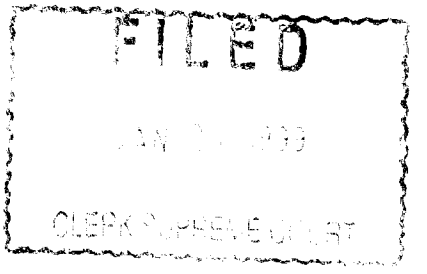
IN THE COURT OF APPEALS OF IOWA

No. 8-629 / 97-1986
Filed January 27, 1999



STATE OF IOWA,
Appellee,

vs.

GLEN E. HUDSON,
Appellant.

Appeal from the Iowa District Court for Scott County, David H. Sivright, Jr., Judge.

Glen Hudson appeals from the judgment and sentences entered upon his convictions, following a jury trial, for willful injury, going armed with intent, and attempt to commit murder. **REMANDED FOR RESENTENCING.**

Linda Del Gallo, State Appellate Defender, and Robert P. Ranschau, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, William E. Davis, County Attorney, and Julie A. Walton, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Huitink, Streit, Vogel, and Mahan, JJ. Zimmer, J., takes no part.

STREIT, J.

Glen Hudson appeals from his convictions for attempted murder, going armed with intent, and willful injury resulting from the beating of a victim's head with an aluminum baseball bat. Hudson argues substantial evidence does not support the attempted murder conviction, challenges the court's sentencing, and claims ineffective assistance of counsel. We find substantial evidence supports the attempted murder conviction, but remand for resentencing and the application of section 902.10. The ineffective assistance of counsel claim is preserved for further proceedings.

I. Background & Facts.

In February 1997, Robert Ratkovcic pulled his semi-truck into a truck stop off Interstate 80. As Ratkovcic telephoned the diesel cashier to arrange for fuel, Hudson attacked him from behind with an aluminum baseball bat. Hudson clubbed Ratkovcic three times in the temple area on the right side of Ratkovcic's head. Hudson then fled the scene to a nearby truck stop on the opposite side of Interstate 80. He was positively identified by the cashier of the truck stop who witnessed the assault.

Hudson was convicted of willful injury, going armed with intent, and attempted murder. Judgment was entered and Hudson was sentenced to indeterminate terms of ten years on count I (willful injury), five years on count II (going armed with intent), and twenty-five years on count III (attempt to commit murder), to be served consecutively. Pursuant to Iowa Code section 902.7 (1997), the court imposed a

minimum sentence of five years on counts I and III, for a total of ten years, before Hudson is eligible for parole. Hudson appeals.

II. Sufficiency of the Evidence.

Hudson asserts insufficient evidence supports his conviction for attempted murder because, he contends, the State offered no evidence proving the element of specific intent to kill. *See* Iowa Code § 707.11 (1997).

The appellate scope of review on sufficiency of the evidence claims is well established:

> [R]eview of a substantial evidence claim is on error. [An appellate court is] bound by the jury verdict unless the verdict is not supported by substantial evidence. In making this determination, [the court will] consider all the evidence in the light most favorable to the State. We accept all legitimate inferences that may fairly and reasonably be deducted from the evidence. Evidence is substantial if it could convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. Direct and circumstantial evidence are equally probative. Evidence, whether direct or circumstantial, must however do more than create speculation, suspicion or conjecture.

State v. Sanborn, 564 N.W.2d 813, 815-16 (Iowa 1997)(quoting *State v.Bayles*, 551 N.W.2d 600, 608 (Iowa 1996)). In evaluating whether substantial evidence supports Hudson's intent to kill, we are mindful a jury may properly draw inferences of malice, deliberation, premeditation, and specific intent to kill from the use of a deadly weapon with opportunity to deliberate. *State v. Mayberry*, 411 N.W.2d 677, 682 (Iowa 1987).

A deadly weapon is an instrument which, under the circumstances, is readily capable of causing death. *State v. Geier*, 484 N.W.2d 167, 172 (Iowa 1992); *State v.*

Emery, 17 N.W.2d 854, 856 (Iowa 1945). A club used to pound a person's skull is clearly a deadly weapon. The supreme court has noted that a baseball bat, if viciously used, is considered a deadly weapon. *State v. Emery*, 17 N.W.2d at 856. There is no doubt from the record Hudson used the baseball bat as a deadly weapon.

The question is whether Hudson had a chance to deliberate. The record shows he did. Ratkovcic was standing by the fuel pump using the phone when Hudson, clutching the bat, left his vehicle and walked toward Ratkovcic with the intention of delivering a severe beating. He clubbed Ratkovcic with such force that the emergency fireman called to the scene saw massive blood spilling from Ratkovcic's head and a pool of blood larger than he had ever seen. With these facts, there is sufficient evidence supporting an inference of specific intent to kill. The jury's conclusion is supported by substantial evidence.

III. Sentencing.

A. Applicability of Mandatory Minimum Sentence. Hudson contends the imposition of mandatory five-year sentences for counts I and III, pursuant to Iowa Code section 902.7, was error because the State failed to allege in the trial information Hudson was armed with a dangerous weapon. Iowa Code section 902.7 provides for a mandatory minimum sentence if the defendant committed a forcible felony while armed with a dangerous weapon:

> At the trial of a person charged with participating in a forcible felony, if the trier of fact finds beyond a reasonable doubt that the person is guilty of a forcible felony and that the person

> represented that the person was in the immediate possession and control of a dangerous weapon, displayed a dangerous weapon in a threatening manner, or was armed with a dangerous weapon while participating in the forcible felony the convicted person shall serve a minimum of five years of the sentence imposed by law. A person sentenced pursuant to this section shall not be eligible for parole until the person has served the minimum sentence of confinement imposed by this section.

Iowa Code § 902.7.

The code section was amended in 1995, substituting the word "dangerous weapon" for the word "firearm" wherever it appeared and in doing so, broadening the scope of crimes for which mandatory minimum sentences could be imposed. *See* 1995 Amendment (76 G.A.) ch. 126, § 1.

Iowa Rule of Criminal Procedure 6(6) provides:

> If the offense charged is one for which the defendant, if convicted, will be subject by reason of the Code to a minimum sentence because of use of a firearm, the allegation of such use, if any, shall be contained in the indictment. If use of a firearm is alleged as provided by this rule, and if the allegation is supported by the evidence, the court shall submit to the jury a special interrogatory concerning this matter, as provided in R.Cr.P. 21(2).

This rule has not been amended to substitute the words "dangerous weapon" for the word "firearm."

Applying these principles, our appellate courts, prior to the 1995 amendment of section 902.7, held it was error for the trial court to impose a mandatory minimum sentence pursuant to 902.7 when the State failed to allege possession of a firearm in the trial information. *See, i.e., State v. Luckett*, 387 N.W.2d 298, 301 (Iowa 1986).

Hudson argues the same should be true when the State fails to allege possession of a dangerous weapon.

Hudson's argument fails for two reasons. First, there is no rule requiring the State to allege possession of a dangerous weapon in the trial information if the defendant will be subject under the code to a mandatory minimum sentence. The broad construction suggested by Hudson is beyond the plain language of the rule. *See State v. Edwards*, 571 N.W.2d 497, 500 (Iowa App. 1997). When the meaning of statute is clear, we will not search for a meaning beyond the clear language. *Saadiq v. State*, 387 N.W.2d 315, 319 (Iowa 1986).

Second, even if the State were required to allege possession of a dangerous weapon in the trial information, they did not completely fail on this burden. One of the counts alleged was going armed with intent. As defined by statute, that offense specifically involves the use of a dangerous weapon. By charging the defendant with going armed with intent, Hudson knew the Sate alleged he had used a dangerous weapon. Accordingly, he was not denied an opportunity to prepare a defense. *See State v. Johnson*, 356 N.W.2d 576, 578 (Iowa App. 1984). His appeal on this ground is denied.

B. Discretion to Reduce Mandatory Minimum Sentence under Section 902.10. Section 901.10 grants the court discretion to reduce the sentence below the mandatory minimum "if mitigating circumstances exist and those circumstances are stated specifically in the record." Iowa Code § 901.10 (1993). This exercise of

discretion must be demonstrated "by stating upon the record the reasons for the particular sentence imposed. The sentencing court, however, is *generally not required to give its reasons for rejecting particular sentencing options*." (Emphasis added). *Id.* Section 901.10 does not require a sentencing court to give its reasons for rejecting particular sentencing options. *State v. Russian*, 441 N.W.2d 374, 374 (Iowa 1989).

Hudson contends the district court did not know it had discretion to reduce his mandatory minimum sentences under Iowa Code section 901.10. The Iowa Supreme Court in *Thomas* dealt with this issue. In that case, the sentencing judge used the phrase, "which *could* require this court to order that you serve a mandatory minimum of one-third of the sentence in connection with this matter." *Thomas*, 547 N.W.2d at 226.

The supreme court has strongly hinted the sentencing judge should acknowledge the existence of section 901.10. "We believe that the district court's use of the phrase '*could* require this court' indicates the court was aware that the application of section 124.413 is not mandatory in all cases." *Id.* (Defendant asserting district court was unaware that it had discretion to waive the mandatory minimum sentence requirements of section 124.413).

In this case, the trial court made the following statement at sentencing: "By its verdicts on Counts I and III, the jury found beyond a reasonable doubt that defendant was in possession or control of a dangerous weapon while committing a forcible

felony. Therefore defendant shall serve a mandatory minimum period of incarceration of five years on each Count . . . ."

No such reference similar to that in the *Thomas* case appeared on the record in this case. While we agree a court need not give specific reasons for rejecting the sentencing option, the record must reveal the sentencing court was aware of its discretion and, in fact, exercised it in a particular case. There is nothing in the record which would lead us to believe the district court took section 901.10 into account when imposing the mandatory minimum sentence of section 902.7. Conversely, there is nothing in the record to lead us to believe the district court did not take section 901.10 into account. But, we are left to speculation where important rights of the defendant are involved. Following the dicta of *Thomas*, we conclude a sentencing court should at least make reference on the record to its discretionary options.

Therefore, we conclude the case should be remanded solely for resentencing and application of Iowa Code section 901.10.

IV. Ineffective Assistance of Counsel.

Hudson contends he was denied effective assistance of counsel because his trial counsel knew there was information that other Ben Shinn trucks, similar to the truck Hudson was driving, were in the area at the time of the attack, but did not seek out the possible exculpatory evidence. Further Hudson contends counsel was ineffective for not moving for mistrial based on the prosecutor's alleged misconduct in failing to turn over the exculpatory evidence to the defense.

Generally, ineffective assistance of counsel claims are preserved for postconviction to allow trial counsel an opportunity to defend the charge. *State v. Pearson*, 547 N.W.2d 236, 241 (1996). We will, however, depart from this preference because the record in this case is sufficient to dispose of Hudson's claim. *See State v. Schoelerman*, 315 N.W.2d 192, 195 (Iowa 1982). Because the record is not sufficient to clarify the likelihood of the evidence being exculpatory or counsel's reasoning in pursuing his course of action, we preserve the ineffective assistance of counsel claims for a postconviction proceeding.

REMANDED FOR RESENTENCING.