

OCT 19 1978

42

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

)

Appellee,

)

Filed October 19, 1978

vs.

)

JAMES DAVID AMPEY, JR.,

)

631

61376

Appellant.

)

Appeal from Linn District Court - Harold J. Swailes and H. D. Viator, Judges.

Defendant appeals his conviction of the crime of robbery with aggravation asserting the trial court erred in instructing that a sawed-off shotgun is a dangerous weapon as a matter of law and in overruling his motion to suppress his incriminating statements. - Affirmed.

John M. Heckel, of Faches, Klinger & Gloe, Cedar Rapids, for Appellant.

Richard C. Turner, Attorney General of Iowa, Lona Hansen, Assistant Attorney General, and Lew Eells, Assistant Linn County Attorney, for Appellee.

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

PER CURIAM

Defendant James David Ampey, Jr., appeals his conviction by jury of the crime of robbery with aggravation in violation of §§ 711.1 and 711.2, The Code. On appeal defendant argues the trial court erred in instructing the jury that a sawed-off shotgun is a dangerous weapon as a matter of law. He also argues that a misleading statement by one of the State's witnesses at the hearing on his motion to suppress was prejudicial and requires a reversal.

One of the elements of the crime of robbery with aggravation is that defendant or a confederate be armed "with a dangerous weapon". Sections 711.1-2, The Code. In the instant case, the trial court instructed the jury that a sawed-off shotgun was a dangerous weapon as a matter of law. In *State v. Lawr*, 263 N.W.2d 747, 750-1 (Iowa 1978), the supreme court while considering the issue of whether a starter's pistol was a dangerous or deadly instrument within the meaning of § 695.1, The Code, stated: "Penal statutes are strictly construed. Doubts are resolved in favor of the accused."

The *Lawr* court went on to say, in holding that a starter's pistol was not a dangerous instrument, that the specific instruments mentioned in § 695.1 "all are instruments which in their intended or readily-adaptable use are likely to produce death or serious bodily injury. A starter's pistol is not of the same kind, class, character or nature. It is not a weapon per se and may not readily be used to cause death or serious bodily injury." See also *State v. Arpino*, 24 Conn. Sup. 85, 1 Conn. Cir. 412, 186 A.2d 827, 830 (1962) (a dangerous or deadly weapon is one which, when used in the ordinary manner contemplated by its design and construction, will, or is likely to cause death or great bodily injury).

In *State v. Ashland*, 259 Iowa 728, 145 N.W.2d 910 (1966), the supreme court held it was not error for the trial court to instruct that a gun, pistol or revolver as a matter of law constitutes a dangerous weapon in a prosecution under § 711.2, The Code. The court stated "when the trial court told the jury that a pistol or revolver is a dangerous weapon he stated a fact recognized by the law and the factual experience of mankind." The court did not invade the province of the jury. 259 Iowa at 731. It found those two items had been specifically classified as dangerous

weapons by the legislature. 259 Iowa at 730; section 695.2, The Code.

In *State v. Hill*, 258 Iowa 932, 935-6, 140 N.W.2d 731 (1966), the court discussed the dangerous nature of the weapons enumerated in § 695.2. It stated "there are many articles and instruments other than those specifically named in that section which might properly come within the scope of an 'offensive or dangerous weapon' if they were used or carried for use as weapons." The court then listed pocketknives, razors, hammers, screwdrivers, ice picks, hatpins, chains and many other items, which are manufactured and generally used for peaceful and proper purposes. Whether or not these items fall within the category of offensive or dangerous weapons depends upon the use which the carrier made or intends to make of them. 258 Iowa at 936.

In *Hill*, the court distinguished weapons which carry their dangerous character because so designed and which are classified as dangerous per se, such as hand grenades or bombs, from other instruments, such as those listed above, which are not dangerous weapons unless turned to offensive or defensive purposes. The test is whether the instrument was used as a weapon or intended for such use. Under § 695.2, it becomes a question of fact for the jury. *Hill, supra*.

A review of the above authorities convinces us that in the instant case the trial court was justified in instructing a sawed-off shotgun is a dangerous weapon as a matter of law. A shotgun is readily adaptable and likely to produce death or serious bodily injury when used for other than hunting or target purposes. *Lawr, supra*. Further, it is designed and constructed to do so. *See State v. Luckey*, 322 N.E.2d 354, 358 (Ohio Ct. App. 1974) (When a firearm used in a robbery is designed to inflict serious bodily injury such as a pistol, rifle or shotgun, such weapon is dangerous per se). Finally, in the instant case, the weapon was a "sawed-off" shotgun. The inherent dangerousness and lack of sporting utilization of a sawed-off shotgun is a fact recognized by law and the experiences of mankind. *Ashland, supra*. *See also People v. Emerling*, 341 Ill. 424, 173 N.E. 474, 476 (1930) (sawed-off shotgun is per se a dangerous weapon); *Turner v. State*, 201 Tenn. 562, 565, 300 S.W.2d 920, 921 (1957) (sawed-off shotgun is a deadly weapon). The trial court did not err.

Ampey's final contention on appeal is that because a witness for the State

made a misleading statement at the suppression hearing, the trial court was unable to fully appreciate his position in regard to his motion to suppress and as a result he suffered prejudice. When a criminal defendant challenges the voluntariness of statements made to the police, being the result of a deceptive promise, a Miranda question arises. Since that assignment of error presents federal constitutional issues, we make an independent evaluation of the totality of the circumstances from which the assertion of unconstitutionality arises. We review the evidence de novo. *State v. Russell*, 261 N.W.2d 490, 492 (Iowa 1978); *State v. Snethen*, 245 N.W.2d 308, 311 (Iowa 1976). Because Ampey's claim is tantamount to a Miranda issue, we review the evidence of the suppression hearing de novo, taking into account the revised statement of Detective Rosdail made at the time of trial.

The State has the burden of proving by a preponderance of the evidence that any waiver or statement made after a Miranda warning was knowingly, voluntarily and intelligently made. See *Russell*, *supra*; *State v. Hilipre*, 242 N.W.2d 306, 311 (Iowa 1976); *State v. Cooper*, 217 N.W.2d 589, 597 (Iowa 1974). At the suppression hearing, defendant attempted to suppress incriminating statements made after his arrest. Ampey stated he had been offered money by Detectives Rosdail and Millsap to implicate others in the robbery, and that because of his need for money, he made the statement to the police.

On rebuttal, Detective Millsap denied any offer of money was made and stated to his knowledge, no money was available to pay persons giving information except perhaps through federal funds for informants in drug related cases. At the full trial, Detective Rosdail stated on cross-examination that department money had been paid to an informant in this case, but not until after defendant was arrested and had made the admissions implicating himself in the crime. Rosdail stated the other names given by defendant confirmed the same information received from the informant earlier.

Defendant claims this mistatement as to the availability of police department money seriously detracted from the credibility of his testimony in support of suppression. Further, it was Judge Swailes who presided at the suppression hearing when the misleading statement was made and not Judge Viotor, who presided at the trial when Rosdail corrected the court's impression of the availability of money to

pay informants. Finally, defendant argues his prejudice was heightened by the fact that Vietor, the trial judge, relied on Judge Swailes' suppression ruling when Ampey renewed his objection where the statements were offered.

We find the trial court correctly determined that the State met its burden of proving the voluntariness of defendant's statements by a preponderance of the evidence. Russell, supra. There is nothing in the record which indicates defendant's admissions were the result of deceptive promises or coercion. Although Detective Millsap unintentionally misinformed the court as to the existence of funds for the payment of informants, defendant was not prejudiced. The issue before the trial court and before this court on our de novo review is whether or not the police promised defendant money in return for implicating statements. The issue of whether or not departmental funds existed for fulfilling the alleged promise is immaterial. The trial court had the problem of determining whether the promise was made and the State sustained its burden of proving it was not.

Affirmed.