FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed November 20, 1984
vs.	)	303
ALUIS REDD a/k/a ACE REDD,	)	4-352 83-900
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Black Hawk County - Carroll E. Engelkes, Judge.

Defendant appeals from the sentences imposed, claiming the trial court improperly considered use of a weapon during commission of a burglary. AFFIRMED.

Charles Harrington, Appellate Defender, and Patrick R. Grady, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Rebecca L. Claypool, Assistant Attorney General, for plaintiff-appellee.

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

SCHLEGEL, J.

Defendant, Aluis Redd, appeals from the sentence imposed, claiming the trial court improperly considered use of a weapon during commission of a burglary. We affirm.

Redd challenges two sentences: one for conviction of second degree burglary, and one for conviction of false use of a financial instrument (FUFI). The sentence for the FUFI conviction is challenged on the grounds that it was dependant on the allegedly erroneous sentence for the burglary conviction. Because this challenge is derivative, we need only address the alleged error in the sentence for the burglary conviction.

I. Background. On January 9, 1980, Redd and another individual were charged with first degree burglary in violation of Iowa Code sections 713.1 and 713.2 (1979). A jury trial was held, and Redd was found guilty of second degree burglary. The jury did not sign the special interrogatory indicating a finding that Redd possessed a firearm during the crime.

Redd later moved for a mistrial based on jury misconduct during deliberations. The motion was granted and a new trial was ordered.

The second trial was held before the bench. The trial court made findings of fact: (1) that Redd had committed a burglary; and (2) that Redd possessed a firearm when he committed the burglary. The factfindings were sufficient to support a conviction for first degree burglary. See Iowa Code §§ 713.3, 702.7 (1979). However, the trial court concluded as a matter of law that, because of the prior jury verdict, the constitutional prohibition against double jeopardy prevented conviction for first degree burglary. The trial court therefore entered a judgment of conviction for second degree burglary.

The trial court believed this second degree burglary was a forcible felony, and relied on the use of a firearm in commission of a forcible felony to sentence Redd to ten years imprisonment, with a minimum term of five years. See Iowa Code § 902.7 (1979). Redd appealed that sentence. The Iowa Supreme Court held

that second degree burglary was not a forcible felony, and reversed and remanded for imposition of a new sentence.

At the hearing for the resentencing, the trial court specifically stated it was relying on the use of a firearm in commission of the crime as a factor in imposing sentence. The trial court subsequently sentenced Redd to imprisonment for a term of ten years. Redd appeals that sentence.

II. Considering Use of a Firearm as a Factor in Sentencing. Redd argues the trial court erred in considering the use of a firearm when imposing sentence. His argument is based on the assertion that the jury finding of second degree burglary constituted an acquittal of the dangerous weapon element of first degree burglary. He contends the trial court's consideration of acts for which he was "acquitted" amounts to improper imposition of sentence based on unproven crimes, see State v. Black, 324 N.W.2d 313, 316 (Iowa 1982), and violates the constitutional protection against double jeopardy. We reject this argument.

Redd was retried after the trial court granted Redd's own motion for a mistrial. These circumstances cause Redd's double jeopardy argument to fail.

> Because the mistrial was granted on defendant's motion, "the circumstances under which [the] defendant may invoke the bar of double jeopardy in a second effort to try him are limited to those cases in which the conduct giving rise to the motion for mistrial was intended to provoke the defendant into moving for mistrial." Kennedy, ___ U.S. at ___, 102 S. Ct. at 2091, 72 L. Ed. 2d at 427. This is because a defendant's motion for mistrial is generally "deemed to be a deliberate election on his part to forego his valued right to have his guilt or innocence determined before the first trier of fact." United States v. Scott, 437 U.S. 82, 93, 98 S. Ct. 2187, 2195, 57 L. Ed. 2d 65, 76 (1978).

State v. Bell, 322 N.W.2d 93, 94 (Iowa 1982) (en banc); see also State v. Chase, 335 N.W.2d 630, 632-33 (Iowa 1983). There was no prosecutorial misconduct barring the application of this rule. Therefore, Redd's contention that he was "acquitted" of first degree burglary has no merit. See Bell, 322 N.W.2d at 94-96.

Because the double jeopardy clause does not apply, the trial court, upon retrial, was free to try and convict Redd for first degree burglary. This freedom

necessarily included the freedom to find as a matter of fact that Redd possessed a firearm while committing the burglary.

The trial court, after hearing the evidence, did find as the trier of fact that Redd possessed a firearm during the burglary. It was not error for the trial court to consider this factfinding when imposing sentence.

III. Abuse of Discretion. Redd also argues that the trial court abused its discretion by impermissibly following an inflexible policy of imposing incarceration for all crimes involving weapons. See State v. Hildebrand, 280 N.W.2d 393, 395-97 (Iowa 1979). We note that the trial court did not specifically refer to the factors governing selection of a sentence found in Iowa Code section 901.5 (1983). Nonetheless, the record of the sentencing hearing shows that Judge Engelkes does not have a fixed policy of imposing incarceration for all crimes involving firearms. We find no abuse of discretion.

AFFIRMED.