IN THE COURT OF APPEALS OF IOWA

No. 6-326 / 95-1338

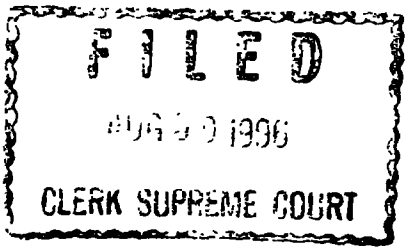
STATE OF IOWA,

Plaintiff-Appellee,

vs.

MICHAEL J. BIRD,

Defendant-Appellant.



Appeal from the Iowa District Court for Scott County, Margaret Briles (criminal trial) and James E. Kelly (probation revocation), Judges.

Defendant appeals from his conviction, following a jury trial, of unauthorized possession of an offensive weapon in violation of Iowa Code section 724.3 (1993).

AFFIRMED.

Linda Del Gallo, State Appellate Defender, and Ahmet S. Gonlubol, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Julie H. Brown, Assistant Attorney General, and William E. Davis, County Attorney, for appellee.

Considered by Sackett, C.J., and Habhab and Huitink, JJ.

HABHAB, J.

Defendant Michael Bird appeals from his conviction of unauthorized possession of an offensive weapon in violation of Iowa Code section 724.3 (1993). He argues: 1) the trial court abused its discretion in allowing evidence of his alleged gang affiliation; 2) the trial court abused its discretion in admitting three photographs; and 3) there was insufficient evidence to support his conviction. We affirm.

I. Evidence of Defendant's Gang Affiliation. Prior to trial, defendant had made an oral motion in limine seeking to exclude various photographs the State intended to introduce which depicted, inter alia, defendant holding a sawed off shotgun. Defense counsel's primary argument was that the State could not properly authenticate the photographs. In addition, counsel noted some of the photographs showed gang insignias and any evidence of gang activity would be irrelevant and prejudicial. The court at that time reserved ruling on the authentication issue but did state it would not allow testimony concerning alleged gang activities.

The State, of course, had the burden to establish how it came to have possession of the photographs, and it had the burden to present the proper foundation for the admission into evidence of those photographs. To lay its foundation, the State called Officer Don Smith, and as part of his background and training testimony, he stated that at the time the photographs came to his attention he was assigned to the police department's Gang Unit. Defense counsel objected. The court then noted the reference was preliminary to establishing the officer's background and training.

At trial, two photographs (exhibits one and two) were admitted. They depicted defendant and a shotgun. In both photographs, defendant was wearing a ball cap with the bill turned sideways on his head. During cross-examination, defendant was asked about the hat and whether it had anything to do with a gang affiliation. Defense counsel's objection to the question was overruled and defendant denied any such affiliation.

In rebuttal, the State recalled Officer Smith to inquire about the way members of street gangs wear their hats. Defense counsel objected to this line of questioning and argued it was precluded by the court's ruling on his motion in limine. The court sustained the objection and the officer was not allowed to testify about any connection between gang members and how they wear hats. The trial court's ruling was correct for the State should not attempt to do indirectly that which it has been precluded from doing directly.

On appeal, defendant argues the trial court abused its discretion in allowing defendant to be questioned about his alleged gang affiliation and in allowing Officer Smith to testify in the manner previously set forth. We review for an abuse of discretion. *See State v. Chambers*, 529 N.W.2d 617, 620 (Iowa App. 1994) (admission of evidence at trial is matter left to trial court's discretion).

Our supreme court has indicated evidence of gang membership is inherently prejudicial because it appeals to a jury's instinct to punish gang members. *State v. Nance*, 533 N.W.2d 557, 562 (Iowa 1995). However, the circumstances in this case

are not as egregious as those present in *Nance*. In *Nance*, evidence was admitted which indicated the defendant associated with gang members, his car had been used in a drive-by shooting, and "gang notes" had been found in his apartment. *Id.* at 562.

In this case, defendant denied any gang affiliation, and the State was not allowed to introduce any evidence of such a connection, including Officer Smith's impressions about connections between gangs and how their hats are worn. We can find no abuse of discretion in allowing this limited line of questioning. We also find no abuse of discretion with respect to the denial of defendant's related motion for a mistrial. *See State v. Wade*, 467 N.W.2d 283, 285 (Iowa 1991) (trial court has broad discretion when ruling on motion for mistrial).

II. Admission of Photographs. Exhibits one and two depicted defendant with a sawed-off shotgun. Exhibit three depicted a boy holding the shotgun. Defendant objected to the admission of all of these photographs and argues their admission was an abuse of discretion.

We leave to the sound discretion of the trial court the determination of whether a sufficient foundation was laid for the admission of photographs. *State v. Farnum*, 397 N.W.2d 744, 746 (Iowa 1986). The relevancy of photographs ordinarily determines their admissibility. *Id.* Where there is no direct testimony from the photographer to establish the admissibility of photographs, other circumstances may be relied upon to lay a foundation for admission. *State v. Holderness*, 293 N.W.2d 226, 234 (Iowa 1980).

In resisting defendant's motion in limine, the State presented evidence from Officer Smith which established he had gone to the home where the photographs were alleged to have been taken and confirmed they had been taken there. *See Farnum*, 397 N.W.2d at 746 (foundation for photographs established where detective had observed room where photos were alleged to have been taken). Defendant admitted he was pictured in exhibits one and two and did not dispute the accuracy of the date stamp on the photos. A sufficient foundation existed for admission of the photographs. Exhibits one and two were clearly relevant to demonstrate defendant's possession of the gun and exhibit three was relevant to allow the jury to observe the full length of the gun. There was no abuse of discretion in the admission of the photographs.

III. Sufficiency of the Evidence. Defendant argues the State failed to prove beyond a reasonable doubt the shotgun was not the required statutory length at the time he handled it and that he in fact possessed it. When reviewing criminal convictions for sufficiency of the evidence, we review the evidence in a light most favorable to the State. *State v. McGrew*, 515 N.W.2d 36, 37 (Iowa 1994). A conviction is reversed only if there is no substantial evidence in the record supporting the verdict or the verdict is clearly against the weight of the evidence. *Id.* at 37-38.

Substantial evidence is evidence which could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. *Id.* at 38. A fair inference of guilt with respect to each element of the crime charged is sufficient

to uphold a verdict. *Id.* We consider all of the evidence, not merely that supportive of the conviction, in determining the sufficiency of the evidence to support a guilty verdict. *State v. Robinson*, 288 N.W.2d 337, 340 (Iowa 1980).

In early March 1994, Officer Smith of the Davenport Police Department received several pictures from a female who wished to have her identity remain confidential. Two of the pictures (exhibits one and two) are pictures of defendant standing next to or holding a Stevens Model 67.20 sawed off shotgun. The pictures bear the date stamp of January 5, 1994.

A Stevens Model 67.20 sawed off shotgun was turned over to Eldridge Police Officer David Kopatich on March 12, 1994. Kopatich later turned over the gun to Officer Smith. When received by Kopatich, the gun was shorter than it was when pictured in exhibits one and two. The gun was admitted at trial as exhibit four.

John Mastin testified he owned the sawed off shotgun (exhibit four) and he testified it was his shotgun pictured in exhibits one through three. He recognized the gun as his because of specific modifications he had made to it to accommodate a sling and a scope. He testified he used a shiny, round, flat piece of aluminum to create an attachment to the gun for a sling. He identified the piece of aluminum on his gun (exhibit four) as the same pictured in exhibit one. The evidence indicated Mastin did not know his gun had been taken by his son, Sean, and sawed off until after it had been recovered by the police.

Officer Smith also testified exhibit four and the gun pictured in exhibits one through three were the same gun. Smith opined the gun pictured in the photographs did not meet the statutory requirements for length.

Defendant testified. He admitted he was pictured in exhibits one and two and he did not dispute the pictures could have been taken on the date stamped on them. Defendant claimed he was handed the gun and handled it only to pose for a picture and then returned it to Sean Mastin.

Defendant does not argue the jury was improperly instructed on the definition of "possession." The pictorial exhibits and his own testimony indicate defendant was in possession of a sawed off shotgun which did not meet the statutory requirements for length. There was sufficient evidence from which a rational fact finder could find defendant guilty beyond a reasonable doubt of the unauthorized possession of an offensive weapon in violation of section 724.3.

AFFIRMED.