IN THE COURT OF APPEALS OF IOWA

No. 6-153 / 95-417

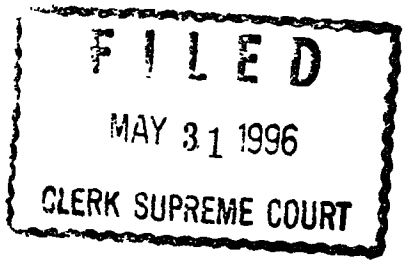
STATE OF IOWA,

Plaintiff-Appellee,

vs.

JIMMY JEFFERSON JOHNSON,

Defendant-Appellant.



Appeal from the Iowa District Court for Polk County, Ray A. Fenton, Judge.

Jimmy Johnson challenges his conviction, following a jury trial, of terrorism. **AFFIRMED.**

Gerald B. Feuerhelm, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, John P. Sarcone, County Attorney, and Daniel Voogt, Assistant County Attorney, for appellee.

Considered by Sackett, P.J., and Habhab and Cady, JJ. Vogel, J., takes no part.

SACKETT, P.J.

Defendant-appellant Jimmy Jefferson Johnson appeals his conviction of terrorism with intent to injure in violation of Iowa Code section 708.6 (1993). Defendant contends there is not sufficient evidence he committed the crime. He bases his argument on the contention the State's case was based on inconsistent evidence and contradictions. He contends his conviction should be reversed. He also contends his defense counsel was not effective. We affirm.

Defendant was charged after six to ten shots were fired at a home where Toyia Strode lived at 1611 Jefferson Avenue in Des Moines.[1] The shots were fired about 2:50 on the morning of April 25, 1994. Strode telephoned the police and reported the incident.

At the time, police officer Knox was on patrol in the 1600 block of Jefferson. He heard several gunshots and drove toward the sound. Officers Christopher Curtis and Raymond Carrington were parked in the parking lot of Martin Luther King, Jr. School and also heard the shots. Curtis and Carrington also drove toward the sound of the shots.

Curtis and Carrington saw a white car followed by a blue car driving out of an alley near Nineteenth Street and Clark Street. They noted the license number of the white car and decided to stop the blue car. There were three or four people in the car.

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[1] There also were shots fired against the same house earlier in the day. There is no evidence connecting defendant to those shots.

The persons in the car got out and were searched, and the car was searched. No gun was found. Knox saw a white car near 1611 Jefferson. He turned on his lights and siren and followed the white car. The car led him on a high-speed chase to Francis Avenue, which is a dead-end street. The car drove through the barrier at the end of the street and went into a ravine. Knox saw two people run from the car.

Curtis and Carrington responded to Knox's report on the police radio he was chasing two people. When Curtis and Carrington arrived at the dead-end of Francis Avenue, they identified the license number on the car in the ravine as the license number of the white car they had seen coming out of the alley near Nineteenth and Clark.

Knox caught defendant. Carrington found a second man who ran from the car hiding behind a wood pile a few blocks away.

There was evidence a third person may have been in the car. Someone had hit his or her head on the windshield, probably when the car went into the ravine, leaving hairs on the windshield. These hairs were not those of defendant or the man found behind the wood pile. Neither man had a head injury. No gun was ever found. A test for gunpowder residue on defendant's hands was inconclusive.

At trial, defendant testified he and a friend had been drinking and were driving around, heard the shots, and saw the police car. Defendant said he drove away from the police car because he did not have a driver's license and had been drinking.

The case was submitted to a jury. The jury found defendant guilty.

Defendant contends there is not substantial evidence supporting his conviction because of inconsistent evidence and contradictions. In considering defendant's challenge to the sufficiency of evidence to support the charge, we review all the evidence in the record in a light most favorable to the State. *State v. Garr*, 461 N.W.2d 171, 173 (Iowa 1990). We will affirm the conviction if there is substantial evidence in the record to support it.

Defendant was charged under the first paragraph of section 708.6, which provides:

> A person commits a class "C" felony when the person, with the intent to injure or provoke fear or anger in another, shoots, throws, launches, or discharges a dangerous weapon at, into, or in a building, vehicle, airplane, railroad engine, railroad car, or boat, occupied by another person, or within an assembly of people, and thereby places the occupants or people in reasonable apprehension of serious injury or threatens to commit such an act under circumstances raising a reasonable expectation that the threat will be carried out.

Iowa Code § 708.6 (1993).

The State contends there is substantial evidence to prove defendant was either an aider and abettor or guilty of joint criminal conduct. The case was submitted on both grounds.

The State advances defendant was an aider and abettor or guilty of joint criminal conduct. To show defendant was an aider and abettor, there must be sufficient evidence to show he assented to or lent counsel and approval to the criminal

act either by active participation in it or by some manner encouraging it prior to the time of its commission. *State v. Barnes*, 204 N.W.2d 827, 828 (Iowa 1972). Knowledge is required to prove aiding and abetting, but knowledge and presence at the scene of the crime only will not support a conviction. *Id.* One cannot be convicted of a crime upon a theory of aiding and abetting unless there is substantial evidence to show he or she assented to or lent countenance and approval to the criminal act either by active participation or by encouraging it prior to or at the time of its commission. *State v. Lott*, 255 N.W.2d 105, 107 (Iowa 1977). Neither knowledge nor proximity to the scene alone is enough to prove aiding and abetting. *State v. Lewis*, 514 N.W.2d 63, 66 (Iowa 1994). However, these factors in combination with circumstantial evidence, such as presence, companionship, and conduct before and after the offense is committed, may be enough to infer a defendant's participation in the crime. *State v. Johnson*, 534 N.W.2d 118, 123 (Iowa App. 1995).

One officer positively identified the car defendant drove as being involved in the shooting. Shell casings were found on the street, evidencing the shots came from the street. There is evidence defendant was at the scene and he knew who fired the gun. There is evidence defendant drove away from the police car and defendant ran after the car went into the ravine. The State contends it proved aiding and abetting in that it proved defendant was with persons in the car when the shots were fired.

To convict defendant as an aider and abettor, there must be sufficient evidence to show he assented to or lent counsel and approval to the criminal act either by active participation in it or by some manner encouraging it prior to the time of its commission. *See Barnes*, 204 N.W.2d at 828.

The evidence supports the fact the shots were fired from the car. There is evidence defendant drove the car, ran away from the police car, and ran from the car after it went into the ravine. This evidence is sufficient to convict defendant as an aider and abettor.

Defendant also contends the State failed to prove he was engaged in joint criminal conduct.

Joint criminal conduct is not the same as aiding and abetting. The aiding and abetting provision of Iowa Code section 701 relates to crimes the defendant himself or herself participated in to some degree and which were jointly planned. *See State v. Irvin*, 334 N.W.2d 12 314 (Iowa App. 1983). Joint criminal conduct is found where one of the people acting together in the commission of a public offense commits a second crime to further that offense and such crime is reasonably foreseeable. *See id.*

The State can establish defendant was present at the scene where the terrorism took place and drove the car from which it happened. We have affirmed on other grounds and need not decide if the State proved joint criminal conduct.

We conclude there was sufficient evidence for the jury to find defendant guilty of the crime of terrorism with intent to injure.

Defendant next contends his trial attorney was not effective when he asked defendant about having lived in Chicago and being involved in a drive-by shooting as a victim. Defendant's trial attorney also had defendant testify there had been a shooting at his apartment complex the day prior to the alleged terrorism. Defendant contends had his trial attorney not asked him about these things this evidence would not have been admissible. He further contends the evidence put him in an unfavorable light in the jury's eyes and allowed the State to question defendant about the shooting at his apartment and possible gang membership.

Defendant testified about numerous shootings while he lived in Chicago and gun shots at his apartment house the day before this incident. He said these factors caused him to take off when he heard the gun shots that formed the basis of this charge. We cannot say this was an improvident trial strategy. *See State v. Wissing*, 528 N.W.2d 561, 564 (Iowa 1995).

We affirm.

AFFIRMED.