

IN THE COURT OF APPEALS OF IOWA

No. 6-226 / 05-0558
Filed May 10, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CENECA ROMELE JOHNSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, J. Hobart Darbyshire,
Judge.

Ceneca Romele Johnson appeals from his conviction for first-degree
robbery. **REVERSED AND REMANDED FOR NEW TRIAL.**

Linda Del Gallo, State Appellate Defender, and David Arthur Adams,
Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant
Attorney General, William E. Davis, County Attorney, and Donald E. Frank,
Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Vogel and Mahan, JJ.

MAHAN, J.

Ceneca Romele Johnson appeals from his conviction following a jury trial for first-degree robbery, in violation of Iowa Code sections 711.1 and 711.2 (2003). We reverse and remand for new trial.

I. Background Facts and Proceedings

On the morning of November 10, 2004, a man later identified as Johnson entered the Metrobank in Davenport. Three tellers and the bank's branch manager were in the bank at the time. Johnson approached one of the tellers and instructed her to fill the white plastic bag he handed her with "fifties and hundreds." He tapped the gun he was carrying on the counter and told the teller to hurry up or he would start shooting. He told the others not to move. After collecting the money from the cash drawers, the teller returned the bag to Johnson, who walked out of the bank.

Gary Thompson lived close to the bank and had observed a strange car parked in front of his house on the morning of November 10. He observed a man he later identified as Johnson get out of the car and walk towards the bank. Suspicious, Thompson noted the description of the car and wrote down the license number. As Thompson walked toward the bank, Johnson returned. Johnson pointed a weapon at Thompson and ordered Thompson to turn around and walk away. Johnson got into the car and drove away.

The police tracked down the car and arrested Johnson in a nearby apartment. After obtaining a search warrant for the apartment, the police discovered a BB pistol in the water tank of the toilet and a duffel bag containing a

large sum of money in a closet. The amount of money recovered in the search equaled that reported taken from the bank in the robbery.

The State filed a trial information charging Johnson with first-degree robbery. The district court denied Johnson's motion to suppress, and the matter proceeded to trial. The jury found Johnson guilty of first-degree robbery. The district court denied Johnson's motion in arrest of judgment and sentenced Johnson to an indeterminate term not to exceed twenty-five years.

Johnson appeals, arguing the district court erred in (1) finding sufficient evidence that he was armed with a dangerous weapon and (2) instructing the jury a BB gun was a dangerous weapon as a matter of law. In a separate pro se brief, Johnson argues the district court erred in (1) denying his motion to suppress evidence and (2) allowing a resident of Illinois to be a juror.

II. Jury Instructions

We review alleged errors in jury instructions for corrections of errors at law. Iowa R. App. P. 6.4; *State v. Fintel*, 689 N.W.2d 95, 99 (Iowa 2004).

The district court instructed the jury that in order to find Johnson guilty of first-degree robbery, the State was required to prove:

1. Johnson had the specific intent to commit a theft.
2. To carry out his intention or to assist him in escaping from the scene, with or without stolen property, Johnson:
 - a. Committed an assault on employees of the bank or other persons, or
 - b. Threatened employees of the bank or other persons with, or purposely put them in fear of, immediate serious injury.
3. Johnson was armed with a dangerous weapon.

See Iowa Code §§ 711.1, .2. The instructions defined a "dangerous weapon" as

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. A BB gun is a dangerous weapon.

Johnson argues the question of whether the BB gun used in the robbery was a dangerous weapon was a fact question for the jury. Further, he claims he was prejudiced by the instruction because, given the lack of evidence as to the capabilities or dangers arising from the use of the BB gun, the jury could have found Johnson was not armed with a dangerous weapon at the time of the robbery.

The jury instruction given by the district court substantially tracks the definition of a “dangerous weapon” found in the Iowa Code section 702.7. That section also provides:

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.

Whether an item not listed in the statute is a dangerous weapon is a fact issue for the jury. *See State v. Dallen*, 452 N.W.2d 398, 398 (Iowa 1990) (concluding the State presented sufficient evidence to permit the jury to find a BB gun was a dangerous weapon); *see also State v. Tusing*, 344 N.W.2d 253, 254 (Iowa 1984) (holding “it is an issue for the fact-finder” whether brass knuckles are “capable of inflicting death” as required by the statutory definition of “dangerous weapons”); *State v. Ashland*, 259 Iowa 728, 730, 145 N.W.2d 910, 911 (1966) (explaining that “[i]tems not specifically named [in the statute] might be factually found to be dangerous weapons,” but it was unnecessary to submit the question to the jury in this case because pistols and revolvers were specifically referred to in the statute

as dangerous weapons); *State v. Brown*, 67 Iowa 289, 25 N.W. 248 (1885) (holding that the question of whether a piece of wood was a deadly weapon should be left to the jury to determine); *State v. Mitchell*, 371 N.W.2d 432, 432 (Iowa Ct. App. 1985) (holding that evidence presented at trial was sufficient to allow the fact finder to decide nunchakus are dangerous weapons). See also *State v. Williams*, 352 N.W.2d 576, 579 (Neb. 1984) (holding that because “[a] pellet gun which discharges a BB shot by means of compressed gas or a spring is not a firearm,” it was not a per se deadly weapon within the meaning of the state statute, and the question of whether it was a deadly weapon must be decided by the trier of fact). Therefore, we agree with Johnson that the district court’s instruction was in error.

However, the district court’s error in instructing the jury does not warrant reversal unless it results in prejudice to the defendant. *Fintel*, 689 N.W.2d at 99; see also *Neder v. United States*, 527 U.S. 1, 15, 119 S. Ct. 1827, 1837, 144 L. Ed. 2d 35, 51 (1999) (holding the omission of an element of the offense in jury instructions is an error subject to harmless-error analysis). The test is “whether it appears ‘beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’” *Neder*, 527 U.S. at 15, 119 S. Ct. at 1837, 144 L. Ed. 2d at 51 (quoting *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 828, 17 L. Ed. 2d 705, 710 (1967)); see also *State v. Engle*, 590 N.W.2d 549, 551 (Iowa Ct. App. 1998) (“An error in instructing the jury is presumed prejudicial unless the contrary appears beyond a reasonable doubt from a review of the whole case.”).

The State was required to show the BB gun either fit the first half of the definition of a “dangerous weapon,” i.e., that it was “designed primarily for use in inflicting death or injury,” or the second half of the definition, i.e., a “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 . . . and . . . is capable of inflicting death upon a human being.” See *State v. Greene*, 709 N.W.2d 535, 537 (Iowa 2006).

At trial, the State presented evidence that Johnson was armed with a fully operational spring-loaded BB gun when he entered the bank. Johnson used the gun to force bank employees to comply with his orders and threatened to shoot them. The bank employees believed the gun was a real one and feared they would be shot.

Although the State did not present evidence that the BB gun was “designed primarily for use in inflicting death or injury,” a juror could have concluded from the evidence that the BB gun was “used in such a manner as to indicate that the defendant intends to inflict death or serious injury.” However, to show the BB gun met the second half of the definition of a “dangerous weapon,” the State was also required to present evidence to prove the BB gun was “capable of inflicting death upon a human being.” See Iowa Code § 702.7. The State failed to do so in this case. Cf. *Dallen*, 452 N.W.2d at 399 (holding that based upon testimony from the medical examiner that CO₂ pellet-BB guns are capable of inflicting death upon a human being “the jury could conclude the gun was designed primarily for use in inflicting death or injury upon a human being or animal.”). Therefore, we cannot conclude beyond a reasonable doubt that the

improper jury instruction did not result in a guilty verdict in this case. We conclude Johnson was prejudiced by the district court's instruction that essentially removed the "dangerous weapon" issue from the jury's consideration.

Based on our determination that Johnson suffered prejudice as a result of the erroneous jury instruction, we reverse his conviction and remand for a new trial. Accordingly, we need not address the other alleged errors raised by Johnson on appeal.

REVERSED AND REMANDED FOR NEW TRIAL.