FILED
MAR 3 1 1987
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,) Filed March 31, 1987 413

vs.)

KARL JAMES TWISELTON,) 7-71
86-629

Defendant-Appellant.)

Appeal from the Iowa District Court for Linn County (CRF 9632) - Harold J. Swailes, Judge.

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

Charles Harrington, Chief Appellate Defender, and John P. Messina, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Bruce Kempkes, Assistant Attorney General, for plaintiff-appellee.

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

PER CURIAM **411**

The defendant appeals his conviction, following a jury trial, of robbery in the first degree. We affirm.

On December 18, 1985, the defendant entered a gas station with the intent to steal money. After failing to open the cash register on his own, the defendant decided to force manager George Skalsky to give him money. The defendant struck Skalsky once on the head with a three-pound metal leaf spring. Skalsky surrendered the cash he was carrying, but the defendant demanded the cash from the register. While ostensibly searching for the register key, Skalsky grabbed a can of mace and opened fire on the defendant. The defendant fled from the station, and Skalsky chased him for a short distance. Skalsky then returned to the station and phoned the police. The police apprehended the defendant shortly after the robbery.

As a result of the blow to his head, the sixty-seven-year-old Skalsky suffered an eight-centimeter cut and a depressed skull fracture. He was hospitalized for seven days to monitor his neurological condition and maintain intravenous intake of antibiotics to prevent infection.

The defendant was accused of first-degree robbery in violation of Iowa Code sections 711.1 and 711.2 (1985). At trial, defendant objected to the presentation of the following instruction in the trial court's marshaling instructions to the jury:

MARSHALING INSTRUCTION NO. 13

> You must find the defendant not guilty of the offense of Robbery in the First Degree . . . unless the State proves by evidence beyond a reasonable doubt, each of the following elements:
>
> * * *
>
> 4. That the defendant intentionally inflicted or intentionally attempted to inflict a serious injury on George Skalsky

> or at the time the defendant was armed with a dangerous weapon.

The trial court overruled the defendant's objection as well as his motions for judgment of acquittal. The jury found the defendant guilty as charged in a general verdict, and the trial court sentenced him to an indeterminate prison term not to exceed twenty-five years. On appeal, defendant contends that the trial court erred in submitting this instruction since there was not sufficient evidence presented to support a finding that the defendant inflicted a "serious injury" on the victim.

Our scope of review is on assigned error only. Iowa R. App. P. 4.

An instruction submitted to a jury must be substantiated by the evidence or it is generally prejudicial. State v. Mays, 204 N.W.2d 862, 865 (Iowa 1973). We believe that the evidence presented at trial was sufficient to justify an instruction on all alternative theories: the intentional infliction of a serious injury, the attempt to inflict a serious injury, and that the defendant was armed with a dangerous weapon. The jury, given the evidence presented, could reasonably have found that the truck leaf spring was a dangerous weapon as defined in Iowa Code section 707.2, that the defendant attempted to inflict a serious injury as defined in Iowa Code section 702.18, and that the defendant did inflict a serious injury. We do not find defendant's argument convincing that there was insufficient evidence in this case to support a finding of "serious injury."

Iowa Code section 702.18 (1985) states:

> Serious injury means disabling mental illness, or bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

The serious injury at issue in the present case is bodily injury which creates a substantial risk of death. Each case must be judged on its own facts when

deciding if there was a serious injury. State v. Coburn, 315 N.W.2d 742, 748 (Iowa 1982). Substantial risk of death is more than just any risk of death but does not mean that death is likely. State v. Anderson, 308 N.W.2d 42, 47 (Iowa 1981). In the present case we find sufficient evidence to enable a jury to find serious injury within the meaning of section 702.18. The victim was hit with a three-pound piece of edged metal. The victim sustained a skull fracture, needed stitches, and bled profusely. His doctor described the head wound as a serious injury from a medical standpoint. There was sufficient evidence to conclude that defendant attempted to inflict a serious injury, did inflict such injury, and was armed with a dangerous weapon. Consequently, we find no error in the marshaling instruction.

AFFIRMED.