

IN THE SUPREME COURT OF IOWA
Supreme Court No. 18-1877

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DAIRRAMEY MOORE,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR CLINTON COUNTY
THE HON. PATRICK A. MCELYEA & MARY HOWES, JUDGES

APPELLEE'S BRIEF

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FINAL

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. There was Sufficient Evidence to Support Moore's Convictions of Intimidation with a Dangerous Weapon and Reckless Use of a Firearm.

Authorities

State v. Anderson, 517 N.W.2d 208 (Iowa 1994)
State v. Crone, 545 N.W.2d 267 (Iowa 1996)
State v. McPhillips, 580 N.W.2d 748 (Iowa 1998)
State v. Robinson, 288 N.W.2d 337 (Iowa 1980)
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II. The District Court Has Not Filed a Final Order of Restitution; Therefore, There Exists No Appealable Order.

Authorities

State v. Albright, 925 N.W.2d 144 (Iowa 2019)
State v. Bonstetter, 637 N.W.2d 161 (Iowa 2001)
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III. If the District Court Failed to Exercise Its Discretion to Determine Whether to Reduce Moore's Mandatory Minimum Sentence, the Error Was Harmless Where There Were No Mitigating Circumstances.

Authorities

State v. Adams, 554 N.W.2d 686 (Iowa 1996)
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State v. Wooten, No. 18-0023, 2018 WL 6706223
(Iowa Ct. App. Dec. 19, 2018)
Iowa Code § 907.3

ROUTING STATEMENT

This case can be decided based on existing legal principles. Transfer to the Court of Appeals would be appropriate. Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

Nature of the Case

The defendant, Dairramey Moore, appeals the judgment and sentence imposed upon his convictions of intimidation with a dangerous weapon with intent and reckless use of a firearm in violation of Iowa Code sections 708.6 and 724.30(3). He argues: (1) the State presented insufficient evidence to support his convictions; (2) the district court erred in ordering him to pay restitution before the total amount of restitution was known and without determining whether he had a reasonable ability to pay; and (3) the district court failed to exercise its discretion in imposing a mandatory minimum sentence.

Course of Proceedings

The State accepts Moore's course of proceedings as adequate and essentially correct. Iowa R. App. P. 6.903(3).

Facts

On April 26, 2018, beginning at 11:53 p.m., the Clinton County Communication Center began to receive 911 phone calls reporting gun shots fired in the 800 block of 13th Avenue South. Trial Tr. p. 19, lines 1-9, 25-p. 20, line 16, p. 24, lines 6-17, p. 34, lines 18-22. When police arrived to investigate, they discovered bullet holes in an east facing window of 830 13th Avenue South and seven shell casings on the ground underneath the window. Trial Tr. p. 78, line 21-p. 79, line 1, p. 81, lines 15-21, p. 127, lines 3-8.

Additionally, police observed bullet holes in the houses on either side of 830. Trial Tr. p. 83, lines 11-18, p. 87, lines 1-4, p. 92, line 23-p. 93, line 2, p. 95, line 19-p. 103, line 14. Specifically, two bullet holes penetrated the west side of 826, in a location directly across from the east window of 830, and one bullet penetrated 834. Trial Tr. p. 83, line 12-p.86, line 8, p. 87, lines 1-4, p. 92, line 23-p. 93, line 2, p. 95, lines 19-24, p. 96, lines 14-19, p. 97, line 19-p. 98, line 9, p. 102, line 3-p. 103, line 4. It therefore appeared to police that someone fired shots from the inside of 830 that entered 826 and that someone fired shots from the outside of 830 that went through 830 into 834. Trial Tr. p. 116, line 6-p. 119, line 18, p. 166, lines 1-22.

Alan Wulf lived at 830 and had installed security cameras, with a live feed, around the outside of his house. Trial Tr. p. 61, lines 21-25, p. 62, lines 7-19. The cameras recorded some of the events surrounding the shooting. State's Exhibit 61.

The camera video shows that Zachary Broder and Moore arrived at 830 13th Avenue at approximately 11:45.¹ After speaking with a woman at the backdoor, Moore and Broder eventually walked to the east side of the house. Trial Tr. p. 157, lines 5-6. However, the east window, underneath where the shell casings were found, is not in camera range. Trial Tr. p. 131, line 23-p. 132, line 6, p. 161, lines 4-16.

The camera shows that at approximately 11:50 p.m., Broder walked away from the east side of the house and back toward the alley behind it. State's Exhibit 61. At 11:51 p.m. Moore can be seen running away from the east side of the house and past Broder's car. Trail Tr. p. 161, line 21-p. 162, line 15; State's Exhibit 61.

On May 22, 2018, the State filed a trial information charging Moore with intimidation with a dangerous weapon, going armed with intent, and reckless use of a firearm. Trial Information; App. 4. At

¹ The time-stamped date on the footage is one hour behind and one day ahead of the actual time and date. Trial Tr. p. 139, line 14-p. 140, line 11.

Moore's trial several witnesses, Broder, Tammy Oberdorf-Long, and Alan Wulf, indicated that they were reluctant to testify. Trial Tr. p. 48, line 22-p. 49, line 2, p. 57, lines 6-16, p. 68, lines 14-24.

Broder testified that he and Moore had gone to Wulf's house because he owed each of them money. Trial Tr. p. 41, line 16-p. 42, line 7. Broder recalled that he went to his car and he was texting on his phone when he heard some pops. Trial Tr. p. 44, line 17-p. 45, line 3, p. 161, line 17-p. 162, line 1. He saw Moore running, locked his door and drove away. Trial Tr. p. 45, lines 3-5. Broder denied that he possessed a gun on April 26, 2018. Trial Tr. p. 49, lines 16-17. He did not see Moore with a gun; however, Broder noted that Moore's hand was in his pocket. Trial Tr. p. 49, lines 18-20.

Oberdorf-Long testified that she was living at 830 13th Avenue and was in the house at the time of the shooting on April 26, 2018. Trial Tr. p. 51, lines 16-25. She stated that prior to shooting she was aware that Moore was at the door and that there was some "issue;" therefore, she went to Wulf's room to watch the cameras. Trial Tr. p. 52, line 4-p. 53, line 21, p. 55, lines 5-6.

Wulf testified that he too was aware that there was someone outside his house who was unhappy with him but did not know who it

was. Trial Tr. p. 63, lines 19-24, p. 64, line 23-p. 65, line 2. In fact, Wulf asserted he did not see Moore at his house on April 26, 2018. Trial Tr. p. 79 lines 5-14. Wulf denied firing any shots from the house and did not see anyone who did. Trial Tr. p. 66, lines 13-20, p. 69, lines 5-10, p. 70, lines 2-5. Wulf testified that he had heard a gun cocking and knew shots were fired but he did not know with certainty from where they were emanating. Trial Tr. p. 65, lines 2-22.

Moore's testimony about the shooting comported with the video that captured his movements around 830 13th Avenue. He testified that he had been at Wulf's house that night with Broder because Wulf owed him money. Trial Tr. p. 184, line 16-p. 185, line 1. Moore reported that Wulf was a drug dealer but denied buying any drugs from him. Trial Tr. p. 188, lines 4-10, p. 189, lines 5-7.

Moore acknowledged that he and Broder were at the east window and stated they were talking to someone inside the house. Trial Tr. p. 185, line 4-p. 186, line 23. Moore admitted that Broder left the area of the east window and he remained. Trial Tr. p. 186, line 2- 7. However, Moore denied he had a gun or fired a gun that evening. Trial Tr. p. 187, lines 15-21.

According to Moore, “[s]ome other guy, his name was Tango,” approached from east of the house and talked to Wulf through the window. Trial Tr. p. 186, line 17-p. 187, line 3. He claimed Tango argued with Wulf, “and then things escalated, gun fire started going, I took off running.” Trial Tr. p. 186, lines 17-33.

The jury found Moore guilty of intimidation with a dangerous weapon and reckless use of a firearm. Verdicts. The district court sentenced Moore to a term of imprisonment not to exceed ten years, to serve a mandatory five-year minimum, upon his conviction of intimidation and to a term of imprisonment not to exceed two years upon his conviction of reckless use of a firearm; it ordered the sentences to be served concurrently with each other but consecutively to his sentence in another case in which his probation was revoked. Probation Revocation and Sentencing Order; App. 11.

Additional facts will be set forth below as relevant to the State’s argument.

ARGUMENT

I. **There was Sufficient Evidence to Support Moore’s Convictions of Intimidation with a Dangerous Weapon and Reckless Use of a Firearm.**

Preservation of Error

The State agrees Moore preserved error on this issue by moving for a judgment of acquittal on the basis that the State had failed to prove he possessed and used a firearm and by obtaining the district court’s ruling on his motion. Trial Tr. p. 177, line 25-p. 178, line 7, p. 179, line 16-p. 181, line 5. *See State v. Schories*, 827 N.W.2d 659, 664 (Iowa 2013), as corrected (Feb. 25, 2013) (noting “that in order to preserve error on a motion to acquit, the defendant must specifically identify the elements for which there was insufficient evidence”).

Standard of Review

Review of a challenge to the sufficiency of the evidence is on assigned error. *State v. McPhillips*, 580 N.W.2d 748, 753 (Iowa 1998). The reviewing court will uphold the denial of a motion for judgment of acquittal if there is substantial evidence in the record to support the defendant’s conviction. *Id.* at 752. Substantial evidence is evidence that could convince a trier of fact that the defendant is guilty of the crime charged beyond a reasonable doubt. *State v. Crone*, 545 N.W.2d 267, 270 (Iowa 1996). In determining whether

there is sufficient evidence, the court considers all the evidence. *State v. Robinson*, 288 N.W.2d 337, 340 (Iowa 1980). However, the court views the evidence in a light most favorable to the State and makes all reasonable inferences that may be drawn from the evidence.

McPhillips, 580 N.W.2d at 752.

Merits

Moore argues the State failed to present sufficient evidence to prove beyond a reasonable doubt that he fired any shots on April 26, 2018; therefore, it failed to prove him guilty either of intimidation with a dangerous weapon or reckless use of a firearm.

It is true that the surveillance video does not show Moore in possession of a gun and no witness testified to seeing Moore with a gun. However, the video, together with other evidence, lead to the inescapable conclusion that Moore must have had a gun and must have been the person who fired shots into 830 13th Avenue immediately prior to the deluge of 911 calls at 11:53 p.m. on April 26, 2018.

The evidence established that Broder, the only person other than Moore who was known to be outside on the east side of 830 13th Avenue, walked away from the side of the house at approximately

11:50 p.m., several minutes prior to when the first call of shots fired was received by the Clinton Communications Center. Trial Tr. p. 160, line 23-p. 161, line 8, State's Exhibit 61. Broder testified he was sitting in his car when he saw Moore running toward him. Trial Tr. p. 45, lines 3-5. This testimony is confirmed by the video evidence. State's Exhibit 61. Additionally, Broder denied having a gun. Trial Tr. p. 49, lines 16-21.

Moore's testimony was self-serving, and his exculpatory statements are not supported by any other witness. He admitted what he could not deny because of the video evidence and then explained that a person who is not seen on any camera was responsible for the shooting. Moore's claim that another person was outside after Broder left is belied by the video evidence demonstrating no one approached the house during the relevant time frame. Trial Tr. p. 163, line 10-19; State's Exhibit 61.

Moreover, Moore's hands were in his pockets when he is seen on camera except when he is running away from the east side of 830 13th Avenue and then it is unclear whether he has anything in his hands. State's Exhibit 61. The jury could reasonably reject Moore's testimony about Tango and find that he fired a gun outside the east

window of 830 13th Avenue. *See State v. Anderson*, 517 N.W.2d 208, 211 (Iowa 1994) (jury is “free to reject certain evidence, and credit other evidence”).

Given the unmotivated witnesses who were present on April 26, 2018, at a known drug house, as well as the absence of any other person outside the east window of the house at the time shooting, and the timing of Moore running away from the house and the 911 calls, the State proved that it was Moore who possessed a firearm and shot it at 830 13th Avenue beyond a reasonable doubt.

II. The District Court Has Not Filed a Final Order of Restitution; Therefore, There Exists No Appealable Order.

Preservation of Error

“[E]rrors in sentencing may be challenged on direct appeal even in the absence of an objection in the district court.” *State v. Lathrop*, 781 N.W.2d 288, 293 (Iowa 2010). However, “any temporary, permanent, or supplemental order regarding restitution is not appealable or enforceable until the court files its final order of restitution.” *State v. Albright*, 925 N.W.2d 144, 162 (Iowa 2019). Because the restitution order is not final, Moore may not appeal the district court’s ruling.

Standard of Review

“[R]eview of a restitution order is for correction of errors at law.” *State v. Klawonn*, 688 N.W.2d 271, 274 (Iowa 2004). The appellate court “determine[s] whether the court's findings lack substantial evidentiary support, or whether the court has not properly applied the law.” *State v. Bonstetter*, 637 N.W.2d 161, 165 (Iowa 2001).

Merits

In *State v. Albright*, 925 N.W.2d 144, 160 (Iowa 2019), the Supreme Court “clarified that a plan of restitution is not complete until the sentencing court issues the final restitution order.” Only when the full amount of restitution is known “shall the court make an assessment as to the offender’s reasonable ability to pay.” *Albright*, 925 N.W.2d at 162.

Here, the district court ordered Moore to pay \$2,500 in court-appointed attorney fees, as well as “costs of these actions including restitution for correctional fees, if any, and all other applicable surcharges, fees and assessments as deemed appropriate by the Clerk of Court, including the \$125 LEI surcharge[.]” It did not issue a final restitution order. Probation Revocation & Sentencing Order; App. 11.

Therefore, the district court did not know the final amount of restitution due and could not make a determination of Moore's reasonable ability to pay.

There is no appealable order of restitution. *Albright*, 925 N.W.2d at 162.

III. If the District Court Failed to Exercise Its Discretion to Determine Whether to Reduce Moore's Mandatory Minimum Sentence, the Error Was Harmless Where There Were No Mitigating Circumstances.

Preservation of Error

"[E]rrors in sentencing may be challenged on direct appeal even in the absence of an objection in the district court." *Lathrop*, 781 N.W.2d at 293.

Standard of Review

The appellate court reviews the district court's sentencing decision for an abuse of discretion. *State v. Adams*, 554 N.W.2d 686, 692 (Iowa 1996). To show an abuse of discretion the defendant must demonstrate that the decision was based on clearly untenable grounds or reasons or that the court exercised its discretion to an extent clearly unreasonable. *Id.* Sentencing decisions are cloaked with a strong presumption in their favor. *State v. Thomas*, 547 N.W.2d 223, 224 (Iowa 1996).

Merits

“When a sentence is not mandatory, the district court must exercise its discretion in determining what sentence to impose.”

Thomas, 547 N.W.2d at 225. Moore contends the district court abused its discretion by failing to exercise it in imposing sentence.

The district court had no discretion in ordering Moore serve an indeterminate term of imprisonment not to exceed ten years upon his conviction of intimidation with a dangerous weapon, a forcible felony. *See* Iowa Code § 907.3. Pursuant to Iowa Code section 902.7, because Moore used a dangerous weapon in committing a forcible felony, the district court was required to order Moore to serve a five-year mandatory minimum sentence. However, as Moore notes, the district court was not completely without discretion.

Section 901.10(1) provides that when a person is convicted for the *first time* under Iowa Code section 902.7, the district court may “sentence the person to a term less than provided by the statute if mitigating circumstances exist and those circumstances are stated specifically in the record.” Moore asserts that the record establishes both that it was his first conviction under section 902.7 and that the

district court was unaware it had discretion to impose a lesser sentence pursuant to Iowa Code section 901.10(1).

At the beginning of the sentencing hearing, the State indicated the district court was required to sentence Moore to a ten-year term of imprisonment and to serve a minimum of five years. Sentencing Tr. p. 3, lines 12-19. Moore's counsel agreed that there was not "*much* wiggle room here." Sentencing Tr. p. 4, lines 9-10 (emphasis added).

In imposing sentence, the district court explained:

Well, I've reviewed the presentence investigation report, and as I mentioned, you were found guilty of these counts by a trial by jury. And the law, as the attorneys commented, requires incarceration because it's a forcible felony under the code section done by the legislature.

And, also, there is a reason for that, which is it was a dangerous situation, and so the safety of the community in a dangerous situation would also warrant incarceration.

So under Count I, under 708.6, intimidation with a dangerous weapon with intent, a Class C felony, the Court sentences you to an indeterminate term of ten years with the Iowa Department of Corrections.

Oakdale will be your receiving center that the Clinton County sheriff will deliver you to. And based on a weapon being used, under 902.7, the Court sentences you to a mandatory minimum of five years before you're eligible for parole or discharge.

Sentencing Tr. p. 5, lines 6-24.

The district court should be “afford[ed] the strong presumption of regularity” because the appellate courts “great confidence in judges to exercise their discretion appropriately.” *State v. Swenka*, No. 13-1821, 2014 4631364 at *1 (Iowa Ct. App. Sept. 17, 2014) (citing *State v. Sailer*, 587 N.W.2d 756, 764 (Iowa 1998)). Here, Moore’s defense counsel did not assert the district court had no discretion, he said it did not have “too much wiggle room.” Sentencing Tr. p. 4, lines 9-13. Moreover, the district court itself did not indicate any limitation to its discretion and a district court in general is “not require[ed] [] to note the absence of mitigating circumstances every time it declines to apply section 901.10.” *State v. Russian*, 441 N.W.2d 374, 375 (Iowa 1989). The lack of evidence showing the district court believed it had no discretion does not militate a conclusion that it did not properly exercise its discretion.

However, if the appellate court finds that the district court failed to exercise discretion, the failure was harmless. *State v. Wooten*, No. 18-0023, 2018 WL 6706223, *2 (Iowa Ct. App. Dec. 19, 2018) (error was harmless where district court mistakenly believed it did not have any discretion but to sentence defendant to

imprisonment). “Under a harmless-error analysis, [the Court] presume[s] prejudice and reverse[s] unless the record affirmatively establishes the defendant suffered no prejudice.” *Id.*

“Mitigating circumstances” are not enumerated in section 901.10(1). However, sections 901.10(2) and (3) only mention mitigating circumstances in the form of a guilty plea and cooperation with the prosecution. Neither of these factors is present in this case. Moreover, on appeal Moore does not contend that there exist any mitigating circumstances.

Additionally, at the time of Moore’s sentencing, the district court found he had violated his probation in cases FECR073196 and AGCR073031 and revoked it. Because the district court ordered Moore’s sentence in a case AGCR073031 to run consecutively to his concurrent sentences in FECR075580, it is improbable the district court would have found mitigating circumstances to warrant a reduction in the five-year mandatory minimum of section 902.7.

CONCLUSION

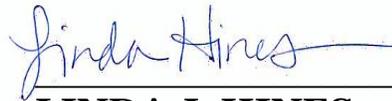
For all the reasons set forth above, the State respectfully requests this Court to affirm Moore’s convictions and sentence.

REQUEST FOR NONORAL SUBMISSION

The State believes that this case can be resolved by reference to the briefs without further elaboration at oral argument.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **3,284** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: July 15, 2019



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