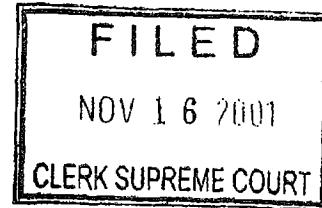


IN THE COURT OF APPEALS OF IOWA

No. 1-607 / 99-1960
Filed November 16, 2001



STATE OF IOWA,
Plaintiff-Appellee,

vs.

KONGSAVANH KEOPASAEUTH,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Robert J. Blink,
Judge.

Kongsavanh Keopasaeth appeals his convictions and sentences for assault causing bodily injury, second-degree burglary, two counts of assault with intent to cause serious injury, and fourth-degree criminal mischief in violation of Iowa Code sections 708.2(2), 713.5, 708.2(1), and 716.6 (1999). **AFFIRMED.**

Christopher A. Kragnes and Tiffany Koenig, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Cristen C. Odell, Assistant Attorney General, John P. Sarcone, County Attorney, and Michael T. Hunter and Michelle Chenoweth, Assistant County Attorneys, for appellee.

Considered by Mahan, P.J., and Hecht and Vaitheswaran, JJ.

HECHT, J.

Kongsavanh Keopasaeth appeals his convictions and sentences for assault causing bodily injury, second-degree burglary, two counts of assault with intent to cause serious injury, and fourth-degree criminal mischief in violation of Iowa Code sections 708.2(2), 713.5, 708.2(1), and 716.6 (1999). We affirm.

I. Factual and Procedural Background. A reasonable fact-finder could find the following facts from the record in the case. On the evening of July 3, 1999, Keopasaeth and three of his companions, Hac Lemvan, Loby Lovan, and Sourisack Praseuth, patronized a Des Moines liquor store, purchasing a case of bottled beer. Also at the store were Morgan and Morris Wright, twin brothers, and their friend Michael Smith. While Morgan Wright was in the store buying liquor, Smith and Morris Wright made sexually degrading comments to Lovan's sister, who was in the area with her uncle. The sister informed Lovan and his friends about the comments, and they confronted the Wrights and Smith in the parking lot. Lovan jumped on the hood of the Wrights' truck and kicked the windshield several times. In addition Lemvan and Keopasaeth reached into the passenger side of the truck, attempting to punch Morris Wright through the vehicle's open window.

Following this altercation, the Wrights and Smith exited the liquor store parking lot, then circled back and rammed Keopasaeth's car, breaking a rear taillight. Keopasaeth and his companions sped away pursued by the Wrights and Smith, who ultimately tracked them down at a grocery store parking lot. A fight ensued between the two groups of men with Keopasaeth and his friends

throwing their beer bottles at the Wrights and Smith. One of the bottles knocked out Smith's front teeth. Morgan Wright was hit in the forehead causing an injury that required twenty-two stitches. Morris Wright was stabbed twice with a broken bottle during the fight.

Keopasa euth was charged in a six count trial information with willful injury, second-degree burglary, going armed with intent, two counts of assault with intent to commit serious injury, and fourth-degree criminal mischief. Keopasa euth was convicted by a jury of the lesser included offense of assault causing serious injury and was acquitted of going armed with intent. Keopasa euth was otherwise convicted as charged and given the following indeterminate sentences to be served consecutively: five years on the assault causing bodily injury charge, ten years on the burglary charge, two years for each assault-with-intent charge, and one year for the criminal mischief charge. On appeal, Keopasa euth contends the trial court (1) erred in denying his motion for judgment of acquittal, as there was insufficient evidence to support his convictions with the exception of criminal mischief, and (2) abused its discretion in imposing consecutive sentences.

II. Sufficiency of the Evidence. We review claims of insufficiency of the evidence for errors at law. *State v. Thomas*, 561 N.W.2d 37, 39 (Iowa 1997). The trial court's findings of guilt are binding on appeal if supported by substantial evidence. Iowa R. App. P. 14(f)(1). Substantial evidence is evidence upon which a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *State v. Robinson*, 288 N.W.2d 337, 341 (Iowa 1980). In reviewing

challenges to the sufficiency of the evidence, we view the evidence in the light most favorable to the State, "including all legitimate inferences and presumptions which may be fairly and reasonably deduced from the record." *State v. Lambert*, 612 N.W.2d 810, 813 (Iowa 2000). All evidence is considered, "not just that of an inculpatory nature." *Id.* Evidence that merely raises suspicion, speculation, or conjecture is not substantial evidence. *Id.*

A. Assault Convictions. Keopasaueth challenges the sufficiency of the evidence to support his convictions for assault causing serious injury and assault with intent to cause serious injury. The Iowa Code allows a conviction for assault where a person commits "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." Iowa Code § 708.1(1). Alternatively, a conviction for assault may stand where one commits "[a]ny 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." Iowa Code § 708.1(2).

Keopasaueth contends there is no evidence in the record to suggest he personally assaulted any of the victims or had any affirmative role in the stab injury sustained by Morris Wright. We disagree. A reasonable fact finder could conclude Keopasaueth assaulted Morris Wright. Morris Wright testified Keopasaueth attempted to punch him as he sat in the passenger seat of his truck at the liquor store. In addition, according to testimony at trial, Keopasaueth

actively participated in the fracas at the grocery store parking lot, specifically brawling with Morris Wright prior to his stab wound, a serious injury.

Furthermore, Keopasaueth contends the evidence is insufficient to convict him of assault under an aiding and abetting theory. Aiding and abetting in a crime occurs when a person assents to or lends countenance and approval to another's criminal act either by active participation or by encouraging it in some manner prior to or at the time of commission. *State v. Wedebrand*, 602 N.W.2d 186, 189 (Iowa Ct. App. 1999) (citing *State v. Lott*, 255 N.W.2d 105, 107 (Iowa 1977)). The State must also prove the aider and abettor's participation or encouragement was done with the knowledge of the act. *State v. Speaks*, 576 N.W.2d 629, 632 (Iowa Ct. App. 1998).

We find sufficient evidence in the record from which a jury could reasonably find Keopasaueth aided and abetted in the assault of the Wrights and Smith. It is clear from the record Keopasaueth actively participated in both encounters at the liquor store and at the grocery store parking lot. A reasonable jury could conclude Keopasaueth assented to the acts committed by his companions by partaking in the fight.

Moreover, Keopasaueth argues there was insufficient evidence to demonstrate his actions were unjustified. We disagree. As fact-finder, the jury was free to find the Wrights' and Smith's testimony more credible and reject Keopasaueth's testimony regarding his defense. *See State v. Anderson*, 517 N.W.2d 208, 211 (Iowa 1994) (holding "jury is free to reject certain evidence, and credit other evidence"). Determinations of credibility are in most instances left for

the trier of fact, who is in a better position to evaluate it. *State v. Weaver*, 608 N.W.2d 797, 804 (Iowa 2000). Accordingly, we affirm on this issue.

B. Burglary Conviction. Keopasaueth challenges the sufficiency of the evidence to support his convictions for burglary in the second degree. In particular, Keopasaueth argues there was no testimony by any of the witnesses that he or his friends entered an occupied structure.

The Iowa Code defines the crimes of burglary as follows:

[a]ny person, having the intent to commit a felony, assault or theft therein, who, having no right, license or privilege to do so, enters an occupied structure, such occupied structure not being open to the public, or who remains therein after it is closed to the public or after the person's right, license or privilege to be there has expired, or any person having such intent who breaks an occupied structure, commits burglary.

Iowa Code § 713.1. Under Iowa Code section 702.12, a motor vehicle is an occupied structure. Iowa Code § 702.12. Entry, in terms of the burglary statute, occurs when any part of the body enters an occupied structure. *State v. Nichols*, 572 N.W.2d 163, 164 (Iowa Ct. App. 1997).

We find sufficient evidence in the record to suggest Keopasaueth, or someone he aided or abetted, entered the Wrights' truck, an occupied structure, by attempting to punch a passenger through an open window. Morris Wright testified Lemvan and Keopasaueth swung at him as he sat in the truck. Ronetta Brooks, a cashier at the liquor store, and Smith corroborated Wright's account of the events, both testifying they saw an Asian man swinging his fists through the vehicle's open window.

We conclude the district court did not err by denying Keopasaueth's motion for judgment of acquittal because substantial evidence exists in the record to support his convictions.

III. Sentencing. Keopasaueth contends the district court abused its discretion by sentencing him to consecutive terms of imprisonment. In particular, he argues the district court improperly focused on his criminal history and failed to consider all relevant factors. In addition, Keopasaueth contends the twenty-year sentence is an extremely harsh penalty considering his role in the crimes charged.

Sentencing decisions of the district court are reviewed for errors at law. Iowa R. App. P. 4; *State v. Grandberry*, 619 N.W.2d 399, 401 (Iowa 2000). A sentence will not be upset on appellate review unless the defendant demonstrates an abuse of district court discretion or a defect in the sentencing procedure. *State v. Wright*, 340 N.W.2d 590, 592 (Iowa 1983).

Iowa Rule of Criminal Procedure 22(3)(d) requires the district court to state its reasons for selecting a particular sentence on the record. *State v. Oliver*, 588 N.W.2d 412, 414 (Iowa 1998). Although the reasons do not need to be detailed, at least a cursory explanation must be provided to allow appellate review of the district court's discretionary action. *Id.* The district court must also give reasons for its decision to impose consecutive sentences. *State v. Jacobs*, 607 N.W.2d 679, 690 (Iowa 2000).

In applying its discretion, the district court should weigh and consider all pertinent matters in determining a proper sentence, including the nature of the

offense, the attending circumstances, and the defendant's age, character, propensities, and chances of his reform. *State v. Laffey*, 600 N.W.2d 57, 62 (Iowa 1999). Iowa Code section 901.5 also requires the court to 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. *Id.* We look at the entire record to determine if the reasons articulated by the district court are sufficient to enable us to determine if an abuse of discretion occurred. *State v. Boltz*, 542 N.W.2d 9, 11 (Iowa Ct. App. 1995).

During the sentencing colloquy, the court made the following statement explaining his imposition of consecutive sentences:

The question of whether you were defending yourself was presented to the jury. The jury disagreed. I do as well, and I believe there were great opportunities for you to break this off. There were opportunities for you not to take beer bottles and use them as weapons.

I understand your view, [counsel], regarding the gentlemen that were involved in this incident, but it was precipitated by and accelerated by the conduct of your client. I think, although the prior conviction is an aggravated misdemeanor, it's a demonstration of willingness to use weapons, to be violent, and that's wrong, and I think there were adequate opportunities for your client to turn himself away from this, to try and persuade his companions away from this, and he did not.

This statement evidences the district court's consideration of several relevant factors when imposing consecutive sentences. The court considered Keopasaueth's past criminal history, which includes convictions for carrying a concealed weapon and possession of a controlled substance. In addition, the court examined the seriousness of the offense which resulted in severe injuries to the Wrights and Smith. Morgan Wright's head wound required twenty-two

stitches, and Michael Smith's front teeth were knocked out. Morris Wright suffered a near fatal stab wound, going into shock and arriving at the hospital in grave risk of death.

Considering these relevant factors, we find the district court provided minimally sufficient reasons for the consecutive sentences and conclude the imposition of a twenty-year sentence was not unduly harsh. Having found no abuse of discretion by the district court in connection with the sentence, we affirm Keopasaueth's conviction and sentence.

AFFIRMED.