FILED
MAY 31 1978
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Appellee,) Filed May 31, 1978
vs.)
MICHAEL THOMAS CARROLL,) 480/60759
Appellant.)

Appeal from Webster District Court - M. D. Seiser, Judge.

Defendant appeals conviction of assault with intent to commit murder alleging the evidence of assault was not sufficient to support the jury verdict. - Affirmed.

John R. Wylde, Jr., Saint Paul, Minnesota, and Francis J. Coyle, Rock Island, Illinois, for Appellant.

Richard C. Turner, Attorney General of Iowa, Raymond Sullins, Assistant Attorney General, and William J. Thatcher, Webster County Attorney, for Appellee.

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

PER CURIAM

Defendant Michael Thomas Carroll appeals his conviction for assault with intent to commit murder in violation of § 690.6, The Code. On appeal defendant attacks the sufficiency of the evidence to support the jury verdict and the excessiveness of his sentence of thirty years, which is the statutory maximum. He also contends he did not receive a fair trial under the totality of the circumstances in that the trial court erred in overruling his motion for new trial based upon the admission of two separate incidents of hearsay testimony and a failure to instruct on a lesser included offense.

Defendant initially challenges the sufficiency of the evidence to support the jury verdict and his conviction. In State v. Overstreet, 243 N.W.2d 880, 884 (Iowa 1976), the supreme court stated:

> [O]n defendant's appeal from criminal conviction based on jury verdict challenging sufficiency of evidence to sustain the verdict, this court views the evidence in the light most favorable to the State and accepts as established all reasonable inferences tending to support the jury's action. It is necessary to consider only the supporting evidence whether contradicted or not. It is for the fact finder, not us, to resolve questions of fact and determine the credibility ofwitnesses. Thus, a finding of guilt by the trier of fact is binding on this court unless we find it is without substantial support in the record or is clearly against the weight thereof. See State v. Reeves, 209 N.W.2d 18, 21 (Iowa 1973); State v. Dahlstrom, 224 N.W.2d 443, 447-448 (Iowa 1974); State v. Menke, 227 N.W.2d 184, 188 (Iowa 1975); and State v. Rosewall, 239 N.W.2d 171, 173 (Iowa 1976).

The county attorney's information accused defendant of the crime of assault with intent to commit murder in violation of § 690.6. Assault with intent to commit murder is basically a charge of attempted murder. State v. Alford, infra. However, the malice aforethought necessary to prove the charge of murder need not be directed against the person actually injured just because injury, rather than death, results. It is enough that a defendant has the requisite degree of malice necessary to support a conviction, regardless against whom it was intended. State v. Alford, 260 Iowa 939, 942, 151 N.W.2d 573 (1967).

In the instant case, the trial court instructed the jury on the crime of assault with intent to commit murder, together with the lesser offenses of assault with intent to commit great bodily injury and simple assault. The instruction on assault

with intent to commit murder required the jury to find beyond a reasonable doubt that defendant committed an assault upon Craig Lowrey with the specific intent to murder. The instruction on assault required the jury to find defendant attempted to apply unlawful, physical force to Lowrey and at the time had the apparent, present ability to execute the attempt. In an earlier instruction containing terms and their respective definitions which were used throughout the instructions, "assault" was similarly defined.

Although the offense of an assault is declared criminal by § 694.1, The Code, we must resort to the common law for a description or definition in order to ascertain what would amount to an assault. State v. Redmon, 244 N.W.2d 792, 796 (Iowa 1976); State v. Vick, 205 N.W.2d 727, 730-1 (Iowa 1973); State v. Twogood, 7 Iowa 252, 253-4 (1858). An assault has been defined as "an attempt or offer, with force or violence, to do a corporal hurt to another whether from malice or wantonness, with such circumstances as denote, at the time, an intention to do it, coupled with a present ability to carry such intention into effect." Redmon, supra at 797; State v. Townsend, 238 N.W.2d 351, 354 (Iowa 1976).

Defendant argues that he could not be guilty of an assault because even though there were shots fired, they were fired in a direction away from that of Lowrey and that he did not have the requisite intent to do a corporal hurt. Therefore, the trial court erred in not sustaining his motion for directed verdict. Intent is seldom capable of direct proof and ordinarily is disclosed by all the circumstances attending the alleged assault, together with all the relevant facts and circumstances as disclosed by the evidence. See State v. Bell, 223 N.W.2d 181, 184 (Iowa 1974). However, a person is presumed to have intended the natural result of his intentional acts. Redmon, supra; State v. Decklever, 172 N.W.2d 109, 110 (Iowa 1969).

In the instant case, the issue of intent is not troublesome. There is sufficient evidence of defendant's previous problems and encounters with Lowrey to support the jury verdict. There was testimony by defendant that he entered the building with the intent of putting a scare into Lowrey so Lowrey would leave defendant's ex-wife alone. When he went into the apartment building, he carried a semi-

automatic rifle concealed in a blanket or coat. The jury was justified in finding defendant had the requisite intent. However, there is a question whether defendant's actions constitute the "attempt or offer to do a corporal hurt" element necessary to establish the offense of assault.

The crime of assault to commit murder or great bodily injury may be committed without any physical injury to the victim. State v. Bell, supra; State v. Crandall, 227 Iowa 311, 316, 288 N.W. 85, 88 (1939). This can occur where one who attempts and intends to inflict injury, fails for one reason or another; the assault is nevertheless completed. Crandall, supra. The "attempt" element need not be proved by evidence of a completed attempt.

The crime of assault as in the case of assault with intent to inflict great bodily injury can be established by proof that defendant pointed a loaded gun at a person under circumstances constituting a threat to shoot. State v. Leahy, 243 Iowa 959, 964, 54 N.W.2d 447 (1952). Moreover, an assault can occur with an unloaded gun as where the person aimed at does not know that the gun is loaded, or has no reason to believe that it is not. State v. Shepard, 10 Iowa 126, 130 (1859). The mere pointing of a loaded gun is sufficient. State v. Schwab, 112 Iowa 666, 667, 84 N.W. 944 (1901).

However, an assault necessarily implies an attempt. State v. Roby, 194 Iowa 1032, 1035, 188 N.W. 709 (1922). Intent alone does not constitute the crime; there must be some overt act. 194 Iowa at 1040.

> The [overt] act must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation. It must not be merely preparatory. * * * While it need not be the last proximate act to the consummation of the offense attempted to be perpetrated, it must approach sufficiently near to it to stand either as the first or some subsequent step in a direct movement towards the commission of the offense after the preparations are made. Whenever the design of a person to commit crime is clearly shown, slight acts done in furtherance of that design will constitute an attempt; and the courts should not destroy the practical and commonsense administration of the law with subtleties as to what constitutes preparation and what an act done towards the commission of a crime. It would be useless to attempt to lay down any rule by which an act might be characterized as overt or otherwise in a particular case, and the general principles * * * must be applied in each case, as nearly as can be, with a view to working substantial justice.

State v. Roby, 194 Iowa at 1043.

To constitute a criminal assault, there must be some evidence of an attempt or endeavor to do violence to the person. Haupt v. Swenson, 125 Iowa 694, 695, 101 N.W. 520 (1904). See also State v. Lewis, 173 Iowa 643, 646-50, 154 N.W. 432 (1916); State v. Butler, 155 Iowa 204, 209-12, 135 N.W. 628 (1912). The question is: did defendant adopt and put into execution a plan designed to effectuate his purpose and intent? See State v. Hoot, 120 Iowa 238, 246, 94 N.W. 564 (1903). See also State v. Roby, supra.

Reviewing the evidence in the light most favorable to the State, State v. Overstreet, supra, we find a factual question existed concerning the events leading up to the alleged crime. Lowrey testified he saw defendant remove an item from his truck which looked like a shotgun and conceal it under his coat. Next, he heard a person he assumed was defendant walking up the stairs. Lowrey then turned out all lights but one, and hid in the kitchen where he could see both of the exits from the apartment. Lowrey heard the screen door of the apartment open and could see defendant tapping on the glass panels of the interior wooden door. He then saw defendant push open the wooden door, sticking the rifle into the apartment in a direction towards the kitchen where Lowrey was hiding. Lowrey ran, dove through a window falling to the canopy below and went to the police station across the street. As he went through the window, he heard the gun discharge.

While this case has similarities to State v. Woolman, 218 Iowa 967, 255 N.W. 524 (1934), it was up to the jury to judge Lowrey's credibility concerning his version of the facts and whether an assault was committed. It was in the best position to evaluate the conflicting testimony of Lowrey and defendant. The trial court would have been in error if it had directed a verdict under these circumstances. Overstreet, supra at 883-4. Accordingly, the trial court did not err in overruling defendant's motion for new trial.

Defendant's second contention on appeal is that the trial court's punishment was excessive. Determination of sentence is addressed to the sound discretion of the trial court, State v. Peckenschneider, 236 N.W.2d 344 (Iowa 1975), and if the sentence is within the statutory maximum, this court will not reverse absent an abuse of discretion. State v. Grgurich, 253 N.W.2d 605 (Iowa 1977); State v. Smith,

244 N.W.2d 325 (Iowa 1976). The punishment for the crime of assault with intent to commit murder is contained in § 690.6, The Code. The penalty under the indeterminate sentencing law leaves no discretion. State v. Bingaman, 210 Iowa 160, 166-7, 230 N.W. 394 (1930). Therefore, there was no error.

The evidentiary objections raised by defendant were not timely objected to, were therefore waived, and are not reviewable on appeal. Defendant's final contention concerns the instructions. First, defendant contends the trial court erred in not instructing further on included offenses. Defendant failed to object at the time and specifically stated he had no objection. Error is not preserved. State v. Hillman, 238 N.W.2d 793, 794 (Iowa 1976); State v. Dague, 206 N.W.2d 93, 95 (Iowa 1973). Secondly, defendant argues instruction nine distorts § 785.4, The Code, and shifts the burden to defendant. This argument was resolved adversely to defendant in State v. Young, 172 N.W.2d 128, 129-30 (Iowa 1969).

Defendant's conviction is affirmed.