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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,) Filed September 21, 1982 131

vs.)

KEITH DENMAN,) 2-156
66959

Defendant-Appellant.)

Appeal from Dubuque District Court - Robert J. Curnan, Judge.

Defendant appeals from his conviction by jury of the crime of robbery in the first degree in violation of Iowa Code §§ 711.1 and 711.2 (1979), contending 1) that trial court erred by admitting a police officer's testimony concerning defendant's comment that he could have shot the officer; 2) that his lack of opportunity to confront and cross-examine the victim of the alleged assault denied him a fair trial and his sixth amendment right of confrontation of witnesses against him; and 3) that Iowa Code § 902.7, imposing a mandatory minimum period of incarceration for use of a firearm during a forcible felony, denies equal protection and is unconstitutionally vague. AFFIRMED.

Paul J. Kaufman of Kaufman, Lange & Hodge, Dubuque, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Theresa Baustian, Assistant Attorney General, for plaintiff-appellee.

Heard en banc.

PER CURIAM

Defendant, Keith Denman, appeals from his conviction by jury of the crime of robbery in the first degree in violation of Iowa Code §§ 711.1 and 711.2 (1979). He contends 1) that trial court erred by admitting a police officer's testimony concerning defendant's comment that he could have shot the officer; 2) that his lack of opportunity to confront and cross-examine the victim of the alleged assault denied him a fair trial and his sixth amendment right of confrontation of witnesses against him; and 3) that Iowa Code § 902.7, imposing a mandatory minimum period of incarceration for use of a firearm during a forcible felony, denies equal protection and is unconstitutionally vague. We affirm trial court's judgment.

A county attorney's information charged defendant with the crime of robbery by assaulting one James Shickles with the intent to commit a theft while armed with a revolver. Upon the defendant's capture a few minutes after the robbery, defendant commented to a pursuing officer that he could have shot the officer several times during the chase. At trial the officer testified about this comment, over the defendant's objections that the testimony was irrelevant and prejudicial. The defendant had previously filed a motion in limine on the same basis, which was overruled by the trial court. For reasons which do not appear in the record, the State did not call Shickles as a witness. Defendant had previously been granted permission to depose Shickles; however, no such deposition ever took place.

The jury found the defendant guilty of robbery in the first degree and also found that defendant had been armed with a firearm during the offense. Pursuant thereto, defendant was sentenced to imprisonment for up to 25 years, with a mandatory minimum term of five years pursuant to Iowa Code § 902.7 (1979). This appeal followed.

I. Scope of Review. When violations of basic constitutional safeguards are alleged, this court makes an independent evaluation of the totality of the circumstances. State v. Cullison, 227 N.W.2d 121, 126-27 (Iowa 1975). The other issues are reviewed on assignment of error only. Iowa R. App. P. 4. We will begin our review with the constitutional issue.

II. Right of Confrontation. Defendant claims that he was denied his sixth and fourteenth amendment right of confrontation when the State failed to produce at trial the victim of the crime. He contends that this inability to confront and cross-examine denied him a fair trial, particularly because the victim was a material witness. We disagree.

We find defendant's claims of denial of his right of confrontation novel with regard to an individual who did not testify at trial. The sixth amendment right of confrontation applies only to those individuals called as witnesses. United States v. Schaffer, 559 F.2d 653, 655 (8th Cir. 1976). It is well established that "[the] law does not require the State of Iowa to call every witness listed in the minutes of testimony which is part of the county attorney's true information." State v. Houston, 261 Iowa 1369, 1373, 158 N.W.2d 158 (1968). See also State v. Castillo, 315 N.W.2d 63, 65 (Iowa 1982).

Defendant bases his argument on the rationale of the Supreme Court decision in Rovario v. United States, 353 U.S. 53, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957), wherein the court stated that the ". . . trial court committed prejudicial error in permitting the government to withhold the identity of its undercover employee . . . ." 353 U.S. at 65, 77 S. Ct. at 630, 1 L. Ed. 2d at 649. Rovario is readily distinguishable from the present case. In that case, the defendant argued entrapment and the informant was the sole witness to crucial circumstances. The informant was the only person who might have testified to certain elements of the crime on behalf of the defendant.

In the present case the victim's name was stated on the minutes of testimony, along with his expected testimony. Defendant had available to him the discovery methods available to all criminal defendants found in the Iowa Rules of Criminal Procedure. For trial purposes defendant, as well as the State, had the ability to subpoena witnesses to testify. Defendant, instead, chose to rely on the State to call the victim. Defendant failed to exercise the powers available to him to compel the victim to testify at trial, and now contends a violation of his constitutional rights because the adverse party did not call his witness for him. After making an examination of the totality of these circumstances, we are totally unpersuaded by defendant's arguments.

III. Motion in Limine. Defendant also asserts that trial court erred in overruling his motion in limine and trial objection to the statement allegedly made by defendant to a police officer that "[y]ou know I could have shot you several times." Defendant claims that the statement was irrelevant to the offense charged and, in the alternative, that the prejudicial effect of the statement outweighed its probative value. The State contends the evidence was relevant and that its introduction did not create the danger of unfair prejudice to defendant. We agree with the State's argument.

"Evidence is relevant if it renders the existence of a fact more probable or less probable with it than without it." Thompson v. Bohlken, 312 N.W.2d 501, 509 (Iowa 1981). Irrelevant evidence will be excluded. See State v. Mark, 286 N.W.2d 396, 410 (Iowa 1979). Relevant evidence, however, may also be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. See State v. Hall, 297 N.W.2d 80, 87 (Iowa 1980). In support of his argument that his statement to the officers should be excluded, defendant cites State v. Hinsey, 200 N.W.2d 810, 817 (Iowa 1972), which by way of dicta said that a statement made by the defendant that he hated all policemen was irrelevant to the charge of robbery. We find Hinsey to be readily distinguishable from the present case.

Defendant's statement was not a derogatory remark aimed at a class of individuals. "You know I could have shot you several times," does not, as defendant contends, denote that defendant was capable of only shooting a law enforcement officer. The defendant's statement expressing his readiness to shoot another human being, although addressed to a police officer, was not restricted to police officers. The statement was relevant to show that the defendant possessed a firearm at times material hereto. Having concluded that the evidence was relevant, we next examine its alleged prejudicial effect.

"The question of balancing the probative value of the testimony against possible prejudice is a matter of trial court discretion. We reverse such decisions only for abuse of discretion." State v. Cassady, 243 N.W.2d 581, 583 (Iowa 1976).

> "[T] he decisions of the trial court are cloaked with 'a strong presumption in [their] favor," and [u] ntil the contrary appears, the presumption is that the discretion of the [trial] court was rightfully exercised.' . . . [T] o overcome this presumption of regularity requires an affirmative showing of abuse and the burden of so showing rests upon the party complaining."

State v. Gartin, 271 N.W.2d 902, 910 (Iowa 1978). Defendant's motion in limine and his objection to the evidence at trial were both overruled by trial court which found the statement relevant to the fact of the defendant's possession of a firearm. On the record before us we find no abuse of the trial court's discretion and consequently hold the ruling of the trial court was proper.

IV. Sentencing of Mandatory Minimum. The defendant finally argues that Iowa Code § 902.7 (1979), mandating a minimum sentence without probation, violates the due process clause and equal protection clauses of the fourteenth amendment. Defendant concedes in his brief that the Iowa Supreme Court has held the provision to be constitutional. See State v. Powers, 278 N.W.2d 26, 27 (Iowa 1979); State v. Holmes, 276 N.W.2d 823, 829-30 (Iowa 1979). We find the court's reasoning remains dispositive and affirm trial court on the legal basis stated in those cases.

We affirm trial court's judgment.