IN THE COURT OF APPEALS OF IOWA

No. 7-287 / 96-856 000633

STATE OF IOWA,
Appellee,

vs.

EARL FULLENWIDER JR.,
Appellant.

FILED
JUN 26 1997
CLERK SUPREME COURT

Appeal from the Iowa District Court for Scott County, C. H. Pelton, Judge.

Defendant appeals judgment and sentence entered, following jury trial, for possession with intent to deliver while in immediate possession of a firearm, failure to affix drug tax stamp, and possession of a firearm as a felon. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and David Arthur Adams, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, William E. Davis, County Attorney, and Realff Ottesen, Assistant County Attorney, for appellee.

Considered by Sackett, P.J., Vogel, J., and Schlegel, S.J.*

*Senior judge from the Iowa Court of Appeals serving by order of the Iowa Supreme Court.

VOGEL, J.

Earl Fullenwider, Jr. appeals judgment and sentence entered, following a jury trial, for possession with intent to deliver while in immediate possession of a firearm, failure to affix drug tax stamp, and possession of a firearm as a felon. He argues the district court erred in refusing to give a jury instruction on diminished responsibility. He also contends there was insufficient evidence to support that he was in possession of a firearm.

Background facts. The above charges were filed after law enforcement officers obtained a search warrant for Johnson's apartment following one-and-a-half to two months of surveillance.

Fullenwider filed a notice of intent to rely on the defense of diminished responsibility. A joint trial commenced on April 8, 1996. Law enforcement officers testified about the surveillance of Johnson's apartment, that Fullenwider was there numerous times, that the apartment and utilities were in Johnson's name, and Fullenwider's vehicle was seen at the apartment frequently. At the time of the execution of the search warrant, Johnson and Fullenwider were in bed, and a loaded nine millimeter handgun was seized from under the bed on Fullenwider's side of the bed. Law enforcement officers also found a digital hand scale and wet crack cocaine in a plastic bag. Fullenwider's cellular phone was found near the scale and crack cocaine. A pager was recovered from Fullenwider's pants pocket. The jury found

Fullenwider guilty of all counts. The court sentenced Fullenwider to an indeterminate term not to exceed 100 years.

Jury instruction. The court denied Fullenwider's request to submit a jury instruction on diminished responsibility. Defendant fails to cite any authority for his claim error was preserved on this issue, and we accordingly deem this issue waived. *See State v. Akers*, 435 N.W.2d 332, 336-37 (Iowa 1989); *State v. Potts*, 240 N.W.2d 654, 655-56 (Iowa 1976) (citing *State v. Baker*, 203 N.W.2d 795, 796-97 (Iowa 1973)). Even if we were to find this issue was not waived, Fullenwider's claim would fail. In determining whether a court should have given a particular jury instruction, the test is whether substantial evidence supported the instruction at issue. *See State v. Broughton*, 425 N.W.2d 48, 51-52 (Iowa 1988). The record does not contain substantial evidence to support the diminished capacity defense, and, as such, the court had no duty to so instruct the jury on this issue.

Sufficiency of evidence. Fullenwider contends there was insufficient evidence that he was in possession of a firearm. Our scope of review is for errors at law. *See State v. Allen*, 348 N.W.2d 342, 347 (Iowa 1984). We look to whether substantial evidence existed to support the jury's verdict. *State v. Robinson*, 288 N.W.2d 337, 340 (Iowa 1980).

When a search warrant was executed at Johnson's residence on the morning of October 9, 1995, police found Fullenwider in bed with Johnson; a loaded nine

millimeter handgun was found directly under Fullenwider's side of the bed. Iowa Code section 124.401(1)(e) (1995) contains the firearms enhancement provision:

> A person in the immediate possession or control of a firearm while participating in violation of this subsection shall be sentenced two times the term otherwise imposed by law, and no such judgment, sentence, or part thereof shall be deferred or suspended.

Id. The *Mehner* court's clarification of the varied meanings of "immediate possession" is instructive. In examining whether there is "immediate possession" of a firearm, the court looked to three factors: (1) whether the firearm is "near at hand, not far apart or distant"; or (2) within the area to be searched incident to arrest; or (3) actual possession (immediate possession or control of the item). *State v. Mehner*, 480 N.W.2d 872, 878 (Iowa 1992). In this case, the location of the gun was "near at hand" and easily accessible to the defendant, and was also within the area searched incident to arrest. Thus, there was sufficient evidence for a jury to find Fullenwider was in possession of a firearm.

Having considered all arguments on appeal, we affirm the district court's order and uphold Fullenwider's convictions.

AFFIRMED.