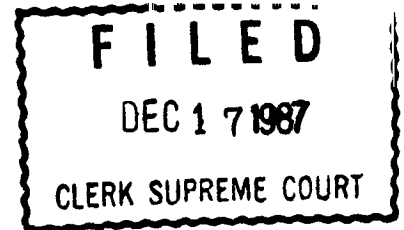


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,

)

Plaintiff-Appellee,

)

vs.

)

Filed December 17, 1987

NORMAN ASKEW MOONEY,

)

7-427
87-152

Defendant-Appellant.

)

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Appeal from the Iowa District Court for Hamilton County (No. 4995) -
Newt Draheim, Judge.

Defendant appeals his conviction of robbery in the first degree. **AFFIRMED.**

Charles L. Harrington, Appellate Defender, and James F. Whalen, Assistant
Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Bruce Kempkes, Assistant Attorney
General; and Bridget Chambers, County Attorney, for plaintiff-appellee.

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

SACKETT, J.

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Defendant, after a jury trial, was convicted of robbery in the first degree. He appeals the conviction contending (1) the trial court erred in failing to grant a mistrial, and (2) he was denied ineffective assistance of counsel because of counsel's failure to request an instruction on assault as a lesser included offense and failure to preserve error on the flight instruction. We affirm.

The trial court sustained defendant's motion in limine to prohibit disclosure of evidence defendant was alleged to have been involved in another robbery shortly before the robbery with which he is charged.

During the course of testimony a state trooper was asked:

Q. Do you remember anything out of the ordinary happening that evening? A. Yes.

Q. What was that? A. Some armed robberies.

Q. What — Where was that armed robbery? A. One?

Q. Was there an armed robbery in Hamilton County, Iowa? A. Yes, there was.

Defendant moved for a mistrial based on the statement claiming it violated the motion in limine. The trial court overruled the motion for mistrial but offered to admonish the jury to disregard the statement.

Defendant claims the motion should have been granted because proof of a defendant's other criminal activity is inadmissible under Iowa Rule of Evidence 404 unless it falls under an exception. We agree with defendant that proof of his prior crimes is not admissible except under certain exceptions. See Iowa R. of Evid. 404(b). However, we fail to find the officer's statement to be evidence defendant committed another crime. Even if it were, it is not so prejudicial that we would find the trial court abused its discretion in overruling defendant's motion for a mistrial. See State v. Johnson, 183 N.W.2d 194, 198 (Iowa 1971).

Defendant next contends he was denied effective assistance of counsel because of his trial attorney's failure to request a lesser included offense instruction and to object to a flight instruction. An instruction was given on first-degree robbery. The jury also was instructed second-degree robbery and theft were lesser included offenses. Iowa Code §§711.3, 714.1. Defendant claims he was rendered ineffective assistance because his attorney failed to request an instruction on assault. See Iowa Code §708.1. We consider the standard for ineffective assistance of counsel as stated in Taylor v. State, 352 N.W.2d 683, 685 (Iowa 1984), and State v. Goff, 342 N.W.2d 830, 838 (Iowa 1983).

Assault is not a necessarily included offense in the robbery alternative in section 711.1(2). State v. Wales, 325 N.W.2d 87, 89-90 (Iowa 1982). Defendant was convicted of robbery in the first degree. The instruction of first-degree robbery on which defendant was convicted was:

You must find Defendant not guilty of the offense of Robbery in the First Degree, as charged in the Trial Information, unless State proves by evidence beyond a reasonable doubt each of the following elements:

1. On or about the 17th day of October, 1986, Defendant, by aiding and abetting, intended to commit a theft.

2. At the time of the intended theft, Defendant, by aiding and abetting, threatened Mrs. Williams or intentionally placed her in fear of immediate serious injury.

3. Defendant did so to assist or further the commission of the theft.

4. At the time, Defendant, by aiding and abetting, was armed with a dangerous weapon.

See Iowa Code §711.1(2). While the unrequested lesser included offense of assault may be included in second-degree robbery, because the jury returned a verdict of first-degree robbery, the error if any in failing to instruct on assault was harmless. See State v. Nowlin, 244 N.W.2d 591, 596 (Iowa 1976); State v. Youngbear, 203 N.W.2d 274, 278 (Iowa 1972).

The submission of a flight instruction does not necessarily constitute reversible error. State v. Marsh, 392 N.W.2d 132, 134 (Iowa 1986). Defendant however complains he was prejudiced because under the evidence the jury could find defendant was merely present at the crime scene and the flight instruction foreclosed any possibility defendant was at the scene as a passive observer.

The evidence was defendant entered the premises with the other man and they went into a room off the lobby of the hotel together. The desk clerk heard the defendant open doors to storage cabinets in an adjacent laundry room. When the manager came out he testified both men were behind the counter and the desk clerk was on her knees. We do not find under this record defendant was prejudiced by the giving of the flight instruction.

AFFIRMED.