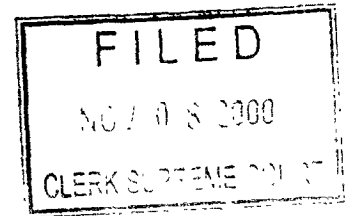


IN THE COURT OF APPEALS OF IOWA

No. 0-476 / 99-1315
Filed November 8, 2000



STATE OF IOWA,
Appellee,

vs.

DEZMOND EUGENE THURMOND,
Appellant.

Appeal from the Iowa District Court for Black Hawk County, Stephen C. Clarke, Judge.

On appeal from his conviction for second-degree robbery, the defendant argues the trial court erred in admitting statements made by a codefendant and in concluding it did not have authority to grant him a deferred judgment or suspended sentence. **AFFIRMED.**

John E. Billingsley and Lee M. Walker of Walker, Knopf & Billingsley, Newton, for appellant.

Thomas J. Miller, Attorney General, Kristin Mueller, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Joel Dalrymple, Assistant County Attorney, for appellee.

Heard by Streit, P.J., and Vogel and Miller, JJ.

VOGEL, J.

Dezmond Thurmond appeals his judgment and sentence from a jury trial in which he was convicted of second-degree robbery in violation of Iowa Code sections 711.1 and 711.3 (1997). We agree the trial court lacked the discretion to defer judgment because Thurmond, although only seventeen at the time of the robbery, was convicted of a forcible felony. We further find no violation of equal protection in the sentencing.

Background facts. On September 27, 1998, Thurmond and D'Carlos Jones approached the victim, Chad Faichney, who sat in his vehicle waiting for his girlfriend. Thurmond approached the driver's side of the vehicle while Jones went up to the passenger's side window. The men conversed briefly with Faichney, asking for directions. They proceeded to open the doors on both sides of the vehicle and demand money from Faichney. When he attempted to give them a handful of change, they demanded his wallet. Jones put Faichney in a headlock, obstructing his breathing, while Thurmond reached into his pocket and took his wallet. Faichney immediately called the police and reported the incident, describing the two men and the vehicle he had seen them arrive in. He described the contents of his wallet as a twenty-dollar bill and several one-dollar bills. The police stopped a white sport utility vehicle fitting the description Faichney had given them. The vehicle was just pulling out of the area where the robbery took place. The officers found a roll of money containing a twenty-dollar bill and six one-dollar bills in the parking lot where the vehicle was stopped. There were five young men in the car and Faichney was brought to the stopped

vehicle to make an identification. He identified Jones at that time and Thurmond during the trial.

Prior to the trial, Thurmond filed a motion in limine seeking to exclude the statements of a witness, Jeremy Holien, as hearsay. The trial court withheld ruling on the admissibility of the statements until trial. The jury found Thurmond guilty of second-degree robbery and the trial court sentenced him to an indeterminate term of ten years. He now appeals.

Statements by co-conspirator. At trial, the State presented the testimony of Jeremy Holien, one of the five men in the vehicle with Jones and Thurmond. He testified the driver of the vehicle dropped Jones and Thurmond off in the vicinity of the robbery. Jones told the driver to pick them up behind the bowling alley. When they returned to the vehicle, they were out of breath and Jones said to Thurmond, "I get half of that." When police followed the vehicle, Jones told the driver to hurry up. After the vehicle was stopped and the men were ordered to return to their vehicle, Jones stated, "I don't have any money anymore."

Thurmond attempted, by his motion in limine, to prevent the introduction into evidence of the statements Holien alleges were made by Jones. The trial court appeared to make a preliminary ruling regarding the motion, stating:

The ruling of the Court will be that the motion in limine will be granted only to the extent that of statements not made during the course of the conspiracy. . . . And so I am going to limit the sustaining of the motion in limine to those things outside the events of the day.

However, when defense counsel asked for a standing objection to these statements, the court retreated from this initial ruling, stating:

[M]aybe what you're asking for is blanket approval for the State to let certain statements in subject to your objection and I think it makes it difficult for me to then distinguish between what may fall or may be objectionable hearsay and what is not hearsay. . . . I think we'd probably just better see how the evidence comes in and make your objection and we'll move on from there.

At trial, defense counsel did lodge several objections, which the court overruled. Thurmond now appeals, alleging the statements were admitted into evidence in error.

It is generally recognized that, unless it is clear the trial court made a final ruling on the matter, a motion in limine does not preserve error until the matter is presented at trial. *State v. Delaney*, 526 N.W.2d 170, 177 (Iowa App. 1994) (citations omitted). An objection should be made at trial to preserve error. *Id.* Further, it is incumbent upon the objecting party to lodge specific objections so the trial court is not left to speculate whether the evidence is in fact subject to some infirmity that the objection does not identify. *See State v. Mulvany*, 603 N.W.2d 630, 632 (Iowa App. 1999). Every ground of exception that is not particularly specified is considered abandoned. *Id.* Therefore, a defendant may not announce an objection at trial and on appeal rely on a different objection to challenge an adverse ruling. *State v. Goodson*, 503 N.W.2d 395, 399 (Iowa 1993). Fairness and considerations of judicial economy dictate that we not consider a contention on appeal which the trial court never had the opportunity to consider. *See State v. Sanborn*, 564 N.W.2d 813, 815 (Iowa 1997).

Although Thurmond filed a motion in limine prior to trial, the trial court did not render a final decision on the issue, preferring to address each objection as it was made at trial. The infirmity in the objections made at trial lies with the very general nature of the objections. Simply stating, "objection," without asserting a reason for it failed to apprise the trial court why the objection should be sustained. See *Mulvany*, 603 N.W.2d at 632. From the hearing on the motion in limine, it is clear the trial court intended to delay ruling on the alleged hearsay statements until each was offered during trial. Any general objections made, therefore, could not rely on the arguments made in limine, but needed to be asserted at trial and tailored to address the context in which the alleged hearsay statements were offered. As Thurmond failed to lodge specific objections at trial, he failed to preserve error as to this issue. Therefore, we cannot decide the merits of an argument not made to the trial court. Even if we were to reach the merits, we would find Jones' statements admissible as statements of a co-conspirator under Iowa Rule of Evidence 801(d)(2)(E). See *State v. Kidd*, 239 N.W.2d 860, 864 (1976) (stating the conspiracy may persist until the fruits of the crime have been divided); see also *State v. Ross*, 573 N.W.2d 906, 915 (Iowa 1998) (holding a conspiracy may continue into the concealment phase).

Sentence. A sentence will be disturbed by a reviewing court only upon a showing that the trial court abused its discretion. *State v. Neary*, 470 N.W.2d 27, 29 (Iowa 1991). No abuse of discretion will be found unless the defendant shows that such discretion was "exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *Id.* The purpose of rule 22(3)(d) is to allow

a reviewing court to determine whether there has been such an abuse of discretion. *State v. Matlock*, 304 N.W.2d 226, 228 (Iowa 1981).

Thurmond asserts the trial court erred in ordering a ten-year indeterminate sentence, finding it had no discretion to defer judgment or suspend the sentence. He claims his status as a minor, age seventeen, affords the court the discretion to find either one of these options to be available. However, the supreme court has already addressed this precise issue in a similar case. See *State v. Edgington*, 601 N.W.2d 31 (Iowa 1999). In that case, the seventeen-year-old defendant was charged with the forcible felony of first degree burglary and sentenced to a twenty-five year indeterminate term rather than given a deferred judgment or suspended sentence. *Id.* at 31-32. Just as in Thurmond's case, the juvenile court did not have jurisdiction over Edgington as he was charged with committing a crime, which was a forcible felony. *Id.* at 32. Iowa Code section 232.8(1)(c) states:

Violations by a child, age sixteen or older, . . . *which constitute a forcible felony are excluded from the jurisdiction of the juvenile court* and shall be prosecuted as otherwise provided by law unless the court transfers jurisdiction of the child to the juvenile court upon motion and for good cause. . . . (emphasis added)

In the case before us, Thurmond was also under the jurisdiction of the district court, pursuant to the above referenced code section. Robbery in the second degree is a forcible felony, which Thurmond was convicted of committing when he was seventeen years of age. The supreme court, in *Edgington*, stated:

It is evident from a reading of the entire statute that the authority to grant a deferred judgment under section 232.8(3) is limited to cases in which juvenile court jurisdiction has been waived. It has no

application to a case which was excluded from the juvenile court's jurisdiction.

Edgington, 601 N.W.2d at 33. Because Thurmond was initially under the jurisdiction of the district court for committing a forcible felony, and was not waived up from juvenile court under Iowa Code section 232.45, he was not entitled to a deferred judgment.

Iowa Code section 907.3 establishes the parameters for the availability of a deferred judgment or suspended sentence in the district court. This code section clearly finds a person convicted of a forcible felony is ineligible for a deferred judgment or a suspended sentence. See Iowa Code § 907.3; see also *Edgington*, 601 N.W.2d at 34. Accordingly, we find the trial court was correct in determining it had no discretion to defer judgment or suspend Thurmond's sentence.

Equal protection. Thurmond further claims imposing a mandatory sentence on him as a seventeen-year-old but not on a younger juvenile who commits the same crime, second-degree robbery, violates the equal protection clause of both the United States and the Iowa Constitutions. Because disparate treatment of juveniles in sentencing does not involve a fundamental right, this issue must be analyzed using the rational basis test. *State v. Mann*, 602 N.W.2d 785, 792 (Iowa 1999); see also *State v. Iowa District Court for Black Hawk County*, 616 N.W.2d 575, 580 (Iowa 2000).

A classification is reasonable if it is "based upon some apparent difference in situation or circumstances of the subjects placed within one class or the other which establishes the necessity or propriety of distinction between them." A classification "does not deny equal protection simply because in practice it results in some

inequality; practical problems of government permit rough accommodations"

Mann, 602 N.W.2d at 792 (citations omitted). "The legislature could reasonably distinguish between juveniles of different ages based on their presumed maturity and judgment, according more severe punishment to older juveniles." *Id.* at 793. It is rational for the legislature to determine that older juveniles should have reached a sufficient maturity level and, thus, be considered more culpable for their actions. *Id.* Therefore, the applicable statutory scheme of punishing juveniles age sixteen or older who commit a forcible felony more severely than younger juveniles does not violate the equal protection clause.

The remaining issue addressed in the briefs, regarding the eighty-five percent rule, has been addressed in a companion case decided by the supreme court and filed September 7, 2000. *Iowa District Court for Black Hawk County*, 616 N.W.2d at 581.

Having considered all issues on appeal before us, we affirm.

AFFIRMED.