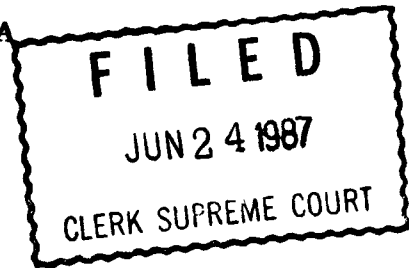


IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Plaintiff-Appellee,)
vs.)
GARY R. GRIMME,)
Defendant-Appellant.)



7-120
86-864

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Appeal from the Iowa District Court for Dubuque County (No. 2860-86CA),
Lawrence H. Fautsch, District Associate Judge.

Defendant appeals from his conviction for theft in the third degree,
asserting that a uniform instruction on contradictory sworn statements of
a witness should have been given. **AFFIRMED.**

Charles Harrington, Chief Appellate Defender, and B. John Burns, Assistant
Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Bradley V. Black, Assistant Attorney
General; and Gregory V. Hand, Assistant County Attorney, for plaintiff-appellee.

Considered by Oxberger, C.J., and Donielson and Schlegel, JJ.

OXBERGER, C.J.

In this appeal, defendant Gary Grimme challenges his conviction by jury for the crime of theft in the third degree. Grimme has raised one assignment of error for appellate consideration: he argues that the trial court erred in refusing to submit a requested instruction concerning a witness's contradictory statements. We disagree with this assertion and affirm.

The facts of this case may be briefly stated. On April 17, 1986, the appellant was arrested in connection with the theft of two wine bottles. The record discloses that Grimme allegedly entered Nabor's Drug Store in Dubuque and was observed by two employees as acting suspiciously. Because of this behavior, the employees watched Grimme and saw him squat in an aisle, remove a bottle of wine from a shelf, put the bottle under his jacket and leave the store without paying. The employees then called the police and Grimme was arrested.

The basis of Grimme's contention on appeal stems from the testimony of one of the employees who observed him in the store. This employee, Sherry Neyens, stated in her deposition that Grimme was wearing "a dark jacket like a green jacket or something." At trial, Neyens testified that she recalled the jacket as having been dark blue. As a result of this inconsistency, Grimme's attorney requested that the following instruction concerning a witness's contradictory statements be submitted to the jury:

Evidence has been received which purports to show that [name(s) of witness(es)] made statements at another time and place, while under oath, which were materially at variance or in contradiction with the testimony given during this trial. Even though these prior statements were not made in this court, they were made under oath. Because of this, you may, but are not required to, consider those statements as if they were made at this trial, and you may consider them for any purpose and give them as much weight as you find them entitled.

Iowa Uniform Jury Instruction No. 241. The court denied this request, which Grimme contends constitutes an error. We disagree.

An argument similar to that urged by the defendant was considered by the supreme court in State v. Harrington, 284 N.W.2d 244 (Iowa 1979). There, the court held that the trial court did not err by refusing to submit a specific instruction concerning a witness's prior inconsistent statement if a general instruction on credibility was given. A general instruction identical to that considered sufficient in Harrington was submitted in the present case. This instruction, Iowa Uniform Jury Instruction No. 105, advised the jury as follows:

You are the sole judges of the weight of the evidence, the credibility of the witnesses and the conclusions to be drawn from the facts and circumstances proved.

If the testimony, or any part thereof, is conflicting, you will reconcile it if you can so that it may all have weight and effect. If you can't reconcile the evidence you will then give credit to the testimony and to those witnesses that you, as fair minded men and women, determine are most entitled to credit.

In passing on the credibility of the witnesses and weighing their testimony, you may and should consider their appearance and conduct on the witness stand; their age, intelligence, and strength of memory; their means of knowledge of matters of which they speak; the remoteness of events about which they testify; their interest or lack of interest in the result of the trial; the motives, if any actuating them as witnesses; their candor, fairness, bias or prejudice; the reasonableness and probability of their statements or the lack thereof; and whether their testimony is corroborated or contradicted by other witnesses or facts proven. From all of these and the other facts and circumstances proven at the trial, you must determine where to give credit and where to withhold credit, and give to the testimony of each witness the weight to which you believe it is fairly entitled.

We think that this instruction accurately advised the jury concerning the reconciliation of Neyens' inconsistent testimony. In this connection, we fully concur with the supreme court's finding in Harrington that, "[w]ith this general direction before the jury, they could hardly have failed to consider the fact in question (impeachment) in determining that weight should be given to the testimony of that particular witness, although their attention was not specifically called to it by the instruction of the court." 284 N.W.2d at 250 (quoting Upton v. Paxton, 72 Iowa 295, 301, 33 N.W. 773, 776 (1887)); see also

State v. Wright, 274 N.W.2d 307, 313 (Iowa 1979) ("A trial court is not bound to any model or form in wording instructions, and a requested instruction may be properly refused if the points raised are otherwise substantially covered.").

Grimme further argues, however, that the trial court erred in refusing to grant the requested instruction because the jury was not advised that Neyens' prior inconsistent statement could have been considered as substantive evidence. Again, we think that Grimme's contention is without merit because the trial court submitted a different instruction which embodied substantially the same information. Iowa Uniform Jury Instruction No. 105, set forth above, advised that:

If the testimony, or any part thereof, is conflicting, you will reconcile it if you can so that it may all have weight and effect. If you can't reconcile the evidence you will then give credit to the testimony and to those witnesses that you, as fair minded men and women, determine are most entitled to credit.

We think that this instruction made it clear to the jury that all of the evidence properly admitted at trial was to be given the amount of weight which they chose to subscribe thereto. Accordingly, we find no merit in this assignment of error. See Wright, 274 N.W.2d at 313 (where a requested instruction is contained in another instruction, no error results from a refusal to submit the former).

Moreover, it is clear that no prejudice can be said to have resulted from the trial court's refusal to submit Iowa Uniform Jury Instruction No. 241. It is well settled that any alleged error resulting from a jury instruction must be prejudicial in order to warrant reversal. State v. Seiler, 342 N.W.2d 264, 268 (Iowa 1983). Not only is it apparent that no error occurred in the instant case, but it is also clear that the defendant was not in any way prejudiced. The color of the defendant's jacket was not an issue at trial because the defendant's identity was never in question: both of the employees who observed the defendant stealing the wine testified that they knew and recognized him because

he had been a repeated customer. As such, the color of his jacket had no significant bearing on the outcome of the case, and the allegedly inconsistent testimony cannot be said to have been of issue.

AFFIRMED.