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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Plaintiff-Appellee,) Filed April 8, 1983
vs.)
PHILLIP HOFFMAN,) 3-03 / 67559
Defendant-Appellant.)

Appeal from Clinton District Court - C. H. Pelton, Judge.

Defendant appeals his conviction for willful injury in violation of Iowa Code § 708.4. AFFIRMED.

Charles L. Harrington, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Steven M. Foritano, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., Donielson, Snell and Schlegel, JJ. Johnson, J., takes no part.

PER CURIAM

Defendant appeals his conviction for willful injury in violation of Iowa Code section 708.4. He claims that the trial court erred in admitting irrelevant medical testimony, allowing the doctor to give an opinion on a mixed question of law and fact, and admitting irrelevant testimony from defendant's brother on cross-examination. We affirm.

While returning home in the early morning hours of May 20, 1981, defendant and his brother saw two men in the alley behind their apartment building. After defendant had gone inside to obtain a gun, the two brothers followed the car in which the two suspicious men had fled. Both cars stopped twice at red lights, at which words were exchanged. At the second light, the victim got out of his car and approached defendant's car. Defendant had previously shown that he had a gun; he now fired two shots at the victim, one of which struck him in the thigh. Defendant then instructed his brother to flee the scene; he eventually disposed of the gun in a creek.

Defendant was charged by trial information with willful injury in violation of Iowa Code section 708.4. He was tried to a jury on August 11-14, 1981. He was found guilty and sentenced to an indeterminate sentence of up to ten years in jail, with a minimum term of five years to be served pursuant to Iowa Code section 902.7 ("Minimum sentence—use of a firearm"). He then brought this appeal.

I. Defendant first complains about the trial court's admission into evidence of medical testimony regarding the consequences of a hypothetically more serious injury than that actually suffered by the victim. At trial the doctor who had treated defendant at the hospital was allowed to testify that if the bullet had struck a major artery in his leg, there was a "remote possibility" the victim would have bled to death. The doctor also testified that the gunshot, which shattered the victim's leg bone, caused him to be immobilized in traction for many weeks. He required reconstructive surgery, and needed therapy to regain use of the leg.

The doctor also testified that the injured leg would be permanently somewhat shorter than the other, although this would not impair function. Defendant's objection to the question was that the "State is asking the doctor to speculate as to something that didn't in fact occur." This objection was overruled.

Initially, we note that there is a question whether defendant properly preserved this alleged error for review. At trial he couched his objection in terms of the proffered evidence calling for "speculation" as to something which did not in fact occur. On appeal, however, he is claiming that the evidence was "irrelevant and immaterial." The trial court was not made aware of this claim in those specific terms. Nevertheless, we will assume that error was in fact preserved and proceed to the merits of the issue.

"Willful injury" is defined in Iowa Code section 708.4 as follows: "[a]ny person who does an act which is not justified and which is intended to cause and does cause serious injury to another commits a class 'c' felony." "Serious injury" is further defined in Iowa Code section 702.18 as any "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." Therefore, it was incumbent upon the State to prove the necessary intent to cause the "serious injury" as defined by section 702.18. Intent is seldom capable of direct proof; instead, it must be determined by "such reasonable inferences and deductions as may be drawn fromt he facts proved by the evidence in accordance with common experience and observation." State v. Rinehart, 283 N.W.2d 319, 321 (Iowa 1979). In determining defendant's intent, the jury "may infer that he intended the natural and probable consequences which ordinarily follow his acts." Id.

We do not believe that the trial court abused its discretion in admitting this evidence regarding the consequences of a more serious injury. See State v. Mark, 286 N.W.2d 396, 413 (Iowa 1979). Considering together the severity of the injury

actually sustained by the victim, the even more severe consequences (including the "remote" possibility of bleeding to death) had the bullet struck a main artery, and the permissible inference that a person intends the natural and probable consequences of his act, the jury could reasonably conclude that defendant intended to cause the victim serious injury. In this respect, we cannot say that the trial court erred in concluding that the evidence concerning the doctor's "hypothetical" testimony was relevant.

Even if the evidence was irrelevant, its admission would have been harmless error. Defendant's only claim of prejudice is that the evidence made it more likely that the jury would find that a serious injury had occurred. However, the record contains overwhelming and unchallenged evidence that the victim in fact sustained a serious injury. The doctor testified that the bullet which struck the victim shattered a bone in his leg, causing its muscles to contract which in turn shortened his leg. The victim also had to have a pin surgically implanted in his shin bone. This evidence alone would be sufficient to allow a jury to conclude that the victim had sustained a serious injury. In any event, we find no reversible error.

II. Defendant next claims that the trial court erred in allowing the doctor to express an opinion on a mixed question of law and fact; i.e., whether the victim had sustained a "serious injury" as that term is defined in Iowa Code section 702.18. We conclude that defendant failed to preserve error on this issue.

The following exchange occurred at trial:

> Q. Now, Doctor, based on your diagnosis and treatment of Mr. Stremlow, do you have an opinion to a reasonable medical certainty as to whether or not he has had and will have a protracted loss or impairment of the function of a bodily member?
>
> MR. HOHENADEL: Your Honor, I'm going to object. The State is asking for a specific legal conclusion, and the question asked has a specific legal meaning as to those specific terms.

THE COURT: Overruled. You can answer that question.

A. Yes. He has had an injury to his leg.

What was said in State v. Hicks, 277 N.W.2d 889 (Iowa 1979), applies with equal force here:

> The defense objected after the witness was asked if he had an opinion; the witness was later asked for the substance of his numerical opinion, at which time the comments claimed to be objectionable were made. The earlier objection was insufficient to preserve the error claimed in the later question and answer. Since no objection was lodged at the time the objectionable testimony was received, we have nothing to review.

277 N.W.2d at 894. Likewise in this case, defendant's attorney did not object when the testimony challenged in this appeal was actually admitted. The objection as stated was premature and was insufficient to preserve for our review the issue now presented.

III. Finally, defendant complains about allegedly improper and irrelevant cross-examination of his brother who testified on his behalf. On cross-examination, the State asked the brother "If you would point a handgun at someone, you would intend to use it; wouldn't you?" Objections on relevancy and materiality grounds were overruled. The witness answered in the affirmative.

We agree with the State that any error in the admission of this testimony was harmless. Although admittedly irrelevant, the brother's testimony could not have prejudiced defendant since the record is replete with evidence which defendant does not challenge from which a jury could reasonably conclude beyond a reasonable doubt that he intended to shoot the victim. Under these circumstances, we find no cause for reversal.

We have considered all of defendant's arguments and conclude that his conviction should be affirmed.

AFFIRMED.