IN THE COURT OF APPEALS OF IOWA

No. 2-600 / 11-1564
Filed September 6, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

REGINALD HENRY BENJAMIN,
Defendant-Appellant.

Appeal from the Iowa District Court for Humboldt County, Joel E. Swanson, Judge.

Reginald Benjamin appeals from the judgment and sentence entered upon his convictions of assault with intent to inflict serious injury and going armed with intent. **AFFIRMED.**

Alfredo Parrish and Andrew Dunn of Parrish, Kruidenier, Dunn, Boles, Gribble, Parrish, Gentry & Fisher, L.L.P., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines and Scott D. Brown, Assistant Attorneys General, and Jennifer Benson, County Attorney, for appellee.

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

BOWER, J.

Reginald Benjamin appeals from the judgment and sentence entered upon his convictions for assault with intent to inflict serious injury and going armed with intent. He contends the State failed to prove he was going armed with intent. He also contends the district court abused its discretion in sentencing him and in excluding lay opinion testimony at trial.

We find sufficient evidence supports Benjamin's conviction for going armed with intent. The court properly exercised its discretion in sentencing Benjamin and in excluding the lay opinion testimony as to an ultimate fact of his guilt or innocence. Accordingly, we affirm.

I. Background Facts and Proceedings.

In November 2010, Benjamin's wife, Kris, filed for divorce and moved out of the family home along with their two minor children. The couples' two older children were in college. When home for break, their adult son stayed with Benjamin and the adult daughter stayed with Kris and her sisters.

At approximately 2:30 a.m. on November 25, 2010, Kris was awakened when Benjamin banged on her bedroom window and yelled at her to let him inside. After letting him in the front door, Benjamin threw a gun case on the couch and told Kris he was going to kill himself. Their daughters witnessed part of the scene. Eventually, Benjamin left the house. Kris searched for but did not find his gun.

After leaving, Benjamin sat in his car. He and Kris talked on the phone and Kris agreed to come out to the car and talk to him. Kris told her eldest daughter that if anything happened to her, to watch after her sisters.

Kris and Benjamin talked in the car for a few minutes before Benjamin started yelling. He drove off, grabbing Kris by the hair to prevent her from exiting the vehicle. Benjamin slammed Kris against the passenger door and shook her while he drove. He then reached into the backseat and grabbed his gun, putting it in his lap. Benjamin stated he was going to kill Kris and himself.

Benjamin pulled over on a low maintenance road after approximately fifteen minutes of driving. They remained at that location for approximately two and one-half hours. Benjamin continued yelling at Kris, shaking her by her hair, and hitting her head against the car's interior. He took Kris's cellular phone and exited the car. Kris heard a popping noise and believed Benjamin had shot her phone. When he returned to the car, he held the gun to Kris's head, told her she was going to die, and pulled the trigger. Kris heard the trigger click, but the gun did not fire because it was not loaded. Benjamin then said, "Whoops, whoops, it's empty," took a bullet out of his pocket and loaded it into the gun, and said, "Let's try this again" while putting the gun back to her head. He told Kris he would not kill her if she promised not to divorce him. When Kris agreed, Benjamin opened his car door and shot the gun before returning the weapon to his lap.

At approximately 5:30 or 6:00 a.m., Benjamin brought Kris to the marital home, telling her he wanted to make their marriage work and insisting they make

love. Kris talked Benjamin out of having sex and planned to wait for him to fall asleep to leave. When asked if Kris was going to give him a second chance, she answered, "Probably not." Benjamin then grabbed her and threw her across the room. After throwing Kris to the ground, Benjamin got on top of her and punched her repeatedly. He told her, "I should have fucking killed you when I had you in the car" and asked her if she wanted to die by knife or by gun, although he did not have a weapon at the time.

Benjamin let Kris go home to get ready for Thanksgiving dinner after she again promised she would not divorce him. She returned to her home at approximately 7:30 a.m. She called the police after speaking with a friend. Benjamin agreed to go to the Humboldt County Sheriff's Office, where he admitted to Sheriff Lampe that he had a loaded gun and fired it that morning. He also admitted he had shaken Kris and caused her bruises but denied holding a gun to her head or threatening to kill her. Benjamin told Sheriff Lampe he had been intoxicated.

The State charged Benjamin with first-degree kidnapping and going armed with intent. Following a jury trial, Benjamin was found guilty of going armed with intent and assault with intent to commit serious injury. He was sentenced to two years in prison on the assault conviction and five years on the going-armed-with-intent conviction. The sentences were ordered to be served consecutively.

II. Sufficiency of the Evidence.

Benjamin first contends there is insufficient evidence to find him guilty of going armed with intent. He argues the evidence does not support that he was "going armed" or that he had the specific intent to shoot Kris.

We review sufficiency-of-the-evidence claims for correction of errors at law. *State v. Canal*, 773 N.W.2d 528, 530 (Iowa 2009). The court must determine whether the evidence could convince a rational trier of fact that the defendant is guilty of the crime charged beyond a reasonable doubt. *Id.* The State must prove every fact necessary to constitute the crime with which the defendant is charged. *State v. Neitzel*, 801 N.W.2d 612, 624 (Iowa Ct. App. 2011). The evidence must do more than create speculation, suspicion, or conjecture; it must raise a fair inference of guilt. *Id.* Our review considers all of the evidence in the record, not just the evidence that is favorable to the verdict. *Id.* However, we review the evidence in the light most favorable to the State. *Id.*

In order to convict Benjamin of going armed with intent, the State was required to prove the following:

> 1. On or about the 25th day of November 2010, the defendant was armed with a firearm.
> 2. The firearm was a dangerous weapon as defined in Instruction No. 31.
> 3. The defendant was armed with the specific intent to use the firearm against another person.

Benjamin does not dispute he was armed or that the gun was a dangerous weapon. Instead, he argues there was insufficient evidence to prove he was "going" armed or that he had the specific intent to use the firearm against Kris.

Iowa Code section 708.8 (2009) does not define "going armed." However, our supreme court has held that "armed" means "the conscious and deliberate keeping of a [dangerous weapon] on or about the person, available for immediate use." *State v. Ray*, 516 N.W.2d 863 (Iowa 1994) (citing *State v. Alexander*, 322 N.W.2d 71, 72 (Iowa 1982)). The court also held the term "going . . . necessarily implicates proof of movement." *Id.* In *Ray*, the court determined the element of "going armed" was satisfied by uncontradicted testimony that the defendant pursued the victim from inside the house onto the front lawn while carrying a knife. *Id.*

Benjamin argues he was not "going armed" with the gun because he used it for work and it was either stored in his vehicle or in the house "as a matter of course" and therefore "was always in a state of movement." He argues no one saw the gun inside of Kris's home, and therefore, his act of throwing the gun case onto the couch is insufficient to find he was "going armed."

We find the evidence is sufficient to prove Benjamin was "going armed" on November 25, 2010. In addition to his act of bringing the gun case into Kris's home, Benjamin removed the gun from the case and held it on his lap while driving Kris in two different counties. Even if the gun was normally present in Benjamin's car, it was not usually kept out of the case and on his lap while moving.

There is also ample evidence by which the jury could find Benjamin had the specific intent to use the gun against Kris. Kris testified Benjamin held the gun to her head on several occasions that morning and told her he was going to

kill her. He pulled the trigger once, although the gun was not loaded at the time. Afterward, Benjamin stated, "Whoops, whoops, it's empty." He then loaded the gun with a bullet before saying, "Let's try this again" and pointing it at her head.

III. Sentencing.

Benjamin next contends the district court abused its discretion in sentencing him to the maximum time in prison. Specifically, he contends the court improperly based its decision only on the nature of the offense and the perceived need to protect society. He also contends the court improperly considered the fact that he had been acquitted of a more serious offense, thereby avoiding a life sentence.

The decision of the district court to impose a particular sentence within the statutory limits is cloaked with a strong presumption in its favor. *State v. Bentley*, 757 N.W.2d 257, 262 (Iowa 2008). Challenges to a sentence as unreasonable are reviewed for an abuse of discretion. *State v. Hall*, 740 N.W.2d 200, 202 (Iowa Ct. App. 2007). An abuse of discretion will only be found where the sentencing decision was exercised on grounds or for reasons that were clearly untenable or unreasonable. *State v. Formaro*, 638 N.W.2d 720, 724 (Iowa 2002).

In exercising its discretion, the district court is to weigh all pertinent matters in determining a proper sentence, including the nature of the offense, the attending circumstances, the defendant's age, character, and propensities or chances for reform. *State v. Leckington*, 713 N.W.2d 208, 216 (Iowa 2006). The punishment should fit both the crime and defendant. *Id.*

In sentencing Benjamin, the district court engaged in a lengthy explanation of the factors it considered in determining his sentence. It noted his age and his prior criminal record, which was sparse. It mentioned Benjamin's alcohol abuse and mental health problems. The court also noted Benjamin's remorse for his crimes. The court stated,

> [I]t would have been life imprisonment had the jury decided that based upon the evidence in the case that you were guilty of kidnapping, which they decided that you were not. So as I previously mentioned, the jury made that determination based upon the evidence that they received, they did not think that you were guilty of that . . . .

The court went on to discuss the presentence investigation report, the violent nature of Benjamin's crimes, including his use of a gun. The court then sentenced Benjamin to five years in prison on the going armed with intent charge and two years in prison on the assault with intent to commit serious injury charge, ordering they be served consecutively. In so doing, the court stated it considered "what I think is best for society, what I think is best for you and your family."

Despite Benjamin's argument on appeal, we do not find the court improperly focused its decision on Benjamin's acquittal of the kidnapping charge or any one factor in determining his sentence. The court's discussion at the sentencing hearing indicates it considered all of the information it was provided and balanced a number of factors in determining which sentence would best address Benjamin's need for rehabilitation and the protection of the community. *See* Iowa Code § 901.5 (stating that the court shall determine which sentence "will provide maximum opportunity for the rehabilitation of the defendant, and for

the protection of the community from further offenses by the defendant and others").

IV. Lay Opinion Testimony.

Finally, Benjamin contends the district court abused its discretion in failing to allow one of his daughters to testify regarding her opinion of whether he intended to harm Kris.

The admissibility of evidence at trial generally lies within the trial court's discretion. *State v. Kinsel*, 545 N.W.2d 885, 889 (Iowa Ct. App. 1996). We will not reverse the court's evidentiary ruling absent an abuse of discretion. *Id.* A manifest abuse of discretion must be found before we will interfere with a trial court's ruling on the admissibility of opinion testimony. *Id.*

Lay witnesses may give opinion testimony only when the opinions or inferences are (1) based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony of the determination of a fact in issues. *Id.* Although the testimony at issue here would have purportedly helped the jury to determine a fact in issue (whether Benjamin had the specific intent necessary), a witness is not permitted to express an opinion as to the ultimate fact of the accused's guilt or innocence on an essential element of the crime. *State v. Vesey*, 482 N.W.2d 165, 167 (Iowa Ct. App. 1991). Permitting Benjamin's daughter to testify as to her opinion of whether Benjamin "intended to seriously injure" Kris would have been permitting her to testify as to the ultimate fact of his guilt or innocence on the charge of assault with intent to inflict serious injury. *See State v. Oppedal*, 323 N.W.2d 517, 524 (Iowa 1975) (holding that

allowing a narcotics officer to testify directly that he had an opinion that a quantity of drugs was possessed by the defendant "with intent to deliver" was tantamount to permitting the witness to testify he had an opinion as to the ultimate fact of defendant's guilt or innocence in prosecution for possession of a controlled substance with intent to deliver); *see also State v. Dinkins*, 553 N.W.2d 339, 341-42 (Iowa Ct. App 1996) (recognizing a distinction in Iowa caselaw between permissible opinion testimony as to whether the amount of drugs possessed in a case fit the profile of "a person who sells drugs" and impermissible opinion testimony regarding the intent with which the "defendant possessed" quantities of drugs; the former type of opinion differs because it does not specifically relate to the defendant); *State v. Maurer*, 409 N.W.2d 196, 198 (Iowa Ct. App. 1987) (holding trooper's testimony that the defendant had been operating a motor vehicle while under the influence of an alcoholic beverage was tantamount to testimony that the defendant was guilty of the crime). Because the opinion testimony regarding Benjamin's intent was inadmissible, the district court properly exercised its discretion in sustaining the State's objection.

AFFIRMED.