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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed April 22, 1987
vs.	)	
ELLSWORTH DONALD GRIFFITH, SR.,	)	7-28 86-704
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Polk County (No. CR 30371), Dick Strickler, Judge.

The defendant appeals from his conviction, following a jury trial, of terrorism. **AFFIRMED.**

Thomas J. McCann of Foxhoven & McCann, Des Moines, for defendant-appellant.

Thomas J. Miller, Attorney General; David L. Dorff, Assistant Attorney General; and Odell G. McGhee, II, Assistant Polk County Attorney, for plaintiff-appellee.

Heard by Donielson, P.J., and Snell and Sackett, JJ.

PER CURIAM

On December 27, 1985, the appellant, Ellsworth Donald Griffith, was charged by trial information with the crime of terrorism. See Iowa Code § 708.6 (1985). Trial commenced on March 17, 1986, and one day later the jury returned a verdict finding Griffith guilty as charged. On April 16, Griffith was sentenced to an indeterminate term not to exceed five years. This appeal followed. Our review is limited to the correction of errors at law. Iowa R. App. P. 4.

Griffith's first contention is that the evidence produced at trial was insufficient as a matter of law to support the jury's verdict. The principles which guide our review of the sufficiency of the evidence were outlined in State v. McFadden, 320 N.W.2d 608, 614 (Iowa 1982), as follows:

> [T]he evidence is viewed in the light most favorable to the State; that all of the evidence must be considered, and not just that which supports the verdict; that the verdict must be upheld if supported by substantial evidence; and that substantial evidence means such evidence as could convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt.

We allow the State all legitimate inferences and presumptions which may fairly and reasonably be deduced from the record evidence. State v. Blair, 347 N.W.2d 416, 419 (Iowa 1984). Direct and circumstantial evidence are equally probative in our analysis. State v. Duncan, 312 N.W.2d 519, 522 (Iowa 1981); see State v. O'Connell, 275 N.W.2d 197, 204-05 (Iowa 1979).

The evidence in the case at bar, when viewed in the light most favorable to the State, establishes the following set of facts. On November 24, 1985, Griffith was residing at an abandoned marina in Des Moines, Iowa. Some time prior to this date the marina was leased by Dave Wiegel from its owner, a resident of LaCrosse, Wisconsin. Wiegel knew Griffith and, in June 1985, hired Griffith to work for him. As part of his compensation, Griffith was allowed to reside at the marina. In October or early November 1985, Wiegel was evicted through

a forcible entry and detainer action. The owner's counsel gave Griffith permission to continue residing at the marina so that Griffith could act as a watchman for the owner.

On November 24, 1985, Wiegel, accompanied by Art Caldwell, returned to the marina with the permission of the owner's counsel in order to remove some of Wiegel's personal property. While they were in the marina, Griffith returned, argued with Wiegel and Caldwell about some of Griffith's property which was allegedly missing, and then left to telephone the police. While returning to the marina, Griffith stopped a police squad car and persuaded the officers to accompany him back to the marina. Upon arriving at the marina, Griffith stated to the police that Wiegel and Caldwell had no right to be present at the marina and asked that the police remove them. The police requested documentation demonstrating who possessed rights of occupancy. When no one was able to produce such documentation, the police concluded that the situation was a civil matter, told Griffith to go to his quarters, and told Wiegel and Caldwell to leave with what they had accumulated at that point. The officers proceeded to leave the marina.

At this point, Wiegel and Caldwell split up with Caldwell staying in the center of the marina and Wiegel proceeding to a room in the southeast corner of the marina. Griffith then came from his quarters, pointed a handgun at Caldwell and said, "Dave, I'm going to blow you away." Griffith and Caldwell then proceeded to the southeast corner of the marina where a similar confrontation with Wiegel took place. The police officers, who had been looking outside the marina for a lost squad car key, heard someone in the marina yelling for them. Upon returning to the marina, the officers found Griffith holding the handgun and arrested him.

Iowa Code section 708.6 (1985) defines the crime of terrorism as follows:

> A person commits a class "D" 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.

This section provides two alternative methods by which a person may be charged with the crime of terrorism. See State v. Vavrik, 336 N.W.2d 193, 194 (Iowa 1983). Under the trial information Griffith was charged only with the alternative whereby a person "threatens to commit such an act under circumstances raising a reasonable expectation that the threat will be carried out." According to the jury instructions submitted in this case, in order to convict Griffith the State was required to prove (1) that Griffith threatened to shoot a gun in a building occupied by another person; (2) that the gun was a "dangerous weapon"; (3) that when Griffith threatened to shoot the gun it was with the intent to injure or provoke fear or anger in the two individuals who were with Griffith at the time; and (4) that Griffith made the threat under circumstances raising a reasonable expectation that the threat would be carried out.

Griffith first argues that the evidence produced at trial was insufficient as a matter of law to support a finding that he threatened to discharge a dangerous weapon within an assembly of people. This contention is of no avail to Griffith in light of the fact that he was not charged with threatening to discharge a dangerous weapon within an assembly of people. Nor was any jury instruction given on that alternative element. Accordingly, the State was not required to prove that element and the question of the sufficiency of the evidence to support it is not relevant to the present appeal.

Griffith next argues that the evidence is insufficient to support a finding that he threatened to discharge a dangerous weapon at, in, or into a building

occupied by another person. This argument is grounded in Griffith's contention that by use of the phrase "building occupied by another person" this portion of the statute was intended to apply only in those situations where such other persons have some type of possessory interest in the building. As in the present case the evidence is undisputed that neither Wiegel nor Caldwell possessed such an interest, Griffith maintains the State failed to carry its burden of proof. We disagree.

Statutory words and phrases are to be construed according to the context and the approved usage of the language. Iowa Code § 4.1(2) (1987). In the context of a statutory definition of the crime of terrorism, we find completely unconvincing Griffith's argument tying the protection of the criminal code to a victim's possessory interest in the scene of the crime. While "occupy" can mean "to reside in as an owner or tenant," Webster's Third New International Dictionary 1561 (1971), it may also mean "[t]o fill space." Ballentine's Law Dictionary 879 (3d ed. 1969). In the context of Iowa Code section 708.6, we think an application of the former meaning would be unreasonable. It has been noted by commentators that section 708.6 "was included [in the Code] to furnish an additional weapon to be used against the growing threat of political terrorism, ..." 4 Yeager & Carlson, Iowa Practice: Criminal Law and Procedure, § 181 at p. 55 (1979). Under Griffith's suggested interpretation, a sole proprietor of a business or a homeowner could lure, for example, the Governor of Iowa into his business or home and proceed to "terrorize" him or her in every way except statutorily. But this same act, if done in the Governor's mansion or in a business in which the Governor happened to be a shareholder, would constitute statutory terrorism. We cannot believe this was the legislature's intent. Accordingly, we reject Griffith's argument to the contrary.

Griffith next maintains the record evidence is insufficient to support a finding that his threats were made under circumstances raising a reasonable expectation that they would be carried out. In support of this contention, Griffith cites State v. Jackson, 305 N.W.2d 420 (Iowa 1981), where our supreme court stated that the focus of the reasonable expectation inquiry under the predecessor to the current section 708.2 was not the victim, but, rather, the defendant. Given Jackson, Griffith claims that the record evidence showing that he removed one of the shells from the gun before confronting Wiegel and Caldwell renders the remaining evidence insufficient to support a finding that he had a reasonable expectation that the threat would be carried out.

Commentators have suggested that to continue to apply Jackson in light of the subsequently-decided State v. White, 319 N.W.2d 213 (Iowa 1982), and the subsequently-amended section 708.6 "would put a strained interpretation on the present [statutory] language." 4 Yeager & Carlson, Iowa Practice: Criminal Law and Procedure § 181 at pp. 42-3 (1987 Supp.). We need not address the current status of Jackson, as we think its application fails to profit Griffith. Assuming the vitality of Jackson, the inquiry is whether the circumstances of the offense give rise to a reasonable expectation on the part of the defendant that the threat will be carried out. Jackson, 305 N.W.2d at 423. The handgun involved in the present case contained five chambers. Although Griffith claims he removed one of the shells, four shells remained with which Griffith could have carried out his threat. As Griffith himself testified, he removed the one shell only because "I would have [had] to pull the trigger at least twice if I had to pull it at all." We think the incremental effort involved in pulling the trigger twice instead of once fails to render unreasonable Griffith's belief that his threat would be carried out. We reject Griffith's contention.

Finally Griffith claims the district court erred in its instruction to the jury which defined "[a] building occupied by another person." That instruction read as follows:

> A building occupied by another person is any building, structure, or similar place adapted for overnight accommodation of persons, or occupied by persons for the purpose of carrying on business or other activity therein, or for the storage and/or safekeeping of anything of value.

This instruction was probably adopted from the definition of "occupied structure" contained in Iowa Code section 702.12 (1985). We agree with Griffith that to the extent this instruction permits the jury to convict a defendant of terrorism without a showing that other persons were actually present in the building, the instruction was erroneous. Although error is presumed where an erroneous instruction is given to a jury, State v. Phillips, 378 N.W.2d 316, 318 (Iowa App. 1985), the giving of an erroneous instruction does not require reversal unless some right of the defendant has been prejudiced thereby. State v. Frink, 120 N.W.2d 432, 436-37, 255 Iowa 59, 66, cert. denied, 375 U.S. 911, 84 S. Ct. 207, 11 L. Ed. 2d 150 (1963). In the present case, we think Griffith was not prejudiced by the instruction. It is undisputed that Wiegel and Caldwell were present in the marina at the time the threat was made, and no evidence to the contrary was presented to the jury. We cannot conceive, therefore, of any possible prejudice resulting to Griffith from the instruction. Compare State v. Pinckney, 306 N.W.2d 726, 729 (Iowa 1981) (error, if any, in jury instruction held harmless where no dispute existed as to the proper characterization of evidence) (dicta); State v. Gibb, 303 N.W.2d 673, 686-87 (Iowa 1981) (erroneous jury instruction held harmless where record evidence clearly showed that jury could not reasonably have been affected by error); State v. York, 256 N.W.2d 922, 926 (Iowa 1977) (error, if any, in jury instruction held harmless where error could have had no effect on jury finding); with State v. Doughty, 359 N.W.2d 439, 441 (Iowa 1984)

(reversible error found where jury not compelled by evidence to find against defendant on erroneously omitted element).

The district court is affirmed.

AFFIRMED.