

IN THE COURT OF APPEALS OF IOWA

No. 9-016 / 97-2325

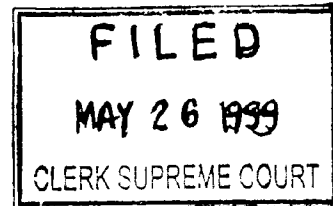
STATE OF IOWA,

Appellee,

vs.

JOHN H. LOWERY,

Appellant.



Appeal from the Iowa District Court for Polk County, Richard G. Blane, II,
Judge.

John Lowery appeals from his conviction and sentence for first-degree robbery. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, John P. Sarcone, County Attorney, and Nan Horvat, Assistant County Attorney, for appellee.

Heard by Huitink, P.J., and Vogel, and Zimmer, JJ. Sackett, C.J., takes no part.

ZIMMER, J.

Defendant-appellant John Lowery appeals his conviction and sentence for first-degree robbery in violation of Iowa Code sections 711.1 and 711.2 (1997). We affirm.

Lowery and Andre Bonner allegedly robbed a hotel on July 6, 1997. Bonner was the primary participant; he struck a hotel employee and possessed a gun during the commission of the crime.

Prior to trial, Lowery filed a motion in limine to preclude any reference to a BB gun found in the vehicle used to drive to and flee from the scene of the crime. The court denied the motion, and over a relevancy objection at trial, the gun was admitted.

At trial, the assaulted employee identified Lowery and Bonner as participants in the crime. Lowery testified he believed Bonner was going to rob the hotel. He stated he went into the hotel with Bonner because he was scared of Bonner and because Bonner had a gun. He stated he did not encourage or approve of the robbery, and had no intent to participate in the robbery when he entered the hotel.

Before the jury began its deliberations, the trial court instructed it as to the elements of first-degree robbery, aiding and abetting, and the compulsion defense. Defense counsel objected to the compulsion instruction, claiming it was an incorrect statement of the law. Defense counsel's objection was overruled.

The jury subsequently returned a guilty verdict on the crime of first-degree robbery. The court sentenced Lowery to an indeterminate twenty-five-year prison

term. He was ordered to serve 100 percent of his sentence pursuant to Iowa Code section 902.12.¹

Lowery now appeals. He argues the compulsion instruction is a misstatement of the law and the trial court erred in submitting it to the jury. He further argues the court erred in admitting the BB gun evidence. He finally argues the “85%” rule is unconstitutional. Lowery alternatively argues that in the event error has not been preserved with regard to the evidentiary and constitutional challenges, his counsel was ineffective for failing to timely challenge the admission of the evidence and for failing to raise the constitutional question at trial.

I. Scope of Review. We review the trial court’s determination regarding jury instructions for errors at law. *See* Iowa R. App. P. 4; *State v. Breitbach*, 488 N.W.2d 444, 449 (Iowa 1992). Evidentiary matters are generally reviewed for abuse of discretion. *See State v. Kjos*, 524 N.W.2d 195, 196 (Iowa 1994). Constitutional challenges are reviewed de novo, considering the totality of the circumstances. *See State v. Predka*, 555 N.W.2d 202, 204 (Iowa 1996).

II. Compulsion Defense Jury Instruction. Defendant argued at trial that he was compelled to participate in the robbery because he feared Bonner would otherwise seriously injure him. Before deliberations began, the jury was instructed Lowery could be found guilty of first-degree robbery so long as he did not act under

¹ This is referred to as the “85%” rule because section 903A.2 allows an inmate to receive good-time credit up to fifteen percent of the inmate’s sentence.

compulsion by another. Lowery's defense is based on Iowa Code section 704.10, which provides:

No act, other than an act by which one intentionally or recklessly causes physical injury to another, is a public offense if the person so acting is compelled to do so by another's threat or menace of serious injury, provided that the person reasonably believes that such injury is imminent and can be averted only by the person doing such act.

Iowa Code § 704.10 (1997).

The jury was instructed as to the defense of compulsion via jury instruction No. 27. That instruction reads:

The Defendant claims that at the time and place in question, he was acting under compulsion.

When a person is compelled to act by another's threat of serious injury, and reasonably believes the injury is about to take place and can be avoided only by doing the act, then no crime has been committed by the person so compelled. If you find that during the crime, the Defendant or a person he aided or abetted, intentionally or recklessly caused a physical injury to Misty Bond, Defendant is not entitled to the defense of compulsion.

This jury instruction also implicates Iowa Code section 703.1, which provides:

All persons concerned in the commission of a public offense, whether they directly commit the act constituting the offense or aid and abet its commission, shall be charged, tried and punished as principals. The guilt of a person who aids and abets the commission of a crime must be determined upon the facts which show the part the person had in it, and does not depend upon the degree of another person's guilt.

The jury was instructed Lowery could be found guilty of first-degree robbery if he either directly committed the crime or aided and abetted in its commission. The

aiding and abetting statute was explained in jury instruction No. 26, which reads in pertinent part:

All persons involved in the commission of a crime, whether they directly commit the crime or knowingly “aid and abet” its commission, shall be treated the same way.

“Aid and abet” means to knowingly approve and agree to the commission of a crime, either by active participation in it or by knowingly advising or encouraging the act in some way before or when it is committed. Conduct following the crime may be considered only as it may tend to prove the Defendant’s earlier participation. Mere nearness to, or presence at, the scene of the crime, without more evidence, is not “aiding and abetting.” Likewise, mere knowledge of the crime is not enough to prove “aiding and abetting.”

Lowery argues jury instruction No. 27 did not accurately reflect the law of compulsion in Iowa.² He claims an aider and abettor does not lose the defense of compulsion simply because the person allegedly forcing participation in the crime physically injures a third person during the commission of that crime. Lowery contends the instruction should have only stated that if Lowery intentionally or recklessly caused a physical injury to Misty Bond, then he is not entitled to the defense of compulsion. Lowery claims any injurious acts committed solely by Bonner should not impact his own ability to claim compulsion.

When a single jury instruction, or a part of one, is challenged, it is not reviewed in isolation, but rather in the context of the charge as a whole. *State v. Hibdon*, 505 N.W.2d 502, 506 (Iowa App. 1993) (citing *Elam v. Nix*, 951 F.2d 890,

² Jury instruction No. 26 mirrors Iowa Criminal Jury Instructions 200.8. Lowery does not contend instruction No. 26 is an inaccurate statement of the law.

891 (8th Cir. 1991)). On appeal, we review the adequacy of jury instructions by reviewing **them** as a whole. *Id.* at 506 (citing *United States v. McQuarry*, 726 F.2d 401, 402 (8th Cir. 1984)). Instructions are reviewed in their entirety, not piecemeal; it is sufficient if an instruction states the applicable law so that a jury composed of non-lawyers can understand it. *See State v. Morrison*, 368 N.W.2d 173, 175–76 (Iowa 1985).

We agree the more limited instruction suggested by Lowery would be consistent with section 704.10. However, we do not agree that the instruction actually given was not also a correct statement of the law when read in conjunction with the other jury instructions also given.

Lowery apparently argues the compulsion instruction implies an aider and abettor loses the defense of compulsion when the principal physically injures a third party during commission of the crime. However, we refrain from considering this argument because we believe Lowery mischaracterizes instruction No. 27. When read in conjunction with the other jury instructions used in this case, the instruction on compulsion does not mean that an aider and abettor loses the compulsion defense *because* the principal physically injures someone. Rather, a person found to be an aider and abettor loses the justification defense of compulsion simply because he is an aider and abettor. Under Iowa law, an aider and abettor is someone who *knowingly approves* of and agrees to commit a crime. An aider and abettor assents to or lends countenance and approval to a criminal act either by active participation in it or by in some manner encouraging it prior to or at the time of its commission.

See State v. Phams, 342 N.W.2d 792, 796 (Iowa 1983); *State v. Speaks*, 567 N.W.2d 629, 632 (Iowa App. 1998). Thus, by definition, a person found to be an aider and abettor cannot be someone compelled to participate in a crime. Therefore, in the context of the instructions given in this case, Lowery does not lose the defense of compulsion because a person he aids and abets physically injures a third person. Rather he loses the defense simply because he is an aider and abettor. We determine the district court did not err in its compulsion instruction.

III. Admission of BB Gun Evidence. Defendant claims the trial court abused its discretion in overruling a motion in limine to bar evidence of a BB gun found in the trunk of defendant's car. He alternatively argues counsel was ineffective for failing to timely file the motion in limine which was offered the day of trial.

Defendant argued in his motion in limine the BB gun was evidence seriously prejudicial to the defendant's right to a fair trial. In overruling Lowery's motion, the trial court apparently found the weapon was not so prejudicial as to warrant exclusion without first further examining its relevancy. It therefore overruled defendant's motion, but reserved the final question of admissibility until defense counsel could offer background and foundation at trial. The court stated it would rule on the relevancy of the evidence at that time and thereafter make a final determination as to admissibility.

At trial, the State offered the weapon in conjunction with testimony detailing the contents of defendant's car when he was first detained by the police. The BB gun was found along with clothing and a revolver used by Bonner during the robbery.

Defendant objected to the BB gun on relevance grounds. The trial court overruled the motion and admitted the gun into evidence.

The State argues defendant has not preserved error on this issue because defendant's motion was filed the day of trial in violation of the criminal procedure rules. *See* Iowa R. Crim. P. 10(4) (motions in limine shall be filed when grounds therefore reasonably appear but not later than nine days before the trial date). The State, however, did not object to the motion as untimely, and the trial court overruled the motion on the merits. At trial, defendant renewed his objection to the evidence, claiming lack of relevancy. The State claims defendant should have objected that the evidence was unduly prejudicial in order to preserve error on the motion. However, the trial court's initial ruling on the motion clearly indicated it did not believe the evidence to be unduly prejudicial. We therefore determine error was preserved with regard to the claim of undue prejudice under the initial ruling and that defendant did not need to object again at trial on undue prejudice grounds. *See State v. Edgerly*, 571 N.W.2d 25, 29 (Iowa App. 1997) (a ruling a motion in limine reaching the ultimate issue of admissibility shall be considered a final ruling and objection need not be renewed at trial).

In addition, the court plainly stated it would review admissibility at trial on relevancy grounds. At trial, defendant objected accordingly. We determine error has also been preserved on defendant's claim the evidence was improperly admitted over his relevancy objections.

In reviewing a trial court's evidentiary ruling for abuse of discretion, we will not reverse that ruling unless the court acted for reasons or on grounds untenable or clearly unreasonable. *See State v. Privitt*, 571 N.W.2d 484, 486 (Iowa 1997). Relevancy of evidence is a question generally left to the trial court's discretion, guided primarily by the rule that relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." *See Iowa R. Evid.* 401; *State v. Tracy*, 482 N.W.2d 675, 680–81 (Iowa 1992). The trial court need simply be satisfied there exists a minimum level of logical connection between the offered evidence and the fact to be proven. *See State v. Waters*, 515 N.W.2d 562, 566 (Iowa App. 1994) (citing *State v. Tracy*, 482 N.W.2d at 680–81). Relevant evidence may be admitted so long as its probative value is not "substantially outweighed by the danger of unfair prejudice." *See Iowa R. Evid.* 403; *State v. Plaster*, 424 N.W.2d 226, 231–32 (Iowa 1988).

To meet its burden on the charges against defendant, the State was required to prove he had the specific intent to commit a theft, and that he aided and abetted Bonner in assaulting Misty Bond and escaping the scene. Finding the gun in the trunk of defendant's car, along with other items used in the robbery, was clearly relevant in determining whether defendant was involved in the preparation and planning of the robbery.

Furthermore, we determine this probative value was in no way overshadowed by the danger of unfair prejudice. There is no evidence defendant used the gun during

the robbery or that the gun was even loaded. We do not believe the challenged evidence is of the type that would necessarily lead the jury to convict him on an improper basis. See *State v. Bayles*, 551 N.W.2d 600, 607–08 (Iowa 1996); *State v. Plaster*, 424 N.W.2d at 231 (unfairly prejudicial evidence is evidence which “appeals to the jury’s sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action caus[ing] a jury to base its decision on something other than established propositions in the case”). The trial court did not abuse its discretion. Its ruling admitting the BB gun into evidence is therefore affirmed.

Because we find error has been adequately preserved we need not consider defendant’s alternative claim of ineffective assistance.

IV. Constitutionality of the “85%” Rule. Defendant argues Iowa Code section 902.12(4) constitutes cruel and unusual punishment and is a violation of equal protection.

A. Error Preservation. The State contends error has not been preserved on defendant’s constitutional claims. Defendant contends his sentence is illegal and void therefore immune from our normal error preservation rules. See Iowa R. Crim. P. 23(5)(a) (an illegal sentence may be corrected at any time); *State v. Austin*, 503 N.W.2d 604, 607 (Iowa 1993) (holding the requirement of error preservation does not bar review on appeal “when the appeal is from an illegal or void sentence”).

A sentence is illegal because it is “beyond the power of the court to impose.” *State v. Wilson*, 294 N.W.2d 824, 825 (Iowa 1980); accord *State v. McCright*, 569

N.W.2d 605, 608 (Iowa 1997). Thus, illegal sentences are excluded from our error preservation principles in those situations where “a trial court has stepped outside the codified boundaries of allowable sentencing.” *State v. Ceaser*, 585 N.W.2d 192, 195 (Iowa 1998) (citing *State v. Halliburton*, 539 N.W.2d 339, 343 (Iowa 1995)).

While defendant’s sentence may be subject to a constitutional challenge it is not illegal. Here, “the trial court is not criticized for *departing* from the sentencing authorized by law, but rather for sentencing [defendant] *in accordance with* the law.” *See State v. Ceaser*, 585 N.W.2d at 195. Defendant’s constitutional challenges are therefore subject to our normal error preservation rules.

Upon review of the record, we find no indication defendant challenged in district court the constitutionality of section 902.12(4). We determine error has not been preserved on either the cruel and unusual punishment or equal protection claims. *See State v. Kinkead*, 570 N.W.2d 97, 102 (Iowa 1997).

We nevertheless consider Lowery’s constitutional challenges because they inhere in his alternative claim of ineffective assistance of trial counsel. *See State v. Mulder*, 313 N.W.2d 885, 891 (Iowa 1981); *State v. Thai*, 575 N.W.2d 521, 525 (Iowa App. 1997).

B. Ineffective Assistance of Counsel. Because ineffective assistance of trial counsel claims implicate constitutionally guaranteed rights to counsel, we review the totality of circumstances de novo. *See State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987). We will find ineffective assistance only where defendant proves by a preponderance of evidence trial counsel failed to perform an essential duty and

prejudice resulted therefrom. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674, 693 (1984); *State v. Arne*, 579 N.W.2d 326, 328–29 (Iowa 1998). To prove trial counsel failed in performing an essential duty, defendant must show “his attorney’s performance fell outside the normal range of competency.” *State v. Henderson*, 537 N.W.2d 763, 765 (Iowa 1995). Prejudice is established by showing “there is a reasonable probability that, but for the counsel’s unprofessional errors, the result of the proceeding would have been different.” *State v. Hopkins*, 576 N.W.2d 374, 378 (Iowa 1998) (quoting *Strickland v. Washington*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698). Trial counsel is not incompetent in failing to pursue a meritless issue. *See State v. McPhillips*, 580 N.W.2d 748, 750 (Iowa 1998).

Generally, claims of ineffective assistance of counsel are preserved for postconviction proceedings. *See State v. Kone*, 557 N.W.2d 97, 102 (Iowa App. 1996). However, they may be resolved on direct appeal when the record adequately addresses the issues. *See State v. McPhillips*, 580 N.W.2d at 754. We find the record is sufficient to determine defendant’s attorney did not provide ineffective assistance with regard to defendant’s constitutional claims.

C. Merits of Cruel and Unusual Punishment Claim. To the extent defendant raises a federal constitutional claim of cruel and unusual punishment, we are guided by our Supreme Court’s recent decisions in *State v. Lara*, 580 N.W.2d 783, 785–86 (Iowa 1998) and *State v. August*, 589 N.W.2d 740, 742–743 (Iowa 1999). In accordance with those decisions, Iowa Code section 902.12(4) does not violate the

prohibition under the United States Constitution against cruel and unusual punishment. *See State v. Lara*, 580 N.W.2d at 785–86.

State v. Lara did not consider whether section 902.12(4) violates Iowa constitutional protections against cruel and unusual punishment. The process for reviewing federal cruel and unusual punishment claims, however, is the same for cruel and unusual punishment claims raised under our state constitution. *See State v. Hoskins*, 586 N.W.2d 707, 709 (Iowa 1998) (applying federal cruel and unusual punishment analysis without distinction to claims brought under our state and federal constitutions). Thus, for the reasons outlined in *State v. Lara*, we determine Iowa Code section 902.12(4) does not violate Iowa Constitution article I, section 17. We find no merit in Lowery's cruel and unusual punishment claim, and therefore determine trial counsel did not breach an essential duty in failing to challenge section 902.12(4) on that basis.

D. Merits of Equal Protection Claim. Lowery claims Iowa Code section 902.12(4) violates his right to equal protection under our state and federal constitutions. Specifically, he argues section 902.12(4) is patently arbitrary because there is no reasonable distinction between first-degree robbery, which is subject to the 85% rule, and other Class B forcible felonies such as first-degree arson and first-degree burglary, which are not subject to the 85% rule.

Because Lowery challenges a criminal statute and suspect classification not implicated, we examine section 902.12(4) under a rational basis analysis. *State v. Hall*, 227 N.W.2d 192, 193 (Iowa 1982) (criminal statutes); *State v.*

323 N.W.2d 242, 243 (Iowa 1982) (suspect classifications). Under this standard, the statute is constitutional if the classification made by this statute “is a reasonable one and operates equally upon all within the class.” *State v. Bell*, 572 N.W.2d 910, 912 (Iowa 1997).

Defining and classifying criminal offenses lies within the broad discretion of the legislature. See *State v. Ragland*, 420 N.W.2d 791, 794 (Iowa 1988). In sentencing matters, the power of the legislature to impose “disparate punishments for different crimes” will not be disturbed “so long as the offenses are distinguishable on their elements.” *State v. Ceaser*, 585 N.W.2d 192, 196 (Iowa 1998). Where persons committing the crimes are not similarly situated, they may be treated differently for purposes of equal protection. *Id.* (citing generally *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 342, 439, 105 S. Ct. 3249, 3254, 87 L. Ed. 2d 313, 320 (1985); 21 Am. Jur. 2d *Criminal Law* § 594, at 982 (1981)); 21A Am. Jur. 2d *Criminal Law* § 982 (1998).

We begin our analysis by considering the differences between first degree robbery and other forcible felonies excluded from the sentencing provisions of section 902.12(4). Iowa Code section 711.1 defines the crime of robbery:

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(1) (1997). The specific crime of robbery in the first degree occurs when a person perpetrating a robbery “purposely inflicts or attempts to inflict serious injury, or is armed with a dangerous weapon.” Iowa Code § 711.2 (1997).

Lowery’s brief implies the classification of crimes for sentencing purposes under 902.12(4) is not based on differences that are real in fact. He argues there is no reasonable distinction between the Class B forcible felony of first degree robbery and other Class B Felonies such as kidnaping in the second degree, arson in the first degree, and burglary in the first degree.

It is true that first degree robbery and forcible Class B felonies not covered by section 902.12 do share the same requirements of serious injury and use of a dangerous weapon. However, as pointed out in *State v. Ceasar*, “robbery combines an intent to commit a property offense with a crime against a person (intent to commit a theft and assault)” *State v. Ceasar*, 585 N.W.2d at 198. In addition, robbery involves the requirement that “the assault be used as a means to accomplish the intended theft or an escape from the crime scene.” *Id.* at 199. Moreover, the assault is specifically necessary to further the commission of the felony or the perpetrator’s escape from the crime scene. *Id.* Finally, a person committing robbery uses assault to commit another crime of a different nature (i.e. the additional property crime of theft) as opposed to using assault to commit another crime differing only in degree (i.e. another crime against the person). *See State v. Ceasar*, 585 N.W.2d at 198. For

these reasons, first degree robbery is distinguishable from other forcible felonies not covered by section 902.12(4).

The legislature could conclude society is more seriously threatened by persons willing to use force to commit the additional different crime of theft than it is by those whose assaultive behavior is not used to accomplish another crime. *See State v. Ceaser*, 585 N.W.2d at 198. So long as a rational basis exists for such a conclusion, we will not disturb the legislature's judgment that crimes such as robbery have a broader social impact than other crimes, and are consequently deserving of greater punishment. *Id.* (citing *Collins v. Johnston*, 237 U.S. 502, 510, 35 S. Ct. 649, 653, 59 L. Ed. 1071, 1079 (1915) (stating "it is hardly necessary to say that the comparative gravity of the criminal offenses, and whether their consequences are more or less injurious, are matters for the state itself to consider"))).

We determine Lowery's right to equal protection has not been violated. It has been sufficiently established that section 902.12(4) treats differently different criminal conduct. There is also a rational basis for including first degree robbery within its sentencing provisions while excluding other Class B forcible felonies. Furthermore, the sentencing provisions operate equally upon all members of the class: all persons convicted of first degree robbery are subject to a mandatory term of imprisonment without the possibility of parole or work release. *See State v. Ceaser*, 585 N.W.2d at 199 (citing *Harris v. State*, 386 So.2d 393, 396 (Miss. 1980) (holding there was no "invidious class discrimination" in statute denying parole to all persons convicted of robbery with an exposed firearm, in part because all persons convicted of this crime

were treated alike). We find no merit in Lowery's equal protection claim, and therefore determine trial counsel did not breach an essential duty in failing to challenge section 902.12(4) on that basis.

AFFIRMED.

No. 97-2325. [9-016] STATE v. LOWERY

Appeal from the Iowa District Court for Polk County, Richard G. Blane, II, Judge. **AFFIRMED.** Heard by Huitink, P.J., and Vogel, and Zimmer, JJ. Sackett, C.J., takes no part. Opinion by Zimmer, J. (17 pages \$6.80)

Lowery appeals his conviction and sentence for first-degree robbery. **OPINION HOLDS: I. Compulsion Defense Jury Instruction.** Defendant argued at trial that he was compelled to participate in the robbery because he feared Bonner, another participant in the crime, would otherwise seriously injure him. The jury was instructed Lowery could be found guilty of first-degree robbery so long as he did not act under compulsion. The jury was instructed Lowery could be found guilty of first-degree robbery if he either directly committed the crime or aided and abetted in its commission. Lowery claims an aider and abettor does not lose the defense of compulsion simply because the person allegedly forcing participation in the crime physically injures a third person during the commission of that crime. We refrain from considering this argument because we believe Lowery mischaracterizes the instruction. When read in conjunction with the other jury instructions used in this case, the instruction on compulsion does not mean that an aider and abettor loses the compulsion defense *because* the principal physically injures someone. Rather, a person found to be an aider and abettor loses the justification defense of compulsion simply because he is an aider and abettor. An aider and abettor is someone who *knowingly approves* of and agrees to commit a crime. Thus, by definition, a person found to be an aider and abettor cannot be someone compelled to participate in a crime. Therefore, in the context of the instructions given in this case, Lowery does not lose the defense of compulsion because a person he aids and abets physically injures a third person. Rather he loses the defense simply because he is an aider and abettor. We determine the district court did not err in its compulsion instruction. **II. Admission of BB Gun Evidence.** Defendant claims the trial court abused its discretion in overruling a motion in limine to bar evidence of a BB gun found in the trunk of defendant's car. Finding the gun in the trunk of defendant's car, along with other items used in the robbery, was clearly relevant in determining whether defendant was involved in the preparation and planning of the robbery. Furthermore, we determine this probative value was in no way overshadowed by the danger of unfair prejudice. There is no evidence defendant used the gun during the robbery or that the gun was even loaded. **III. Constitutionality of the "85%" Rule.** Section 902.12(4) does not violate the prohibition under against cruel and unusual punishment under our state and federal constitutions and we determine trial counsel did not breach an essential duty in failing to challenge 902.12(4) on that basis. We also determine Lowery's right to equal protection has not been violated: section 902.12(4) treats differently different criminal conduct; there is a rational basis for including first degree robbery within its sentencing provisions while excluding other Class B forcible felonies; and the sentencing provisions operate equally upon all members of the class. We find no merit in Lowery's equal protection claim, and therefore trial counsel did not breach a duty in failing to challenge 902.12(4) on that basis.