

IN THE COURT OF APPEALS OF IOWA

No. 8-914 / 07-2046
Filed November 26, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ROBERT JOSEPH MUSCH,
Defendant-Appellant.

Appeal from the Iowa District Court for Clinton County, Mark D. Cleve,
Judge.

Defendant appeals his conviction and sentence for (1) carrying a weapon
and (2) assault with a weapon, contending the evidence was insufficient to
support the jury's verdict of guilt. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Stephan Japuntich,
Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney
General, Mike Wolf, County Attorney, and Elizabeth Srp, Assistant County
Attorney, for appellee.

Considered by Vogel, P.J., and Vaitheswaran and Potterfield, JJ.

VAITHESWARAN, J.

Robert Musch appeals his conviction and sentence for (1) carrying a weapon and (2) assault with a weapon. Iowa Code §§ 708.1, 708.2(3), 724.4(1) (2007). He contends the evidence was insufficient to support the jury's findings of guilt.

With respect to the carrying a weapon charge, the jury was instructed that the State would have to prove Musch "was armed with a pistol, revolver, or loaded firearm" and "was within the city limits of Clinton." With respect to the assault with a weapon charge, the jury was instructed that the State would have to prove Musch "committed an assault on another person" and "used or displayed a dangerous weapon in connection with the assault." Assault was defined for the jury as follows:

An Assault is committed when a person does an act which is meant to cause pain or injury, or result in physical contact which will be insulting or offensive, or place another person in fear of immediate physical contact which will be painful, injurious, insulting or offensive to another person, when coupled with apparent ability to do the act; or a person intentionally points a firearm toward another, or intentionally displays a dangerous weapon in a threatening manner toward another.

A dangerous weapon was defined for the jury as including a firearm.

Musch maintains the evidence was insufficient to prove that he was "armed with a pistol, revolver, or loaded firearm" or that he "used or displayed a dangerous weapon." We will uphold a jury's finding of guilt if there is substantial evidence to support it. *State v. Bass*, 349 N.W.2d 498, 500 (Iowa 1984). We find more than that quantum of evidence here.

The record reveals that Musch was a passenger in a car parked down the street from Matt Hlubek's home. The car had previously passed Hlubek's home at least two times. Hlubek, who was having a party, walked to the car with two friends. All three identified Musch as the person in the front passenger seat of the vehicle. A young man in the back seat eventually got out of the car and started arguing and fighting with one of Hlubek's friends. When that friend was pushed and rendered unconscious, Hlubek entered the fray. At this point, Hlubek testified that Musch got out of the front passenger door, pulled out a gun, held it over the top of the car, and fired one to two shots toward him. Although Hlubek was not able to clearly see the gun, he saw a flash and surmised that it came from a small revolver.

This testimony alone amounts to substantial evidence supporting the contested elements. Additionally, Hlubek noticed damage to the zipper of his new hooded sweatshirt and a hole in the sweatshirt. One of Hlubek's friends also testified that Hlubek said Musch shot at him.

We recognize that the record contains evidence that could have diminished Hlubek's credibility as well as the strength of the State's case. For example, Hlubek admitted he was intoxicated on the night of the incident and he admitted that the hole in his sweatshirt did not go all the way through the garment. It was also conceded that the lighting at the scene was poor and no shell casings or bullets were found in the area. These facts do not alter our conclusion because it was the jury's function to decide what credence and weight to be given them. *State v. Williams*, 695 N.W.2d 23, 28 (Iowa 2005); *State v. Mitchell*, 568 N.W.2d 493, 503 (Iowa 1997).

Having found substantial evidence to support the contested elements of the two crimes, we affirm Musch's conviction and sentence for carrying a weapon and assault with a weapon.

AFFIRMED.