

IN THE COURT OF APPEALS OF IOWA

FILED

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CLERK SUPREME COURT

STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

THURMON ROBERT MILLS, JR.,)

Defendant-Appellant.)

8-531
87-872

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Appeal from the Iowa District Court for Black Hawk County (Fayette 41137), James L. Beeghly, Judge.

Defendant appeals from his conviction and sentence, following a jury trial, for first-degree robbery and first-degree theft. **AFFIRMED.**

William L. Wegman, State Public Defender, and Barbara M. Anderson, Assistant State Public Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Ann E. Brenden, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson and Schlegel, JJ.

SCHLEGEL, J.

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Defendant Thurmon Robert Mills appeals his conviction and sentence, following a jury trial, for first-degree robbery and first-degree theft. On appeal, he contends that: (1) he was denied effective assistance of counsel when his trial attorney failed to assert a double jeopardy challenge to the robbery charge; (2) the district court erred by improperly admitting certain evidence at trial; and (3) the trial court failed to exercise proper discretion in imposing consecutive sentences. We affirm.

Following an armed holdup of a bank, the defendant, Thurmon Mills, Jr., was charged with a variety of robbery, theft, and assault crimes in an eleven-count trial information. His first trial ended in a hung jury after the district court had entered a judgment of acquittal on nine of the eleven counts. In a second trial, the remaining two counts--first-degree robbery and first-degree theft--were submitted to a jury that found Mills guilty as charged. The district court sentenced him to twenty-five years imprisonment for robbery and ten years for theft, the terms to run consecutively.

I. Mills first contends that he was denied ineffective assistance of counsel because his trial attorney failed to challenge the robbery charge on double jeopardy grounds. Mills claims that since he was acquitted of charges of assault while participating in a felony at his first trial,

his subsequent prosecution and judgment on the greater offense of first degree robbery subjected him to double jeopardy. Mills claims that he was denied effective assistance of counsel by reason of counsel's failure to object and thus preserve his double jeopardy claim.

Our ultimate concern in claims of ineffective assistance of counsel is with the "fundamental fairness of the proceeding whose result is being challenged." State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987), quoting Strickland v. Washington, 466 U.S. 668, 696, 104 S.Ct. 2052, 2069, 80 L.Ed.2d 674, 699 (1984). We review de novo the totality of the circumstances relating to counsel's conduct, keeping in mind the presumption that counsel performed competently. Risdal, 404 N.W.2d at 132. The burden is on the defendant to prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. State v. Losee, 354 N.W.2d 239, 243 (Iowa 1984). "Reasonableness under prevailing professional norms" is the standard by which we measure counsel's performance. Risdal, 404 N.W.2d at 132. A finding of prejudice requires proof of a "reasonable probability that but for counsel's unprofessional errors, the result would have been different." State v. Hildebrant, 405 N.W.2d 839, 841 (Iowa 1987) (emphasis added).

Ordinarily, the record on a direct appeal is insufficient to allow us to adjudicate a claim of ineffective assistance of counsel. State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978). In the present case, however, we believe the record is adequate to allow us to adjudicate the matter of trial counsel's effectiveness, and we believe nothing would be gained by requiring a further hearing on the subject. State v. Schoelerman, 315 N.W.2d 67, 71 (Iowa 1982).

In our review of the ineffective assistance of counsel claim, we find that it is more efficient in this situation to first consider the prejudice prong of the test which necessarily requires an examination of the underlying legal principles upon which the ineffectiveness claim is based. See Hildebrant, 405 N.W.2d at 841. Mills' complaint is that his counsel failed to timely raise the double jeopardy claim. The fifth amendment provision that no person shall be "subject for the same offense to be twice put in jeopardy of life or limb" protects against both multiple prosecutions and multiple punishments for the same offense. State v. Jeffries, 430 N.W.2d 728, 734 (Iowa 1988) (citing North Carolina v. Pearce, 359 U.S. 711, 717, 89 S.Ct. 2072, 2076, 33 L.Ed.2d 656, 664-65 (1969)). As the court in Jeffries further noted:

The lesser-included offense doctrine comes into play in determining what is a "same offense" for double-jeopardy purposes. Ex parte Nielsen, 131 U.S. 176, 188, 9 S.Ct. 672, 676, 33 L. Ed. 118, 122 (1889). According to Nielsen, if an offense

is a lesser-included one of the offense charged, a conviction or acquittal of the charged offense bars a subsequent prosecution of the lesser offense. Id. Further, a conviction or acquittal of the lesser-included offense bars a subsequent prosecution of the greater offense.

Jeffries, 430 N.W.2d at 734.

In Jeffries, decided only recently, our supreme court provided a modified approach to the lesser-included offense doctrine. Prior to Jeffries, our approach in Iowa to lesser-included offenses involved a two-part legal-factual t e s t :

The legal or element test requires the lesser offense to be composed solely of some but not all of the elements of the greater offenses. Thus the lesser offense is necessarily included in the greater offense if the greater offense cannot be committed without also committing the lesser. Conversely, if the lesser offense contains an element that is not part of the greater offense, the lesser cannot be included in the greater. The factual test requires the court to determine whether there is a sufficient factual basis in the record for submitting the included offense.

State v. Lampman, 345 N.W.2d 142, 143 (Iowa 1984) (citations omitted). Jeffries modified this approach by retaining the legal test, and stated that when the legal test is met, the factual test is met as a matter of law, with two exceptions. "The first exception occurs when the defendant stipulates to the dissimilar elements in the greater offense. The second exception occurs when a statute makes an offense, which is not necessarily included, a lesser-included offense." Jeffries, 430 N.W.2d at 741. It is clear that neither of these exceptions apply in the instant case.

In determining the elements of the greater offense, we look to the statute defining the greater offense and, if it is defined alternatively, to the alternative involved in the particular prosecution. See State v. Sangster, 299 N.W.2d 661, 663 (Iowa 1980). "To satisfy the legal test, the minor offense must be an elementary part of the major offense." Id. Furthermore, the elements of the offense are determined by the statute, not the charge or evidence. Id. In the case at bar, the robbery charge which is the subject of this appeal is defined alternatively as follows:

A person commits a robbery when, having the intent to commit a theft, the person does any of the following acts to assist or further the commission of the intended theft or the person's escape from the scene thereof with or without the stolen property:

1. Commits an assault upon another.
2. Threatens another with or purposely puts another in fear of immediate serious injury.
3. Threatens to commit immediately any forcible felony.

Iowa Code § 711.1 (1985). The State sought to establish defendant's guilt under all three alternatives.

When the elements of the major offense are identified, the next inquiry is whether the elements of the lesser offense are included in them. Under Iowa Code section 708.1, a person commits an assault when "without justification, the person does" either:

- (1) [a]ny act which is intended to cause pain or injury to, or which is intended to result in physical contact which will be insulting or offensive to another, coupled with the apparent ability to execute the act,

(2) [a]ny act which is intended to place another in fear of immediate physical contact which will be painful, injurious, insulting, or offensive, coupled with the apparent ability to execute the act, or

(3) [i]ntentionally points any firearm toward another, or displays in a threatening manner any dangerous weapon toward another.

§ 708.1 (1)-(3).

The Iowa Supreme Court has repeatedly held that assault is a lesser-included offense of robbery as defined by section 711.1(1), the assault alternative, see State v. Johnson, 328 N.W.2d 918, 920 (Iowa 1983); State v. Wales, 325 N.W.2d 87, 89-90 (Iowa 1982). "This is because section 711.1(1) proscribes robbery where a person 'commits an assault upon another.' In a prosecution solely under section 711.1(1), therefore, a person could not commit a robbery without necessarily committing an assault." We believe that Jeffries dictates the same result.

In cases where the other two definitions of robbery have been charged, however, the supreme court has held that neither 711.1(2) nor 711.1(3) carry assault with them as lesser-included offenses under the legal test. "[B]y threatening another with immediate serious injury, an assault is not necessarily committed. A mere threat, without more, is not necessarily an assault by placing another in fear." State v. Law, 306 N.W.2d 756, 759 (Iowa 1981). "[Assault] would not necessarily be included in the [§ 711.1(3)] alternative either." Wales, 325 N.W.2d at 90.

In the case at bar, the jury was charged as to the first two definitions of robbery, sections 711.1(1) and 711.1(2). Assuming that assault while participating in a felony (section 708.1(3)) is a lesser-included offense of robbery under Jeffries, the double jeopardy clause barred reprosecution of that alternative definition of robbery. However, in this case, it is far from clear that defendant's entire prosecution would have failed but for counsel's failure to object to the assault alternative of the robbery charge in light of overwhelming evidence in the record which supports the threat alternative of the robbery charge. The record is clear that Mills threatened to shoot the bank teller and a customer if they didn't cooperate with him. The record also shows that Mills threatened both women at gunpoint. In light of the record, we cannot say that but for counsel's alleged error, Mills' conviction of first degree robbery would have failed.

II. Mills next contends that the district court erred in two evidentiary rulings. He alleges that the court was in error in admitting into evidence various weapons found in his car that were not used in the commission of the robbery. He also argues that the court should have excluded evidence concerning a conversation he had with a police officer about other bank robberies in the area. We consider each claim separately.

A. Weapons. A police search of defendant's vehicle revealed a large knife, an operational stungun, an empty box for a .22 caliber revolver, and a box of empty .32 caliber bullets. Prior to trial defendant filed a motion in limine asking the trial court, among other requests, to suppress this evidence. The court denied defendant's request as to this evidence and stated: "To the extent that Defendant's Motions in Limine are overruled by this Order, the Plaintiff's evidence remains subject to any appropriate objections at the time of trial." Defendant's counsel objected to the admission of the stungun and the box of empty .32 caliber shells at trial, but failed to object to the remaining items.

The general rule as announced in State v. Garrett, 183 N.W.2d 652, 654 (Iowa 1971), is that the granting or rejecting of a motion in limine is not reversible error. The error occurs, if at all, when the matter is presented at trial. An objection should then be made in order to preserve error on appeal. State v. Harlow, 325 N.W.2d 90, 91 (Iowa 1982) (citing Garrett, 183 N.W.2d at 654). The supreme court has recognized an exception to this general rule, however, and has said that a defendant need not renew his objections at trial if the prior ruling amounts to an unequivocal holding concerning the issue raised. State v. Mark, 286 N.W.2d 396, 410 (Iowa 1979). In the case at bar, defense counsel failed to object to the introduction of the

fillet knife and an empty .22 caliber revolver box. We thus deem defendant's objection to these items on appeal waived. The record does indicate that counsel properly objected to the introduction of the stungun and the empty box of .32 caliber bullets, however, and error was preserved with respect to to these items.

In our determination of this issue, we note that trial court has considerable discretion in determining the admissibility of demonstrative evidence. State v. Badgett, 167 N.W.2d 680, 688 (Iowa 1969). On the record in this case, we cannot say that the court abused its discretion in overruling counsel's objections to the empty box of .32 caliber ammunition, as sufficient proof exists in the record to justify a reasonable inference that a weapon compatible with this type of ammunition may have been used in the commission of the offense. See State v. Fuhrmann, 257 N.W.2d 619, 623 (Iowa 1977). We believe that the court's admission of the stungun, however, was error, under the general rule that weapons not used, or not reasonably thought to have been used in the offense are inadmissible. Id. Despite this error, we find that defendant's case was not prejudiced by this admission, and that such error was harmless. See State v. Freeman, 297 N.W.2d 363, 367 (Iowa 1980) (harmless error may be found where overwhelming evidence of guilt exists in record).

2. Conversation with police officer. Mills also claims that the trial court erred in admitting evidence of a conversation he had in 1986 in which he discussed other bank robberies in northeast Iowa with a police officer. At trial, defendant objected to this testimony on relevancy grounds and his objection was overruled. On appeal, Mills claims that such evidence "fueled speculation" as to his possible involvement in the other robberies, and severely prejudiced him at trial. Under the principles announced in Freeman, supra, any such error was harmless in light of the overwhelming amount of evidence in the record of defendant's guilt.

III. Mills last claims that the trial court failed to exercise discretion in imposing consecutive sentences. He claims that the court's statement of reasons for sentence "suggests that the court felt its discretion was limited or nonexistent" with respect to the issue of consecutive sentencing.

Under Iowa Code section 901.8, it is clear that the judge in this case had the discretion to order that the defendant's sentences for first-degree robbery and first-degree theft run either consecutively or concurrently. Iowa Code § 901.8 (1985). Where a court has discretion in a sentencing matter, the court must state its reasons on the record for a particular sentence. See State v. Beaver, 429 N.W.2d 778, 779-80 (Iowa App. 1988). The

Iowa Supreme Court has held that failure to comply with this requirement deprives the reviewing court of adequate means of resolving an abuse of discretion claim. State v. Leudtke, 279 N.W.2d 7, 8 (Iowa 1979).

In the case at bar, we agree with the defendant that the trial judge appeared to be somewhat confused as to the amount of discretion he possessed. At the sentencing hearing, the trial court stated:

In making this judgment and sentence, I have considered many factors; among them I have considered, of course, the fact that I don't have a lot of discretion with respect to whether it is consecutive or concurrent. . . .

Under section 901.8, we conclude that the court clearly had discretion in this matter, and the court's failure to exercise the discretion granted it by law requires that the case be remanded for resentencing. See Beaver, 429 N.W.2d at 780.

The defendant's conviction is affirmed. The sentence is vacated and remanded for resentencing.

SENTENCE VACATED AND REMANDED FOR RESENTENCING.