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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed November 26, 1986
vs.	)	311
DANNY LEE SHAFFER,	)	6-389 85-1899
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Monroe County (No. 1-441-0985) - Phillip R. Collett, Judge.

Defendant appeals from his conviction for possession of a firearm by a felon in violation of Iowa Code section 724.26 (1985). **AFFIRMED.**

Charles L. Harrington, Appellate Defender, and Michael J. Laughlin, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Lona Hansen, Assistant Attorney General; and William S. Owens, Assistant County Attorney, for plaintiff-appellee.

Considered by Donielson, P.J., Hayden and Sackett, JJ.

HAYDEN, J.

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Defendant appeals from his conviction for possession of a firearm by a felon in violation of Iowa Code section 724.26 (1985). He asserts: (1) the evidence was insufficient to support the jury's verdict and (2) the rendition of a sealed verdict failed to comply with requirements of Iowa Rule of Criminal Procedure 21(5).

Complainant testified that on September 4, 1985, he was driving in Albia on his way to a friend's home. The defendant, while driving a friend's car with two passengers, began to follow him. He proceeded to the friend's house knowing he was being followed by defendant. Complainant had been in conflict with defendant before. Complainant further testified as he got out of his car, defendant pulled up to the curb (approximately six to ten feet away), said "Hey, punk, look over here," and pointed a .22 caliber automatic pistol at him. Defendant allegedly then said, "Do you want to die now or later?" Complainant then ran into the house and defendant drove off.

Defendant testified that during the confrontation he did not use the exact language to which the complainant had testified and he had pointed his finger and had not been in possession of a gun. His two companions also testified defendant had not been in possession of a gun. One of them testified defendant had pointed his finger while the other did not recall seeing defendant point anything. The first of them did not recall defendant saying anything during the confrontation.

Defendant was arrested two days later, on September 6, 1985. When he was searched following his arrest, the Albia police chief found thirty-four .22 caliber long shells in defendant's pocket. The police did not find a .22 caliber pistol.

At trial, defendant's sister testified she owned a .22 caliber rifle and the cartridges found in defendant's possession were hers. On rebuttal a police officer testified that two or three weeks prior to the incident defendant had inquired as to whether he knew where there were any .22 caliber automatic pistols for sale, stating he wanted such a pistol for his sister.

On the last day of trial, November 14, 1985, the parties agreed to a sealed verdict. On the same day, at 2:03 p.m., the jury returned the sealed verdict of guilty, signed only by the foreman. The next day, November 15, 1985, the jury was reconvened and polled, with each juror confirming the guilty verdict.

Our review of criminal proceedings is at law for correction of errors only. Iowa R. App. P. 4.

I.

Initially, defendant contends the evidence presented by the State was insufficient to support the jury's verdict. At the close of State's case in chief and again at the close of all evidence, defendant moved for a judgment of acquittal. Both were denied.

Iowa Code section 724.26 (1985) provides: "Any person who is convicted of a felony in any state or federal court and who subsequently possesses, receives or transports or causes to be transported a firearm or offensive weapon is guilty of an aggravated misdemeanor." It is uncontested that defendant is a felon, having been convicted of the offense of terrorism in violation of Iowa Code section 708.6(1) (1979). The issue here is whether defendant actually possessed a firearm.

In reviewing a challenge to sufficiency of the evidence, we must view evidence in the light most favorable to the State. State v. Doss, 355 N.W.2d 874, 877 (Iowa 1984); State v. Robinson, 288 N.W.2d 337, 338 (Iowa 1980). We must also consider all legitimate inferences and presumptions which may fairly

and reasonably be deduced from the record. State v. Bair, 347 N.W.2d 416, 419 (Iowa 1984); State v. Schrier, 300 N.W.2d 305, 306 (Iowa 1981). We will uphold a verdict unless the record lacks substantial evidence to support it. State v. Mitchell, 371 N.W.2d 432 (Iowa Ct. App. 1985). Substantial evidence means evidence which would convince a rational factfinder the defendant is guilty of the crime charged beyond a reasonable doubt. Id.

When viewing the evidence in the light most favorable to the State, we find: the testimony by the complainant that defendant when six to ten feet away pointed a .22 caliber automatic, blue steel pistol at him; the fact, when arrested, defendant possessed thirty-four shells of a type that could fit into the weapon described by complainant; and the testimony of Officer Morgan that two to three weeks prior to the incident defendant had approached him and inquired if he knew where there was any .22 caliber automatic pistols for sale.

Further, we note defendant's story that on September 4, 1985, he had no pistol and the .22 caliber shells in his possession were his sister's, was supported by defendant's, his friend's, and his sister's testimony. The jury is not required to accept the defendant's version of the facts. State v. Wilkens, 346 N.W.2d 16, 20 (Iowa 1984). Also, we may infer the jury found the testimony given by the State's witnesses more credible than of the defense; determination of the credibility of the witnesses and the weight of the evidence is the function of the fact finder. State v. Robinson, 288 N.W.2d at 341.

II.

Defendant contends the use of a sealed verdict failed to comply with Iowa Rule of Criminal Procedure 21(5), which provides in pertinent part:

> In any misdemeanor case in which the defendant is not in custody at the time of trial and the parties agree, the court may permit the return of a sealed verdict.

> The sealing of the verdict is equivalent to rendition in open court, and the jury shall not be polled or permitted to disagree with the verdict. A sealed verdict and the answer to each interrogatory shall be signed by all jurors, sealed, and delivered by the bailiff to the clerk of court, who shall enter it upon the record and disclose it to the court as soon as practicable.

On November 14, 1985, the jury returned a sealed verdict of guilty and separated. The parties had agreed to a sealed verdict even though rule 21(5) required defendant to not be in custody. Here, defendant was in custody at the time of trial, and the verdict was not signed by all jurors. To correct any possible error, the judge had the jury reconvene on the morning of November 15, 1985. After reading the verdict, the trial court asked the jurors as a group if it was the verdict of each and every juror. He asked anyone who thought the verdict was not his or hers to raise a hand, none did. Finally, all jurors were polled and each replied that it was his or her verdict. Defendant contends because of the recall the verdict is void.

The court polled the jury pursuant to Iowa Rule of Criminal Procedure 21(6). As a result of this polling, the intent of the jury to convict defendant was clearly manifested.

Jury misconduct justifies a new trial only if the defendant produces proof, by competent evidence, the misconduct was calculated to, and it is reasonably probable that it did, influence the verdict. State v. Christianson, 337 N.W.2d 502, 504 (Iowa 1983). Trial courts possess broad discretion in deciding whether evidence of alleged jury misconduct warrants a new trial. State v. Harrington, 349 N.W.2d 758, 762 (Iowa 1984).

Any "error" that might have arisen due to the court's use of a sealed verdict, when the defendant was in custody and which was not signed by all jurors, was rendered harmless by the subsequent polling of the jury in open court with defendant present.

AFFIRMED.