

IN THE COURT OF APPEALS OF IOWA

FILED

MAY 28 1985

CLERK SUPREME COURT

STATE OF IOWA,

)

543

Plaintiff-Appellee,

)

Filed May 28, 1985

vs.

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5-198

GEORGE WOODS, JR.,

)

84-397

Defendant-Appellant.

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Appeal from the Iowa District Court for Polk County - Harry Perkins, Judge.

Defendant appeals from judgment and sentence for second degree robbery.

AFFIRMED.

Thomas Mann, Jr., Des Moines, for defendant-appellant.

Thomas J. Miller, Attorney General, and Steven K. Hansen, Assistant
Attorney General, for plaintiff-appellee.

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

SACKETT, J.

Jeffrey Roe, while walking home from work at 2:00 a.m., was attacked in a field near his home. He escaped and ran to his front porch. His attacker pursued him and beat him. When the police arrived, defendant, his clothing covered with blood, was found on the front porch standing over Roe. At trial, Roe testified the attack lasted for approximately fifteen minutes. During that time the attacker hit Roe repeatedly with his fists and a broom handle, threatened to kill Roe and demanded money. Although Roe did not see his attacker's face, he testified the attack continued up to the time police arrived and arrested defendant. Prior to the attack, Roe had stopped to buy cigarettes and a pack of the cigarettes was found in defendant's possession at the time of his arrest. Defendant was ultimately convicted of robbery in the second degree and sentenced to ten years in prison.

On appeal, defendant asserts several claims of error.

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Defendant first argues the trial court should have granted his request for a directed verdict because the State failed to prove the elements of robbery in the first degree.¹ Iowa Code section 711.2 provides in part:

A person commits robbery in the first degree when, while
perpetrating a robbery, the person purposely inflicts or attempts
to inflict serious injury. . . .

In a review of a motion for directed verdict, we consider the sufficiency of the evidence in the light most favorable to the State. State v. Mulder, 313 N.W.2d 885, 888 (Iowa 1981). Evidence was presented that the beating lasted for a significant period of time, threats were made and the victim was injured. There was sufficient evidence to present a first degree robbery question to the jury.

¹ Second degree robbery which defendant was convicted of is all robbery which is not in the first degree. See Iowa Code §711.3.

II.

Defendant also argues that he should have been granted a mistrial because of the prosecutor's failure to produce exculpatory evidence. Prior to trial, defense counsel requested an examination of the blood stains on defendant's clothing. The DCI tested the stains and determined they were type A human blood. Defense counsel was informed the stains were human blood, but apparently was not given the type. Counsel did not request a copy of the test results. At trial when the lab report was offered, defendant objected because the report had not been provided to the defense and no comparison to the victim's blood had been made. The trial court allowed the report to be admitted with the blood type obliterated. Defendant now argues that failure to compare the stains with the victim's blood type was error.

For defendant to prevail on this claim, he must show that (1) the evidence was requested, (2) it was favorable to defendant, and (3) it was material to the case. Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215, 218 (1963).

Defendant has failed to establish that admitting the blood type would have been favorable to his case. The victim had blood type A. Defense counsel was able to argue in closing argument that the prosecution had not shown the blood on defendant's clothing was the victim's. If the blood type had been admitted and shown to be the same as the victim's, counsel could not have made this argument. Rather than being exculpatory, this evidence was inculpatory. Defendant's claim that the prosecution withheld exculpatory evidence is without merit.

III.

Defendant next claims he was prejudiced by the State's closing argument. During argument, the prosecutor argued:

It was a terrible thing. He's a man who had been at work, was on his way home, and was severely beaten and robbed. The law is a beautiful thing. Jurors — or we most often think of it as a traffic ticket or property taxes, but the law as we're doing it here is a beautiful thing. It's what allows us to sleep at home. It's what allows us to walk the streets safely.

Defendant contends these comments were so prejudicial that a mistrial should have been ordered on the basis of prosecutorial misconduct.

Following defense counsel's objection to the closing remarks, the trial court ruled:

I'm going to sustain the objection to the argument in that form. I think that by making his objection early enough that the jury hasn't been contaminated, and I certainly wouldn't consider this grounds for a mistrial if one were being requested.

The ruling was well within the trial court's discretion to determine prejudice, and we will not disturb it absent a clear abuse of discretion. See State v. Chadwick, 328 N.W.2d 913, 916 (Iowa 1983). The trial court is in a better position to observe the effects of any prejudice, Id.; we find no abuse of discretion here.

IV.

Defendant also claims his counsel was ineffective. Ineffective assistance of counsel will only be found where defendant proves that counsel's performance was deficient and the deficient performance deprived defendant of a fair trial. Strickland v. Washington, ___ U.S. ___, ___, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984); see also Taylor v. State, 352 N.W.2d 683, 685 (Iowa 1984).

Defendant contends defense counsel was ineffective in not asserting an intoxication defense. Defendant's defense at trial was he did not attack Roe, rather he came on the scene after someone else had assaulted Roe. The defense of intoxication is inconsistent with the theory the defendant was not the attacker. Under the circumstances, this was reasonable trial strategy.

Defendant further claims his counsel did not follow up on the blood comparison prior to trial. Rather than being prejudiced, defendant was helped

² This is actually a summary by defense counsel of the prosecutor's statements. The prosecutor admitted the rendition was "reasonably accurate."

since the closing argument could then be made that the State hadn't proven the blood stains came from the victim. Counsel's performance was based on reasonable trial strategy and tactics, and we will not find that performance deficient. See State v. Wilkens, 346 N.W.2d 16, 18-19 (Iowa 1984).

V.

Finally defendant argues the trial court on its own should have instructed the jury on the lesser included offense of assault. Defense counsel did not request such an instruction. While Iowa R. Crim. P. 6(3) provides that it is the duty of the court to instruct on lesser included offenses, defendant is not relieved of his duty to object to those instructions.

In State v. Rouse, 290 N.W.2d 911, 913-14 (Iowa 1980), the supreme court held where defendant fails to object to the final instructions, that issue is not preserved for appeal. Defendant asks us to reconsider the Rouse opinion, but we will not do so.

AFFIRMED.