

IN THE COURT OF APPEALS OF IOWA

FILED

FEB 25 1987

CLERK SUPREME COURT

STATE OF IOWA,)
)
Plaintiff-Appellee,)
)
vs.)
)
VERNON LUTHER PRUITT,)
)
Defendant-Appellant,)
)
and)
)
VERNON LUTHER PRUITT,)
)
Petitioner-Appellant,)
)
vs.)
)
STATE OF IOWA,)
)
Respondent-Appellee.)

275

Filed February 25, 1987

6-495
86-416

Appeal from the Iowa District Court for Polk County (No. PCR 260) Louis A. Lavorato, Judge, Dick Strickler, Judge (on application for postconviction relief).

Defendant appeals from a conviction for robbery in the first degree and subsequent denial of his application for postconviction relief. **AFFIRMED.**

Charles Harrington, Appellate Defender, and B. John Burns, Assistant Appellate Defender, for defendant/petitioner-appellant.

Thomas J. Miller, Attorney General; Elizabeth E. Ciebell, Assistant Attorney General; and Harlan Lemon, Assistant Polk County Attorney, for *plaintiff/respondent-appellee*.

Considered by Schlegel, P.J., and Hayden, and Sackett, JJ.

SACKETT, J.

Defendant Vernon Luther Pruitt appeals from the judgment and conviction following a jury trial for robbery in the first degree in violation of Iowa Code §§711.1 and 711.2 (1985) and from subsequent denial of postconviction relief. He claims he was denied ineffective assistance by his trial counsel's failure (1) to move to dismiss the charge against him where the state allegedly failed to prove the use of a "dangerous weapon," a necessary element of the crime charged, and (2) to move for mistrial based on an allegedly improper comment made by the prosecutor during closing argument.

Allegedly Ms. Cole and the defendant drove the victim to a small road near the Des Moines river, where the defendant held a knife to the victim's throat and demanded money. The victim gave the defendant about \$200, with all of the twenty dollar bills marked with a red stamp. According to the victim, the defendant stated, "[I]f you have any more . . . I am going to gouge your . . . eyeball out."

The defendant was later arrested and charged with first-degree robbery. At his jury trial, many witnesses referred to a knife in the defendant's possession, but none of them made any statement concerning the length of the knife's blade. The knife itself was also introduced into evidence. In closing argument, the prosecutor remarked that while the defendant explained how he acquired his "marked" money, defendant did not explain how Ms. Cole, whose case had been severed from his, had obtained hers. The jury found the defendant guilty as charged.

I. Dangerous Weapon

Defendant claims there was insufficient evidence for a jury to determine he was armed with a dangerous weapon. His argument is centered on the conten-

tion that although the record contains evidence a knife was used in the robbery, there is no evidence in the record the knife was capable of killing anyone. He also contends there is insufficient evidence the knife was a dangerous weapon because no one ever testified to the length of the blade. Defendant argues the only way a knife is a dangerous weapon under Iowa Code §702.7 (1985) is if the blade is three inches or longer in length.

The state counters that the knife itself was admitted into evidence. We have examined the knife and find it to be a pocket-type knife. There are two blades. The blades are approximately three inches long. However, we disagree with the defendant's interpretation of §702.7 that only those knives with a blade three inches or over are dangerous weapons. Section 702.7 provides:

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 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, is a dangerous weapon. Dangerous weapons include, but are not limited to, any offensive weapon, pistol, revolver, or other firearm, dagger, razor, stilleto, or knife having a blade of three inches or longer in length. (emphasis added).

In this case the jury was instructed:

Under the law, 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.

It is for you to determine, from a consideration of all of the facts and circumstances, whether the knife used, if you find it was used, was a dangerous weapon.

When actually used with the intent to hurt someone a knife with less than a three-inch blade is certainly a dangerous weapon. State v. Durham, 323 N.W.2d 243, 245 (Iowa 1982).

In interpreting a statute similar to §702.7, the Washington court determined whether a knife having a blade three inches or less in length is a deadly weapon depends upon the circumstances and is a fact question to be decided by the jury. State v. Thompson, 564 P.2d 323, 324 (Wash. 1977). It cannot be denied a knife having a blade three inches or less in length can be capable of producing death and is in fact capable of producing death if strategically used. Thompson, 564 P.2d at 325. The evidence was defendant held the knife to the victim's throat and demanded money. The knife was identified and put into evidence. The jury examined the knife, as did we. Testimony that a knife (regardless of its length) is put to some one's throat coupled with a demand for money is evidence of intended use of the knife as a dangerous weapon. See Iowa Code §702.7; State v. Tusing, 344 N.W.2d 253, 255 (Iowa 1985).

We fail to determine as defendant argues that there is insufficient evidence to convict defendant simply because no one testified as to the actual blade length. There was sufficient evidence to submit the matter to the jury and the jury could properly find the knife used was a dangerous weapon under the circumstances of this case.

II. Ineffective Counsel

Petitioner next claims the counsel was ineffective in failing to move for a mistrial after the county attorney made what defendant considered an impermissible comment on his failure to present certain exculpatory evidence. We will not find that the prosecutor manifestly intruded on defendant's right to remain silent when an equally plausible explanation exists for the prosecutor's

statement. See State v. Bishop, 387 N.W.2d 554, 563 (Iowa 1986). We do not determine the prosecutor's statements when viewed in the context presented, demonstrate an intent to comment on defendant's right to remain silent.

We therefore do not find defendant's counsel failed to perform an essential duty in not moving to dismiss the charge or moving for a mistrial. We affirm the trial court on all issues.

AFFIRMED.