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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF

STATE OF IOWA,)

Appellee,)

Filed March 14, 1977

vs.)

JIMMIE WINSTON WARE,)

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59445

Appellant.)

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

The appellant appeals on the grounds that he was denied
a fair trial in a conviction for carrying a concealed weapon,
695.2, The Code. - Reversed and remanded for new trial.

Thomas T. Skewes, of Fort Madison, for appellant.

Richard C. Turner, Attorney General, Richard A.
Williams, Assistant Attorney General, Joel J. Kamp, Assist-
ant County Attorney, for appellee.

Heard by Allbee, C.J., Donielson, Snell, Oxberger and
Carter, JJ.

OXBERGER, J.

Defendant, Jimmie Winston Ware, was charged by a county attorney's information with the crime of carrying a concealed weapon in violation of § 695.2, The Code. He was tried before a jury, convicted, sentenced, and now appeals. We reverse and remand for a new trial.

The events giving rise to the charge occurred in the following circumstance. The defendant, an inmate of the state prison, was subjected to a strip search by correctional officers. They testified they observed him take a knife from the waistband of his trousers and lay it on the table.

On appeal the defendant seeks reversal on the ground the marshalling instruction failed to include an essential element of the charged crime.

In *State v. Watts*, 223 N.W.2d 234, 238 (Iowa 1974) the court reviewed its position regarding a marshalling instruction, citing with approval from the *State v. Straw*, 185 N.W.2d 812 (Iowa 1971) decision:

"Where an instruction marshals the essential element of a crime and authorizes conviction if the elements listed have been proved beyond a reasonable doubt, all of the essential elements must be included in the marshalling instruction. *Omission of an element even if included in another instruction is fatal.*' (Emphasis added.)" 185 N.W.2d at 816.

The trial court, in the marshalling instruction, required the jury to find:

"4. That the defendant carried said knife with the knowledge of its character as a weapon." X. 13.

No one disputes the fact a knife has the potential to be a weapon. What makes a knife a weapon is the use the holder intends. The crime is not the knowledge that a knife is a weapon.

In *Watts*, the court distinguishes knife cases from gun

cases. In gun cases the State is not required to show specific intent. The court said: " . . . the statute absolves the State of the necessity of proving such instruments (handguns) were carried as offensive or dangerous weapons. The *noninclusion in the marshalling instruction* of the State's burden to prove the knife in question was carried by the defendant as a weapon constitutes reversible error." (emphasis added). 223 N.W.2d at 238.

The State asserts that the defendant failed to preserve his error. His objection was as follows:

"I feel presently proposed instruction number eleven, the marshalling instruction, does not follow the recent Watts case in that it's not, does not in its marshalling instruction provide for any statement that the defendant consciously carried this particular weapon." R. 73.

The defendant properly preserved his objection by informing the court of the *Watts* case. A cursory reading of that case would have alerted the judge to the correct rule of law. *Watts* is dispositive of this appeal.

Additionally, review of this record would be proper pursuant to 793.18, The Code., which requires an examination of the case without regard to technical defects to determine whether the defendant received a fair trial.

"The duty placed on this court by section 793.18 is to decide criminal appeals according to the very justice of the case as shown by the record without regard for technical errors [citation]. It requires us to enter such judgment as the law demands' [citation]." *State v. Ford*, 259 Iowa 744, 752, 145 N.W.2d 638, 644 (1966) citing *State v. Kelley*, 253 Iowa 1314, 1318, 115 N.W.2d 184, 186 (1962).

The only issue in this case was whether the defendant carried the knife with the intent to use it as a weapon. The jury was not asked to determine this issue. The jury reported it was unable to reach a verdict. The trial judge

told them to reread the instructions, R. 96. The instructions did not tell them they had to find the defendant carried the knife with the intent to use it as a weapon.

No other issues were in dispute.

Fairness and *Watts* require a new trial.

Reversed and remanded for new trial.

ALLBEE, C.J. and SNELL, J. concur; DONIELSON and CARTER, JJ. each dissent.

DONIELSON, J. (dissenting)

I dissent. This disagreement is for essentially four reasons.

1. Error was not preserved.
2. The majority only uses a portion of the quotes between the judge and the trial counsel, and only recites a portion of the final instruction in arriving at their decision.
3. §793.18, the Fair Trial section, indicates that the defendant received a fair trial.
4. The majority does not correctly interpret State v. Watts, 223 N.W.2d 234 (Iowa 1974).

I and II

The majority refers to only a portion of the dialogue between the court and the defense counsel in asserting error was preserved. I have italicized the portion used by the majority, but it seems to me that the balance of the dialogue is by far and away the most important part to make a determination whether or not error was preserved.

"MR. LILES: The last objection we would have, I'm not sure that this will help nor hurt any party, but *I feel presently proposed instruction number eleven, the marshalling instruction, does not follow the recent Watts case in that it's not, does not in its marshalling instruction, provide for any statement that the defendant consciously carried this particular weapon.* I think on page 236 of the Watts case, the Court approved one of the defendant's exceptions that the trial court failed to, in its marshalling instruction, provide that the defendant did, in fact, consciously carry the weapon, although it comes very close to it by saying that, in number four there of the proposed instruction, that the defendant carried the knife with the knowledge of its character of the weapon. As I read those instructions, I don't see any requirement that that the jury must find that the defendant actually consciously carried it.

THE COURT: What about number one, says on or about the 4th day of August, 1975, in Madison Township, Lee County, Iowa, the defendant carried a knife, which was an offensive or dangerous weapon?

MR. LILES: That doesn't provide that he consciously did so, knowingly.

MR. WILLIAMS: Could insert the word knowingly after the word defendant, or in number two, after the word defendant.

THE COURT: All right, I'll insert the word "knowingly" after the word defendant in number one.

MR. LILES: That would be the extent of our objections at this time." (emphasis added)

A review of the record reveals the trial court complied with nearly every request by the defense counsel in one fashion or another. And this was at the conclusion of his discussion as it related to the instructions with the defense counsel finalizing his statement by saying:

"MR. LILES: That would be the extent of our objections at this time."

The criteria and the reasons for calling the court's attention specifically to objection in the instructions were clearly set forth in *State v. 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 v. 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 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 v. Overstreet, 243 N.W.2d 880, 885 (Iowa 1976); State v. Buchanan, 207 N.W.2d 784, 787 (Iowa 1973); State v. Lyles, 225 N.W.2d 124, 127 (Iowa 1975); State v. Lewis, 242 N.W.2d 711, 716 (Iowa 1976); and Dutcher v. Lewis, 221 N.W.2d 755, 759 (Iowa 1974).

I see no way for the trial judge to have been alerted by the simple naming of a case when after substantial deliberation involving considerable time, that this court is not in accord with the meaning of State v. Watts, 223 N.W.2d 234 (Iowa 1974). The simple naming of a case, the judge responding and the counsel responding with "*That's the extent of our objections*" seems to me to require the trial judge to have a degree of responsibility for instructions far and beyond anything, State v. Baskin, 220 N.W.2d 882 (Iowa 1974), and its progeny anticipated.

The remaining matters on the appeal concerning the used or intended to be used as a weapon are not matters to be considered because of the failure to preserve the error either on an objection to the proposed instruction at trial nor on a motion for new trial pursuant to 787.3(5)(7), The Code. Therefore, we have nothing to consider. See State v. Hinsey, 200 N.W.2d 810, 813 (Iowa 1972). Not even constitutional considerations may be raised first on appeal. State v. Peer, 193 N.W.2d 530, 532 (Iowa 1972); State v. Greene, 226 N.W.2d 829, 832 (Iowa 1975).

Even though the alleged error was not properly preserved, we examine the entire case pursuant to the obligation imposed upon us by 793.18, The Code, since this appellant has alleged that the failure goes to his right to a fair trial. State v. Youngbear, 202 N.W.2d 70, 72 (Iowa 1972). We, therefore, review it in that light on a limited basis and as a matter of grace. State v. Miskell, 161 N.W.2d 732, 734 (Iowa 1968).

The court stated from the Uniform Jury Instruction 530.8 as essentially cited in State v. Watts, 223 N.W.2d 234 (Iowa 1974), with the parties agreeing to waive the permit issue.

Although the majority sets out only point No. 4 of the marshalling instruction No. 11, it is my belief that the entire instruction is essential for the orderly disposition of the case.

Instruction No. 11

"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 4th day of August, 1975, in Madison Township, Lee County, Iowa, the Defendant knowingly 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.*

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."

Although the majority refers to only subsection 4 of

instruction No. 1, it can be readily observed that subsection No. 1 of instruction No. 11 is and does carry with it the essential elements required under *State v. Watts*, 223 N.W.2d 234 (Iowa 1974), and under Uniform Jury Instructions 530.8.

This is a conviction under §695.2, Carrying a Concealed Weapon, not under §695.1, Going Armed with Intent. My reading of *State v. Watts*, 223 N.W.2d 234 (Iowa 1974) leads me to the conclusion that there was no intent by Justice McCormick to merge 695.1 and 695.2 as it relates to what the majority refers to as the primary issue.

"The only issue in this case was whether the defendant carried the knife with the intent to use it as a weapon. The jury was not asked to determine this issue."

I believe it was the intent of the Supreme Court in *Watts* to leave the matter of an unlikely merger of 695.1 and 695.2 for the legislature, but rather *Watts* intended a different purpose.

My reading of *Watts* leads me to believe that although there was a recognition that guns, grenade and bombs were per se deadly weapons pursuant to *State v. Hill*, 258 Iowa 932, 936 140 N.W.2d 731 (1966), that *Watts* continued to reemphasize that there need not be any proof of "*intent to use as a weapon*" per se as the majority indicates as it relates to these per se deadly weapons. *Watts* and *Hill* stated only some additional requirement in non per se areas such as knives, dirks or daggers, etc., that it be a weapon or an offensive weapon and that the perpetrator have knowledge (intent) of same.

Watts then would leave "*intent to use*" under 695.1, but 695.2 would continue the prohibition of concealed weapons with it divided in two divisions. The first division being per se weaponry. The second division being weapons not per se deadly

with the additional requirement on these types of weapons that they be an offensive or dangerous weapon and that the defendant has knowledge (intent) of its character as a weapon as set forth in 1 and 4 of instruction No. 11 and as clearly defined and explained in detail in instruction No. 7.

See State v. Watts, 223 N.W.2d 234, at 239 (Iowa 1974) where it states:

"Conviction would be warranted if the facts established the defendant carried the concealed knife and that it was his intent then and there to use it as a weapon, either for the purposes of assault or defense. The subjective reasons for the concealment of the knife on defendant's person, or for its intended use, are of course questions for the jury; but subjective intent to carry the knife as a weapon would have to arise inferentially from the objective facts such as the time and place the defendant was found in possession of the instrument, the manner in which it was concealed on his person, or other facts which would indicate the defendant intended to use the instrument as a weapon of defense or assault. See People v. Jones, 37 Mich.App. 91, 93, 194 N.W.2d 433, 435." (emphasis added)

While the court has frequently equated knowledge with intent that is not always the case, State v. Straw, 185 N.W.2d 812, 815 (Iowa 1971), we find that pursuant to trial counsel, attention was called to State v. Watts, *supra*, and the word "knowingly" was placed in instruction No. 11, section 1. While the entire instruction given is not a model of clarity and perhaps the better practice would have been to submit 530.8 of the Uniform Jury Instructions. Appellant's counsel overlooks section 1 of the given instruction which carries with it the objection that the appellant's counsel raises as it relates to section 4.

All parties agreed to inserting "knowingly". While perhaps "intentionally" might have been a better word, we find in Black's Law Dictionary 1012 (4th ed. rev. 1968) states:

"KNOWINGLY. With knowledge; consciously; intelligently; willfully; intentionally."
(cites omitted) (emphasis added).

When coupling this marshalling instruction No. 11 with the instructions No. 7 and No. 9 in particularly sections 1 and 4 of No. 11, we find no error. All instructions are to be read together, we find that it is not confusing or misleading, and that the ultimate test of an instruction is whether it clearly sets out for the jury the issue to be determined. State v. Morelock, 164 N.W.2d 819, 823 (Iowa 1969), and that the instructions themselves are to be considered as a whole and that all the applicable law may not be found to be in any single instruction. State v. Buchanan, 207 N.W.2d 784, 787 (Iowa 1973); State v. Lynch, 197 N.W.2d 186, 189 (Iowa 1972), *cert. denied*, 409 U.S. 1116, (1973).

I conclude that the defendant was not deprived of a fair trial under 793.18, The Code, and supporting case law, and I go no further since error was not preserved.

I would affirm.

CARTER, J. (dissenting)

I dissent. I do not believe the marshalling instruction which the trial court gave complied with State v. Watts, 223 N.W.2d 234 (Iowa 1974), but, for the reasons advanced in the dissenting opinion of Donielson, J., I feel that the defendant failed to preserve any error on this point. I also disagree with the interpretation which the majority places on §793.18, The Code. The remedial provisions of that rule must be given a limited application or we will erode those procedural rules without which trials would become a welter of confusion. Failure to properly object should not be excused simply because the omission may relate to a critical stage of the proceedings. Such procedural requirements have been classified as "substantial" and not "mere technicalities." State v. Post, 255 Iowa 573, 579, 123 N.W.2d 11, 15 (1963); State v. Kramer, 252 Iowa 916, 918, 109 N.W.2d 18, 19 (1961).