

IN THE COURT OF APPEALS OF IOWA

No. 2-797 / 11-1665
Filed October 31, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KEITH ALLEN HADAWAY,
Defendant-Appellant.

Appeal from the Iowa District Court for Story County, Lawrence E. Jahn (motion in limine) and Steven P. Van Marel (jury trial), District Associate Judges.

The defendant appeals his felony conviction for possession of a firearm by a prohibited person. **REVERSED AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Theresa R. Wilson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Stephen Holmes, County Attorney, and Keisha Cretsinger, Assistant County Attorney, for appellee.

Heard by Doyle, P.J., and Mullins and Bower, JJ.

MULLINS, J.

Keith Allen Hadaway appeals his conviction, sentence, and judgment for possession of a firearm by a prohibited person, a class D felony, in violation of Iowa Code section 724.26(2) (2009), following a jury trial. We find the district court erred in determining Hadaway's prior domestic assault conviction was a qualifying offense under Iowa Code section 724.26(2) and by denying his motion for judgment of acquittal. Accordingly, we reverse and remand.

I. BACKGROUND AND PROCEEDINGS.

The facts related to this appeal are not in dispute. On the morning of February 21, 2011, Ames police officers responded to a 911 call by Vicki Black, who resided at 222 Apple Place in Story County. Black called 911 to report a domestic situation involving a male with a gun. Hadaway also lived at the residence. When officers arrived at the scene, they located Hadaway between some trailers. The officers patted Hadaway down and found several cans of beer on his person. Hadaway exhibited signs of intoxication such as watery bloodshot eyes, slurred speech, an odor of alcohol, and he appeared to have urinated on himself. The officers asked Hadaway where the gun was, and he informed them that it was located in his Nissan Maxima parked in the driveway. One of the officers went to the vehicle, opened the door, and found a Mossberg twelve-gauge shotgun rolled up in a rug on the backseat. The shotgun had one shell in the chamber, and two other shells were found in Hadaway's pocket as he was placed under arrest for public intoxication. After his arrest, Hadaway admitted the gun was his and explained that he removed it from the house because he did

not want Black to have it. At the station, officers learned that Hadaway had a prior conviction for domestic assault.

On March 3, 2011, the State filed a trial information charging Hadaway with possession of a firearm by a prohibited person, a class D felony, in violation of Iowa Code section 724.26(2), and public intoxication, second offense, a serious misdemeanor, in violation of Iowa Code sections 123.46 and 123.91(1). Hadaway pleaded not guilty to these offenses.

On May 13, 2011, Hadaway filed a motion in limine seeking to exclude a 2001 conviction for simple misdemeanor domestic assault on the ground it did not qualify as a prohibited offense under Iowa Code section 724.26. The district court treated the motion in limine as a motion for adjudication of law points and determined that Hadaway's prior conviction was an assault which fell under Iowa Code section 708.1(1), even though the complaint and judgment entry from Hadaway's previous conviction of simple misdemeanor domestic assault only referred to Iowa Code section 708.1 and not specifically to section 708.1(1).

The case proceeded to a jury trial on May 24, 2011. After the State rested, Hadaway moved for a judgment of acquittal based on the State's failure to prove his prior conviction was a qualifying offense under section 724.26. He also argued that the State had failed to prove that his prior offense was perpetrated against a victim who qualified under Iowa Code section 724.26(2)(c), which requires a domestic relationship between the perpetrator and victim. The court denied the motion. The State then moved to have the complaint and judgment entry for the prior domestic assault case amended to reflect a violation

of Iowa Code section 708.1(1) in accordance with the court's ruling on the motion in limine. Hadaway objected to the amendments. The court sustained the objection but agreed to the State's alternative suggestion to word the marshaling instruction so that it referenced section 708.1 generally, without identifying a specific subsection. Hadaway also objected to this alternative, but his objection was overruled. The result of the court's ruling was that the jury instruction regarding possession of a firearm by a prohibited person only required the jury to find that Hadaway had previously been convicted of a violation of section 708.1.

The jury found Hadaway guilty of possession of a firearm by a prohibited person. On September 30, 2011, the district court held a sentencing hearing, and Hadaway was sentenced to five years in prison. The sentence was suspended, and Hadaway was placed on probation. Hadaway was also fined and ordered to pay court costs and attorney fees. He then filed a timely notice of appeal.

Hadaway asserts the district court erred when it determined that his prior domestic assault conviction was a qualifying offense under Iowa Code section 724.26(2). A conviction for a violation of section 708.1(1) or section 708.1(3) would prohibit him from possessing a firearm. A conviction for a violation of section 708.1(2) would not prohibit him from possessing a firearm. His prior conviction was for a violation of section 708.1, but the complaint did not specify under which subsection he was charged, and the judgment entry did not specify under which subsection of section 708.1 he pleaded guilty. Hadaway argues that because the subsection is not specified, and the complaint and affidavit includes

facts that could support a charge under either section 708.1(1) or .1(2), the district court erred when it determined as a matter of law that his prior domestic assault conviction was for a violation of section 708.1(1) and that his motion for judgment of acquittal should have been granted. As we find this issue dispositive, we need not address the other issues raised on appeal.

II. SCOPE AND STANDARD OF REVIEW.

This court reviews legal rulings and sufficiency of the evidence claims for corrections of errors at law. *State v. Brubaker*, 805 N.W.2d 164, 171 (Iowa 2011). “Due process requires that the State prove all the elements of a crime beyond a reasonable doubt.” *State v. Wilkens*, 346 N.W.2d 16, 20 (Iowa 1984). In reviewing challenges to the sufficiency of evidence supporting a guilty verdict, courts consider all of the record evidence “in the light most favorable to the State and make all reasonable inferences that may be fairly drawn from the evidence.” *State v. McPhillips*, 580 N.W.2d 748, 753 (Iowa 1998). We uphold a verdict if it is supported by substantial evidence. *State v. Williams*, 695 N.W.2d 23, 27 (Iowa 2005). “Substantial evidence” is evidence which “would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt.” *Id.* The ultimate burden is on the State to prove every fact necessary to constitute the crime with which the defendant is charged. *State v. Gibbs*, 239 N.W.2d 866, 867 (Iowa 1976). The evidence presented must raise a fair inference of guilt and do more than create speculation, suspicion or conjecture. *State v. Hamilton*, 309 N.W.2d 471, 479 (Iowa 1981).

III. MISDEMEANOR CRIME OF DOMESTIC VIOLENCE.

In order for Hadaway to be convicted of possession of a firearm by a prohibited person, he must have been previously convicted of a misdemeanor crime of domestic violence. The relevant language in section 724.26(2)(a) provides: “[A] person who . . . has been convicted of a misdemeanor crime of domestic violence under 18 U.S.C. § 922(g)(9) and who knowingly possesses, ships, transports, or receives a firearm, offensive weapon, or ammunition is guilty of a class ‘D’ felony.” The cited federal statute makes it unlawful for any person who has been convicted in any court of a misdemeanor crime of domestic violence to possess any firearm or ammunition. 18 U.S.C § 922(g)(9) (2006). A “misdemeanor crime of domestic violence” is an offense that:

- (i) is a misdemeanor under Federal, State, or Tribal law; and
- (ii) had, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or had cohabited with the victim as a spouse, parent or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

Id. at § 921(a)(33)(A). The “use or attempted use of physical force” is a necessary element of the crime.

Iowa Code section 724.26(2)(c) explains:

For purposes of this section, “misdemeanor crime of domestic violence” means an assault under section 708.1, subsection 1 or 3, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

Section 708.1 states that an assault is committed when a person does any of the following:

1. Any act which is intended to cause pain or injury to, or which is intended to result in physical contact which will be insulting or offensive to another, coupled with the apparent ability to execute the act.
2. Any act which is intended to place another in fear of immediate physical contact which will be painful, injurious, insulting, or offensive, coupled with the apparent ability to execute the act.
3. Intentionally points any firearm toward another, or displays in a threatening manner any dangerous weapon toward another.

If Hadaway's prior conviction for misdemeanor domestic assault was for a violation of section 708.1(2) he is not prohibited from possessing a firearm under section 724.26(2) because Iowa Code section 724.26(2)(c) defines "misdemeanor crime of domestic violence" as an assault only under section 708.1(1) or 708.1(3). See *State v. Carpenter*, 616 N.W.2d 540, 543 (Iowa 2000) ("[T]he express mention of one thing implies the exclusion of others not mentioned.").

Hadaway asserts that because the complaint and judgment entry from his 2001 conviction for simple misdemeanor domestic assault do not specify under which subsection of 708.1 he was charged or to which he pleaded guilty, his prior conviction should not be considered a qualifying offense. The State concedes that the prior conviction documents do not specify a particular subsection, but asserts that the court could determine the conviction was for violating Iowa Code section 708.1(1) based on the factual allegations in the complaint. The district court agreed with the State and determined as a matter of law that Hadaway's conviction fell under 708.1(1).

When a judgment entry “does not designate the offense in the prior judgment, the State must supplement the judgment entry in that respect by introducing other parts of the record that do show the crime which was charged and for which the defendant was convicted and sentenced.” *State v. Talbert*, 622 N.W.2d 297, 302 (Iowa 2001). The judgment entry for Hadaway’s 2001 conviction of simple misdemeanor domestic assault only states that Hadaway was convicted of violating 708.1. There is no record of the factual basis upon which the court relied when Hadaway pleaded guilty, as this was a guilty plea to a simple misdemeanor for which no verbatim record was made. The State’s only other evidence of a factual basis for Hadaway’s 2001 conviction was the complaint from that case. The State used this to supplement the judgment entry and to attempt to provide evidence that Hadaway’s original conviction was for a violation of Iowa Code section 708.1(1).

The State relies on *Taylor v. United States* for the proposition that a court can look beyond the fact of conviction to the charging papers or jury instructions to help identify which subsection of a statute the defendant was charged with violating. 495 U.S. 575, 600–02 (1990). We find *Taylor* to be distinguishable from the case at hand. In *Taylor*, the United States Supreme Court considered whether a prior state conviction for burglary could be considered as a prior conviction for purposes of a federal sentencing enhancement, when the state definition of burglary was broad and encompassed many acts which would not fit the federal definition of burglary. *Id.* The Court ruled that a sentencing court was

to “look only to the fact of conviction and the statutory definition of the prior offense. This categorical approach, however, may permit the sentencing court to go beyond the mere fact of conviction in a narrow range of cases where a jury was actually required to find all the elements” *Id.* at 602. If the statutory definition was inconclusive then the sentencing court could also consider whether “the charging paper and jury instructions actually required the jury to find all the elements” of burglary required under the federal definition. *Id.*

In the present case there are no jury instructions to reference because Hadaway pleaded guilty. There is no transcript or other documentation of the factual allegations Hadaway admitted because it was a simple misdemeanor. There is only the judgment entry, which is nonspecific as to which subsection Hadaway pleaded, and the complaint that contained a factual account which may or may not have been what Hadaway agreed to in his plea. Furthermore, the complaint contains facts that could support a conviction under either Iowa Code section 708.1(1) or .1(2). The narrative section of the complaint includes allegations of both a physical assault, which would fall under section 708.1(1), and verbal threats, which would fall under section 708.1(2).

The State also relies on *United States v. Smith* for the proposition that “it was appropriate . . . in a case where the predicate convictions were the result of a guilty plea, to look to the charging papers to determine to which section of a statute a defendant pleaded guilty to.” 171 F.3d 617, 621 (8th Cir. 1999). We also find *Smith* to be distinguishable from the case at hand. In *Smith*, the

complaint recited that “Smith grabbed Lorenson ‘by the throat and did also push her down.” *Id.* Based on those facts, the court concluded that Smith had been charged under Iowa Code section 708.1(1) for “committing an act intended to cause pain, injury, or offensive or insulting physical contact.” *Id.* In *Smith*, the factual allegations in the complaint could only be read as a violation of Iowa Code section 708.1(1). *Id.* Here, the factual allegations in the complaint could be read as a violation of section 708.1(1) or (2), or both.

In *Shepard v. United States*, the defendant entered a guilty plea to one count of being a felon in possession of a firearm. 544 U.S. 13, 16 (2005). The Government sought to increase the defendant’s sentence pursuant to the Armed Criminal Career Act (ACCA) by proving that the defendant had three prior convictions for violent felonies which included burglary. *Id.* The state burglary statute defined burglary to encompass a broader range of activities than the federal statute covered, making it unclear whether the defendant’s convictions for burglary under the state statute satisfied the elements for burglary under the federal statute. *Id.* The Court held that:

[E]nquiry under the ACCA to determine whether a plea of guilty to burglary defined by a nongeneric statute necessarily admitted elements of the generic offense is limited to the terms of the charging document, the terms of the plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information.

Id. at 26. The Court ruled that the sentencing court cannot look to police reports to decide if all of the elements necessary for an enhanced sentence were

present, and because the record was silent on the elements necessary under the federal statute, the defendant's sentence could not be enhanced. *Id.* at 25.

The Eighth Circuit Court of Appeals has explained that “[i]f the predicate statute reaches a broad range of conduct, this court may expand the inquiry to review the charging papers and jury instructions, but only to determine which part of the statute the defendant violated.” *United States v. Howell*, 531 F.3d 621, 622–23 (8th Cir. 2008) (an assault conviction was not a predicate offense for a firearms possession conviction where the state statute to which defendant pleaded did not require the same elements as the federal statute). “Where the defendant pled guilty to a predicate offense, this inquiry may include the written plea agreement, transcript of plea colloquy, and any explicit factual findings by the trial judge to which the defendant assented.” *Id.* at 623.

In the present case there is no written plea agreement, transcript of admissions, or any record of factual findings made at the time of Hadaway's 2001 conviction. The factual allegations in the complaint support a violation of either section 708.1(1) or .1(2). It is unclear under which subsection Hadaway pleaded guilty. Accordingly, the district court erred by determining as a matter of law that Hadaway's prior conviction was under section 708.1(1). Based on this record, there was insufficient evidence from which a jury could find beyond a reasonable doubt that Hadaway had been convicted of a violation of Iowa Code section 708.1(1) instead of section 708.1(2) in 2001. As such, it was error for the court to deny Hadaway's motion for judgment of acquittal.

IV. CONCLUSION.

For the foregoing reasons we find there was not sufficient evidence to convict Hadaway of a violation of Iowa Code section 724.26, and his motion for judgment of acquittal should have been sustained. We reverse the judgment and sentence entered, and remand for a dismissal of the charge.

REVERSED AND REMANDED.