IN THE COURT OF APPEALS OF IOWA

No 5-432 / 94-1336

FILED
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CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

JEROME POWER,

Appellant.

Appeal from the Iowa District Court for Black Hawk County, William G. Klotzbach, Judge.

Power appeals the judgment and sentence entered upon his conviction, following a jury trial, of first-degree robbery. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Andi S. Lipman, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Robert P Ewald, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Thomas H. Miller, Assistant County Attorney, for appellee.

Considered by Sackett, P.J., and Habhab and Huitink, JJ.

HUITINK, J.

On March 2, 1994, Trisha Hill returned home from work at about 9 p.m. She entered her apartment building and went to retrieve her mail. As she did so, a man with a knife jumped out. The man was wearing a black knit hat, with holes cut out to create a make-shift ski mask, and a black jacket that had red letters "S F" printed on it. He held the knife about twelve inches from her and asked for her purse. Hill threw some money at the man, which included some five and one dollar bills. She then ran up the stairs to her apartment, where she called the police.

Within a few minutes, police officers saw a man wearing a black jacket with a "S F" emblem walking in Hill's neighborhood. This man was defendant Jerome Power. The officers returned Power to Hill's apartment, where she identified him as the man who had robbed her. Other police officers, who had been searching the area where Power was walking, found a knife with a three and three-fourths inch blade lying on the ground. After Power was removed from the police car, a homemade black ski mask was found under the driver's seat of the car. Power was found to have twelve dollars on him, two five-dollar and two one-dollar bills.

Power was charged with robbery in the first degree, in violation of Iowa Code sections 711.1 and 711.2. A jury found him guilty of the crime charged. The district court denied defendant's motion for judgment of acquittal. Defendant was sentenced to a term of imprisonment not to exceed twenty-five years. He now appeals.

Defendant was charged with robbery in the first degree due to the State's allegation that at the time of the robbery he was armed with a dangerous weapon. Section 702.7 defines "dangerous weapon" as follows:

> A "dangerous weapon" is any instrument or device designed primarily for use in inflicting death or injury upon a human being or animal, and which is capable of inflicting death upon a human being when used in the manner for which it was designed. Additionally, any instrument or device of any sort whatsoever which is actually used in such manner as to indicate that the defendant intends to inflict death or serious injury upon the other, and which, when so used, is capable of inflicting death upon a human being, is a dangerous weapon. Dangerous weapons include, but are not limited to, any offensive weapon, pistol, revolver, or other firearm, dagger, razor, stiletto, switchblade knife, or knife having a blade exceeding five inches in length.

Section 702.7 defines three means by which an instrument may be considered a dangerous weapon, by design, by actual use, and *per se*. A knife having a blade exceeding five inches in length is considered a dangerous weapon *per se* under the statute. Iowa Code § 702.7. The blade of the knife in the present case was less than five inches, and thus, cannot be considered a dangerous weapon *per se*.

The jury instruction in this case was based on the design and actual use definitions of a dangerous weapon. The court gave the following instruction defining the term "dangerous weapon":

> A "dangerous weapon" is any device or instrument designed primarily for use in inflicting death or injury, and when used in its designed manner is capable of inflicting death. It is also any sort of instrument or device which is actually used in such a way as to indicate the user intended to inflict death or serious injury, and when so used is capable of inflicting death.

Defendant contends he is entitled to a new trial because the district court erred by including the design alternative in the jury instructions. The State agrees the language concerning the design alternative should not have been submitted to the jury. A knife with a blade length less than the length required to be considered a dangerous weapon *per se* should be considered a dangerous weapon only on a showing of its actual use as a dangerous weapon. *State v. Durham*, 323 N.W.2d 243, 245 (Iowa 1982).

The trial court has the duty to instruct the jury as to the law on all material issues supported by the evidence. *State v. Watkins*, 463 N.W.2d 15, 17 (Iowa 1990). Giving an instruction without a factual basis is generally prejudicial. *State v. Horstman*, 222 N.W.2d 427, 431 (Iowa 1974). On appeal, we will not disturb a trial court's ruling on instructions absent an abuse of discretion. *State v. Webb*, 516 N.W.2d 824, 831 (Iowa 1994). Moreover, any error in jury instructions must be prejudicial to warrant reversal. *Id.*

Although the jury instruction given in this case included the design alternative of the definition of a dangerous weapon, which was not supported by the evidence, we find the instruction did not constitute reversible error.

In the case of *State v. Franklin*, 368 N.W.2d 716, 720 (Iowa 1985), the trial court gave a general definition of a dangerous weapon and refused defendant's request to limit that definition to the specific weapon involved in the case, a machete. The

supreme court concluded any error in giving the instruction was harmless because there was no argument in the case about any other weapons. *Id.* at 720-721. We find a similar situation exists in the present case. Neither defendant nor the State presented any evidence concerning the design of the knife. We conclude any error in the jury instructions was harmless.

Furthermore, we find overwhelming evidence was presented to support defendant's conviction under the actual use alternative in the definition of a dangerous weapon. Under the actual use alternative, a dangerous weapon is:

> any instrument or device of any sort whatsoever which is actually used in such a manner as to indicate that the defendant intends to inflict death or serious injury upon the other, and which, when so used, is capable of inflicting death upon a human being.

Iowa Code § 702.7.

Hill testified defendant pointed the knife at her and held it about twelve inches from her. She stated defendant twice told her he did not want to hurt her. She testified she interpreted this as a threat and that defendant meant he would hurt her if she did not give him her money. We find this is sufficient evidence to support the jury's conclusion that defendant used the knife in a such a manner to indicate he intended to inflict death or serious injury on Hill. Also, by examining the knife, the jury could conclude it was capable of inflicting death.

We determine defendant is not entitled to a new trial based on his claim of error in the jury instructions.

Defendant has also raised a claim that there was insufficient evidence presented to support his conviction. In particular, he claims the State failed to show he possessed a dangerous weapon at the time of the robbery. We have already found there was overwhelming evidence that the knife used in this case was a dangerous weapon under the actual use alternative. We conclude there was sufficient evidence in the record to support defendant's conviction.

We affirm defendant's conviction for robbery in the first degree. Costs of this appeal are assessed to defendant.

AFFIRMED.