

IN THE COURT OF APPEALS OF IOWA

FILED

MAR 31 1987

CLERK SUPREME COURT

STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed March 31, 1987

354

vs.

)

RICHARD RAYMOND HENLEY,

)

7-64
86-391

Defendant-Appellant.

)

Appeal from the Iowa District Court for Dubuque County (CR 15951)

- Alan L. Pearson, Judge.

Defendant appeals his conviction, following a jury trial, of attempted murder. **AFFIRMED.**

Charles Harrington, Chief Appellate Defender; Dory A. Sutker, Assistant Appellate Defender; and B. John Burns, Assistant Appellate Defender; for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Pamela Greenman Dahl, Assistant Attorney General, for plaintiff-appellee.

Considered by Oxberger, C.J., Schlegel, and Hayden, JJ.

PER CURIAM

Defendant appeals his conviction, following a jury trial, of attempted murder. We affirm.

On June 8, 1985, the defendant shot Dean Boncyk with a shotgun following a period of drinking and fighting. At the trial on the attempted murder charge, the defendant argued that the court should not submit a jury instruction which, he claimed, unduly emphasized the State's theory of the case and unfairly prejudiced his defense. The court overruled the defendant's objection to the instruction, ruling that the instruction was not cumulative and did not create a conclusive presumption. On appeal, the defendant contends that the trial court erred in submitting the jury instruction since the instruction unduly emphasized certain evidence.

Our scope of review is for corrections of errors at law. Iowa R. App. P. 4.

There are two jury instructions at issue here. Instruction 27 provided:

I told you in the attempted murder instruction (Instruction No. 17, Paragraph 3), that the State has to prove that when Richard Henley shot Dean Boncyk he intended to cause his death. I also told you in the instruction on assault with the intent to inflict serious bodily injury (Instruction No. 25, Paragraph 2), that the State was required to prove that at the time Richard Henley pointed the shotgun at Dean Boncyk he intended to cause him a serious injury. In each of these crimes Richard Henley's intent is one of the essential facts that the State has to prove beyond a reasonable doubt.

The Defendant's intent is a mental state, emotion or condition of the mind that the doing of an act is for a certain purpose. Intent is seldom, if ever, capable of being proven directly or positively. Rather, intent must be inferred from facts proved by the evidence. In considering the Defendant's intent at the time of the events at issue here, you are permitted to make such reasonable inferences and deductions from the proved facts as you think are justified by common experience and observation.

In determining Richard Henley's intent you may, but are not required, to infer that he intended the natural and probable consequences which would ordinarily follow from his voluntary actions.

Instruction 28 provided:

If you find that the Defendant had a chance to think about using the shotgun against Dean Boncyk and then decided that he would then you may infer, if you want to, that the shotgun was used with the intent to kill. You have no obligation to follow this inference if you do not want to.

In any event, the inference is not conclusive and should be considered along with all the other evidence in the case.

We believe that this issue was properly preserved for review. A defense counsel's objection must be sufficient to alert the trial court to the error which is urged on appeal. State v. Chadwick, 328 N.W.2d 913, 917 (Iowa 1983); Goetzman v. Wichern, 327 N.W.2d 742, 745 (Iowa 1982). The defense counsel's objection to instruction 28 was based on grounds that the instruction was cumulative and that it created a conclusive presumption. The trial court was at least arguably alerted that undue emphasis was being placed on certain evidence. See State v. Marsh, 392 N.W.2d 132, 133 (Iowa 1986); State v. Milliken, 204 N.W.2d 594, 596-97 (Iowa 1973).

However, we do not find that the instruction was unduly prejudicial to the defendant. Instruction 27 addressed the matter of intent. Instruction 28 further informed the jury that it could infer an intent to kill based upon a finding that the defendant deliberated and then used a dangerous weapon. See State v. Lass, 228 N.W.2d 758, 766 (Iowa 1975). The jury was informed that it had no obligation to follow the inference and in any event the inference was not conclusive. The rule in Milliken and Marsh that particular evidence should not be unduly emphasized could certainly not apply in this case so as to prohibit the use of relevant and necessary facts in an inference instruction.

AFFIRMED.