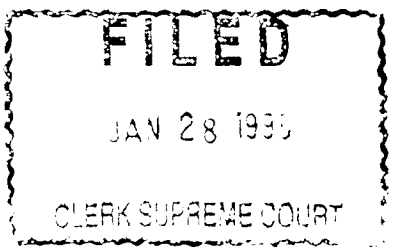
IN THE COURT OF APPEALS OF IOWA

No. 7-680 / 97-0054

000441



STATE OF IOWA,

Plaintiff-Appellee,

vs.

RANDALL TIMOTHY KROHN,

Defendant-Appellant.

Appeal from the Iowa District Court for Sac County, Joel E. Swanson, Judge.

Defendant appeals from his convictions, following a jury trial, for going armed with intent and assault with intent to inflict serious injury in violation of Iowa Code sections 708.8 and 708.1(1) (1995). **AFFIRMED IN PART, VACATED IN PART, AND REMANDED FOR RESENTENCING.**

Linda Del Gallo, State Appellate Defender, and John M. Priester and Shellie L. Knipfer, Assistant State Appellate Defenders, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, and Pamela Dettmann, County Attorney, for appellee.

Considered by Sackett, P.J., and Huitink and Mahan, JJ.

MAHAN, J.

Defendant Randall Krohn became engaged in an argument with Bill and John Hare over the citizen band (CB) radio. This resulted in the Hares driving to defendant's house to continue the argument in person. Defendant came out and twice pointed a gun at and threatened Bill Hare as Hare attempted to approach him. The police eventually arrived and arrested defendant. He was charged with going armed with intent and assault with intent to inflict serious injury.

At trial, defendant and Hare told differing versions of the events which culminated in the incident at defendant's house. A jury found defendant guilty on both counts. He then filed a motion for new trial based on newly-discovered evidence. The evidence was an affidavit from a CB user who had overheard the conversation between the Hares and defendant on the CB and stated the Hares were the aggressors. The district court denied the motion stating this new evidence was not material to the issue of guilt as it did not deal with what happened at defendant's house. The district court sentenced defendant to suspended terms not exceeding five and two years.

Defendant appeals. He argues there was insufficient evidence to prove the movement and lack of justification necessary for the going-armed-with-intent conviction. He further claims the court should have granted his motion for new trial based on newly-discovered evidence. Finally, defendant argues the court was

prohibited from imposing sentence on both the assault charge, as an aggravated misdemeanor based on the use or display of a dangerous weapon, and the going-armed-with-intent charge. We affirm in part, vacate in part, and remand for resentencing by memorandum opinion pursuant to Iowa Supreme Court rule 9.

Defendant first asserts there was not sufficient evidence in the record to support the jury's verdict. We will uphold a jury's verdict unless the record lacks substantial evidence to support the verdict. *State v. Liggins*, 524 N.W.2d 181, 186 (Iowa 1994). Substantial evidence means evidence that could convince a rational jury the defendant is guilty of the crime charged beyond a reasonable doubt. *State v. Stallings*, 541 N.W.2d 855, 857 (Iowa 1995). We view the evidence in the light most favorable to the State, without regard to contradiction or inconsistencies. *State v. Robinson*, 288 N.W.2d 337, 338 (Iowa 1980). Defendant argues the record lacks sufficient evidence to show his "going" to support his conviction of going armed with intent. From the evidence defendant came out of his house toward the Hares, brandishing his gun, we conclude a rational jury could find defendant was "going" and was not justified in the extent of his actions toward the Hares. We affirm the trial court on this issue.

Next, defendant argues the trial court abused its discretion by denying his motion for new trial based on newly-discovered evidence. We review the trial court's denial or grant of a motion for new trial on the basis of newly-discovered evidence

for abuse of discretion. *State v. Weaver*, 554 N.W.2d 240, 244 (Iowa 1996). The court has broad discretion in ruling on such motions. *State v. Romeo*, 542 N.W.2d 543, 551 (Iowa 1996). Such motions are not favored and should be granted only sparingly. *Weaver*, 554 N.W.2d at 245. To prevail, defendant must show (1) he discovered the evidence after the verdict, (2) he could not have discovered the evidence earlier in the exercise of reasonable diligence, (3) the evidence is material to the issues in the case and not merely cumulative or impeaching, and (4) the evidence probably would have changed the result of the trial. *Id.* at 246. We conclude the trial court did not abuse its discretion when it determined the newly-discovered evidence was merely impeaching and not material. We affirm the trial court's denial of defendant's motion for new trial.

Finally, defendant asserts the trial court erred in sentencing him for assault with intent to inflict serious injury based on the use or display of a dangerous weapon under Iowa Code sections 708.1 and 708.2, because section 708.2(3) states the section does not apply if section 708.6 or 708.8 apply. Defendant's conviction for going armed with intent was under section 708.8.

Our review for defects in sentencing procedure or for sentences outside statutory bounds is for correction of errors at law. *State v. Morris*, 416 N.W.2d 688, 689 (Iowa 1987). We conclude the trial court erred in sentencing defendant under Iowa Code section 708.2 in addition to section 708.8 because such sentence is not

permitted under section 708.2(3). We therefore vacate defendant's sentence on assault with intent to inflict serious injury with a dangerous weapon and remand this case to the trial court for resentencing on that count.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED FOR RESENTENCING.