IN THE COURT OF APPEALS OF IOWA

No. 0-573 / 89-1976

FILED
DEC 27 1990
CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

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ANTHONY NELSON STOKES,

Appellant.

Appeal from the Iowa District Court for Woodbury County, Michael S. Walsh, Judge.

The defendant appeals his conviction, following a jury trial, for first-degree robbery. **AFFIRMED IN PART; REVERSED IN PART; AND REMANDED WITH INSTRUCTIONS.**

Dennis D. Hendrickson, Sioux City, for appellant.

Thomas J. Miller, Attorney General; Thomas S. Tauber, Assistant Attorney General; Thomas S. Mullin, County Attorney; and Mark Campbell, Assistant County Attorney, for appellee.

Heard by Oxberger, C.J., and Donielson and Habhab, JJ.

DONIELSON, J.

Anthony Stokes and a companion robbed two pedestrians on a street. During the robbery Stokes' companion stabbed one of the victims. Stokes then threatened to stab the other victim. Although Stokes did not display a knife, he held his hand behind his leg in a manner which led the victim to believe Stokes' representation. Other than Stokes' own threatening statements, there was no direct evidence that Stokes personally had been in possession of a knife.

Stokes was charged with robbery in the first degree, a violation of Iowa Code sections 711.1(2) and 711.2 (1989). The charge was elevated to first-degree robbery on the theory Stokes had been "armed with a dangerous weapon" during the commission of the robbery. See Iowa Code § 711.2. A jury found Stokes guilty of robbery in the first degree.

Stokes appeals the resulting conviction. He challenges the sufficiency of the evidence to prove he was guilty of robbery in the first degree. He contends there was no evidence he was "armed with a dangerous weapon" within the meaning of section 711.2. We agree and, therefore, we reverse the defendant's conviction of robbery in the first degree.

Our scope of review is on assigned error only. Iowa R. App. P. 4. The standard of review in challenging the sufficiency of the evidence is well established. State v.

Lampman, 342 N.W.2d 77, 81 (Iowa App. 1982). We will uphold a verdict where there is substantial evidence in the record tending to support the charge. State v. Aldape, 307 N.W.2d 32, 39 (Iowa 1981). Substantial evidence means evidence which would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. State v. Hall, 371 N.W.2d 187, 188 (Iowa App. 1985); State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984). Of course, the State must prove every element of a crime charged beyond a reasonable doubt. State v. King, 256 N.W.2d 1, 10 (Iowa 1977) (citing In re Winship, 397 U.S. 358, 361-64, 90 S. Ct. 1068, 1071-73, 25 L. Ed.2d 368, 373-75 (1970)); see also State v. Robertson, 351 N.W.2d 790 (Iowa 1984).

When reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State, including legitimate inferences and presumptions that fairly and reasonably may be deduced from the evidence in the record. Hall, 371 N.W.2d at 188; State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984). Direct and circumstantial evidence are equally probative so long as the evidence raises "a fair inference of guilt and [does] more than create speculation, suspicion, or conjecture." State v. Hamilton, 309 N.W.2d 471, 479 (Iowa 1981).

If this court had been asked to review the sufficiency of the evidence to prove the defendant had a knife, the question would be much closer. However, the issue is whether substantial evidence supports the jury's finding

that the defendant was armed with a "dangerous weapon." Even viewing the evidence in the light most favorable to the State, this court must conclude no evidence was presented to show Stokes was armed with a dangerous weapon at the time of the robbery.

Iowa Code 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, stiletto, switchblade knife, or knife having a blade exceeding five inches in length.

The first sentence of this definition cannot support the conclusion that a knife is a dangerous weapon because a knife is not an instrument or device "designed primarily for use in inflicting death or serious injury upon a human being or animal." State v. Durham, 323 N.W.2d 243, 245 (Iowa 1982); State v. Tusing, 344 N.W.2d 253, 254 (Iowa 1984). However, a knife may be a "dangerous weapon" under § 702.7 when actually used to hurt someone, c.f. Durham, 323 N.W.2d at 245, or if it has "a blade exceeding five inches in length." See id. at 244-45 (third sentence of § 702.7 establishes an enumerated list of per se dangerous weapons).

In the case before this court, Stokes did not use a knife to hurt anyone, eliminating any reliance on the second sentence of the definition of a dangerous weapon. No knife was ever seen in Stokes' possession. No knife was found. No knife was introduced into evidence. There is a total absence of proof regarding the character of the knife Stokes allegedly possessed. There is no evidence whatsoever relating to the length of the blade of the alleged knife. The State failed to introduce any evidence that Stokes was armed with a "dangerous weapon" at the time of the robbery. Under these circumstances, the jury's finding that Stokes was armed with a dangerous weapon was mere speculation and conjecture.

We hold the evidence is insufficient as a matter of law that the defendant was armed with a dangerous weapon while perpetrating a robbery. Inherent in the jury's verdict of guilty of first-degree robbery is the jury's finding of second-degree robbery. The elements of the two crimes differ only in the defendant being armed with a dangerous weapon. No error has been found in this case except for the insufficiency of the evidence to prove the single element which elevates second-degree robbery to first-degree robbery. Therefore, this case is remanded to the trial court with instructions to enter an amended judgment of guilty of the lesser included offense of robbery in the second degree. See State v. Lampman, 342 N.W.2d 77 (Iowa App. 1982).

The conviction for robbery is affirmed; the finding that the defendant was armed with a dangerous weapon is reversed and remanded for proceedings in accordance with this opinion.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED WITH INSTRUCTIONS.

Oxberger, C.J., concurs; Habhab, J., dissents.

HABHAB, J. (dissenting)

I respectfully dissent. I would affirm.