

FILED

JAN 30 1981

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

WILLIAM JOSEPH GILLETTE,)

Defendant-Appellant.)

Filed January 30, 1981.

0-352

64245

Appeal from Black Hawk District Court - Carroll E. Engelkes, Judge.

Defendant appeals his conviction of first degree robbery in violation of section 711.2, The Code 1979, contending that the trial court erred in instructing the jury on the definition of "dangerous weapon" under section 702.7, The Code 1979. **AFFIRMED.**

Theodore R. Stone, Assistant Public Defender, Black Hawk County Public Defender's Office, Waterloo, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Merle Wilna Fleming, Assistant Attorney General, for plaintiff-appellee.

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

DONIELSON, J.

Defendant William Gillette appeals his conviction of first degree robbery, asserting that the trial court erred in instructing the jury on the definition of a "dangerous weapon." We affirm the conviction.

I.

In the summer of 1979, defendant was charged with and convicted of first degree robbery in violation of section 711.2, The Code 1979. At trial, the robbery victim, a 7-Eleven store clerk, testified that the defendant entered the store, displayed a knife with a two-inch blade, and demanded money from the cash register. The clerk further testified that he cooperated with the defendant because he was afraid of being cut, even though he acknowledged that the knife was only a pocket knife. Following presentation of the evidence, the trial court submitted a proposed instruction on the definition of a "dangerous weapon," which reads in pertinent part:

Robbery in the First Degree occurs when a person, while perpetrating the robbery, is armed with a dangerous weapon.

A "dangerous weapon," as that term is used above and elsewhere in these instructions, is either:

(a) 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; or

(b) Any instrument or device of any sort whatsoever which is actually used in such manner as to indicate that the user intends to inflict death or serious injury upon another, and which, when so used, is capable of inflicting death upon a human being.

Defense counsel then requested the trial court to add to the proposed instruction that "[d]angerous weapons include, but are not limited to, any offensive weapon, pistol, revolver, or other firearm, dagger, razor, stiletto, or knife having a blade of three inches or longer in length." This provision is contained in the third sentence of section 702.7, The Code 1979, the section that defines "dangerous weapon." The trial court refused defendant's request after some discussion, concluding that addition of this sentence, which provides that a three-inch knife constitutes a dangerous weapon as a matter of law, would be misleading and not relevant to the issues in the case, since the evidence presented for the jury's consideration did not include a knife with a three-inch blade. The court then gave the proposed instruction to the jury, which convicted the defendant of robbery in the first degree.

II.

Defendant now contends that the trial court erred in refusing to make the proposed addition to the instruction, but we do not agree.

Defendant's conviction should not be reversed for failure to give this portion of the instruction unless there exists a reasonable basis for finding that the omission resulted in confusion for the jury, see State v. Lynch, 197 N.W.2d 186, 190 (1972), or in prejudice to the defendant, see State v. Frink, 255 Iowa 59, 66, 120 N.W.2d 432, 436-37 (1963). We see no reasonable basis for finding either in the instant case. The instruction as it was actually given was lifted almost verbatim from section 702.7, The Code 1979 (with the exception of the third sentence of that section, the omission of which defendant is now complaining). It so clearly outlines for the jury the characteristics of a "dangerous weapon" that we see no basis for thinking that the jury may have found the instruction confusing. Furthermore, we find no reason to believe that the jury was misled or the defendant prejudiced by the fact that the trial court omitted the third sentence of section 702.7 from its instruction. The omitted sentence provides examples of instruments that satisfy the "dangerous weapon" definition and makes it clear that the list is not all-inclusive. Had this sentence been added to the instruction as defendant requested, it would not have eliminated the possibility that a reasonable jury could conclude that a two-inch knife constitutes a "dangerous weapon" under the second sentence of section 702.7. In fact, given the facts of this case, we think it quite likely that a jury might so conclude. Defendant displayed the knife to the store clerk during the robbery in such a way as to indicate that he intended to inflict at least serious harm if the clerk refused to cooperate. Furthermore, a knife, even though its blade is only two inches long, presumably is capable of inflicting such injury. Therefore, since it appears unlikely that the instruction was confusing to the jury or that addition of the proposed sentence would have affected the jury's determination as to whether this knife was a dangerous weapon, we find no prejudice to the defendant and no reason to reverse his conviction.

AFFIRMED.