

FILED

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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed November 26, 1980

vs.

)

STEPHEN JOSEPH HOWES,

)

0-295

64327

Defendant-Appellant.

)

Appeal from Lee District Court - David B. Hendrickson, Judge.

Defendant appeals conviction for robbery in the first degree in violation of section 711.2, The Code 1979. He contends that the trial court erred in refusing to suppress his oral and written confessions and in failing to give a requested instruction. AFFIRMED.

David U. Sallen, Lee County Public Defender, Ft. Madison, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, John P. Messina, Assistant Attorney General, and Michael Short, Lee County Attorney, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

DONIELSON, J.

Defendant Stephen Howes appeals his conviction for robbery in the first degree in violation of section 711.2, The Code 1979. He contends that the trial court erred in refusing to suppress his oral and written confessions because the confessions were induced by official promises of leniency and because he should have had the right to counsel prior to waiver of his Miranda rights. Defendant further asserts that the trial court erred in failing to instruct the jury that they should determine whether the shotgun used in the robbery was in working order and whether it was a dangerous weapon as defined in chapter 724, The Code 1979. We affirm the conviction.

Our review is limited to correction of errors at law. Iowa R. App. P. 4.

I.

Defendant was charged with robbery in the first degree in July of 1979. He filed a motion to suppress evidence of confessions he had made, contending that such confessions were involuntary. The motion to suppress was denied and defendant was convicted and sentenced following a jury trial. Defendant filed a notice of appeal on November 21, 1979.

On July 9, 1979, defendant had a meeting with his probation officer, Gary Davis, for the purpose of completing a probation agreement. Before the meeting, Davis had been informed that the police wished to speak to the defendant. Davis relayed this information to the defendant after the two had completed their discussion of the conditions of defendant's probation. The defendant accepted Davis' offer of a ride to the police station and declined to have Davis accompany him into the room for questioning.

Prior to being questioned by Detective Beard, defendant was informed of his Miranda rights and signed a waiver of those rights. Following approximately forty minutes of interrogation, defendant orally confessed to the robbery. The confession was taken down in shorthand and typed out. Davis was then asked to come into the room and the defendant repeated his confession. Defendant then signed the written version of the confession in the presence of Davis and Detective Beard.

At the hearing to suppress evidence of the oral and written confessions, defendant testified that he had thought he was supposed to confess as a condition of his probation. He further testified that both Davis and Beard had told him he would "be better off" if he signed the statement and that he believed he would be violating his probation if he

did not sign it. Both Davis and Beaird deny having made any statements to the effect that defendant would be better off to sign the confession.

In overruling defendant's motion to suppress, the trial court concluded that Davis had done nothing prior to defendant's arrival at the police station to give defendant reason to believe that he was required as a condition of his probation to confess to the robbery. The court also found that Beaird had said nothing to indicate to defendant that he was required to confess. Significantly, the court failed to find that either Davis or Beaird had told defendant he would be better off to sign the written confession, but the court noted that if such statements had been made, they were not tantamount to inducements, promises of leniency, or threats of any kind.

Following presentation of the evidence, defendant requested that the jury be instructed that the gun allegedly used in the robbery could not be considered a dangerous weapon unless it was determined to be in working order at the time of the offense. Defendant's proposed instruction was not given to the jury.

II.

Defendant's allegation that the trial court erred in refusing to suppress his oral and written confessions is based on two contentions. First, defendant contends that the confessions were not voluntarily made but were induced by the statements of Davis and Beaird that the defendant would be better off if he signed the written confession. Second, defendant proposes that this court overrule existing precedent to hold that an accused has the right to counsel prior to waiver of his Miranda rights. We are not persuaded by either of defendant's arguments.

At the outset, we note that it has not been established that David and Beaird ever made such a statement. Both men deny having told defendant that he would be better off to sign and, most significantly, the trial court failed to find that the statement or a similar one was ever made. We therefore cannot assume, as defendant apparently would have us do, that the words were spoken. However, assuming arguendo that Davis and Beaird did tell the defendant that he would be better off to sign the confession, we are not convinced that such a statement amounts to an inducement sufficient to make a confession involuntary. In discussing the distinction between an impermissible inducement and a mere admonition to cooperate, our supreme court has observed that:

[w]hile it is hard to believe that a person would admit false facts showing his guilt without greater assurance than is sometimes held sufficient to make inadmissible alleged confessions, the courts feel compelled to go to

the extreme to protect the weak or confused innocent party who may feel his chances of establishing his innocence are too remote to turn down what appears to be an assurance of leniency if he will confess to the crime of which he is accused. It seems more reasonable to assume that before an accused would falsify bad conduct for good conduct, he would demand some fairly specific assurance or promise of leniency, which is the obvious reason for the many decisions that a mere statement by an officer that it would be better or wiser to tell the truth, is not such an assurance or inducement as to make a statement by [an] accused inadmissible. However, when the officer or officers go further and explain just how it will be better or wiser for the accused to speak, these statements may suddenly become more than an admonishment and assume the character of an assurance or promise of special treatment which may well destroy the voluntary nature of the confession in the eyes of the law.

State v. Mullin, 249 Iowa 10, 16, 85 N.W.2d 598, 601-02 (1957). In the instant case, we conclude that telling the accused he would be better off to sign the confession is not in itself a fairly specific assurance of leniency sufficient to constitute an impermissible inducement, and it is undisputed that Davis and Beaird made no further statements to defendant specifying how it would be better for him to sign. We therefore hold that the defendant cannot complain that his confession was not voluntary. The validity of our conclusion is particularly striking when one examines the totality of the circumstances surrounding defendant's confessions. Cf. Schneekloth v. Bustamonte, 412 U.S. 218, 227, 93 S. Ct. 2041, 2048, 36 L. Ed. 2d 854, 862-63 (1973) (establishing the "totality of the circumstances" standard to determine voluntariness of consents), State v. Cullison, 215 N.W.2d 309, 315 (Iowa 1974) (adopting the Schneekloth standard to determine voluntariness of an inculpatory admission). The statement that defendant would be better off if he would sign the written confession was made, if at all, only after defendant had twice confessed orally. In our estimation, defendant's oral confessions were clearly voluntary. The statement signed by defendant was merely the written version of the oral confessions. We decline to find error on this point.

Defendant further contends that his confessions were inadmissible because no attorney was present to advise him on the question of waiving his right to counsel and other Miranda rights. In effect, defendant would advocate an unwaivable right to counsel, a position clearly inconsistent with the well-established principle that Miranda rights, including the right to counsel, may be properly waived. Miranda v. Arizona, 384 U.S. 436, 475, 86 S. Ct. 1602, 1628 16 L. Ed. 2d 694, 724 (1966); State v. Russell, 261 N.W.2d 490, 492 (Iowa 1978); State v. Winfrey, 221 N.W.2d 269, 273 (Iowa 1974); State v.

Kendrick, 173 N.W.2d 560, 562 (Iowa 1970). We therefore conclude that evidence of defendant's confessions is not rendered inadmissible by the fact that no counsel was present when defendant signed a waiver of his Miranda rights.

III.

Finally, defendant alleges error from the trial court's refusal to instruct the jury that in order to convict the defendant of first degree robbery, it must first find that the shotgun used in the robbery was in working order and that it was a dangerous weapon as defined in chapter 724, The Code 1979. Defendant never requested the trial court to instruct the jury regarding the definition of a dangerous weapon. Moreover, he did not object to the fact that the court failed to so instruct the jury. Accordingly, we hold that the defendant has not preserved error on this point. State v. Rouse, 290 N.W.2d 911, 914 (Iowa 1980).

Nor do we find merit in defendant's contention that the jury should have been instructed concerning the need to determine whether the shotgun was in working order at the time of the offense. In State v. Nichols, 276 N.W.2d 416 (Iowa 1979), the supreme court held that the state need not prove, in a prosecution for first degree robbery, that a gun was loaded at the time of the robbery in order for it to come within the definition of a dangerous weapon. Nichols, 276 N.W.2d at 417. In so holding, the court observed that "one facing a gun in the hands of a robber should not be required to ask if it is loaded." Id. Because it is equally obvious that a person in this situation should not be required to ask if the gun is in working order, we hold that it was not error to fail to instruct the jury concerning an obligation to determine whether the shotgun was working at the time of the offense.

We affirm defendant's conviction.

AFFIRMED.