FILED
JAN 23 1995
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 4-532 / 94-300

STATE OF IOWA,

Appellee/Cross-Appellant,

vs.

BENNY RAY GULLY,

Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Webster County, Mark S. Cady, Judge.

Gully appeals the judgment and sentence entered upon his conviction of two counts of attempted murder. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Kevin Cmelik, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Martha E. Boesen, Assistant Attorney General, James J. Koll, County Attorney, and Robert Hansen, Assistant County Attorney, for appellee.

Heard by Donielson, C.J., and Hayden and Huitink, JJ. Habhab and Cady, JJ., take no part.

HAYDEN, J.

In August 1993 Benny Gully fired a gun at Ricky and Larncey Foy, members of a family with whom Gully had an ongoing feud. He was charged by trial information with two counts of attempted murder and one count of possession of a firearm as a convicted felon in violation of Iowa Code sections 707.11 and 724.26 (1993). Gully's motion to sever the count of possession of a firearm was granted, and Gully proceeded to trial on the remaining two counts.

At Gully's December 1993 jury trial the State requested the trial court to instruct the jury intent to kill may be inferred from Gully's use of a firearm. The trial court denied the State's request. The jury found Gully guilty of two counts of attempted murder.

At the sentencing hearing the State presented evidence of six witnesses who described three incidents in which Gully allegedly committed criminal acts. These incidents were (1) the attempted murder of Kenneth Thornton; (2) a fight with Wallace Wildt at a Fort Dodge bar; and (3) resisting arrest for public intoxication. Much of the evidence regarding the first two incidents came from police officers who testified about what they were told by witnesses.

The court found Gully had shown a "cavalier attitude" towards using weapons to resolve disputes not only in this case but in other incidents in his life. The court sentenced Gully to a term not to exceed twenty-five years

for each count of attempted murder and ordered the sentences run consecutively.

Gully appeals. He contends the State relied primarily on hearsay evidence to establish his commission of unprosecuted offenses during the sentencing hearing and the trial court abused its discretion in considering this evidence. The State cross-appeals arguing the trial court erred in failing to instruct the jury intent to kill may be inferred from Gully's use of a firearm.

I. Sentencing.

We review defendant's sentence for an abuse of discretion. In order to show an abuse of discretion, one generally must show the court exercised its discretion "'on grounds or for reasons clearly untenable or to an extent clearly unreasonable.'" State v. Blackwell, 238 N.W.2d 131, 138 (Iowa 1976) (quoting Weeks v. Burnor, 326 A.2d 138, 140 (Vt. 1974)). Defendant argues the trial court abused its discretion by considering evidence of prior unprosecuted offenses.

The court may not rely upon prior unprosecuted offenses in imposing sentence, unless those offenses are admitted to by defendant or the facts before the court show the accused committed the offense. State v. Messer, 306 N.W.2d 731, 732-33 (Iowa 1981); State v. Hansen, 344 N.W.2d 725, 730 (Iowa App. 1983). In this case, the sentencing court stated:

> But what is most revealing, Mr. Gully, is the cavalier and basically barbaric attitude that you

> have towards the use of weapons, the cavalier attitude that you have with the use of weapons towards other human beings not only with the acts that you stand convicted of in this case, but in other ways in your life. You have fallen into a pattern of behavior where the use of a gun is done essentially the same way to resolve disputes as others in our society use verbal discourse. It's that attitude, Mr. Gully, that really steers the Court in the sentence that it must impose this morning. (Emphasis added.)

At the sentencing proceeding, the State called six witnesses. These witnesses gave detailed testimony about defendant's attempted murder of Kenneth Thornton, defendant's slashing of Wallace Wildt with a butcher knife, and defendant's behavior toward the police during and after his arrest for public intoxication. Given this testimony, the unprosecuted offenses the sentencing court alluded to were sufficiently shown. The trial court is affirmed on this issue.

II. **Requested Jury Instruction.**

We must now consider the State's cross-appeal. The State contends the trial court erred by denying the State's request for an instruction on permissive inference.

To begin, we note the State and Gully dispute the proper scope of review of the trial court's refusal to give the State's requested jury instruction. The State argues review is on error; Gully argues review is for abuse of discretion.

Iowa case law supports the State's position. See Morgan v. Perlowski, 508 N.W.2d 724, 729 (Iowa 1993) ("We review jury instructions to determine if they correctly

state the law and are supported by substantial evidence."). Gully cites State v. Cunningham, 463 N.W.2d 887, 889 (Iowa App. 1990), in support of his contention review is for abuse of discretion. Although Cunningham does state review of the trial court's refusal to give a requested instruction is for abuse of discretion, the cases cited in that opinion, State v. Christensen, 323 N.W.2d 219, 222 (Iowa 1982) (stating the trial court's determination of whether to allow evidence based on good cause for failure to file an alibi defense is reviewed for abuse of discretion), and State v. Lewis, 391 N.W.2d 726, 728 (Iowa App. 1986) (stating review of what constitutes good cause for filing belated alibi notice is for abuse of discretion), do not stand for this proposition. We take this opportunity to state review of the trial court's refusal of a requested instruction is for error.

Jury instructions explain the applicable law to jurors so they have a framework in which to observe the facts presented at trial. State v. Freeman, 267 N.W.2d 69, 71 (Iowa 1978). The trial court has a duty to instruct the jury on all the issues and the law of the case. Henderson v. Scurr, 313 N.W.2d 522, 525 (Iowa 1981). Although it is the court's duty to instruct, counsel shares the burden to see that appropriate instructions are given. State v. Sallis, 262 N.W.2d 240, 248 (Iowa 1978). Despite these principles, it is not generally expected a judge must give an instruction on every subsidiary issue or possible

inference to be drawn from the evidence. Commonwealth v. Chasson, 423 N.E.2d 306, 309 (Mass. 1981). Nor is the court required to submit a specific instruction to the jury if the content of the instruction can be gleaned from reading the instructions as a whole. State v. Spargo, 364 N.W.2d 203, 210-11 (Iowa 1985); State v. Bolinger, 460 N.W.2d 877, 880 (Iowa App. 1990).

Under this record, the trial court could have concluded the instruction on specific intent and the natural consequences of one's act adequately informed the jury of a similar inference it could make from the evidence. Error cannot be predicated on the failure to give an instruction on a subject which is contained elsewhere. State v. Farni, 325 N.W.2d 107, 109 (Iowa 1982). We affirm the trial court on this issue.

Judgment of the trial court affirmed.

AFFIRMED.