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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

Filed March 31, 1986

STATE OF IOWA,)

Plaintiff-Appellant,)

vs.)

EUGENE ARLEN GOSCH,)

Defendant-Appellee,)

5-712 / 85-581

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Appeal from the Iowa District Court for Guthrie County (No. 3720) - Jack D. Levin, Judge.

The State has appealed from the trial court's judgment of acquittal contending the evidence was sufficient to support the jury's verdict of guilty and to support a finding that the defendant had intended to strike the victim. **AFFIRMED.**

Thomas J. Miller, Attorney General, and Roxann M. Ryan, Assistant Attorney General, for the plaintiff-appellant.

Alfredo G. Parrish, Des Moines, Iowa, for the defendant-appellee.

Considered by Oxberger, C.J., Hayden and Sackett, JJ.

PER CURIAM

Defendant Eugene Gosch was charged with willful injury and the case was tried to a jury. At the close of the State's evidence, Gosch moved for a judgment of acquittal, which was denied by the court. The motion was not renewed at the close of all the evidence. Gosch was subsequently found guilty of the crime charged.

Defendant subsequently filed a timely motion for a new trial pursuant to Iowa Rule of Criminal Procedure 23(2)(b)(6). He alleged that the verdict was contrary to the evidence at trial. In response to the motion, the trial court entered an order captioned "Order Granting Motion for New Trial." The actual order provided: "IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Defendant is acquitted and he shall immediately be released from jail and his bond exonerated." The State has appealed alleging that the court erred in "granting" the motion.

Based upon the record before this court, we decline to address the merits of the State's arguments. Contrary to the assumption of the parties to this action, the trial court's order did not have the effect of granting a new trial. Rather, the actual language of the order granted a judgment of acquittal at that time.

Since no error was raised concerning the judgment of acquittal, it must be allowed to stand.

AFFIRMED.

Oxberger, C.J., dissents.

OXBERGER, C.J. (dissenting)

I dissent. Iowa Rule of Criminal Procedure 18(8) governs judgments of acquittal. Pursuant to subsection a, a court may enter a judgment of acquittal on its own motion prior to submission of the case to the jury. However, entry of a judgment of acquittal after the jury returns the verdict is only authorized in response to a timely motion by one of the parties at the close of all the evidence. Iowa R. Crim. P. 18(8)(b). In the present case, no motion was made at the close of all the evidence. Consequently, the trial judge had no authority to enter a judgment of acquittal.

Since the court's order was not responsive to defendant's motion for a new trial, I would vacate the order and remand for the limited purpose of entry of a responsive ruling on the motion before the court.