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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	Filed November 22, 1978
Appellee,	)	
v.	)	646 / 60740
HERBERT LOUIS WHITFIELD,	)	
Appellant.	)	

Appeal from the Polk District Court - Luther T. Glanton, Jr., Judge.

Defendant appeals from judgments imposed following convictions of assault with intent to commit manslaughter. Affirmed.

R. Earl Barrett, of Krpan, Barrett & Krpan, of Des Moines, for appellant.

Richard C. Turner, Attorney General, Raymond W. Sullins, Assistant Attorney General, and Dan Johnston, Polk County Attorney, for appellee.

Submitted to Oxberger, C.J., and Donielson, Snell and Carter, JJ.

PER CURIAM

Defendant appeals judgment and sentence imposed upon conviction following jury trial of two counts of assault with intent to commit manslaughter. Said judgment and sentence are predicated upon § 694.5, The Code, 1977.

I. Defendant's first contention is that with respect to both counts, the trial court erred in failing to grant his motion for directed verdict of acquittal. The basis for this contention is his two-pronged assertion that (a) the State was compelled to establish a specific intent to kill as an element of the offenses of which he was convicted; and (b) the evidence, viewed in the light most favorable to the State, fails to show that he possessed such intent.

We reject defendant's contention for two reasons. First, while the offense of assult with intent to commit manslaughter has been characterized as "anomalous in some respects,"[1] it has been determined that it is not necessary for the State to establish a specific intent to kill. E.g. State v. Townsend, 238 N.W.2d 351, 356 (Iowa 1976): "In order to establish the requisite factual basis for assault with intent to commit manslaughter, it was not necessary to establish defendant intended to shoot officer Babb, but only that she consciously pointed a gun at the police and fired it with wreckless indifference toward their lives." As applied to the issue under consideration, State v. Townsend, supra, supports defendant's conviction on both counts.

In addition, we conclude that if a specific intent to kill had been required as an element of the crime, there was sufficient evidence with respect to use of a deadly weapon to infer such intent from the facts. State v. McNamara, 252 Iowa 19, 25, 104 N.W.2d 568, 572 (1960). See also, State v. Lass, 228 N.W.2d 758, 766 (Iowa 1975). Simply because the defendant rejected an opportunity to kill his victims after having already fired the gun does not preclude a finding of intent to kill at the time the shot was fired.

II. Defendant's other contention is that the trial court abused its discretion in sentencing defendant to two concurrent five-year prison sentences. Under the indeterminate sentence law, the only other choice available to the trial court (except

[1]State v. Marish, 198 Iowa 602, 606, 200 N.W. 5,7 (1924).

consecutive five-year sentences) was to grant the defendant probation. We are unable to agree that the trial court, in refusing to grant probation, abused its discretion. See State v. Grgurich, 253 N.W.2d 605, 606 (Iowa 1977); State v. Peckenschneider, 236 N.W.2d 344, 348 (Iowa, 1975). It appears the trial court was motivated by the belief a more lenient disposition would unduly depreciate the seriousness of the offense. See State v. Grgurich, supra, at 606 (McCormick, J. concurring).

We have considered all issues presented and find no basis for reversal.

AFFIRMED.