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IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Appellee,) Filed November 22, 1978
vs.)
JESSE DAN HALL,) 703 / 61704
Appellant.)

Appeal from Warren District Court - M. C. Herrick, Judge.

Defendant appeals conviction of the crime of robbery without aggravation alleging errors in the trial court's instructions. - Affirmed.

Richard B. Clogg, Indianola, for Appellant.

Richard C. Turner, Attorney General of Iowa, Lona Hansen, Assistant Attorney General, and John W. Criswell, Warren County Attorney, for Appellee.

Submitted to Oxberger, C. J., and Donielson, Snell and Carter, JJ.

PER CURIAM

Defendant Jesse Dan Hall appeals his conviction by jury of the crime of robbery without aggravation in violation of § 711.3, The Code. Defendant allegedly took a revolver from a State highway patrolman during a scuffle which occurred when the patrolman was questioning Hall after stopping the vehicle he was driving for speeding. On appeal, defendant alleges the trial court erred in instructing the jury and in overruling his motions for directed verdict, new trial and judgment notwithstanding the verdict.

Defendant's first assignment of error is that the trial court erred in excluding the word "permanently" before the words "convert to his own use" when it set forth the elements of the crimes of robbery and larceny. The State argues that Hall waives any challenges to the instructions because he did not except to the court's rulings after his objections were overruled. See State v. Overmann, 220 N.W.2d 914, 918 (Iowa 1974).

Initially, we note that the trial court informed the parties that the instructions were presented in their final form; therefore, no further exceptions were required after defendant's objections were overruled. Secondly, the supreme court in State v. Banoch, 193 Iowa 851, 853, 186 N.W. 436, 437 (1922), stated that as there are no common law crimes in Iowa, it is ordinarily sufficient for the trial court to define the crime in the language of the statute. In the instant case, the trial court instructed the jury regarding the crimes of robbery and larceny in the language of the statute and followed the form suggested in the Iowa Uniform Jury Instructions. No essential element of the crimes was omitted. 193 Iowa at 854. There was no error.

Defendant's second contention on appeal concerns Instruction 16 which dealt with the element of intent. Specifically, defendant complains about the last sentence which states: "The law warrants an inference that when a person intentionally commits an act, he intends the natural results or consequences to follow which ordinarily do follow such acts." Hall argues the instruction is confusing and misleading and fails to include the testimony of defendant as having some significance on what his intent was. From a review of the evidence we find

the giving of the instruction was not error. The part of the instruction complained of only warranted an inference on the issue of intent and did not operate to the exclusion of any other evidence which may have been presented.

Third, defendant complains the trial court erred in not submitting the lesser included offense of larceny in an amount greater than $20. A lesser included offense is appropriate for submission when (1) the elements of the lesser offense are an elementary part of the greater offense (the legal test) and (2) there is a factual basis in the record for submitting the included offense to the jury (the factual test). State v. Rosewall, 239 N.W.2d 171, 174 (Iowa 1976); State v. Hawkins, 203 N.W.2d 555 (Iowa 1973). In Hawkins, the court quoting from State v. Marshall, 206 Iowa 373, 377, 220 N.W. 106, 107 (1928), stated "where under the evidence the defendant is clearly guilty of the offense charged or not guilty, it is not error to fail to give instructions with reference to included offenses". In the instant case, Hall was clearly guilty of either robbery, with or without aggravation, or of the crime of larceny from the person or not guilty at all. Under Hawkins and Marshall the trial court did not err in refusing defendant's request to instruct to the lesser offense.

Fourth, defendant claims the trial court erred in not including the general uniform instruction on circumstantial evidence in criminal cases. In State v. Moehlis, 250 N.W.2d 42, 47 (Iowa 1977), the court stated: "there is no reversible error in failing to instruct as to circumstantial evidence where the evidence is not wholly circumstantial . . . where there is sufficient direct evidence to convict, the circumstantial evidence instruction need not be given even though the prosecution relies in part on circumstantial evidence." See also State v. Kaufman, 265 N.W.2d 610, 615-16 (Iowa 1978). Further, in Moehlis the court held that although the evidence of intent was entirely circumstantial, omitting the instruction on circumstantial evidence was not error. Hall's claim that an instruction on circumstantial evidence was required on the issue of intent is without merit.

Finally, defendant argues the court erred in submitting the charge of robbery without aggravation. Hall argues the evidence was insufficient on the issue of criminal intent. We disagree. The crime of robbery without aggravation is a lesser included offense of the crime of robbery with aggravation, the crime charged. In

the instant case, both the legal and factual tests set forth in State v. Hawkins, supra, were satisfied. The only issues involved were whether defendant took the revolver by force or violence or by putting the victim in fear and whether he did so while armed with a dangerous weapon. There was no error.

Hall's final contention on appeal is that the trial court erred in overruling his motions for directed verdict, new trial and judgment notwithstanding the verdict. The standards for ruling on motions for directed verdicts, for submitting a criminal case to the jury and for ruling on motions for new trial based upon the sufficiency of the evidence to sustain the verdict are contained in State v. Overstreet, 243 N.W.2d 880, 883-84 (Iowa 1976). Our review of the evidence in light of the standards set forth in Overstreet discloses the trial court did not err in overruling defendant's motions for directed verdict and new trial. A judgment notwithstanding the verdict is not available in a criminal case and there is no authority upon which such a judgment can be entered. State v. Campbell, 217 N.W.2d 251, 253 (Iowa 1974). Finding no errors, defendant's conviction is affirmed.

AFFIRMED.

All judges concur, except Oxberger, J., who dissents.

OXBERGER, C. J. (dissenting)

I dissent. The only feature which distinguishes the instant case from State v. Campbell, 214 N.W.2d 195 (Iowa 1974), is the fact that Hall knew when he took the gun that its owner was a police officer. In Campbell the accused took a revolver from an off-duty Omaha policeman who had pointed the gun at him in an attempt to break up a fight. Here, it is undisputed when Hall grabbed the officer's gun he was either resisting arrest or acting in self defense. There was no larcenous intent. I find the following language from Campbell, 214 N.W.2d at 198, controlling:

> Every fact shown in this record belies any claim a robbery was committed. The evidence shows beyond question defendant was not bent on robbery. The events which closed in on him and which now threaten him with long-term imprisonment shows conclusively from start to finish, an absence of plan, design, intent, or purpose to rob Irvin. To turn this street fracas into an armed robbery conviction is entirely beyond any reasonable interpretation of the testimony.

Similarly, to turn this case of resisting arrest, assault, or pointing a gun at another into a robbery conviction is not reasonable. Finding no evidence of Hall's intent to rob, I believe the motion for directed verdict should have been granted.