FILED
DEC 18 1985
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed December 18, 1985
vs.	)	
LEWIS LUCKETT, a/k/a **LEWIS BRANCH,**	)	5-503 84-1589
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Scott County - James E. Kelley, Judge.

The defendant appeals from his conviction and sentence for attempt to commit murder. **AFFIRMED.**

John P. Messina, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Rebecca L. Claypool, Assistant Attorney General; and R. Douglas Wells, Assistant Scott County Attorney, for plaintiff-appellee.

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

DONIELSON, P.J. 443

Defendant appeals from his conviction and sentence for attempt to commit murder. He contends the trial court erred by refusing to submit to the jury the lesser-included offenses of simple assault and aggravated assault. He also contends the trial court erred by imposing a mandatory minimum sentence for use of a firearm, where the trial information had not included an allegation of firearm possession.

The defendant, Lewis Luckett, was charged with attempt to commit murder. A jury found him guilty of that charge. The trial court then sentenced him to imprisonment for up to 25 years, with a five-year mandatory minimum sentence pursuant to Iowa Code section 902.7 because of the involvement of a firearm.

Defendant was charged with attempted murder after he fired a single shot through Wade Dawson's windshield. The incident involved in this case ultimately arose from a family dispute between estranged spouses. The relevant parties are: the defendant; Wade Dawson, the victim; and Sandra Arrington, defendant's girlfriend and the victim's former wife. The victim and Sandra Arrington were married in March 1982, and divorced in April 1984. Apparently tension arose between those parties over certain terms in the divorce decree, particularly the visitation rights.

On March 26, 1984, Dawson left his residence at 7:30 p.m. and drove around town, supposedly in an attempt to find his second wife. At this time, he noticed Sandra's car was following him. Dawson testified that as he pulled into his yard to park, the other car pulled in front of his and defendant jumped out from the driver's side. The victim testified that the defendant was six or seven feet from the victim's van when he fired the shot into the windshield from a well-lit area. An investigating police officer testified that had the bullet passed through

the windshield "it would have struck the driver . . . in the shoulder or just above the right shoulder."

The State offered additional evidence that the defendant had fired the shot at the victim, but defendant denied that he had any involvement whatsoever. Sandra Arrington testified in support of defendant's alibi, but Sandra's testimony was discredited by rebuttal evidence.

There was substantial evidence in the record regarding animosity, threats, and counter-threats between the parties involved in this case. Julie Dawson testified that on the day of the shooting Sandra Arrington, the defendant, and another man confronted her at a local credit union and made threats against Wade. She also testified that Sandra had been making threats against her since the victim's separation from Sandra. The victim testified that he had had problems with his ex-wife Sandra and her boyfriend (the defendant) over visitation rights to Wade and Sandra's child. The victim testified that the defendant made threats to kill him.

I.

Iowa law provides:

> Whether a crime is an included offense involves the legal test (the lesser offense must be legally included in the greater offense) and the factual test (the lesser offense must also be factually included under the evidence in the particular case). State v. Johnson, 291 N.W.2d 6, 7 (Iowa 1980).

State v. Morgan, 322 N.W.2d 68, 69 (Iowa 1982). The legal test is satisfied in this instance because assault under Iowa Code section 708.1 is a lesser-included offense to attempted murder under section 707.11. See State v. Powers, 278 N.W.2d 26, 28 (Iowa 1979).

Moreover, as to the factual test, it is well-settled that:

> In the included offense setting the courts apply a principle that when the major offense consists of elements A,

> B, and C, the lesser offense consists of elements B and C, and the record does not contain substantial evidence from some quarter controverting element A, the State's case stands or falls on the major offense.

Morgan, at 70.

The element A, in this instance, which raises assault to attempted murder is specific intent to kill. Compare Iowa Code § 708.1 (1983) with Iowa Code § 707.11 (1983). Thus, the issue becomes whether the record contained substantial evidence controverting the element of intent to kill. If the record did contain such evidence, defendant would be entitled to the instruction. We hold, however, that the record did not contain such evidence.

Defendant claims on appeal that his intent to kill was controverted because the evidence could have led to the inference that he only attempted to frighten or threaten the victim by shooting near him. Defendant, however, tried the case on an alibi theory claiming he was not present, which apparently was not a particularly persuasive defense. The evidence indicates defendant, in a well-lit area, jumped out of a car, took aim, and fired directly at the victim. Defendant's bullet did not kill the victim, but the fact that defendant missed his target does not negate his intent.

Evidence was introduced which showed that defendant had previously threatened to kill the victim. Specifically, the defendant informed the victim he had killed before and that "to kill [the victim] would be nothing." Moreover, on the day of the incident, the victim's wife was confronted by the defendant and was told "tell your man I'll kill him." Defendant was armed at this time. We cannot find the record as developed and presented by the defendant contained substantial evidence controverting the defendant's intent to kill when he attempted to shoot the victim at close range.

II.

Defendant's other alleged error is that the trial court, pursuant to Iowa Code section 902.7 (1983) which requires a mandatory minimum sentence for certain crimes committed with a firearm, ordered an illegal sentence because the prosecutor did not charge defendant with possession of a firearm in the trial information as required by Iowa Rule of Criminal Procedure 6(b). The trial court held it was inherent in the jury verdict, apparently because the testimony undisputably indicated a firearm was shot, that defendant was armed while perpetrating this forcible felony. The State raises a preservation of error claim and also indicates that defendant did not contest the finding that he possessed a firearm but only the alleged procedural irregularity[1].

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[1]This case would have presented an issue of first impression for Iowa. Iowa Rule of Criminal Procedure 6(b) expressly states:

> 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).

(emphasis added). It is worth noting that the legislature in drafting rule 6(b) used the word "indictment." Had the word "complaint" been chosen, which is a more encompassing term than indictment and information, then both terms would have been within the scope of the rule. See Iowa Code § 805.1 (1985). Rule 6(b), however, contains the word "indictment" which, by definition, does not include an "information." Black's Law Dictionary 918 (rev. 4th ed. 1968) (information distinguished from an indictment in that the former is "an accusation in the nature of an indictment, from which it differs only in being presented by a competent public officer on his oath of office, instead of a grand jury on their oath.") Compare Iowa R. Crim. P. 4 (indictment defined) with Iowa R. Crim. P. 5 (information discussed). This case involved a trial information, not an indictment. Therefore, it appears that under rules of statutory construction that rule 6(b) would have been inapplicable because it only addresses indictments. See Iowa R. App. P. 14(13).

447

It is well-established that "matters not raised in the trial court or in a post-trial motion will not be considered for the first time on appeal. State v. Morehouse, 316 N.W.2d 884, 886 (Iowa 1982); (citing State v. Jump, 269 N.W.2d 417, 430 (Iowa 1978)). Defendant raises this alleged error for the first time on appeal. Therefore, we cannot address the merits of this claim because it was not adequately preserved for appeal.

We affirm the conviction of the defendant.

AFFIRMED.