of such injury because he did not verbally threaten her, did not have physical contact with her, and did not make any movements toward her. He contends that even if Allen's conduct produced an implied threat of physical force or bodily injury, it is not sufficient to sustain a finding that he threatened serious injury. An overt act is not necessary to "put another in fear of immediate serious injury." *State v. Wales*, 325 N.W.2d 87, 90 (Iowa 1982). The term "threaten" in section 711.1(2) "was intended to cover verbal or other express offers of harm." *State v. Law*, 306

N.W.2d 756, 759 (Iowa 1981) (overruled on other grounds by *Wales*, 325 N.W.2d at 89-90).

Jurgens testified that Allen asked her for the money while she was ringing up a can of beer and bag of chips for him. She replied no. Then Allen lifted up his sweatshirt and began pulling a gun out of his waistband. She again stated no and he put the gun back into his pants. He grabbed the change bag on the counter and fled. Jurgens locked the door after he exited the store "so he couldn't come back." She recalled that at the time, "I was very shocked, scared, in disbelief that I—you know, put my life in jeopardy." Her co-worker testified that immediately afterward Jurgens appeared in shock and shaken. We conclude this is substantial evidence to support the jury's finding that Allen threatened Jurgens with, or purposely put her in fear of, immediate serious injury.

IV. CONCLUSION. We affirm. The expert testimony about air guns was admissible and did not cause any actual prejudice to Allen. The jury's finding that Allen committed robbery in the second degree is supported by substantial evidence.

AFFIRMED.