IN THE COURT OF APPEALS OF IOWA

No. 0-105 / 99-0808
Filed April 28, 2000

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CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DARTONYA LEE SHIVERS,
Defendant-Appellant.

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

Defendant appeals from the judgment and sentence entered upon a jury verdict finding him guilty of possession of a firearm as a felon and being a habitual offender, in violation of Iowa Code sections 724.26, 902.8, and 902.9 (1997). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and James G. Tomka, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, Ron Robertson, County Attorney, and Stephen J. Lickiss, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Mahan and Miller, JJ.

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MAHAN, J.

Defendant appeals from the judgment and sentence entered upon a jury verdict finding him guilty of possession of a firearm as a felon and being a habitual offender, in violation of Iowa Code sections 724.26, 902.8, and 902.9 (1997). He contends the court erred in instructing the jury a Colt .38 Special is a firearm because the record does not include evidence it was in working condition. We affirm.

Mona Dillard was walking home with her husband Jimmy and her two sons on September 11, 1998. As she walked across Central Avenue in Fort Dodge, Dartonya Shivers drove by her in a van. As it went by her, Shivers said, "Get out of the way, you stupid bitch." Dillard responded, "Fuck you." Shivers parked the van and started walking toward Dillard. At this point, Dillard's husband, who had been talking to some people in another car, noticed Shivers and began walking toward him. The two men began arguing and Shivers started walking back to his van. Shivers said something to one of the girls in the van, and she handed him a small purple Crown Royal bag. Shivers pulled a gun out of the bag, pointed it at Jimmy, and said, "Am I still a punk?"

Someone alerted a nearby police officer Shivers had a gun. When the police officer stopped and got out, Shivers began to run. He was pursued by several police officers. In his attempt to get away from officers, Shivers ran down an alley, stumbled, and dropped something. He started running again and was tackled and handcuffed by a Fort Dodge police officer. The officer found a purple cloth Crown Royal bag on the ground near Shivers. Another Fort Dodge police

officers found a small .38 caliber handgun at the location where Shivers had stumbled.

Shivers was charged with being in possession of a firearm as a felon and being a habitual offender. There were eighteen jury instructions prepared. Defense counsel objected to Instruction No. 14. The district court overruled this objection, and all eighteen of the instructions were submitted. The jury convicted Shivers for being in possession of a firearm as a felon and they found him to be a habitual offender. Shivers does not dispute the facts on appeal.

I. Standard of Review. Our review of jury instructions is for errors of law. *State v. Breitbach*, 488 N.W.2d 444, 449 (Iowa 1992). We review to decide if the jury instructions are correct statements of the law and are supported by substantial evidence. *State v. Liggins*, 557 N.W.2d 263, 267 (Iowa 1996). The district court has the duty to ensure the jury understands the issues and the law it must apply. *State v. Bennett*, 503 N.W.2d 42, 45 (Iowa App. 1993). When only one instruction is challenged, it will be judged in context with other instructions relating to the criminal charge and not in isolation. *Liggins*, 557 N.W.2d at 267. If the trial court errs in submitting or refusing to submit an instruction, we will reverse only if the error has caused prejudice. *Kessler v. Wal-Mart Stores, Inc.*, 587 N.W.2d 804, 806 (Iowa App. 1998).

II. Jury Instruction. At trial, jury Instruction No. 14 was objected to by the defense. This instruction read as follows:

> A "firearm" is any instrument which will or is designed to discharge a shot, shell, bullet or projectile by the force of a chemical explosive such as gunpowder.
>
> A Colt .38 Special is a firearm.

Shivers contends Instruction No. 14 improperly shifted the burden of proof to the defendant for the specific reason that "nowhere in the record" is there evidence the Colt .38 Special was "in working condition." We find this argument to be without merit.

The term "firearm" is not defined in the Iowa Code. However, our supreme court has previously addressed this issue and determined a firearm is "a small arms weapon from which a projectile is fired by gunpowder." *State v. Kenney*, 334 N.W.2d 733, 733 (Iowa 1983) (citing *State v. Lawr*, 263 N.W.2d 747, 749 (Iowa 1978)). Our supreme court has additionally determined a firearm must have been clearly designed to be capable of propelling a projectile by explosive force. *State v. Hemminger*, 308 N.W.2d 17, 21 (Iowa 1981). These definitions clearly apply to serviceable and unserviceable firearms. *State v. Pinckney*, 306 N.W.2d 726, 728-29 (Iowa 1981). Thus, the State was not required to show the Colt .38 Special was serviceable in order to prove the offense of possession of a firearm as a felon.

The authority cited above is consistent with the definition in Instruction No. 14. A Colt .38 Special clearly falls under this definition.[1] We find the district court did not err in submitting Instruction No. 14 to the jury.

AFFIRMED.

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[1] In *Kenney*, our supreme court held a shotgun and a rifle were firearms.