IN THE COURT OF APPEALS OF IOWA

No. 9-983 / 09-0895
Filed December 30, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RICARDO ORTIZ,
Defendant-Appellant.

Appeal from the Iowa District Court for Plymouth County, Jeffrey A. Neary, Judge.

Ricardo Ortiz appeals his conviction and sentence entered on a plea of guilty to first-degree robbery. **SENTENCE VACATED AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Patricia Reynolds, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, Darin J. Raymond, County Attorney, for appellee.

Considered by Vogel, P.J., and Doyle and Mansfield, JJ.

MANSFIELD, J.

Ricardo Ortiz appeals the conviction and sentence entered upon his plea of guilty to first-degree robbery in violation of Iowa Code sections 711.1 and 711.2 (2009). He claims that his counsel was ineffective because his plea lacked a sufficient factual basis. We agree and therefore vacate the sentence and remand for further proceedings.

I. Factual and Procedural Background.

According to the minutes of evidence, K.S. was in her home at around 9:30 p.m. on January 18, 2009, when three individuals barged into the house through the door between the garage and the house. All were wearing ski masks. The first intruder was wielding a box cutter type knife that contained a razor blade. K.S. was extremely frightened and started yelling. F.T., a male who also lived in the home, was in the master bedroom at the time. K.S. tried to push the door of the bedroom closed while the first intruder got in between the door and the room and kept pushing the door open.

F.T. made an emergency call, and two deputies quickly arrived on the scene. The intruders had left by then, but the deputies were able to pursue their car until it got stuck in the snow. Two persons, Ivan Flores and Armando Valentin, were apprehended in the car. Three other individuals, Ortiz, Michael Carson, and David Zamora, were caught after they fled into the snow. Ortiz's footprints matched one of the three sets of footprints found at K.S. and F.T.'s home. Carson's and Flores's footprints matched the other two.

Under questioning, Ortiz admitted he was one of the persons who entered the house "to see what they could get." Ortiz admitted wearing a black stocking cap and a red bandanna.

Zamora was also questioned. He stated that Ortiz, Carson, and Flores had entered the house while Zamora and Valentin waited in the car. According to Zamora, Ortiz, Carson, and Flores all belonged to the "Latin Kings" gang of Sioux City. Zamora stated that he was at a friend's house when Ortiz, Carson, and Flores were in a backroom planning a job.

According to Zamora, Ortiz, Carson, and Flores carried black trash bags into the house with them for placing stolen items. While the group was trying to get away in the car, Carson threw something out. One of the sheriff's deputies later found a fixed blade five-inch knife with a black rubber handle and a silver metal hatchet with a black rubber handle in the same ditch along the road where the car ultimately got stuck. Black ski masks and black trash bags were also recovered.

Subsequently, K.S. examined photographs of Carson and stated that he appeared to be the same person who brandished the box cutter knife in her residence.

Ortiz, who had just turned seventeen when these acts were committed, was initially charged with robbery in the first degree, burglary in the first degree, conspiracy to commit robbery, and conspiracy to commit burglary in the first degree. On April 3, 2009, Ortiz pled guilty to the robbery charge only. *See* Iowa Code §§ 711.1 & 711.2. Ortiz was sentenced to an indeterminate term of twenty-five years in prison with a mandatory minimum of seventy percent. *See id*.

§ 902.12. Ortiz subsequently filed a notice of appeal, claiming a factual basis for his plea was not established.

The record shows that, during the guilty plea colloquy, the district court initially explained the elements of robbery to Ortiz, and Ortiz acknowledged he understood them. The district court characterized them as the elements of *first* degree robbery, but they were actually only the elements of *second* degree robbery. Thus, Ortiz specifically admitted on the record that on January 18, 2009, he "purposely put someone in fear of a serious injury" and "had the intent to commit a theft." The district court then asked the prosecutor if he was satisfied with the factual basis, and the prosecutor responded that there was an additional element for first degree robbery that the defendant "purposely inflict serious injury or attempt to inflict serious injury or is armed with a dangerous weapon." *See* Iowa Code § 711.2 (setting forth these alternatives).

The court then addressed defense counsel:

> Mr. Sloan, I don't know which one you might be prepared to talk about with regard to that, but would you want to visit with your client as to which element there is established, if you believe one has been established.

After Ortiz and his defense counsel consulted briefly off the record, the following dialogue occurred:

> THE COURT: All right. Uh, I think my last question, Mr. Sloan, was are you prepared to address which one of those options under 711.2 might apply to this particular case?
>
> MR. SLOAN: I—I believe it is armed with a dangerous weapon, Your Honor.
>
> THE COURT: All right. Uh, Mr. Ortiz, do you agree that either you or someone with whom you were, uh, participating in this robbery with was armed with a dangerous weapon?
>
> DEFENDANT: Yes.

> THE COURT: All right. Have, uh, you, uh, visited with Mr. Sloan about what's involved and what the definition of a dangerous weapon is?
>
> DEFENDANT: Yes.

The court thereupon accepted the plea. Ortiz now argues that his counsel was ineffective for failing to file a motion in arrest of judgment because there was no factual basis for the accusation that anyone participating in the offense was armed with a dangerous weapon.[1]

II. Analysis.

To prevail on an ineffective assistance of counsel claim, a defendant must prove by a preponderance of evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted therefrom. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). An attorney breaches an essential duty if the attorney allows a defendant to plead guilty to an offense for which there is no factual basis. *State v. Philo*, 697 N.W.2d 481, 485 (Iowa 2005). Also, prejudice is inherent in those circumstances. *Id*. at 488.

We believe the record is not sufficient to establish a factual basis for the first-degree robbery plea. In determining whether a factual basis existed, we consider the entire record, including the minutes of testimony. *State v. Hallock*, 765 N.W.2d 598, 603 (Iowa Ct. App. 2009). The minutes of testimony establish

[1] *See* Iowa R. Crim. P. 2.8(2)(*b*) ("The court . . . shall not accept a plea of guilty without first determining that the plea is made voluntarily and intelligently and has a factual basis.").

that potentially three weapons were used in the robbery: a knife with a five-inch blade, a hatchet, and a box cutter type knife with a razor blade.[2]

According to Iowa Code section 702.7, there are three paths under which a weapon may be deemed "dangerous." First, a dangerous weapon is "any instrument or device designed primarily for use in inflicting death or injury upon a human being or animal, which is capable of inflicting death upon a human being when used in the manner for which it was designed." Second, a dangerous weapon is:

> 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.

Third, 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 third category is known as "per se" dangerous weapons; they are deemed dangerous regardless of circumstances. Other items will be considered dangerous weapons if they meet the first or second circumstance. *See State v. Tusing*, 344 N.W.2d 253, 254-55 (Iowa 1984) (holding that brass knuckles were a dangerous weapon because they met the first standard, even though they did not meet the third).

We agree with Ortiz that none of the weapons described in the minutes of testimony met the definition of a "per se" dangerous weapon. *See State v.*

[2] We think a plausible inference can be drawn from the minutes that there were three weapons and that each intruder had his own weapon. A box cutter has a significantly different appearance from a fixed blade five-inch knife. On the other hand, it is also possible that the box cutter and the five inch knife were one and the same, since no "box cutter" was found, at least according to the minutes. Moreover, Carson was apparently the lead intruder and the person whom K.S. saw with a box cutter, yet the minutes indicate he was the only person seen throwing anything out of the car.

Durham, 323 N.W.2d 242, 245 (Iowa 1982). In *Durham*, the supreme court stated that "the term 'razor' as used in the former statute and in section 702.7 is limited to the straight razor, a common shaving instrument before invention of the safety razor but now used for shaving mainly in barber shops." *Id*. at 245. Regardless of our personal views of the dangers presented by box cutters, we are bound to follow the supreme court's prior interpretation of the statute. Thus, to find a factual basis for the plea, the district court had to have a basis for determining that one of the weapons was either "designed primarily for use in inflicting death or injury" or "used in such a manner as to indicate that the defendant intends to inflict death or serious injury upon the other." We note that the trial court "is not required to extract a confession from the defendant." *State v. Keene*, 630 N.W.2d 579, 581 (Iowa 2001). Rather, it "must only be satisfied that the facts support the crime, 'not necessarily that the defendant is guilty.'" *Id*. (quoting 1A Charles Alan Wright, *Federal Practice and Procedure* § 174, at 199 (1999)).

From the minutes of testimony alone we cannot say that any of the weapons was "designed primarily for use in inflicting injury." Knives, box cutters, and hatchets generally have legitimate uses other than causing death or injury to human beings or animals. *Cf. State v. Dallen*, 452 N.W.2d 398, 399 (Iowa 1990) (holding that the trial evidence sufficiently established that a BB gun was a dangerous weapon under this branch of the section 702.7 definition). One or more of these weapons might be able to meet the second prong of section 702.7, but from the minutes before us we cannot say.

Similarly, from the minutes alone we cannot draw the conclusion that any of the weapons was "actually used in such a manner as to indicate [an intent] to inflict death or serious injury." Three masked men, possibly carrying multiple weapons, broke into a house they had staked out. The lead intruder, who had a box cutter in his hand, attempted to charge into the master bedroom where the occupants of the house were holed up. However, the minutes do not indicate the intruder threatened to use the box cutter against K.S. or F.T. personally. *See State v. Greene*, 709 N.W.2d 535, 538 (Iowa 2006) (reversing a verdict that steel shards used to cut the tires on the victim's car were a "dangerous weapon," while noting that "[i]f the shards were held in the defendant's hand in a personal confrontation with a victim, there would be little doubt that they were dangerous weapons, as they would have been used in a manner indicating an intent to kill or injure"). The minutes of testimony would support the inference that the box cutter was intended to deter potential resistance from anyone who happened to be in the house. However, inferring more from these minutes would involve "conjecture." *Id*. As we read sections 702.7 and 711.2, they do not cover the situation where a robber simply carries a weapon but never threatens to use it, unless the weapon falls into one of the other two section 702.7 categories.

It is true that in this case we have more than just the minutes. Ortiz admitted early in the colloquy that he "purposely put someone in fear of a serious injury." This was when the district court was going through the elements of second degree robbery, under the mistaken impression that these were the elements of first degree robbery. We believe there is a difference between putting someone in fear of a serious injury, and *using a weapon in such a*

manner as to indicate an intent to inflict serious injury. That difference is the distinction between first and second degree robbery.

The prosecutor and the district court recognized that the colloquy was incomplete, and the court gave Ortiz an opportunity to consult privately with his counsel. After a brief off-the-record discussion, defense counsel explained that the "dangerous weapon" alternative of section 711.2 was the applicable provision in this case. The court then asked Ortiz to confirm on the record whether he or one of the other participants had a "dangerous weapon"[3] and whether he had had "visited" with his counsel concerning the definition of a dangerous weapon. Ortiz answered "yes" to both inquiries.

Yet, as we have already discussed, "dangerous weapon" is a term of art with a specific set of meanings under section 702.7. When Ortiz admitted that a "dangerous weapon" was involved in the robbery, he was really making a *legal* admission rather than a factual one. One cannot simply assume that a seventeen-year-old's understanding of a "dangerous weapon" will match the statutory definition. This is different from the situation, for example, where a defendant is asked (as Ortiz was) whether he "had the intent to commit a theft." There, an individual's common sense understanding of the question is likely to correspond with what the statute requires, so a district court can safely rely on the defendant's admission to help establish the needed factual basis for the plea.

[3] Whether Ortiz personally had a dangerous weapon or not, he could be punished as if he had one if he aided and abetted the crime. *See* Iowa Code § 703.1; *State v. Sanders*, 280 N.W.2d 375, 377 (Iowa 1979).

The district court implicitly recognized this point; that is why it went on to ask Ortiz whether he had "visited" with his counsel about the definition of a dangerous weapon. But this leads to another problem. The district court

> may not abrogate or delegate to anyone, including the attorney for the accused, the duty to determine defendant's knowledge of the charge, appreciation of legal consequences of a guilty plea, whether it is voluntarily entered, or *[the] existence of facts supporting it*.

State v. Loye, 670 N.W.2d 141, 152 (Iowa 2003) (quoting *State v. Ludemann*, 484 N.W.2d 611, 613 (Iowa Ct. App. 1992) (in turn quoting *State v. Sisco*, 169 N.W.2d 542, 548 (Iowa 1969))) (emphasis added).

In essence, the district court delegated to Ortiz's counsel the task of explaining what a "dangerous weapon" was and verifying that such a weapon was involved. Counsel's off-the-record discussion with Ortiz was used to fill a gap in the on-the-record factual basis. Presumably counsel did his job, although the term "visited" is somewhat loose and would allow for the possibility that defense counsel provided something less than a full explanation of section 702.7's different permutations. Regardless, the relevant duty rested with the district court, not counsel.

We believe the situation here is in some respects analogous to that in *Ludemann*. There the district court did not itself explain the elements of second-degree burglary to the defendant, but instead asked for and received confirmation from defense counsel that he had explained those elements. We set aside the plea, because counsel had "failed to personally and fully inform Ludemann of the nature of the charge against him." *Ludemann*, 484 N.W.2d at 613. *Ludemann* did not involve a factual basis question, because the minutes of

testimony were adequate to establish that the offense had been committed (unlike here), but we think the basic non-delegation principle is the same.

Even more directly on point is our supreme court's earlier decision in *State v. Fluhr*, 287 N.W.2d 857 (Iowa 1980). In that case, the supreme court found fault with several aspects of a guilty plea, including its lack of a factual basis. The court observed,

> Nor do the facts that the plea form indicated that defendant had discussed the elements and facts of the crime with his attorney and that the attorney certified, on a separate form, that he was satisfied that the plea was factually justified overcome any of the plea's deficiencies.

Fluhr, 287 N.W.2d at 867. The court then went on to quote the non-delegation language from *Sisco*. *Id*. It is true that in *State v. Kirchoff*, 452 N.W.2d 801, 804-05 (Iowa 1990), the supreme court overruled *Fluhr* to the extent it held that informing a defendant of the defendant's rights and possible punishment by the use of written forms, rather than orally, requires automatic reversal. However, *Kirchoff* did not involve an issue of factual basis, *see* 452 N.W.2d at 804 ("Kirchoff does not even claim that his pleas of guilty were . . . lacking factual basis"), and we do not read it as disturbing that aspect of *Fluhr*.

Thus, we hold that the minutes of evidence did not establish a sufficient factual basis in themselves for first-degree robbery, that the district court's colloquy with Ortiz was not sufficient to plug the hole, and that Ortiz's counsel failed to discharge an essential duty when he allowed his client to plead guilty to first-degree robbery despite the absence of a sufficient factual basis in the record. As noted, prejudice is presumed. *See State v. Straw*, 709 N.W.2d 128, 137 n.4 (Iowa 2006) ("We also presume prejudice when there was no factual

basis for the plea because we do not want to convict people for crimes they did not commit."). We therefore turn to the question of remedy.

Ortiz urges that he was charged with the "wrong crime," and therefore his guilty plea should be set aside. *See Philo*, 697 N.W.2d at 488. The State argues, on the other hand, that if the existing record falls short, it may be possible to show a factual basis for the plea based on additional facts and circumstances that do not appear in the minutes of testimony. Thus, the State asks us to vacate the sentence and remand if necessary. This would allow the State an opportunity to supplement the record to establish a factual basis for first-degree robbery. *Id.*; *see also Hallock*, 765 N.W.2d at 604.

Upon our review, we agree with the State's position that it may be possible to develop a factual basis for first-degree robbery. Accordingly, we vacate the sentence and remand.

SENTENCE VACATED AND REMANDED.

Doyle, J., concurs; Vogel, P.J., dissents.

VOGEL, P.J. (dissenting)

I respectfully dissent and would find that his counsel was not ineffective as there was a factual basis to support Ortiz's guilty plea.

As the majority set forth, the minutes of testimony state that all three who entered the home were wearing ski masks. One was brandishing a box cutter type knife that contained a razor blade. During his plea proceedings, Ortiz specifically admitted that, while having the intent to commit a theft, he "threaten[ed] another person" and "purposely put someone in fear of a serious injury." After consulting with his attorney, Ortiz further admitted either he or one of the other intruders was armed with a dangerous weapon. However, the majority then goes on to conclude that none of the weapons described in the minutes of testimony met the definition of a "per se" dangerous weapon. Because box cutters have a purpose other than to inflict serious injury or death, and there was no proof "the intruder threatened to use the box cutter against K.S. or F.T. personally," the majority concludes the box cutter was not a dangerous weapon. Thus, the record lacked a factual basis for Ortiz's plea.

I would find that under Iowa Code section 702.7 (2007), a box cutter meets two of the definitions for a dangerous weapon. First, it is common knowledge that a box cutter is a razor blade with a handle, which is simply a safe way for the user to hold a razor blade. It should easily fall within the statute as a "razor"—a per se dangerous weapon. *See* Iowa Code § 702.7 (providing a "razor" is a dangerous weapon); *State v. Durham*, 323 N.W.2d 243, 245 (Iowa 1982) (holding that a straight razor is a per se dangerous weapon).

Additionally, even if a box cutter would not qualify as a per se dangerous weapon, it clearly is an

> 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.

Id.[4] Masked intruders barged into an occupied home in order to commit a theft, with one brandishing a box cutter who then struggled with a victim to get into the bedroom where the victims sought refuge. When deciding whether any object is a dangerous weapon, our supreme court has stated,

> If the [steel] shards were held in the defendant's hand in a personal confrontation with a victim, there would be little doubt that they were dangerous weapons, as they would have been used in a manner indicating an intent to kill or injure.

State v. Greene, 709 N.W.2d 535, 538 (Iowa 2006). That is the case here—the box cutter was held in the hand of an intruder as the intruders confronted their victim. Furthermore, Ortiz admitted that he, with the intent to commit a theft, "purposely put someone in fear of a serious injury."

The majority finds the box cutter was not "used in such a manner as to indicate that the defendant intends to inflict death or serious injury." Iowa Code § 707.2. Yet the majority states, the "minutes of testimony *would support the inference that the box cutter was intended to deter potential resistance from anyone in the house*." (Emphasis added). I would agree that simply having a

[4] Box cutters were the weapons used to threaten the passengers on the airplanes hijacked in the September 11, 2001 terrorist attacks. *See U.S. v. Aukai*, 440 F.3d 1168 1181 (9th Cir. 2006) (noting that terrorists "turned [four planes] into deadly guided missiles" using only "small knives, box cutters, and cans of Mace or pepper spray") (citing National Commission on Terrorist Attacks upon the United States, The 9/11 Commission Report: Executive Summary (2004)).

box cutter does not deter potential resistance. Rather, having a box cutter and displaying it in a manner indicating an intent to injure or kill does have the desired effect of deterring potential resistance. This clearly meets the requirement of using the box cutter "in such a manner as to indicate that the defendant intends to inflict death or serious injury upon the other." Finally, a box cutter "is capable of inflicting death upon a human being." *See id*.; *Durham*, 323 N.W.2d at 245 (noting that straight razors "have a well documented history or use as weapons").

As the minutes of testimony demonstrate that one of the intruders was armed with a weapon fitting the description of a box cutter type knife, I would affirm the district court and find Ortiz's counsel breached no essential duty as Ortiz's plea was supported by a factual basis.