

IN THE COURT OF APPEALS OF IOWA

No. 6-561 / 05-1758
Filed October 25, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOHN SHIMKO,
Defendant-Appellant.

Appeal from the Iowa District Court for Louisa County, Mary Ann Brown,
Judge.

John Shimko appeals from a judgment and sentence following his convictions for attempted murder, willful injury, going armed with intent, assault causing bodily injury, and carrying weapons. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and James Tomka, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, David L. Matthews, County Attorney, and Adam Parsons, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Zimmer and Eisenhauer, JJ.

EISENHAUER, J.

John Shimko appeals from a judgment and sentence following his convictions for attempted murder in violation of Iowa Code section 707.11 (2003), willful injury in violation of section 708.4(1), going armed with intent in violation of section 708.8, assault causing bodily injury in violation of section 708.2(4), and carrying weapons in violation of section 724.4(2). He contends the district court erred in failing to strike a juror for cause and in denying his motion for judgment of acquittal. We affirm.

I. Background Facts and Proceedings. On September 3, 2004, John Shimko was attending a motorcycle rodeo at the Thirsty Camel Rodeo Grounds in Louisa County. Also attending the rodeo were Heather, Shimko's "on again, off again" girlfriend, and her former boyfriend, Robert Gray. All three were attending the rodeo separately.

Shimko encountered Gray while walking across the campground that afternoon. He asked Gray if he and Heather were camping together and shouted at Gray to "stay away from my bitch." Shimko then began calling Heather's cellular phone and accusing her of attending the rodeo to meet Gray. He threatened to stab and kill Gray, saying he would bury Gray before the weekend was over and would "stick a knife in his throat."

Later, Shimko again walked by Gray's campsite and engaged him in a verbal confrontation. That night, Shimko walked by a third time and another verbal confrontation ensued. This time, Gray left his campsite and began to follow Shimko, telling him to "bring it on." One witness heard Shimko say, "I will shank you." A fight then occurred. Shimko eventually knocked Gray to the

ground and began hitting him in the face and head. After a few minutes, Gray rolled onto his stomach while Shimko continued hitting him. Shimko was then pulled off of Gray by Dorlan Crane and Dave Prokes. Shimko fled the area. Gray was left lying in a pool of blood with large cuts to his neck and chest. A small switchblade knife was found lying in a pool of blood with the blade exposed. No fingerprint or DNA evidence was recovered.

Shimko was charged with attempted murder, willful injury, going armed with intent, assault causing serious injury, and carrying weapons. He filed a notice of self-defense. A jury trial was held in September 2005. During jury selection, it was disclosed that the prosecutor had performed legal work for a prospective juror, David Morse. Shimko's attorney requested that Morse be struck for cause. The court first determined the prosecutor was not currently performing work for Morse and hadn't for about a year. It then obtained an assurance from Morse that his prior attorney-client relationship would not affect his ability to impartially decide the case. The district court then denied Shimko's motion to strike.

Following the trial, the jury convicted Shimko on all five counts as charged. Shimko was sentenced to a twenty-five year term of imprisonment.

II. Failure to Strike for Cause. Shimko first contends the district court erred in failing to strike juror Morse for cause. We review this claim for an abuse of discretion. *State v. Tubbs*, 690 N.W.2d 911, 915 (Iowa 2005).

In criminal prosecutions, a juror may be struck for cause if he or she has an attorney-client relationship with the prosecutor. Iowa R. Crim. P. 2.18(5)(e). The term "may" implies permissive or discretionary action. *Phillips v. Nat'l*

Trappers Ass'n, 407 N.W.2d 609, 612 (Iowa Ct. App. 1987). The test to be applied in ruling on challenges for cause is “whether the juror holds such a fixed opinion on the merits of the case that he or she cannot judge impartially the guilt or innocence of the defendant.” *State v. Neuendorf*, 509 N.W.2d 743, 746 (Iowa 1993). Although Morse initially indicated the prosecutor was his attorney, further questioning disclosed he had acted as Morse’s attorney on business matters about a year before this trial. Morse affirmed that he could set aside his personal biases and opinions and render a verdict only on the information presented as evidence and testimony. He further opined that his past business dealings with the prosecutor would not interfere with his ability to impartially judge the evidence presented at trial. Accordingly, we conclude the district court did not abuse its discretion in denying Shimko’s motion to strike for cause. *Compare State v. Simmons*, 454 N.W.2d 866, 868 (Iowa 1990) (holding motion to strike for cause was properly denied where challenged jurors indicated they would withhold judgment and presume the defendant innocent until the evidence proved otherwise) *with Neuendorf*, 509 N.W.2d at 746 (holding it was error to fail to strike a juror for cause where juror’s responses failed to indicate the requisite lack of prejudice).

III. Motion for Judgment of Acquittal. Shimko next contends the district court erred in denying his motion for judgment of acquittal on all charges because there was insufficient evidence to prove each element of the crimes and because the State did not prove beyond a reasonable doubt the absence of the justification defense.

We review claims of insufficient evidence for errors at law. *State v. Rohm*, 609 N.W.2d 504, 509 (Iowa 2000). We will uphold a finding of guilt if substantial evidence supports the verdict. *Id.* “Substantial evidence is evidence upon which a rational finder of fact could find a defendant guilty beyond a reasonable doubt.” *Id.* In assessing the sufficiency of the evidence, we consider all the evidence in the record, but we view the record in the light most favorable to the State. *State v. Corsi*, 686 N.W.2d 215, 218 (Iowa 2004).

Shimko specifically argues the evidence is insufficient because there is no proof that he brought a knife to the fight with Gray. He claims Gray brought the knife, he was able to wrestle it away, and Gray’s injuries were a result of Shimko defending himself. Substantial evidence supports the verdict.

Although one witness saw Shimko use a knife to open a bag of ice earlier in the day, no witness observed a knife in either Shimko or Gray’s hand during the fight. However, throughout the day Shimko made several threats about stabbing Gray, including just prior to the altercation when he told Gray, “I will shank you.” At the end of the fight, Gray was discovered to have sustained two injuries made by a sharp instrument.

Dorlan Crane witnessed the fight and testified Shimko’s strike towards Gray was “strange.” He stated Shimko “didn’t swing like a normal punch which would be straight. He kind of went like this, like a downward motion, and that made me think that’s really strange.” Crane elaborated that the punch seemed “awkward” and he saw “a reflection in Mr. Shimko’s hand. Something the light caught. I seen [sic] a reflection. I couldn’t tell you what it was.” This testimony,

coupled with Shimko's threats against Gray, is sufficient for a reasonable jury to conclude Shimko brought a knife with him to the fight and stabbed Gray.

There is also substantial evidence disproving Shimko's justification defense. The jury was instructed that the State could rebut Shimko's justification defense by proving any of the following:

1. The defendant started or continued the incident which resulted in the injury.
2. An alternative course of action was available to the defendant.
3. The defendant did not believe he was in immediate danger of death or injury and the use of force was not necessary to save him.
4. The defendant did not have reasonable grounds for the belief.
5. The force used by the defendant was unreasonable.

Shimko started the fight by walking by Gray's campsite on three separate occasions and engaging Gray in a verbal altercation. Although Gray followed after Shimko and told him to "bring it on," Shimko could have continued walking instead of turning and advancing toward Gray. Substantial evidence also shows it was Shimko who brought the knife to the fight, not Gray. Shimko's use of a knife was not reasonable self-defense under the facts of this case. Gray suffered severe wounds as a result of the fight, while Shimko did not sustain injuries. For these reasons, the jury could reasonably reject Shimko's justification defense on any one of the ground.

Because there is substantial evidence supporting Shimko's convictions, we conclude the district court did not err in denying Shimko's motion for judgment of acquittal. Accordingly, we affirm.

AFFIRMED.

Sackett, C.J., concurs in part and dissents in part.

SACKETT, C.J. (concur in part and dissents in part)

I concur with the majority opinion in all respects except I believe the district court should have sustained the motion to strike.