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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-553 / 89-1541

243

STATE OF IOWA,

Appellee,

vs.

DONALD LYNN HAGEN,

Appellant.

Appeal from the Iowa District Court for Polk County, Ray Hanrahan, Judge.

The defendant appeals his convictions, following a jury trial, for going armed with intent and possession of marijuana. He challenges the sufficiency of the evidence to support either conviction. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, for the appellant.

Bonnie J. Campbell, Attorney General; Amy M. Anderson, Assistant Attorney General; James Smith, County Attorney; and Jamie Bowers, Assistant County Attorney, for appellee.

Considered en banc.

DONIELSON, P.J.

A team of police officers was preparing to execute a search warrant (authorizing the search of an apartment, defendant's van, and defendant's person) when they encountered Donald Hagen and another man leaving the apartment. Hagen was wearing a bulletproof vest and was carrying a loaded lever action rifle with a scope. Hagen was holding the rifle at a forty-five degree angle from his body but he set it down when he saw the officers.

After seizing Hagen and his companion, the officers searched the apartment. They found, among other things, several weapons and marijuana. They also found letters addressed to Hagen and documents bearing his name on a dresser in the bedroom, which they construed to be evidence that Hagen was an occupant of the apartment.

Hagen was charged with going armed with intent, a violation of Iowa Code section 708.8 (1989), and possession of a controlled substance (marijuana), a violation of Iowa Code section 204.402(3) (1989). A jury found him guilty of both crimes. Hagen has appealed the resulting convictions.

Hagen challenges the sufficiency of the evidence to prove one of the elements of the crime of going armed with intent, namely that he had possessed the intent to use the weapon without justification against the person of another.

Hagen also challenges the sufficiency of the evidence to prove that he had possessed marijuana. He contends the evidence did not establish that he was an occupant of the apartment where the marijuana was found.

Our scope of review is on assigned error only. Iowa R. App. P. 4. The standard of review in challenging the sufficiency of the evidence is well established. State v. Lampman, 342 N.W.2d 77, 81 (Iowa App. 1982). We will uphold a verdict where there is substantial evidence in the record tending to support the charge. State v. Aldape, 307 N.W.2d 32, 39 (Iowa 1981).

When reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State, including legitimate inferences and presumptions that fairly and reasonably may be deduced from the evidence in the record. State v. Hall, 371 N.W.2d 187, 188 (Iowa App. 1985); State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984). Direct and circumstantial evidence are equally probative so long as the evidence raises "a fair inference of guilt and [does] more than create speculation, suspicion, or conjecture." State v. Hamilton, 309 N.W.2d 471, 479 (Iowa 1981). It is necessary to consider all the evidence in the record, and not just the evidence supporting the verdict, to determine whether there is substantial evidence to support the charge. Hall, 371 N.W.2d at 188; Bass, 349 N.W.2d at 500. Substantial evidence means evidence which would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. Hall, 371 N.W.2d at 188; State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984).

A reasonable jury could conclude that defendant intended to shoot the rifle at the officers he encountered. Proof of intent is seldom susceptible to proof by direct evidence. State v. Olson, 373 N.W.2d 135, 136 (Iowa 1985) (citing State v. Furlong, 216 Iowa 428, 432, 249 N.W. 132, 134 (1933)). Proof of intent will usually be a matter of circumstantial evidence and inferences to be drawn therefrom. Id. It is true no evidence established that defendant pointed the rifle directly at anyone or that defendant had a dispute with anyone in particular. However, defendant was leaving the apartment clad in a bullet-proof vest. Defendant was also carrying a loaded scoped rifle, which apparently had been "short stroked," i.e., jammed when defendant improperly attempted to chamber a round. The jury could infer the short stroking of the rifle occurred because defendant was hasty in attempting to chamber a round. The jury could also infer from the attempt to chamber a bullet that defendant was intent on shooting the rifle in the near future. Furthermore, defendant carried the rifle in port position (at a forty-five degree angle in front of him), also allowing an inference defendant wanted the weapon ready and able to shoot. We conclude there was sufficient evidence from which a jury could infer defendant possessed the requisite intent to shoot another with the rifle he was carrying.

Because the marijuana was not found on the person of defendant, we must determine whether the evidence was sufficient to establish constructive possession. See State v. Rudd, 454 N.W.2d 570, 571 (Iowa 1990).

> Possession is constructive when the accused maintains dominion and control of the place where the substances are found. The dominion and control can be direct or indirect. It is direct when the accused is in such close proximity to the substances as to claim immediate dominion over them. It is indirect when the accused maintains or closely shares exclusive dominion over the premises where the substances are found.

Id.

Here, the jury could reasonably infer defendant exercised indirect dominion and control of the seized marijuana. The Des Moines police obtained a warrant to search the apartment, the defendant, and the defendant's van. The defendant was seen entering and leaving the apartment freely. The police arrested the defendant as he was leaving the apartment. On the bedroom dresser, the police found numerous pieces of correspondence addressed to defendant. The marijuana was found in a drawer of that same bedroom dresser. The jury was entitled to infer the bedroom was defendant's and that he knew of, and maintained control over, the contents of the dresser. We conclude there was sufficient evidence to establish that defendant knowingly or intentionally possessed marijuana.

For the foregoing reasons, defendant's convictions are affirmed.

AFFIRMED.

All judges concur, except Schlegel, J., who dissents.

SCHLEGEL, J. (dissenting)

I respectfully dissent from that portion of the majority's opinion finding that the State has presented substantial evidence to prove intent. The majority correctly points out that we must view the evidence in a light most favorable to the State, State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984), and that direct and circumstantial evidence are equally probative, Iowa R. App. P. 14(f)(16). The majority also correctly states that we must find more than mere "speculation, suspicion, or conjecture." State v. Hamilton, 309 N.W.2d 471, 479 (Iowa 1981). Nevertheless, the majority holds that correctly carrying a dangerous weapon, which an experienced gun owner would know to be disabled, at some time before an arrest, supplies the requisite intent for a violation of Iowa Code section 708.8.

The majority concedes that there is no evidence that the defendant pointed the rifle at anyone or had a dispute with anyone. Indeed, the record shows only that the defendant was carrying his weapon in the correct position. The record also shows that the defendant was completely surprised by the presence of the officers when he was apprehended. In fact, the defendant had set the rifle down at the top of a flight of stairs before descending and apparently discovering the police staked out at the bottom of the stairs. Though the majority would infer from the

"short stroked" loading an immediate intent to use the weapon against another without justification, there is no evidence to show when or where the defendant "short stroked" the rifle. Even conceding that an inoperable weapon may be considered dangerous, the fact that it was inoperable (and we have no evidence of the defendant's knowledge either way) has to militate against a finding of intent against this defendant. Finally, the defendant's wearing of a bullet-proof vest as it relates to using the inoperative weapon against another is utterly speculative at best.

On the record before us, I would find that it is not clear that the defendant even had the opportunity to form the specific intent necessary for conviction under section 708.8. Thus, as a matter of law the evidence was insufficient to convict under that section. Consequently, I would reverse defendant's conviction on the charge of going armed with intent.