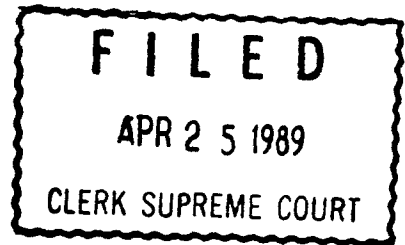


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,)
Plaintiff-Appellee,)
vs.)
TRACEY GENE REDD)
Defendant-Appellant.)

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9-122
88-994

Appeal from the Iowa District Court for Black Hawk County (D7X 013943), Joseph C. Keefe, Judge.

The defendant appeals from his conviction, following a jury trial, of second-degree robbery. **AFFIRMED.**

William L. Wegman, State Public Defender, and Shari Barron, Assistant State Public Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Roxann M. Ryan, Assistant Attorney General; and Daniel B. Shuck, Assistant County Attorney, for plaintiff-appellee.

Heard by Oxberger, C.J., and Schlegel and Sackett, JJ.

OXBERGER, C.J.

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The defendant, Tracey Redd, was convicted by a jury of second-degree robbery in violation of Iowa Code section 711.3. Redd took a carton of cigarettes from a Hy-Vee store in Waterloo. While in the parking lot Redd struck the store manager who had followed him outside. Redd then fled.

Redd raises two issues on appeal: (1) that the trial court erred by submitting a flight instruction; and (2) that the trial court erred by admitting certain evidence and testimony which the defendant contends was marginally relevant but highly prejudicial. Our review is for the correction of errors at law. Iowa R. App. P. 4. We affirm.

Redd first contends the trial court erred by submitting a flight instruction in that it placed undue emphasis on his having fled from the scene. The instruction which was given is as follows:

If you find the offense charged in the Information was committed, and that the defendant thereafter fled from the scene of the crime for the purpose of avoiding or retarding prosecution, then such flight is a circumstance you may consider in determining the guilt or innocence of the defendant.

The credit and weight, if any, to be given such circumstance is for the jury to determine from a consideration of all the evidence in the case.

The general rule with respect to flight instructions is that courts should avoid commenting upon or drawing attention to specific evidence. State v. Marsh, 392 N.W.2d

132, 134 (Iowa 1986). In State v. Bone, 429 N.W.2d 123, 126-27 (Iowa 1988), our supreme court expanded this admonition:

Unless some evidence exists at the time of flight regarding an accusation of the specific crime charged, and the defendant's flight is shown to be prompted by an awareness of that accusation and an effort to avoid apprehension or prosecution, it will be error to give a flight instruction.

In this case, the store manager watched the defendant conceal the cigarettes, followed him outside to the parking lot where the defendant struck the manager and fled. We find these facts to fit squarely within the exception set forth in Bone. However, the supreme court in Bone also noted that "any such flight instruction should include the caveat that there may be reasons for the flight (or concealment) which are fully consistent with innocence." Bone at 127. The instruction given in this case did not contain such a caveat. However, we note the reason for the general disapproval of flight instructions is they place undue emphasis on the actual flight. See State v. Marsh, 392 N.W.2d 132, 134 (Iowa 1986). Here, flight is one of the elements of the crime charged. See Iowa Code §§ 711.1, 711.3 (1987). Accordingly, the danger of undue emphasis is not presented. We find no prejudice to the defendant where the jury is instructed on flight when flight is an element of the crime charged.

Redd's second contention is the trial court erred by admitting an emergency room report and testimony by a nurse

who treated the store manager for a large hematoma and contusion in his left temple area. Redd argues this "marginally relevant" evidence was highly prejudicial and should have been excluded under Iowa Rule of Evidence 403.

Under Iowa Rule of Evidence 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. The balancing of probative value against the grounds for exclusion is a matter for the trial court's discretion. State v. Munz, 355 N.W.2d 576, 580 (Iowa 1984).

One of the elements of second-degree burglary is assault. See Iowa Code § 711.3 (1987). The State had to prove Redd committed an assault on the store manager. Thus, the evidence is relevant. Evidence of the manager's wounds was presented through other witnesses as well. Thus, we fail to find this evidence unfairly prejudicial. See State v. Windsor, 316 N.W.2d 684, 688 (Iowa 1982). We do not find the trial court abused its discretion by admitting this evidence.

We affirm the defendant's conviction.

AFFIRMED.