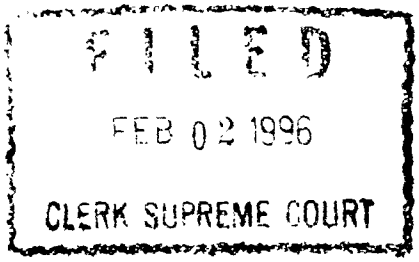
IN THE COURT OF APPEALS OF IOWA

No. 5-530 / 94-1305



STATE OF IOWA,

Appellee,

vs.

CARL DAVID BRIGHT,

Appellant.

Appeal from the Iowa District Court for Linn County, David M. Remley and William L. Thomas, Judges.

Defendant appeals from judgment and sentences, following jury trial, entered upon his convictions of three counts of attempted murder, in violation of Iowa Code section 707.11 (1993). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia Ann Reynolds, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Susan M. Crawford, Assistant Attorney General, and Denver D. Dillard, County Attorney, for appellee.

Heard by Habhab, P.J., Cady, J., and McCartney, S.J.*

*Senior judge from the 2nd Judicial District serving on this court by order of the Iowa Supreme Court.

CADY, J.

Carl David Bright appeals judgment and sentences entered upon his conviction of three counts of attempted murder. We affirm.

In December 1993, law enforcement officials executed a search warrant seeking controlled substances, currency, weapons, and other items at the residence of Pamela Dodson and Carl Bright. During the execution of the search warrant, officials used "flash-bangs" as a distraction devise, obtained entrance to the home with the use of a battering ram, and repeatedly identified themselves as police officers.

Bright and three officers exchanged gunfire inside the residence. Bright fired a semi-automatic weapon eight times, with several bullets hitting one of the officer's ballistic shield. Bright himself was also hit by four police bullets.

Immediately following the shooting incident, officials handcuffed Bright as he was lying on the floor. One officer stated to Bright "You know you are going to be arrested." Bright suffered severe injuries and was taken by ambulance to Mercy Hospital where he underwent surgery. Police officers also rode in the ambulance with Bright and stayed at the hospital. Bright was later transported to the University of Iowa Hospitals where at least three Cedar Rapids police officers remained on guard at all times. During his stay, police officials prevented him from seeing visitors, making outgoing telephone calls, receiving telephone calls and leaving his room

without officers nearby. Police officers also registered Bright under the name "John Doe" without his knowledge.

On January 17, 1994, upon his release from the hospital, Bright was served with a warrant for his arrest and taken to the Linn County Jail where officials informed him he was under arrest. Bright made an initial appearance the following day. The State then filed trial information charging Bright with three counts of attempted murder on March 1, 1994.

Bright filed a motion to dismiss alleging the trial information had been filed more than forty-five days following his arrest, which he contended took place on December 30, 1993, in violation of Iowa Rule of Criminal Procedure 27(2)(a). The district court denied the motion. It found January 17, 1994, was the date of Bright's arrest.

At trial Bright attempted to establish he did not know the residence was being invaded by police officers. He presented testimony indicating he had been in a fight with David Brown in October, who threatened revenge on Bright and persons close to him. Bright himself also testified he never heard officers shout "police" and did not notice the police shield or the word "police" written across the officer's clothing. He testified he believed he was under attack by Brown or some of Brown's friends.

Bright also filed a second motion to dismiss and a motion to preclude the use of wiretap evidence. The district court granted the motion to preclude in part and

denied the motion in part. It indicated the introduction of the wiretap evidence could be used by the State for impeachment purposes but instructed counsel to approach the bench to alert the court when the evidence was to be introduced. The court denied the motion to dismiss.

During trial, the State cross-examined Bright as to whether or not, prior to the shooting, he believed the police had been watching his house and was apprehensive about returning to his house from a local bar on the night of the shooting. The State also asked Bright if he had made a phone call to his girlfriend Pam before leaving the bar and if he had called another person named Miles Chaplin (nicknamed "Wiz"). Bright's attorney objected. Outside the presence of the jury, Bright's counsel argued the State violated the court's ruling by not approaching the bench prior to using evidence gleaned from the wiretap tapes and renewed his motion to dismiss. The court overruled Bright's motion, noting the questions by the State did not mention the transcripts or tapes. The court also determined questions concerning what Bright knew prior to going home were permissible. Later, during further cross-examination of Bright, the State approached the bench and requested to use the wiretap transcripts. The district court, however, refused to allow the use of the transcripts.

The jury found Bright guilty of three counts of attempted murder. The district court sentenced him to three consecutive twenty-five year terms of imprisonment and ordered Bright to serve at least five years on each term before being eligible for parole. Bright's counsel filed a motion for a new trial, alleging among other things,

the court's ruling on Bright's motion to dismiss concerning the wiretap information contradicted its previous ruling on the motion to preclude evidence. Bright filed a motion for a new trial, which was denied by the district court.

Bright now appeals contending the district court erred in finding he was arrested on January 17, 1994 and overruling the motion to dismiss for speedy trial violation. He also argues the district court erred in its rulings on the motions to dismiss and for a new trial in regards to the wiretap information. Finally, Bright asserts the record contains insufficient evidence to support his conviction.

I. Speedy Indictment

Bright contends the district court erred in overruling the motion to dismiss for speedy trial violation. He argues he was arrested on December 30, 1993 because the conditions surrounding the transportation to and stay in the hospital rose constituted an arrest.

In interpreting rule 27(2)(a) we review for errors of law. *State v. Davis*, 525 N.W.2d 837, 838 (Iowa 1994). *See* Iowa R. App. P. 4. We remain bound by findings of fact if supported by sufficient evidence. *State v. Waters*, 515 N.W.2d 562, 566 (Iowa App. 1994).

A. Arrest

Iowa Rule of Criminal Procedure 27(a)(2) outlines the time period for which an indictment must be found in order to ensure criminal prosecutions are concluded

"at the earliest possible time consistent with a fair trial to both parties." Iowa R. Crim. P. 27(2).

> When an adult is arrested for the commission of a public offense . . . and an indictment is not found against him [or her] within forty-five days, the court must order the prosecution to be dismissed unless good cause is shown or the defendant waives his [or her] right thereto.

Iowa R. Crim. P. 27(a)(2). The term indictment embraces trial information and the rule applies to situations where trial information is filed. Iowa R. Crim. P. 5(5); *Davis*, 525 N.W.2d at 839.

An "arrest" is defined in Iowa Code section 804.5 (1993) as the "taking of a person into custody when and in the manner authorized by law, including restraint of the person or the person's submission into custody." "'An arrest to be effective does not require formal words of arrest or station house bookkeeping.'" *State v. Harvey*, 242 N.W.2d 330, 339 (Iowa 1976) (quoting *United States v. Hensley*, 374 F.2d 341, 348 (6th Cir. 1967)). An assertion of authority and purpose of arrest followed by submission of the arrestee constitutes an arrest. *State v. Johnson-Hugi* 484 N.W.2d 599, 601 (Iowa 1992) (quoting *California v. Hodari*, 499 U.S. 621, 626, 111 S. Ct. 1547, 1551, 113 L. Ed. 2d 690, 697 (1991)).

We find the State effectively arrested Bright on December 30, 1993. Here, police officers made several assertions of authority. Police officers pointed guns at Bright, handcuffed him, required him to slide down the staircase, stood guard throughout his transportation to the hospital and during his stay, refused to allow

Bright to see visitors, refused to allow Bright to receive or make telephone calls, and kept him under an assumed name. Bright's liberty was clearly restrained because of police actions. Moreover, a police officer told Bright he was going to be placed under arrest as he was taken from the scene of the crime. Bright, as well as some hospital staff, testified they believed he was under arrest during his stay in the hospital.

Bright also submitted to the assertions of authority by the police officers, as evidenced by his actions at the scene and the hospital. He remained in the hospital, did not challenge the presence of police guards, and could not receive calls or visitors. We find the trial court erred in its conclusion that Bright was arrested on January 17, 1993.

B. Good Cause

The State argues, however, regardless of the date the arrest good cause existed for the delay in filing trial information. The State bears the burden to show good cause for the delay in a speedy indictment. *State v. Deases*, 476 N.W.2d 91, 95 (Iowa 1991). What constitutes good cause to excuse the late filing of a trial information depends upon the individual circumstances of each case. *Id.* Where the delay has been short and the defendant is not prejudiced by the delay, a weaker reason will constitute good cause. *Id.*

The State's reason for the delay is the hospitalization of the defendant. The State delayed formally arresting the defendant to avoid burdening the City of Cedar Rapids with costly medical expenses and to allow the defendant to recover from his

injuries before initiating formal proceedings. We find in light of the mitigating factors, the State proved it had sufficient good cause for the delay.

Here, the State filed its trial information only sixteen days after the deadline for the speedy indictment requirement, the exact amount of time Bright remained hospitalized. It structured its prosecution around its mistaken belief Bright was not arrested until January 17, 1994. No prosecutorial advantage was obtained by the State due to the delay in filing charges. Bright had been hospitalized, causing difficulty in filing trial information on him. *See State v. Van Rees*, 246 N.W.2d 339, 342 (Iowa 1976) (defendant's request for a delay granted due to his hospitalization for a from serious injury). The defendant had made an initial appearance in January, where counsel was appointed, and even initiated discovery prior to the filing of trial information. We find Bright was aware of the pending litigation and the State's delay in filing trial information did not impair his ability to prepare his defense strategy.

While a defendant possesses a right to a speedy indictment, the procedures set forth in Iowa R. Crim. P. 27(2) "are not intended to be a device by which, through technicalities, a defendant can obtain absolute immunity from prosecution." *Deases*, 476 N.W.2d at 95. We find Bright suffered no prejudice as a result of the delay. We also find substantial evidence exists to show good cause for the delay in filing the trial information, due to Bright's hospitalization.

II. Wiretap Material

Bright argues the trial court violated its prior ruling on Bright's motion to preclude evidence when it allowed the State to pursue questions dealing with information gleaned from the wiretap materials without first approaching the bench. He contends the trial court allowed inadmissible evidence to be admitted and the State violated the court's ruling.

Our scope of review is for the correction of errors of law. Iowa R. App. P. 4. On this evidentiary issue, we review for an abuse of discretion. *State v. Halstead*, 362 N.W.2d 504, 506 (Iowa 1985). In order to show an abuse of discretion, one generally must show that 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)).

We find the trial court did not abuse its discretion in allowing the State to ask Bright questions pertaining to his knowledge that police may be coming to his house. The State's questions never dealt with the substantive matter of the wiretap materials and did not indicate to the jury such wiretap information existed. Moreover, the testimony remained relevant to the circumstances surrounding the evening of the shooting in view of Bright's claim he believed the intruders in his home were not police officers.

Furthermore, when a prosecutor violates a previous court order, he or she commits prosecutorial misconduct. Claims of prosecutorial misconduct are reviewed

for an abuse of discretion. *State v. Thornton*, 498 N.W.2d 670, 676 (Iowa 1991). In order for us to properly decide this issue, it must have been properly preserved for appellate review.

Counsel for Bright did not move for a mistrial due to prosecutorial misconduct at trial during cross-examination of Bright. Instead, he merely objected and renewed a motion to dismiss the trial asserting Bright had been denied a fair trial. It is the duty of the party aggrieved by a claim of error to timely voice an objection and give the trial court an opportunity to rule on the issue of a fair trial. *See State v. Dahlstrom*, 224 N.W.2d 443, 449 (Iowa 1974). While counsel should have preserved error by moving for a mistrial, we find the motion to dismiss and motion for a new trial adequately preserved the issue for review.

On appeal, a defendant must point to some unfairness which resulted in prejudice from the alleged prosecutorial misconduct. *State v. Moorhouse*, 316 N.W.2d 884, 886 (Iowa 1982). Prosecutorial misconduct does not require a new trial unless it appears to have been so prejudicial as to deprive a defendant of a fair trial.

We find the State's conduct did not prejudice Bright's rights to a fair trial. The State attempted to elicit the defendant's account of his activities prior to the shooting, yet never alluded to the wiretap materials nor used them to impeach Bright. Neither the contents nor the existence of the wiretap materials were ever revealed to the jury. Ultimately, the district court precluded the use of the wiretap materials. As no

unfairness resulted from the State's conduct, we need not address the issue of whether the State's actions actually constituted prosecutorial misconduct.

III. Sufficiency of the Evidence

Bright claims the State presented insufficient evidence to prove he specifically intended to kill the police officers and to prove his actions were not justified.

Our standard of review is well settled. A verdict will be upheld where there is substantial evidence to support the charge. *State v. LeGear*, 346 N.W.2d 21, 23 (Iowa 1984). Substantial evidence means such evidence as could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. *Id.* The evidence is viewed in the light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the record. *State v. Bass*, 349 N.W.2d 498, 500 (Iowa 1984). We consider all the evidence at trial, not just the evidence that supports the verdict. *State v. Robinson*, 288 N.W.2d 337, 340 (Iowa 1980).

The State bears the burden of proving all elements of the crime, including specific intent, beyond a reasonable doubt. *See* C.J.S. *Homicide* § 301 (1991). Specific intent to kill may be inferred by the deliberate use of a deadly weapon. *State v. Khouri*, 503 N.W.2d 393, 395 (Iowa 1993). *See also State v. Wilkins*, 346 N.W.2d 16 (Iowa 1984) (when a person intentionally uses a deadly weapon in killing a victim, jury may infer he has formed the specific intent to kill); *State v. Jeperson*, 360 N.W.2d 804 (Iowa 1984) (use of deadly weapon, if accompanied by opportunity to

deliberate, even only for a short time, is evidence from which a jury could find malice, deliberation, premeditation and specific intent to kill).

Here, Bright testified he intended to kill the persons he was shooting at, even though he did not know they were police officers. Moreover, evidence clearly showed Bright fired a semi-automatic handgun at the persons approaching him. Ample evidence also indicated the police officers were wearing unusual clothing with the word "Police" written on them in large letters, were carrying police shields with the word "Police" on them, and had repeatedly identified themselves as police through shouting. *See State v. Wilkins*, 346 N.W.2d 16 (Iowa 1984) (jury need not believe the defendant's version of the facts).

We find substantial evidence from which a rational jury could find the State met its burden of proof in regards to the specific intent element. We find Bright's mistaken belief the police officers were men seeking retaliation pertains more to his justification claim and not specific intent.

The State bears the burden of proving Bright was not justified in his actions beyond a reasonable doubt. *See State v. Thorton*, 498 N.W.2d 670, 673 (Iowa 1993). The State need only prove one of the following to establish no justification: (1) Bright initiated or continued the situation which resulting in the shooting; (2) he did not believe he was in imminent danger of death or injury requiring a use of force; (3) he did not have reasonable grounds for his belief he was in imminent danger; or (4) the force used was unreasonable. *State v. Elam*, 328 N.W.2d 314, 319 (Iowa 1982). A

jury considers not only whether a defendant actually feared he was in danger, but whether such fear was reasonable. *State v. Nunn*, 356 N.W.2d 601, 603 (Iowa App. 1984).

Bright testified at trial he believed the "flash-bang" devices sounded like shots and he acted in defense of himself and his family by shooting at the police officers, believing them to be persons seeking retaliation. However, the State presented testimony indicating Bright knew they were police officers. Bright himself testified he saw the persons coming up the stairs prior to the shooting. Testimony also described the sound emitted by the "flash bangs" to be quite different from a gun firing.

We find a rational trier of fact, under the evidence presented, could have found Bright's mistaken belief the police officers were other persons retaliating was unreasonable. We find substantial evidence from which a jury could find Bright was not justified in his use of deadly force.

We affirm Bright's conviction for three counts of attempted murder.

AFFIRMED.