

FILED

SEP 29 1981

CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed September 29, 1981

vs.

)

HENRY FLETCHER CLAYTOR, JR.,

)

1-184

65068

Defendant-Appellant.

)

Appeal from Linn District Court - John L. Hyland, Judge.

Defendant appeals from his conviction of robbery in the second degree in violation of sections 711.1 and 711.3, The Code 1979. **AFFIRMED.**

James E. Bennett of Keyes, Bennett & Kucera, Cedar Rapids, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa; Julie Pottorff, Assistant Attorney General; and Lew Eells, Assistant Linn County Attorney, for plaintiff-appellee.

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

Defendant, Henry Fletcher Claytor, Jr., appeals from his conviction of robbery in the second degree in violation of sections 711.1 and 711.3, The Code 1979. He asserts 1) that there was insufficient evidence to convict him of robbery, 2) that there was insufficient evidence to support submission of a charge of robbery in the first degree, 3) that he did not knowingly and intelligently waive his Miranda rights, 4) that his statements to the police were not voluntarily given, and 5) that he was denied effective assistance of counsel. We affirm. We will discuss the relevant facts as they relate to the various issues.

I. Scope of Review. Since this is an action at law, our review is on assigned error only. Iowa R. App. P. 4.

II. Sufficiency of the Evidence. Defendant first asserts that the evidence was insufficient to convict him of robbery. He specifically focuses on the element of robbery which requires the perpetrator to threaten another with or purposely put another in fear of immediate serious injury. We disagree.

We will first enumerate some general principles important to our review on this issue. When the sufficiency of the evidence is challenged, we view the evidence in the light most favorable to the State, taking into consideration all evidence in the record. State v. Kern, 307 N.W.2d 22, 28 (Iowa 1981); State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980). On factual issues, the credibility of witnesses and the weight to be given to their testimony is for the jury. State v. Cott, 283 N.W.2d 324, 329 (Iowa 1979).

Applying these principles to the evidence in this case, we conclude the evidence was sufficient. In this regard, the victim testified that a person, who she later identified as defendant, came into the restaurant where she worked, that the man had his right hand in his coat pocket with a cylindrical object pointed at her, that he stated to her "what would you do if I had a gun on you," and that he demanded money. The witness stated that she thought the man had a gun. She also testified to her thoughts about being shot and concern about who would take care of her children in that event. As soon as the robber left the restaurant, the woman "ducked down" behind the counter to "get out from sight." In view of the entire record, we conclude there is substantial evidence upon which a reasonable jury could find guilt beyond a reasonable doubt.

III. Instruction on First Degree Robbery. Defendant next urges that trial court erred in instructing the jury on first degree robbery since that charge required defendant, at the time of the offense, to be armed with a dangerous weapon, and the

record contains no evidence of such a weapon. He contends that submission of the higher offense, upon which the evidence would not support a finding of guilt, induced the jury to reach a compromise verdict in finding guilt on the lesser offense of robbery in the second degree. We reject defendant's assertion.

We find State v. Sharpe, 304 N.W.2d 220 (Iowa 1981), to be controlling. In that case the court stated "... if a court erroneously fails to dismiss a higher charge, the error is harmless, if the conviction is only of the lower offense." Id. at 225. However, if a defendant can show prejudice, or at least a likelihood of prejudice, reversal may be required under the specific facts of a case. We do not find such facts in this case and conclude there is no reversible error on this point.

IV. Admissibility of Defendant's Confession. Defendant also argues that the trial court erred in overruling his pretrial motion to suppress and permitting his confession to be admitted as evidence at trial. He specifically asserts 1) that he did not knowingly and intelligently waive his Miranda rights and 2) that he did not make the statements voluntarily. We reject both contentions.

A. Waiver. When admissibility of defendant's statement is challenged on the basis of Miranda, the State must prove that defendant received the necessary constitutional warnings and that any waiver of those rights were knowingly and intelligently made. State v. Munro, 295 N.W.2d 437, 443-44 (Iowa 1980). Since a constitutional challenge is involved, we review the evidence *de novo*, based on the totality of the circumstances, to make our independent determination. State v. Hahn, 259 N.W.2d 753, 758 (Iowa 1977).

On our review of the record, we find no merit in defendant's claim that he did not knowingly and intelligently waive his Miranda rights. At the hearing on the motion to suppress, the arresting officer testified that he gave defendant the Miranda warnings following defendant's arrest. The second officer stated that the defendant signed a written waiver of his rights and that defendant said he understood it, that he had no questions about the waiver, and that he had no reservations about it. Defendant testified that he requested an attorney after he was given his Miranda rights, but was told he would get one when he went to court. Defendant's claim, thus, is reduced to a matter of his credibility against those of two police officers. In this regard, we agree with the trial court's conclusion that defendant waived his rights. Further, in light of defendant's age, his past experience with the criminal justice system, and his education, we find the waiver also was knowingly made.

B. Voluntariness. We last must address defendant's assertion that his statements were not voluntary due to an ingestion of cocaine prior to the crime. The determination of voluntariness is a separate question from that of waiver. State v. Washington, 257 N.W.2d 890, 895 (1977), cert. denied, 435 U.S. 1008, 98 S. Ct. 1881, 56 L. Ed. 2d 390 (1978).

The record reflects testimony that defendant was depressed, but that he did not appear under the influence of intoxicants. There was testimony that he was fully cognizant of what was going on and responded to all questions. Most significantly, however, is defendant's own testimony at trial wherein he stated that he could recall his precise thoughts during the encounter with the restaurant employee. On cross-examination, defendant testified that the cocaine did not affect his recollection of events. In light of this record, we find no basis to support his contention that his capacity for self-determination was "critically impaired" and, thus, conclude trial court properly found his statements were voluntarily made.

V. Effective Assistance of Counsel. Defendant last contends that the performance of his trial counsel was so inadequate that he was denied his constitutional right to effective assistance of counsel. While defendant cites some fifty-eight instances reflecting trial counsel's inadequacy, we find that this issue should not be adjudicated under the present record but should be preserved for subsequent proceedings under chapter 663A, The Code.

Having found no reversible error, we affirm trial court's judgment.

AFFIRMED.