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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Plaintiff-Appellee,)
vs.)
RONALD DEAN BROWN,)
Defendant-Appellant.)

Filed February 14, 1977

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No. 59353

Appeal from Lee District Court -- Thomas E. Tucker, Judge

The appellant appeals a conviction for carrying a concealed weapon, 695.2, The Code, on grounds that the State failed to prove that he did not have a permit.

AFFIRMED

Carl A. Saunders, of Fort Madison, for appellant.

Richard C. Turner, Attorney General, Ray Sullins, Assistant Attorney General, Jim Hoffman, Lee County Attorney, attorneys for appellee.

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

DONIELSON, J.

On December 19, 1975, at approximately 2:00 p.m., Ronald Dean Brown, an inmate at the Iowa State Penitentiary, Fort Madison, reported to Mr. James Menke, the security director for the prison. He was to report for a disciplinary hearing and came to the hearing dressed in normal prison clothes with a black jacket. It is the policy of the prison that the prisoners are shaken down for weapons at the conclusion of the disciplinary hearing depending upon the results of that hearing. The appellant was searched at the conclusion of the hearing by shift supervisor, Richard Bruhl. In the appellant's belt line area, Mr. Bruhl found a concealed dining room knife that had been altered by sharpening the end and wrapping the handle. Inmates can possess an electrician's knife or a leather working knife, but only with the permission of the deputy warden.

The appellant was charged with carrying a concealed weapon 695.2, The Code, 1975. The appellant was tried and the jury returned a verdict of guilty.

At the conclusion of the State's evidence, the defendant's attorney moved for dismissal and a directed verdict. The motions were overruled by the court. At the close of the evidence, the defendant renewed his motions for dismissal and a directed verdict. The court overruled the defendant's renewed motions.

We affirm.

The defendant basically assigns two claimed errors in which he relies upon for reversal.

1. Trial court erred in overruling defense motions for directed verdict and dismissal.
2. Trial court erred in giving the marshalling instruction.

The verdict of the jury is binding upon us unless it is

without substantial support in the record or is clearly against the weight of the evidence. State vs. Werner, 181 N.W.2d 221 (Iowa 1970).

In making a determination as to whether the evidence as a matter of law supports the verdict, the appeals court must view the evidence most favorable to the State and accept as established all reasonable inferences tending to support the jury action. State vs. Overstreet, 243 N.W.2d 880 (Iowa 1976). The defendant is entitled to a fair trial but not a perfect one. State vs. Kelsey, 201 N.W.2d 921, 927 (Iowa 1972).

I and II

The first part of Proposition No. I is an allegation by the appellant that the trial court erred in not directing a verdict at the close of the State's evidence and that can quickly be disposed of by State vs. Werner, *supra:*

> "[1] I. Defendant first asserts the trial court should have sustained his motion for a directed verdict made at the close of the State's evidence. It is not reversible error for the trial court to refuse to direct a verdict at the close of the State's evidence. State vs. Everett, Iowa, 157 N.W.2d 144, 146; State vs. Mabbitt, 257 Iowa 1063, 1065, 135 N.W.2d 525, 527; State vs. Kulow, 255 Iowa 789, 793, 123 N.W.2d 872, 875."

See also State vs. Dahlstrom, 224 N.W.2d 443, 446 (Iowa 1974).

The appellant argues that there has been a complete failure of proof by the State regarding necessary elements of the crime in question. Specifically, lack of proof showing that the defendant did not have a permit to carry a weapon, and also that the defendant was not an employee or officer of the State of Iowa under 695.9, The Code, 1975.

The lack of permit by Brown to carry a knife concealed upon his person is indeed an element of the crime charged here and by

which the State must carry its burden of proof. State vs. Baych, 169 N.W.2d 578 (Iowa 1969); State vs. Burns, 181 Iowa 1098, 165 N.W. 346 (1917); State vs. Cochran, 179 Iowa 1304, 162 N.W. 755 (1917); §695.2, The Code, 1975 * .

The second part of Proposition No. I relief on by the appellants can be discussed more in detail, and we again start at State vs. Werner, 181 N.W.2d 221, at 222 (Iowa 1970):

> "Defendant did however renew his motion on the ground of insufficient evidence at the close of all of the evidence. We consider this claim as we will not allow a finding of guilty to stand where there is an absence of proof of any essential element of the crime charged. State vs. Stodola, 257 Iowa 863, 865, 134 N.W.2d 920, 921; State vs. Myers, 253 Iowa 271, 274, 111 N.W.2d 660, 662. A conviction notwithstanding such absence of proof amounts to denial of a fair trial. State vs. Hill, 258 Iowa 932, 935, 140 N.W.2d 731, 733; State vs. Poffenbarger, 247 Iowa 552, 554, 74 N.W.2d 585, 586."

See also State vs. Brown, 176 N.W.2d 180 (Iowa 1970).

* This criminal element may be waived or stipulated. See State vs. Watts, 223 N.W.2d 234 (Iowa 1974) where Justice Rees, discusses at length the elements of an instruction in the Uniform Jury Instructions 530.8 where the instruction recited therein contains no section in referring to a permit. Presumably was waived by counsel in that case.

The appellant relies upon 695.9, The Code, where the Commissioner of Public Safety may issue a permit to *"carry concealed a revolver, pistol, pocket billy or other weapon to any officer or employee of the state."*

The main thrust under this portion of the appeal goes to what the appellant calls the total lack of evidence, that the inmate-appellant at Fort Madison Penitentiary was not an officer or an employee of the State under that section.

The record reflects, however, that Mr. James Menke, security director of the Penitentiary and an employee for 24 1/2 years, indicated the appellant was in his office for disciplinary hearing, and that he was dressed in prison clothes, and both on direct and cross-examination referred to the rules applicable to inmates in reference to knives. Cross-examination went as follows:

> "Q. Mr. Menke, did Mr. Brown do anything or say anything to you that did indicate or would have indicated to you that he had a knife or anything like that on his person on the day in question? A. No.
> Q. Is there a policy at the Penitentiary, Mr. Menke, that when an inmate comes to you under the circumstances that Mr. Brown came to you on the day in question, that that inmate should know or would know that under certain circumstances, as a result of the meeting with you, he could be shaken down?
> A. Yes.
> Q. So what you're saying is that Mr. Brown, on the day in question, should have known or did know that under certain conditions, as a result of his meeting with you, he could be shaken down, searched for weapons? A. An inmate can be searched down at any time."

Mr. Richard Bruhl, a shift supervisor at the Penitentiary and an employee for 20 years, testified the appellant was brought to his office from the disciplinary hearing dressed in an inmate shirt, and he proceeded to frisk him whereupon he found the knife in question. The record reflects the following: *"... First of all, am I correct in saying that Mr. Brown is an inmate at the*

Penitentiary? A. Yes, sir."

Cross-examination was repleat with references that appellant-Brown was an inmate. Robert Cramblit, correctional officer, employed at the Penitentiary for 21 years, was present for the frisk and the finding of the concealed knife repeatedly referred to the appellant as an inmate. Verle Parrott, a supervisor and an assistant training officer employed at the prison for 29 years, also referred to Brown as an inmate. (Never is there any reference or inference that Brown was an officer or an employee of the State at any place in the record.)

Is there then enough evidence to carry the State past the directed verdict? Both appellant's counsel and the trial court agree that the permit issue that can be given by the Commissioner of Public Safety can be disposed of in two ways: direct testimony that no permit was issued by him; or secondly, in the alternative, circumstantial evidence that the inmate-appellant was in a class of persons that are prohibited from obtaining a permit from the Commissioner under 695.9, because that person is not an officer or an employee of the State.

We agree the latter can be sued and was used with a proper instruction submitted by the appellant's counsel in Instruction No. 9A.

The judicial criteria for overruling the motion for directed verdict is set forth in State vs. Dahlstrom, 224 N.W.2d 443, 448 (Iowa 1974).

> "[10] To sustain the overruling of a motion for directed verdict, 'any evidence, circumstantial or direct, must be sufficient to raise a fair inference of guilt.' There must be more than 'a suspicion, speculation or conjecture. ... [citing authority].' State vs. Williams, 179 N.W.2d 756, 758 (Iowa 1970).
>
> "[11] In making a determination as to the

> propriety of the court's ruling on a motion for directed verdict in a criminal case this court views the evidence in the light most favorable to the state regardless of whether it is contradicted and every legitimate inference that may be fairly and reasonably deducted therefrom must be carried to the aid of the evidence. Kirschbaum vs. United States, 407 F.2d 562, 563 (8 Cir. 1969)."

See also State vs. Lewis, 242 N.W.2d 711, 724 (Iowa 1976) where it was argued that circumstantial evidence did not exclude every other, *"reasonable hypothesis for the commission of the offense alleged"*. In the instant case, *"reasonable"* is the key word, and we find that when every witness, four in number, referred to and indicated that this appellant is an inmate at the State Penitentiary, that it is a *"reasonable hypothesis"* to conclude that this appellant is not an officer or employee of the State of Iowa, and thusly makes this a submissible jury question on that aspect of the crime alleged. See also State vs. Williams, 179 N.W.2d 756, 760 (Iowa 1970) * .

*Note should be made of the appellant's counsel argument regarding the Uniform Jury Instructions 530.8, we find him to be correct. The instruction is in error. Those instructions assume that the sheriff is the only one to give permits pursuant to 695.4 and involves permits to carry *"revolver, pistol or pocket billy"*, that instruction then recommends that element No. 5 *"that the defendant had no permit to carry a concealed weapon"* be eliminated if the weapon was other than a revolver, pistol or pocket billy. This instruction overlooks 695.9 which gives the Commissioner of Public Safety additional and broader authority to give a permit for *"a revolver, pistol, pocket billy or other weapon."*

III

In Proposition No. III, the appellant alleges an error in giving Jury Instruction No. 12 * , the marshalling instruction. He gives us his primary reason in that it did not include words to the effect that the defendant was not at the time of the alleged commission of the crime an employee or officer of the State of Iowa. The instruction did include, however, as No. 5 in that instruction, the following: *"5. That the Defendant had no permit from the Commissioner of Public Safety to carry a concealed weapon."*

*"Instruction No. 12 Before the Defendant can be found guilty of the offense charged in the Information, the State must establish by the evidence beyond a reasonable doubt each and all of the following propositions:

1. That on or about the 19th day of December, 1975, in Madison Township, Lee County, Iowa, the Defendant consciously or intentionally carried a knife which was an offensive or dangerous weapon.

2. That the Defendant carried said knife concealed on or about his person.

3. That the Defendant was then in a place other than his dwelling house, his place of business or on land possessed by him.

4. That the Defendant carried said knife with the knowledge of its character as a weapon.

5. That the Defendant had no permit from the Commissioner of Public Safety to carry a concealed weapon.

If the State has established each of the foregoing propositions beyond a reasonable doubt, it will be your duty to find the Defendant guilty.

If the State has failed to so establish one or more of the foregoing propositions, then you will find the Defendant not guilty."

It is simply not possible to put all of the definitions and all of the explanation into the marshalling instruction or there indeed would be only one instruction given.

We hold that No. 5 of the marshalling instruction was fully sufficient as to the element of permit and even, in some respects, went beyond the Uniform Jury Instructions of 530.8. It was permissible to put the explanation or definition of No. 5 in Instruction No. 9A submitted by the appellant's counsel.

The marshalling instruction No. 12 is virtually a verbatim restatement of the Uniform Jury Instruction No. 530.8 as approved in State vs. Watts, 223 N.W.2d 234, 236-238 (Iowa 1974).

The elements of definitions relating to the fifth element under the marshalling instruction are nearly the same situation as occurred in State vs. Conner, 241 N.W.2d 447, at 462 (Iowa 1976) where it states:

> "Defendant contends the marshalling instruction should have apprised the jury that the actions of the defendant had to be affirmative and accompanied by an intent to commit a crime.
>
> "[34,35] Although it was necessary that the marshalling instruction include all elements of the offense, State vs. Watts, 223 N.W.2d 234, 237 (Iowa 1974), it was not necessary for those elements to be defined in the same instruction. In ascertaining the sufficiency of definitions, instructions are construed together and not piecemeal. Furthermore, the trial court has the right to choose its own language to explain applicable legal principles. State vs. Robinette, 216 N.W.2d 317, 318 (Iowa 1974)."

at 463 where it states:

> "As we said in Division XV, supra, it is not essential that a marshalling instruction contain definitions or explanations of the elements which it lists. Similarly, when, as here, the marshalling instruction tells the jury all listed elements must be proved beyond a reasonable doubt, it is not necessary to repeat this principle in a separate instruction defining or explaining an element."

See also State vs. Robinette, 216 N.W.2d 317, 318 (Iowa 1974).

The second portion of Proposition No. III should be addressed as to whether or not that the trial counsel made adequate record to call the court's attention to his now alleged objection to the marshalling instruction No. 12. We hold he did not. The record reflects a good deal of solid, adequate and specific dialogue between both counsel and the court in regard to these instructions. The appellant's counsel was forceful and articulate in his objections to the instructions and the motion for a new trial which might be called for lack of a better name the mechanical or technical operations of the trial. These mechanical accouterments to the trial comprised nearly 30 pages of the appendix. Towards the conclusion of that dialogue, the appellant's counsel specifically and specially objected to Sections 1 and 5 of Instruction No. 12. These were both adopted by the court and the appellant's counsel concluded:

> "I would have nothing futher, Your Honor, except for the dictation of the proposed instruction regarding the State's burden of proof on the question of whether or not the defendant was an employee or officer of the State of Iowa."

Further conversation relating to the wording of the Instruction then appears in the record as follows:

> "THE COURT: That negatives the fact that he's either an officer or an employee.
> MR. WILLIAMS: It can be left that way, I guess; if it was worded the way I suggested, it could fit any circumstance, I suppose; in this case, it's acceptable the way Mr. Saunders has suggested, I suppose.
> THE COURT: Okay. Is that all, gentlemen?
> MR. WILLIAMS: As far as I'm concerned.
> MR. SAUNDERS: That's all I've got."

The proceedings were then recessed and either later that day or the next morning final approval of appellant's counsel's

Instruction No. 9A was given * .

The criteria and the reasons for calling the court's attention specifically to objection in the instructions were clearly set forth in State vs. Baskin, 220 N.W.2d 882, at 886 (Iowa 1974):

> "Rule 196, R.C.P., requires that objections to instructions set out the grounds for complaint. A party objecting has the duty to state what he complains of so the trial court has an opportunity to rule or correct the error which is now argued in this court. State vs. Youngbear, 202 N.W.2d 70, 72 (Iowa 1972).
>
> "In one way or another this court has frequently said an objection to an instruction given to a jury should reveal to the trial judge the purported defect to which the objecting party makes complaint and may wish to make the subject matter of attack upon appeal. The objection should be as specific and as penetrating as the stress of the trial permits. The purpose of requiring clarity of objections is not to gratify any possible whim of the trial judge, but to afford the trial judge an opportunity to catch exactly what is in counsel's mind and thereby determine whether the objection possesses merit to an extent the instruction should be recast. In short, a party, upon objecting, must make

*Instruction No. 9A As one of the elements of the offense charged, the State must establish beyond a reasonable doubt that the Defendant had no permit from the Commissioner of Public Safety to carry a weapon concealed on his person. You have previously been instructed that the only person or persons that the Commissioner of Public Safety could issue said permit to would be an employee of the State of Iowa or an Officer of the State of Iowa. It is therefore the burden of the State to prove to you beyond a reasonable doubt that the Defendant was not, at the time of the alleged commission of this crime, an employee or officer of the State of Iowa.

> known to the trial judge the specific objection which he may wish to urge upon appeal. If his objection then taken possesses merit and induces the trial judge to recast his words, a subsequent appeal is avoided. But if he does not disclose what is then in his mind, a needless appeal may be the ultimate result."

See also State vs. Overstreet, 243 N.W.2d 880, 885 (Iowa 1976); State vs. Buchanan, 207 N.W.2d 784, 787 (Iowa 1973); State vs. Lyles, 225 N.W.2d 124, 127 (Iowa 1975); State vs. Lewis, 242 N.W.2d 711, 716 (Iowa 1976); and Dutcher vs. Lewis, 221 N.W.2d 755, 759 (Iowa 1974).

The question is whether the following dialogue is sufficiently specific as an objection, and we hold it is not.

> "(Court, Counsel and defendant present in chambers.)
> THE COURT: All right, Mr. Saunders, now where do you want your proposed instruction?
> MR. SAUNDERS: I suppose it would have to be 9A.
> THE COURT: Any objection?
> MR. WILLIAMS: No, that's where it belongs.
> MR. SAUNDERS: The thing I'm still torn on, now, after that 9A goes in, is whether or not that should be in the marshalling instruction, Instruction 12.
> THE COURT: I would say you're torn too late at this point.
> MR. SAUNDERS: Yeah."

This is at the conclusion of a long and detailed discourse on the instructions where the appellant's counsel prevailed for the most part on his forceful objections. *"... I'm still torn on, ..."* is not a specific enough objection to alert the trial judge that it is a serious objection.

Thinking out loud, musing, pondering, weighing, deliberating, mediatating, mulling over, ruminating, turning over, studying, all out loud does not sufficiently alert the trial judge that it is an objection unless it is more specific and more properly designated. Obviously, the trial court did not take it as a serious objection by his response, and we see no reason for us to

rule otherwise.

The trial court is there. The trial counsel is there, and whether or not an objection is made in the spirit of levity, thinking out loud or what have you is best determined from the words themselves, at what point in the proceedings they are said and the response given. In this instance, the record does not reflect that this comment was sufficient to alert the trial judge that this was a serious objection to the instruction.

All judges concur except Oxberger, J. who concurs in the result.

AFFIRMED.