FILED
AUG 30 1983
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

RANDY L. KRANA,)

Defendant-Appellant.)

Filed August 30, 1983

3-112
69193

Appeal from Scott District Court - J. Hobart Darbyshire, Judge.

Defendant appeals from his conviction of the crime of terrorism in violation of Iowa Code § 708.6 (1981) and from the resulting sentence. AFFIRMED.

Edward N. Wehr and Harold J. DeLange II of Wehr and DeLange, Davenport, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Marcia Mason, Assistant Attorney General, for plaintiff-appellee.

Considered by Oxberger, C.J., and Donielson, Snell, Schlegel and Hayden, JJ.

PER CURIAM

Defendant, Randy L. Krana, appeals from his conviction of the crime of terrorism in violation of Iowa Code § 708.6 (1981) and from the resulting sentence. He asserts that the evidence was insufficient to prove either that the crime of terrorism occurred or that he was the perpetrator, that an instruction relating to the victim's "reasonable apprehension of injury" was erroneous, that applying the mandatory minimum five-year sentence for use of a firearm to a class D felony whose maximum sentence is also five years is unconstitutional, and that he is entitled to a new trial because he was not present at a discussion involving the judge and both attorneys during a trial recess. Finally, defendant contends that his trial attorney rendered ineffective assistance of counsel in several ways. We affirm.

During the early morning hours of April 7, 1982, Paul Wells was driving his tractor trailer truck in the course of his employment in Davenport, Iowa. As he was driving on Howell Street, Wells saw two men standing in the street across from the Corner Tap tavern. Wells was forced to stop his vehicle in order to avoid running over one of the men wearing the cowboy hat. Wells opened his truck door and talked to the man in the cowboy hat for two to three minutes. Wells drove away after the man in the cowboy hat threatened to drain his gas and asked the other man for his gun.

A bartender at the Corner Tap, James Sheil, testified that Bradley Dalton, also charged with terrorism, and a friend wearing a large cowboy hat had been in the Corner Tap prior to closing. James Sheil also testified that he saw the man with the cowboy hat talking to a truck driver on the street. After the truck left the two men got into a pickup and left in the same direction as the truck had taken.

Shortly after Paul Wells pulled his truck away from the Corner Tap tavern he noticed a pickup overtaking him at a high rate of speed. The pickup pulled up alongside the left-hand side of the Wells' truck and the man with the cowboy hat

sitting on the passenger side of the pickup fired a gun into the lefthand door of the tractor truck. The pickup then drove away.

The victim, Paul Wells, identified Bradley Dalton in a lineup at trial as the man with the cowboy hat who shot at him and a third person as the man who was driving the pickup. James Sheil, however, identified the defendant as the man with the cowboy hat and passenger in the pickup. The jury found the defendant guilty of the crime of terrorism and answered "yes" to a special interrogatory as to whether the defendant possessed a firearm. The defendant alleged error as set out above.

Generally, our review of criminal proceedings is at law for correction of errors only, and not de novo. Iowa R. App. P. 4. However, on issues concerning violation of constitutional safeguards, our review is **de novo.** State v. Lamp, 322 N.W.2d 48, 50 (Iowa 1982).

I. Sufficiency of the Evidence. At the conclusion of the State's evidence, defendant unsuccessfully moved for a directed verdict on the ground of insufficiency of the evidence. Defendant alleged the evidence was insufficient to show that he was the perpetrator of the offense. Defendant's motion was sufficient to preserve error on this issue. State v. Rich, 305 N.W.2d 739, 741 (Iowa 1981). Defendant also alleges on appeal that the evidence is insufficient to show the victim was placed in "reasonable apprehension of serious injury" as required by Iowa Code § 708.6(1) (1981). "No ground may be urged on appeal in support of a motion for directed verdict which was not urged as part of the motion when made in trial court." State v. Rosewall, 239 N.W.2d 171, 173 (Iowa 1976). An appellant may not urge to us a contention he did not first raise in trial court. The issue of whether the evidence was sufficient to show the victim was placed in reasonable apprehension of serious injury was not raised in trial court and preserved for this appeal. We do, however, consider defendant's other ground for sustaining a motion for a directed verdict.

The standard of review in challenging the sufficiency of evidence is well established, see State v. Freie, ___ N.W.2d ___, ___ (Iowa 1983); State v. Robinson, 288 N.W.2d 337, 339 (Iowa 1980); we will uphold a verdict if there is "substantial evidence in the record tending to support the charge." State v. Aldape, 307 N.W.2d 32, 39 (Iowa 1981).

The defendant argues that the evidence is insufficient to support the verdict because the victim failed to identify the defendant as the perpetrator in the in-court lineup. The bartender, James Sheil, did identify the defendant as the man in the cowboy hat who was talking to the truck driver. The incident occurred at night and the victim had not seen the defendant before that night. The bartender had seen the defendant on several prior occasions. The weight to be given to testimony is a function of the factfinder. Robinson, 288 N.W.2d at 341.

We believe the testimony of the witness, James Sheil, and the description of the perpetrator given by the victim, Paul Wells, could have convinced a rational trier of fact that defendant was guilty beyond a reasonable doubt. Thus, the verdict is supported by substantial evidence.

II. Instructions. Defendant next asserts that an instruction given to the jury relating to the victims "reasonable apprehension of injury" as required by the Iowa terrorism statute was erroneous. Iowa Code § 708.6(1) (1981). Defendant admits this objection to the instructions was not made prior to submission of the case to the jury so that the trial court might correct any alleged errors. Defendant argues that under State v. Wisniewski, 171 N.W.2d 882, 887 (Iowa 1969), he may raise the issue for the first time on appeal. Wisniewski involved a rule of law which was adopted after the trial of Wisniewski. There the defendant was permitted to assert a new ground on appeal based on the new right. Defendant relies upon the Court's interpretation of Iowa Code § 708.6 in State v. White, 319 N.W.2d 213, 215 (Iowa 1982), as providing a new and unknown right. This argument is without merit because in this case, the trial was held on September 7, 1982, and

White was decided on May 19, 1982, over three months before trial. The Wisniewski exception to the rule that failure to assert a known or existing right in the trial court is fatal only applies to rights arising after trial. Wisniewski, 171 N.W.2d at 887.

III. Sentence. The defendant asserts that applying the mandatory minimum five-year sentence for use of a firearm to a class D felony whose maximum sentence is also five years is unconstitutional in that it constitutes cruel and unusual punishment under the Eighth Amendment to the Constitution of the United States. The issue was not presented to the sentencing court but defendant, without citing authority, argues the constitutional issue may be raised for the first time on appeal because this is an attack upon the sentencing procedure itself. Even assuming the issue was preserved, the imposition of a five year mandatory minimum sentence to a class D felony which has a five year maximum sentence is within the inherent power of the legislature in establishing a sentencing scheme for the judiciary to administer. State v. Iowa District Court for Shelby County, 308 N.W.2d 27, 30 (Iowa 1981). (The legislature possesses the inherent power to prescribe punishment for crime, and the sentencing authority of the courts is subject to that power.) This power is subject only to constitutional limitations. The five year minimum sentencing statute was held to withstand equal protection analysis in State v. Fagen, 323 N.W.2d 242, 243 (Iowa 1982), and cruel and unusual punishment analysis in State v. Jones, 298 N.W.2d 296, 299-300 (Iowa 1980). See State v. Holmes, 276 N.W.2d 823, 829 (Iowa 1979). Defendant's claim is without merit.

IV. Presence at Trial. Defendant asserts that he is entitled to a new trial because he was not present at a discussion held in the judge's chambers during a trial recess between the judge and both attorneys. Iowa R. Crim. P. 25(1). Both attorneys and the judge left the courtroom to continue a sidebar discussion concerning a possible in-court lineup. The defendant did not go to chambers

because the victim would have seen him as he crossed the hallway thereby prejudicing the lineup. The rule requiring defendant's presence at all stages of the trial must be considered together with the rule of harmless error. State v. Blackwell, 238 N.W.2d 131, 136 (Iowa 1976). Assuming without deciding that the defendant's absence was not voluntarily waived by the defendant and that the discussion was a "stage of trial" within the meaning of Iowa R. Crim. P. 25(1), we find any error to be harmless beyond a reasonable doubt. State v. Hempton, 310 N.W.2d 206, 208 (Iowa 1981). A full record was made of the discussion in chambers. The discussion concerned an in-court lineup which was to include defendant and a separately tried co-defendant. The line-up results were favorable to defendant when the victim was unable to identify the defendant. The record completely negatives any reasonable possibility of prejudice arising from the defendant's absence from the in-chambers discussion.

V. Ineffective Assistance of Counsel. Defendant finally raises several alleged examples of ineffective assistance of counsel. We hold that in the instant case the record is inadequate to allow us to determine whether "counsel's performance was within the range of normal competency." Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980). (See State v. Lucas, 323 N.W.2d 228, 232 (Iowa 1982)). The defendant's claims are more appropriately presented to a postconviction forum after an evidentiary hearing.

The defendant's conviction is affirmed.

AFFIRMED.