

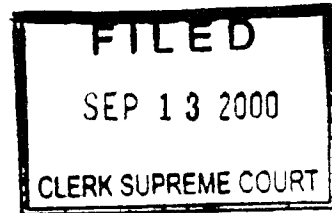
IN THE COURT OF APPEALS OF IOWA

No. 0-390 / 99-0881
Filed September 13, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

VICTORIA ANN HOWARD,
Defendant-Appellant.



Appeal from the Iowa District Court for Scott County, Douglas McDonald,
District Associate Judge.

On appeal from her conviction for first-degree harassment, defendant contends (1) the record contains insufficient evidence to support the conviction, and (2) trial counsel was ineffective in failing to object to the constitutionality of the harassment statute. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Nan Jennisch, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, William E. Davis, County Attorney, and Kelly Raines and Marc Gelleman, Assistant County Attorneys, for appellee.

Considered by Sackett, C.J., and Streit and Vaitheswaran, JJ.

SACKETT, C.J.

Defendant-Appellant, Victoria Ann Howard, appeals from her conviction of harassment in the first degree in violation of Iowa Code sections 708.7(1)(b)¹ and 708.7(2) (1997)². Defendant contends there was not sufficient evidence to support the conviction and her trial attorney should have challenged the constitutionality of the statute and was ineffective in not doing so. We affirm.

On October 1, 1998, defendant learned her grandson was the subject of a traffic stop in the 600 block of West 14th Street in Davenport, Iowa. Police officers Linn Kindred and Steven Brown went to the scene for the purpose of backing up the officers who made the stop. They had been there a short time before defendant drove up. Defendant and Brown had prior dealings and defendant had not been happy with Brown's conduct. Seeing this as an opportunity to tell Brown what she thought of him, defendant got out of her car and approached him. Then according to the officers' testimony defendant began talking to Brown and making threats in a manner the officers considered angry and aggressive. She stayed at the scene about ten minutes. It was this confrontation that formed the basis of the State's charge, though defendant was not charged until several weeks later.

We review defendant's challenge of sufficiency of the evidence for correction of errors at law. *State v. Thomas*, 561 N.W.2d 37, 39 (Iowa 1997).

¹ Iowa Code § 708.7(1)(b) provides in part:

"A person commits harassment when the person, purposefully and without legitimate purpose, has personal contact with another person, with the intent to threaten, intimidate or alarm that other person." . . .

² Iowa Code § 708.7(2) provides in part:

"A person commits harassment in the first degree when the person commits harassment involving a threat to commit a forcible felony . . .".

We will uphold the trial court's denial of a motion for judgment of acquittal if there is substantial evidence in the record to support the defendant's conviction. *State v. McPhillips*, 580 N.W.2d 748, 752 (Iowa 1998). The jury's findings of guilt are binding on appeal if supported by substantial evidence. *State v. Hopkins*, 576 N.W.2d 374, 377 (Iowa 1998); *State v. Allen*, 348 N.W.2d 243, 247 (Iowa 1984). Substantial evidence is such evidence as could convince a rational fact finder the defendant is guilty beyond a reasonable doubt. *Allen*, 348 N.W.2d at 247. In deciding whether there is substantial evidence, we view the record in the light most favorable to the State. *State v. Torres*, 495 N.W.2d 678, 681 (Iowa 1993).

Viewing the evidence in the light most favorable to the State there is evidence that defendant called the officer a motherfucker and complained about him harassing her family. There was testimony that defendant said she would "cap" Brown and that another person would "cap" Brown after that person was released from jail. There was testimony "cap" is the street word for kill.

Defendant's two issues going to the sufficiency of the evidence and the constitutionality of the statute under which she was charged focuses on the same twofold theme. First, did defendant have a legitimate purpose in talking to the officer? Second, in saying what she did to the officer was defendant exercising her constitutional right of free speech?

In addressing defendant's challenges we need to determine whether the words she spoke to the police officer were constitutionally protected. While recognizing that the preservation of liberty depends in part upon the maintenance of social order the United States Supreme Court has said the First Amendment recognizes that a certain amount of expressive disorder not only is inevitable in a

society committed to individual freedom, but must itself be protected if that freedom would survive. *City of Houston v. Hill*, 482 U.S. 451, 472, 107 S. Ct. 2502, 2515, 96 L. Ed. 2d 398, 418 (1987). The freedom of individuals verbally to oppose or challenge police action without risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state. *Id.* at 462-63, 107 S. Ct. at 2510, 96 L. Ed. 2d at 413.

The Iowa Supreme Court in *State v. Fratzke*, 446 N.W. 2d 781 (Iowa 1989) recognized that offensive language, in and of itself, will not strip a communication of its otherwise legitimate purpose. The court held that "so long as a lawful purpose for the communication exists, no language short of "fighting words" may serve to defeat or criminalize the sender's message." *Fratzke*, 446 N.W.2d at 785.

Defendant correctly argues that she had a legitimate purpose in criticizing Officer Brown. She was unhappy with the treatment he as a police officer had given her family. Though defendant and Brown had a difference of opinion as to whether his actions were fair she had a legitimate right to tell him she thought they were not. In complaining about a public official's actions she was exercising the privilege of a citizen of the United States " 'to speak one's mind, although not always with perfectly good taste, on all public institutions.' " *New York Times Co. v. Sullivan*, 376 U.S. 254, 269, 84 S. Ct. 710, 720, 11 L. Ed. 2d 686, 700 (1964) (citations omitted).

The fact defendant elected to call Officer Brown a motherfucker or use some other offensive language does not criminalize her otherwise legitimate purpose of protesting governmental action. See *Fratzke*, 446 N.W.2d 785.

However, the right to speak one's mind in criticism does not insulate all of one's words from state action. Restraint on free speech is justified in a case where the speaker uses what are referred to as "fighting words." See *id.* Using so called, "fighting words," subjects one to a narrowly defined exception to the First Amendment guarantees of free speech. See *id.* at 784; see also *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 62 S. Ct. 766, 769, 86 L.Ed. 1031, 1035 (1942); *Gooding v. Wilson*, 405 U.S. 518, 522, 92 S. Ct. 1103, 1106, 31 L. Ed. 2d 408, 414 (1972); *Lewis v. New Orleans*, 415 U.S. 130, 132, 94 S. Ct. 970, 972, 39 L. Ed. 2d 214, 218 (1974). Because a lawful purpose for the defendant's communication existed, no language short of "fighting words" will criminalize the remarks she made to Brown.

The question then becomes whether there were "fighting words" spoken by defendant to Brown. "Fighting words" have been defined as personally abusive epithets, which by their utterance inflict injury or tend to incite an immediate breach of the peace. *Chaplinsky*, 315 U.S. at 572, 62 S. Ct. at 769, 86 L.Ed. at 1035. We are not to assume that every expression of a provocative idea will incite violence. See *Texas v. Johnson*, 491 U.S. 397, 409, 109 S. Ct. 2533, 2541-42, 105 L. Ed. 2d 342, 356-57 (1989). We must consider the actual circumstances surrounding such expression, asking whether the expression "is directed to inciting or producing imminent lawless action." See *id.* at 409, 109 S. Ct. at 2542, 105 L. Ed. 2d at 357 (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S. Ct. 1827, 1829, 23 L. Ed. 2d 430, 434 (1969)). In examining what is said we do it in the context that peace officers "may reasonably be expected to 'exercise a higher degree of restraint' than the average citizen and thus be less

likely to respond belligerently to "fighting words." *Houston*, 482 U.S. at 462, 107 S. Ct. at 2510, 96 L. Ed. 2d at 412 (citations omitted).

There is evidence from which the jury could have determined that defendant threatened to kill Brown or have him killed. While the complaints about police action defendant made were constitutionally protected, the threats to kill Brown or have him killed were "fighting words" and as such were not. Therefore defendant's argument that she had a legitimate purpose in uttering threats of death has no basis. There was substantial evidence to support the charge.

The defendant contends her trial attorney should have challenged the constitutionality of the statute under which she was charged. We review claims of ineffective assistance of counsel de novo. *State v. Allison*, 576 N.W.2d 371, 373 (Iowa 1998). While we generally preserve such claims for postconviction relief proceedings, we will consider them on direct appeal where the record is adequate to address the issue. *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999). To prevail, defendant must prove by a preponderance of the evidence (1) his trial counsel breached an essential duty, and (2) prejudice resulted. *State v. Astello*, 602 N.W.2d 190, 198 (Iowa App. 1999). We may dispose of defendant's claim if he fails to prove either prong. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997).

Harassment by threat to commit a forcible felony as is prohibited by Iowa Code section 708.2 is harassment by the use of "fighting words." Such words are not protected by the First Amendment's guarantee of free expression. *Chaplinsky*, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942). There be

constitutional basis to challenge the statutes under which defendant was charged there is no basis for finding her trial counsel ineffective for failing to do so. We affirm the conviction.

AFFIRMED.

VAITHESWARAN, J. (specially concurring)

I **specially concur**. The majority rejects Howard's First Amendment challenge to her conviction, concluding the threats she made constituted "fighting words", which are not protected by the United States and Iowa Constitutions. See *State v. Fratzke*, 446 N.W.2d 781, 783 (Iowa 1989). I agree with the majority's conclusion that Howard's speech was not protected, but would conclude her comments were classic unprotected "true threats" rather than "fighting words". See *State v. Milner*, 571 N.W.2d 7, 14 (Iowa 1997).

Streit, J., joins this special concurrence.