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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

406

STATE OF IOWA,)
Plaintiff-Appellee,)
vs.)
WILLIAM LEE MAHANEY,) 8-691 / 88-201
Defendant-Appellant.)

Appeal from the Iowa District Court for Polk County (CR 36573), Harry Perkins, Judge.

Defendant appeals his conviction, following a jury trial, for robbery in the second degree. **AFFIRMED.**

Raymond E. Rogers, Acting Chief Appellate Defender, and Shari Barron, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Sarah J. Coats, Assistant Attorney General, for plaintiff-appellee.

Heard by Schlegel, P.J., and Hayden and Sackett, JJ.

SCHLEGEL, P.J 407

Defendant William Lee Mahaney appeals his conviction, by jury trial, of robbery in the second degree in violation of Iowa Code sections 711.1 and 711.3 (1987). He claims the trial court erred in admitting hearsay evidence. We affirm.

At trial, the State introduced evidence that Mahaney took a calculator from a shelf in a Target store and, without paying for it, obtained a cash refund for it from the customer service counter. Mahaney was then confronted by three store employees, whereupon he ran out of the store with all three employees in pursuit. Mahaney got into his car and attempted to drive away. In an attempt to apprehend Mahaney, Steven Armstrong, one of the employees, tried to reach into the car to turn off the engine, and in the process, was dragged a short distance and thrown to the ground. In his fall Armstrong struck the side of the car and the parking lot, suffering a concussion and a bruised liver.

At trial, Armstrong was initially limited to describing what he had actually felt, seen, and experienced, but the court later permitted him to testify, over objection, that his doctor had told him he had sustained a concussion with resultant swelling of the brain and pressure in the skull, and that he had probably suffered a bruising of the liver.

Mahaney claims the admission of this evidence was error, since the evidence was hearsay. The State contends that the statements fell under the "present sense impression" exception to the hearsay rule. It was upon this theory that the trial court permitted the testimony.

We believe that the trial court was in error in admitting Armstrong's recitation of what the doctor told him. The repetition of those statements constituted hearsay since the statements were offered for the truth of the matters asserted. Iowa Rule of evidence 803(1) provides:

> [T]he following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (1) **Present sense impression.** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

In the instant case, we are not prepared to hold that a doctor, treating a patient who, at a later time relates to that patient the results of his examination, is one who described an event or condition while he was perceiving it or immediately thereafter. We hold that it was error to admit these descriptions.

The admission of hearsay evidence is presumed to be prejudicial error unless the contrary is affirmatively established. Fratzke v. Meyer, 398 N.W.2d 200, 204 (Iowa App. 1986).

Mahaney was tried on an information charging him with robbery in the first degree in violation of Iowa Code sections 711.1 and 711.2 (1987). Those sections provide:

> Section 7.11.1 **Robbery defined.**
>
> 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.

> Section 711.2 **Robbery in the first degree.**
>
> 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. Robbery in the first degree is a class "B" felony.

The jury found Mahaney guilty of robbery in the second degree. That crime is described as follows:

> Section 711.3 **Robbery in the second degree.**
>
> All robbery which is not robbery in the first degree is robbery in the second degree. Robbery in the second degree is a class "C" felony.

To find the defendant guilty of robbery in the second degree, the jury was required to find that the defendant, having intent to commit a theft, committed an assault upon

another. The hearsay evidence offered by the State, and erroneously admitted, could not have gone to that issue. That evidence was obviously offered to show the element of robbery in the first degree: "[t]he person purposely inflicts or attempts to inflict serious injury."

We find that the presumption of prejudice which accompanies the erroneous admission of evidence was overcome in this case. The error here was without prejudice, since the jury found the defendant guilty of robbery in the second degree, conclusively showing that the jury didn't believe that the defendant purposely inflicted or attempted to inflict serious injury. See State v. Sharpe, 304 N.W.2d 220, 225 (Iowa 1981); State v. Bragg, 388 N.W.2d 187, 188 (Iowa App. 1986).

The defendant also contends that the hearsay testimony went directly to the issue of assault. We disagree. In any event, there was more than enough evidence to demonstrate that an assault was made upon one or more employees of the store. See State v. Smith, 309 N.W.2d 454, 456 (Iowa 1981). As in Smith, the hearsay evidence was merely cumulative of other evidence.

The admission of hearsay evidence, while error, was harmless. We affirm defendant's conviction of robbery in the second degree.

AFFIRMED.