IN THE COURT OF APPEALS OF IOWA

No. 1-591 / 90-1118

FILED
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CLERK SUPREME COURT

847

STATE OF IOWA,

Appellee,

vs.

BRYAN PATRICK TEETERS,
Appellant.

STATE OF IOWA,

Appellee,

vs.

LARRY LARSEN,

Appellant.

Appeal from the Iowa District Court for Pottawattamie County, Keith Burgett, Judge.

Defendants appeal their conviction and sentence, following jury trial, for attempted murder and willful injury. **AFFIRMED IN PART, REVERSED IN PART, SENTENCE VACATED IN PART, AND REMANDED WITH INSTRUCTIONS.**

Linda Del Gallo, State Appellate Defender, and Shari Barron, Assistant State Appellate Defender, for appellants.

Bonnie J. Campbell, Attorney General; Julie Ann Halligan, Assistant Attorney General; and Richard Crowl, County Attorney, for appellee.

Heard by Donielson, P.J., and Hayden and Habhab, JJ.

HABHAB, J.

The defendants were convicted after a jury trial of two counts of attempted murder and one count of willful injury. The shooting victims testified at trial the defendants shot them. The defendants presented an alibi defense essentially asserting they were at their respective homes at the time of the shootings. We affirm the convictions and sentences except we vacate the enhanced sentence of Teeters. We affirm as to Larsen.

The defendants appeal from their convictions. In addition, defendant Brian Teeters challenges the imposition of a mandatory minimum sentence for the use of a firearm. They further claim the trial court abused its discretion by: 1) not allowing a continuance for a witness who failed to appear; 2) not reopening the trial when the witness finally did appear; and 3) not allowing discovery of one of the shooting victim's psychiatric records.

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

I. Trial Court's Discretionary Rulings.

We deal first with the trial court's rulings on the witness and discovery motions. We review for an abuse of discretion. 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 State v. Burnor, 132 Vt. 603, 326 A.2d 138, 140 (1974)).

After reviewing the facts, we determine the trial court did not abuse its discretion by not allowing a continuance and not reopening the trial when the witness finally did appear. The defendants did not even know the address or whereabouts of the missing witness. Further, the witness's testimony was merely cumulative to that of several other witnesses for the defense. We affirm on this issue.

We further determine the trial court did not abuse its discretion by not allowing discovery of one of the shooting victims' psychiatric records. First, the fact of the victim's mental problems was brought out at trial. Second, the trial court found the matter was irrelevant and unlikely to lead to relevant information. We agree. We affirm on this issue.

II. Special Interrogatory.

Finally, we turn to the imposition of a mandatory minimum sentence on Brian Teeters for use of a firearm. A special interrogatory was submitted to the jury. The jury was instructed to find by special interrogatory whether the defendants used a firearm in the commission of the crime. Upon a finding of use of a firearm, the trial court would enhance the sentence by a mandatory minimum imposed under Iowa Code section 902.7.

Although the jury was given a special interrogatory on this issue, it was returned unsigned. Both the positive and negative responses were left blank. Both counsel for the defendants were present. Neither objected to the trial court's dismissal of the jury without completing the interrogatory on the use of a firearm.

To facilitate our discussion, we set out the trial court's jury instruction on the special interrogatory:

> INSTRUCTION NO. 44
>
> If you find the Defendants, or either of them, guilty, you must decide if he was armed with a firearm.
>
> To be armed means the Defendant had a firearm on his person at the time of the crime. It is not necessary the firearm was used, displayed or represented as being in his possession.
>
> The State must prove beyond a reasonable doubt the Defendant was armed with a firearm. You shall answer the question about this issue which is attached to these instructions. Your answer, as with your verdict, must be unanimous.

We have previously dealt with similar cases. See State v. Kinzenbaw, 344 N.W.2d 258 (Iowa App. 1983); State v. Johnson, 312 N.W.2d 144 (Iowa App. 1981). In both cases the trial court failed to submit a special interrogatory on the use of a firearm. Kinzenbaw, 344 N.W.2d at 260-61; Johnson, 312 N.W.2d at 145-46. In each case we held the finding of use of a firearm was necessarily included in the jury's finding on the underlying crime itself. Kinzenbaw, 344 N.W.2d at 261-62; Johnson, 312 N.W.2d at 146.

There is a significant difference in this case, however. Here a special jury verdict form was submitted to the jury. It, as the fact finder, was specifically

directed to decide this question. Even though it was so directed, and for reasons not explained on the record, the interrogatory was returned unfilled. We are not inclined to extend the rationale of Kinzenbaw and Johnson to a circumstance where a special interrogatory on this question is submitted.

The rules applicable to special interrogatories are found in Iowa Rule of Criminal Procedure 21(6) and Iowa Rule of Civil Procedure 206. See State v. Mumford, 338 N.W.2d 366, 370-71 (Iowa 1983) (Iowa R. Civ. P. 206 applies in part to criminal cases).

Iowa Rule of Criminal Procedure 21(6) provides:

> If the jury renders a verdict which is in none of the forms specified in this rule, or a verdict of guilty in which it appears to the court that the jury was mistaken as to the law, the court may direct the jury to reconsider it, and it shall not be recorded until it is rendered in some form from which the intent of the jury can be clearly understood. If the jury persists in finding an informal verdict, from which, however, it can be understood that the intention is to find for the defendant upon the issue, it shall be entered in the terms in which it is found, and the court must give judgment of acquittal.

This rule provides in the case of an informal verdict, the court may send the case back to the jury for further deliberations. In Mumford our supreme court determined the procedure to be followed when an informal verdict is handed down. The court concluded two of the three courses provided in Iowa Rule of Civil Procedure 206 are available in criminal cases. These alternatives are "sending the matter back to the jury for further deliberation, or

ordering a new trial." Mumford, 338 N.W.2d at 370-71. Mumford approved the use of only these two alternatives in criminal cases when faced with an informal verdict. Mumford is apposite. We recite the supreme court's discussion and position as follows:

> In application of rule 21(6) to situations where special findings of the jury conflict with the general verdict, we are persuaded that trial courts should have some of the alternatives in criminal cases which Iowa Rules of Civil Procedure 206 provides in civil cases. That rule gives the trial court in civil cases the alternatives of (a) accepting the verdict and entering judgment consistent with the special findings, (b) sending the matter back to the jury for further deliberation, or (c) ordering a new trial. While we have substantial doubt that the first alternative should ever be availed of in a criminal trial, we approve use of the latter two in criminal cases. Which of those alternatives is to be adopted in a given case is a matter falling within the sound discretion of the trial court.

Id. at 370-71.

The verdict as to the firearm was an informal one because the jury did not follow the instructions directing it to answer the special interrogatory. It was deficient in legal form. The trial court did not follow either of the two procedures available to it. Instead, the court accepted the verdict as it was handed down by the jury.

We determine the trial court erred in enhancing Teeters' sentence on the basis of an informal verdict. The trial court essentially operated as the trier of fact in so doing. It had no authority to so usurp the duty of the jury. We therefore vacate the enhancement portion of Teeters' sentence imposing a mandatory minimum under Iowa

Code section 902.7.[1] An illegal sentence may be corrected at any time. Iowa R. Crim. P. 23(5)(a); see also State v. Young, 292 N.W.2d 432, 435 (Iowa 1980).

We modify Teeters' judgment and sentence accordingly. We remand this case to the trial court with instructions to strike those portions of its judgment enhancing Teeters' sentence under Iowa Code section 902.7.

We affirm the trial court in all other respects.

AFFIRMED IN PART, REVERSED IN PART, SENTENCE VACATED IN PART, AND REMANDED WITH INSTRUCTIONS.

Hayden, J., concurs; Donielson, P.J., dissents.

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1. We affirm as to the defendant Larsen. Although he was convicted of the same offenses as Teeters and the same special interrogatory applied to him, the trial court did not enhance his sentence under section 902.7.

DONIELSON, P.J. (dissenting in part)

I respectfully dissent to the majority's decision to vacate the enhanced portion of the defendant's sentence. I believe the reasoning in our prior decisions of State v. Kinzenbaw, 344 N.W.2d 258 (Iowa App. 1983), and State v. Johnson, 312 N.W.2d 144 (Iowa App. 1981), governs in this case as well. I do not believe the present case is distinguishable simply because a special interrogatory was submitted but not completed.

In Kinzenbaw, we stated:

> The main objective of the rules is to establish a procedure by which to insure compliance with the requirements of Iowa Code section 902.7. The main objective of Iowa Code section 902.7 is to enhance punishment for the use of a firearm in committing a forcible felony. While these objectives are facilitated by compliance with the rules, we hold the prescribed duty to submit the interrogatory as to the use of firearms before considering the enhanced punishment is not mandatory where other jury instructions also require the jury to find beyond a reasonable doubt the use of a firearm. The failure to submit the special interrogatory on the use of a firearm, unaccompanied by any showing of prejudice, does not, therefore, prevent the application of Iowa Code section 902.7. Where the required findings are necessarily included in the jury verdict, the sentencing court may consider enhanced punishment.

344 N.W.2d at 261 (citations omitted).

In the present case, the jury was instructed on all three counts to return a verdict of not guilty unless it found, beyond a reasonable doubt, the defendant shot one of the victims. The jury found the defendant guilty on all three counts. As such, the required finding--that

defendant used a firearm--was necessarily included in the jury's verdict of guilty.

I believe the trial court properly considered the jury's implicit finding in enhancing the defendant's sentence pursuant to Iowa Code section 902.7. The trial court's ruling properly promotes the statute's objective to enhance punishment for the use of a firearm. Indeed, under the Federal Sentencing Guidelines, a federal court has the authority in sentencing to enhance the base offense level for conduct of which the defendant has been acquitted. See United States v. Sims, No. 90-2701, slip op. at 5 (8th Cir. filed Dec. 27 1991)(citing United States v. Slow Bear, 943 F.2d 836, 838 (8th Cir. 1991); United States v. Eberspacher, 936 F.2d 387, 389 (8th Cir. 1991)(emphasis added)).

The defendant has made no showing of prejudice. Finding no reason to vacate the sentence, I would affirm.