IN THE COURT OF APPEALS OF IOWA

No. 6-634 / 95-2197

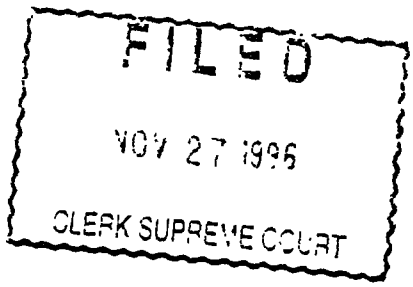
STATE OF IOWA,

Plaintiff-Appellee,

vs.

KEVIN KIRK GIBLER,

Defendant-Appellant.



Appeal from the Iowa District Court for Polk County, Gene L. Needles, Judge.

Defendant Kevin Gibler appeals his convictions and sentences, following a jury trial, for attempted murder and willful injury. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, John P. Sarcone, County Attorney, and Daniel C. Voogt, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Cady and Streit, JJ.

PER CURIAM

This is an appeal by a defendant challenging his convictions for attempt to commit murder, in violation of Iowa Code section 707.11, and willful injury, in violation of section 708.4. We affirm on appeal by memorandum opinion pursuant to Iowa Supreme Court Rule 9.

Kevin Gibler was having an affair with Christine Ferris, who was separated from her husband Tom Ferris. On May 28, 1995, the three members of the love triangle met at the Ferris home. Tom asked Christine to come back to him, and she agreed to give him another chance. Gibler went to his car, which was parked in front of the home. While sitting in his car, he engaged in a conversation with a neighbor, Mike Aloian. Tom came out of the home and yelled at Gibler. Aloian testified he saw Tom give Gibler a tap or poke. Gibler pulled a .357 magnum handgun from between the seats of the car and shot Tom in the face. The bullet went through Tom's cheek and severed his ear. Gibler left the scene.

Gibler was charged with attempt to commit murder, willful injury, and possession of a controlled substance (methamphetamine) with intent to deliver. He pled guilty to the drug charge, and it is not a subject of this appeal. A jury found Gibler guilty of the two other charges. He now appeals his convictions for attempt to commit murder and willful injury.

Gibler claims there is insufficient evidence in the record to support his convictions for attempt to commit murder and willful injury. He testified he pointed

the gun at Tom merely to scare him off, Tom pushed at the gun, and it accidentally went off. Gibler asserts his actions were justified and that he was afraid of Tom. He states Tom was a methamphetamine addict, which made him unpredictable.

A jury's finding of guilt is binding upon us unless we conclude the record lacks substantial evidence to support such a finding. *State v. Bush*, 518 N.W.2d 778, 779 (Iowa 1994). The jury is in the best position to decide the credibility of witnesses, including the defendant. *State v. Knox*, 536 N.W.2d 735, 742 (Iowa 1995).

The jury was not required to believe Gibler's testimony that the gun discharged accidentally. Christine testified Gibler told her he had purposely pointed the gun at her husband's head and shot him. The jury could also have found Gibler was not justified in his actions because an alternative course of action was available. Gibler was sitting in his car at the time of the incident and could have driven away.

We find there is substantial evidence in the record to support Gibler's convictions. Costs of this appeal are assessed to Gibler.

AFFIRMED.