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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,) Filed October 23, 1984

vs.)

DONALD E. SEAGER,) 4-287
83-1318

Defendant-Appellant.)

Appeal from the Iowa District Court for Lee County - Harlan W. Bainter, Judge.

Defendant appeals his conviction of first-degree robbery in violation of Iowa Code sections 711.1 and 711.2 (1983). REVERSED AND REMANDED.

James O. Bell of Bell & Hansen, New London, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General, and Richard L. Cleland, Assistant Attorney General, for plaintiff-appellee.

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

HAYDEN, J.

Defendant appeals his conviction of first-degree robbery in violation of Iowa Code sections 711.1 and 711.2 (1983). On appeal defendant asserts that the trial court's refusal to instruct the jury on the lesser included offense of assault constituted prejudicial error.

Defendant was charged with first-degree robbery for allegedly robbing at gunpoint a convenience store in Mt. Pleasant. Defendant filed a notice of intent to rely on the defense of intoxication. The matter was tried to a jury.

The State's evidence indicated that defendant entered the convenience store, pointed a pistol at the store clerk, ordered the clerk to give him the money from the cash register, and then fled with the money. The store manager and others apprehended defendant behind the store, disarmed him, and detained him until law officers arrived. Defendant testified that he was intoxicated at the time of the robbery and had no recollection of it. He admitted possession of the pistol prior to the incident, and did not deny that he pointed the pistol at the store clerk. However, he claimed that because of intoxication, he could not have formed the specific intent to commit theft, an element of robbery.

The trial court refused defendant's request to instruct the jury on the lesser included offense of simple assault. The trial court did, however, instruct the jury on the lesser included offense of second-degree robbery. The jury subsequently found defendant guilty of first-degree robbery. Defendant unsuccessfully filed a motion for new trial based upon the assault instruction issue. The trial court ruled that it had erred in failing to submit the lesser included offense of assault, but that such error was harmless because the jury found defendant guilty of the greater of the two robbery offenses submitted. Defendant was sentenced to an indeterminate twenty-five year term of imprisonment.

Our review is on assigned error. Iowa R. App. P. 4; State v. Cullison, 227 N.W.2d 121, 126-27 (Iowa 1975).

It is not disputed in this case that the trial court should have submitted to the jury the lesser included offense of assault. See Iowa R. Crim. P. 6(3); State v. Johnson, 328 N.W.2d 918, 919-20 (Iowa 1983). The issue is whether under the circumstances of this case the error was prejudicial so as to require that defendant be given a new trial.

In State v. Donelson, 302 N.W.2d 125, 134 (Iowa 1981), the defendant was convicted of first-degree sexual abuse. He asserted as error the trial court's failure to submit to the jury the included offenses of assault while participating in a felony, aggravated assault, and simple assault. Id. The supreme court agreed with defendant's contention and rejected the State's argument as follows:

> The State points out, correctly, that the trial court submitted second- and third-degree sexual abuse in addition to first degree and that the jury rejected those included offenses and found defendant guilty of first degree. Hence, the State urges, defendant suffered no harm by the failure of the court to submit the assault offenses. See State v. Smith, 215 Iowa 374, 380, 245 N.W. 309, 311 (1932).
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> The rule of the cited case has its proper place, but this is not such a place. The defense was that although defendant stabbed the victim, neither he nor Dooms had sexual contact with her. Hence the factual issue in the case was sexual contact. All of the three crimes submitted had that element. First-degree sexual abuse required violence, which defendant admitted; if the jury was to find sexual abuse at all it would naturally find first-degree. The problem is that the jury had but two alternatives: to find sexual abuse in some degree, all requiring sexual contact, or to acquit. It had no alternative of finding in accordance with the defense: assault without sexual contact. The no-harm exception urged by the State does not apply here; the general rule requiring submission of included offenses is applicable. Iowa R. Crim. P. 21(3).

Id. at 135. See also State v. Lux, 315 N.W.2d 859, 860-61 (Iowa Ct. App. 1981).

The present case is very similar to Donelson. Defendant was charged with first- and second-degree robbery. His defense was that he was so intoxicated that he could not form the specific intent to commit a theft. Defendant did not deny that he may have committed an assault, a general intent crime. He stated that he had a gun on the night in question but could not remember anything that happened

from the time he left a party until he awoke in jail the next day. The jury was faced with the choice of convicting defendant of robbery or finding him not guilty of any crime. Since defendant admitted possessing a gun, the jury on these instructions naturally convicted him of the higher crime, robbery in the first degree. The jury was not permitted to find in accordance with the defense that defendant could be guilty of assault but not robbery.

The trial court, in ruling on defendant's motion for a new trial, relied upon State v. Youngbear, 203 N.W.2d 274 (Iowa 1972), and State v. Hopkins, 311 N.W.2d 694 (Iowa Ct. App. 1981). Both of these cases are distinguishable from the present case.

In Youngbear the defendant was charged with robbery with aggravation and the trial court submitted that crime and robbery to the jury. Defendant was convicted of the higher crime. Defendant alleged the trial court erred by not instructing the jury on larceny from the person, assault and battery, and assault with intent to inflict great bodily injury. State v. Youngbear, 203 N.W.2d at 277. The supreme court held that defendant waived his right to raise this issue by not requesting the additional instructions before the jury was charged. Id. at 277-78. The court further observed that there was a second reason defendant could not prevail on this issue. The court then stated the general proposition that "where a choice is given to select a lesser offense than the offense charged and the jury refuses to do so, there is no prejudice to defendant in the court's failure to submit still lesser offenses." Id.at 278. There was no discussion of this proposition in Youngbear nor any indication of additional factors which would make the case similar to Donelson.

In State v. Hopkins, 311 N.W.2d at 696, the trial court gave instructions to the jury for sexual abuse in the second and third degrees but refused defendant's requested instruction for the lesser included offense of asault and battery. In concluding that there was no prejudice to defendant from the trial court's failure to instruct the jury on assault, this court distinguished Donelson as follows:

> In Donelson, the defendant was entitled to instructions on the various degrees of assault because failure to do so would deprive him of his defense that no sexual acts occurred. In the instant case the defendant's only defense was one of wrong identity. Whether or not Ms. Parks was actually sexually attacked by her assailant was never at issue, only the assailant's identity. The failure to instruct the jury on assault did not prevent consideration of an alternative crime put at issue by defendant as it did in Donelson. The only crime alleged was sexual abuse in either the second or third degree, and the only defense was wrong identity.

Id. at 697.

We conclude that the present case is closer to Donelson than to Hopkins. The failure to instruct the jury on assault prevented the jury from considering an alternative crime put in issue by the defendant. If the assault instruction had been given, the jury could have concluded, as defendant alleged, that he was too intoxicated to have the specific intent to steal, but not so intoxicated that he was without the general intent necessary for assault. Since the instruction was not given, the jury was prevented from so deciding.

Therefore, defendant's conviction is reversed and the case is remanded for a new trial.

REVERSED AND REMANDED.