IN THE COURT OF APPEALS OF IOWA

No. 1999-81 (9-268) / 98-1118
Filed June 23, 1999

STATE OF IOWA,
Appellee,

vs.

JOHN LINGO,
Appellant.

FILED
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CLERK SUPREME COURT

Appeal from the Iowa District Court for Black Hawk County, Todd A. Geer, Judge.

John Lingo appeals his conviction for second-degree robbery. **AFFIRMED.**

Mary E. Chicchelly of Seidl & Chicchelly, Marion, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and John Lammers, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Vogel and Zimmer, JJ.

VOGEL, J.

John Lingo appeals his conviction for second-degree robbery, alleging the trial court erred in denying his motion in limine, in instructing the jury on the "fear of serious injury" alternative of robbery, and in refusing to instruct that theft from a person was a lesser-included offense. We affirm.

Background facts. On March 11, 1998, Lingo was a passenger in a vehicle driven by Malissa Tyler. As they drove through a grocery store parking lot, Lingo reached out the window and grabbed a purse from an elderly woman. The woman slipped on some ice, fell, and sustained injuries. Lingo was arrested and charged with second-degree robbery and child endangerment.[1]

Trial was held in May 1998. A jury found Lingo guilty of the robbery charge and he now appeals.

I. Motion in limine. Prior to trial, Lingo filed a motion in limine seeking to exclude certain prejudicial statements he allegedly made at the time of his arrest. He contends the district court erred in ruling that the statements were admissible.

The primary purpose of a motion in limine is to preclude reference to potentially prejudicial evidence prior to the trial court's definitive ruling on its admissibility. *See State v. Davis*, 240 N.W.2d 662, 663 (Iowa 1976); *Ray v. Paul*, 563 N.W.2d 635, 638 (Iowa App. 1997). Ordinarily, any error resulting from the court's

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[1] Lingo was charged with child endangerment because there was a small child in Tyler's car at the time of the offense and arrest who was not secured in a child safety seat. The district court dismissed this charge at the close of trial and it is not an issue in this appeal.

ruling on a motion in limine is not preserved unless a timely objection is made when the evidence which was the subject of the motion in limine is offered at trial. *Davis*, 240 N.W.2d at 663; *State v. Edgerly*, 571 N.W.2d 25, 29 (Iowa App. 1997). At the motion in limine, Lingo argued the statements should be excluded from trial on the basis of Iowa Rule of Evidence 403. Lingo objected to the testimony on the same grounds at trial. We generally review rulings on the admissibility of evidence for abuse of discretion. *See State v. Veal*, 564 N.W.2d 797, 308 (Iowa 1997). However, although we question whether the argument was properly preserved for our review, we will also address whether the evidence was admissible on grounds of hearsay. The erroneous admission of hearsay is presumed to be prejudicial unless the contrary is established affirmatively. *See State v. Hildreth*, 582 N.W.2d 167, 170 (Iowa 1998); *State v. Rice*, 543 N.W.2d 884, 887 (Iowa 1996). However, we will not find prejudice if the admitted hearsay is merely cumulative. *Hildreth*, 582 N.W.2d at 170; *State v. McGuire*, 572 N.W.2d 545, 547 (Iowa 1997).

The statements which Lingo sought to exclude were allegedly made to officers he spoke to following his arrest. The officer who transported Lingo to the police station testified that Lingo had asked him "how long he'd get for this?" Another officer testified that Lingo was laughing and joking at the station and told him that, if given the opportunity, he would do the same thing again, except he would make sure he would not get caught. Although these statements were in the nature of a confession, we find that they were not prejudicial to Lingo because they were

cumulative. Lingo confessed to the crime and signed a detailed statement at the police station. The confession was admitted into evidence. The State had overwhelming evidence of Lingo's guilt. We find no abuse of discretion by the trial court in admitting the statements.

II. Instruction on robbery. Lingo next argues that the trial court erred in instructing the jury on robbery in the second degree.

Courts have a duty to instruct juries on the law applicable to the facts when there is evidence which supports some material issue. *State v. Monk*, 514 N.W.2d 448, 451 (Iowa 1994) (citation omitted). Our review of district court determinations regarding jury instructions is for corrections of errors at law. *See State v. Mesch*, 574 N.W.2d 10, 12 (Iowa 1997).

Iowa Code section 711.1 (1997) outlines the elements of robbery as follows:

> A person commits a robbery when, having the intent to commit a theft, the person does any of the following acts to assist or further the commission of the intended theft or the person's escape from the scene thereof with or without the stolen property:
>
> 1. Commits an assault upon another.
>
> 2. Threatens another with or purposely puts another in fear of immediate serious injury.
>
> 3. Threatens to commit immediately any forcible felony.
>
> It is immaterial to the question of guilt or innocence of robbery that property was or was not actually stolen.

In this case, the jury was instructed that in order to find Lingo committed second-degree robbery, the State had to show that:

1. On or about the 11th day of March, 1998, the defendant had the specific intent to commit a theft.

2. To carry out his intention or to assist him in escaping from the scene, with or without the stolen property, the defendant:

(a) Committed an assault on [the victim], OR

(b) Purposefully put [the victim] in fear of immediate or serious injury.

Lingo contends that the trial court erred in including section 2(b) of the instruction because the State produced no evidence showing that it was his intent to place the victim in fear. In reviewing whether there was sufficient evidence to support the submission of an instruction to the jury, we consider all the evidence in the light most favorable to the State, and accept all legitimate inferences that may fairly and reasonably be deducted from the evidence. *See State v. Sanborn*, 564 N.W.2d 813, 815-16 (Iowa 1997); *State v. Bayles*, 551 N.W.2d 600, 608 (Iowa 1996).

We agree that the victim's fear, which she testified to at trial, is not dispositive of the issue. *See State v. Spears*, 312 N.W.2d 79, 81 (Iowa App. 1981). However, the evidence presented at trial gave rise to an inference that Lingo intended to put the victim in fear of immediate serious injury. Lingo grabbed the purse from the victim's arm as he rode by her in his friend's car. The victim, an elderly woman who was using a crutch, initially resisted and was dragged briefly alongside the car before falling to the ground. Lingo admitted he intended to steal the purse, and his intent to scare the victim into releasing the purse was a reasonable and legitimate inference for

the jury to make under the circumstances described by witnesses at trial. We conclude there was no error in submitting the instruction.

III. Lesser-included offense. Finally, Lingo argues that the trial court erred in failing to instruct the jury as to the lesser-included offense of theft from a person.

An offense is a lesser-included offense of the greater when the greater offense cannot be committed without also committing the lesser crime. *State v. Beeson*, 569 N.W.2d 107, 112 (Iowa 1997) (citing *State v. Heacock*, 521 N.W.2d 707, 710 (Iowa 1994)). If the lesser offense contains an element that is not part of the greater offense, the lesser cannot be included in the greater. *Id.*

Lingo acknowledges that the Iowa Supreme Court has previously determined that theft from a person is not a lesser-included offense of second-degree robbery. *See State v. Holmes*, 276 N.W.2d 823, 825 (Iowa 1979) (theft not included in robbery because theft includes the element of taking, while robbery does not). Nevertheless, Lingo asserts that because a theft actually occurred in this case, it *was* an included offense and an instruction on theft was appropriate. We find his argument is unsupported by case law and lacking in merit. The trial court did not err in refusing to give the instruction.

Having considered all issues properly before us on appeal, we hereby affirm Lingo's conviction and sentence.

AFFIRMED.

No. 98-1118. [1999-81 (9-268)] STATE v. LINGO

Appeal from the Iowa District Court for Black Hawk County, Todd A. Geer, Judge. **AFFIRMED.** Considered by Sackett, C.J., and Vogel and Zimmer, JJ. Opinion by Vogel, J. (6 pages $2.40)

On March 11, 1998, John Lingo was riding in a vehicle when he reached out the window and grabbed a purse from an elderly woman. Lingo was subsequently arrested and convicted of second-degree robbery. **OPINION HOLDS:** ***I. Motion in limine.*** Prior to trial Lingo filed a motion in limine seeking to exclude certain prejudicial statements he allegedly made to officers at the time of his arrest. He contends the district court erred in ruling that the statements were admissible. One officer testified that Lingo had asked him "how long he'd get for this?" Another officer testified that Lingo was laughing and joking at the station and told him that, if given the opportunity, he would do the same thing again, except he would make sure he would not get caught. Although these statements were in the nature of a confession, we find that they were not prejudicial to Lingo because they were cumulative. Lingo confessed to the crime and signed a detailed statement at the police station. The confession was admitted into evidence. The State had overwhelming evidence of Lingo's guilt. We find no abuse of discretion by the trial court in admitting the statements. ***II. Instruction on robbery.*** Lingo next argues that the trial court erred in instructing the jury on robbery in the second degree. Lingo contends that the trial court erred in instructing the jury on the "fear of serious injury" alternative of robbery because the State produced no evidence showing that it was his intent to place the victim in fear. We agree that the victim's fear, which she testified to at trial, is not dispositive of the issue. However, the evidence presented at trial gave rise to an inference that Lingo intended to put the victim in fear of immediate serious injury. Lingo grabbed the purse from the victim's arm as he rode by her in his friend's car. The victim, an elderly woman who was using a crutch, initially resisted and was dragged briefly alongside the car before falling to the ground. Lingo admitted he intended to steal the purse, and his intent to scare the victim into releasing the purse was a reasonable and legitimate inference for the jury to make under the circumstances described by witnesses at trial. We conclude there was no error in submitting the instruction. ***III. Lesser-included offense.*** Finally, Lingo argues that the trial court erred in failing to instruct the jury as to the lesser-included offense of theft from a person. Lingo acknowledges that the Iowa Supreme Court has previously determined that theft from a person is not a lesser-included offense of second-degree robbery. Nevertheless, Lingo asserts that because a theft actually occurred in this case, it *was* an included offense and an instruction on theft was appropriate. We find his argument is unsupported by case law and lacking in merit. The trial court did not err in refusing to give the instruction.