

IN THE COURT OF APPEALS OF IOWA

No. 5-497 / 94-2055

000323

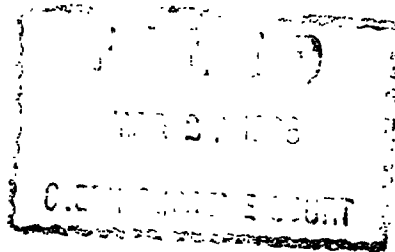
STATE OF IOWA,

Plaintiff-Appellee,

vs.

LARRY McGEE,

Defendant-Appellant.



Appeal from the Iowa District Court for Polk County, Glenn E. Pille, Judge.

The defendant challenges his conviction and sentence for terrorism with intent to injure. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Kevin Cmelik, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, John P. Sarcone, County Attorney, and Daniel C. Voogt, Assistant County Attorney, for appellee.

Considered by Sackett, P.J., and Habhab and Cady, JJ.

CADY, J.

Defendant Larry McGee appeals his conviction for the crime of terrorism with intent to injure in violation of Iowa Code section 708.6 (1993). He contends the district court should have granted his motion for judgment of acquittal because there was insufficient evidence he acted as the principal, aided or abetted the principal, or engaged in joint criminal conduct. He advances the State failed to prove his guilt under any of these theories and his conviction should be reversed. We affirm.

McGee was charged with terrorism 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 around 2:50 in the morning of April 25, 1994. Strode telephoned the police and reported the incident.

At the time, police officer Knox was on patrol near Sixteenth Street and Jefferson. He heard the gunshots and drove toward the sound. Officers Christopher Curtis and Raymond Carrington were parked about one block away. 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 blue car. They got out, and the car and its passengers were searched. No gun was

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

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 police radio he was chasing two people. When Curtis and Carrington arrived at the dead-end of Francis Avenue, they identified the license number of 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 one of the men, Jimmy Johnson. Carrington found McGee hiding behind a wood pile a few blocks away. McGee was arrested and taken to the police station. At the police station, he said a third man who was in the car had done the shooting.

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 Johnson or McGee, and neither man had a head injury. No gun was found. A test for gunpowder residue on McGee's hands was inconclusive.

The case was submitted to a jury. The jury found McGee guilty of terrorism with intent to injure. The district court denied McGee's motion for judgment of acquittal and sentenced him to a term of imprisonment not to exceed ten years.

McGee contends his motion for acquittal should have been sustained because there was no substantial evidence supporting his conviction. In considering McGee'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.

We first address McGee's claim there was insufficient evidence in the record to show an intent to injure or provoke fear or anger. McGee was charged under the first paragraph of section 708.6, which provides:

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.

It is difficult to prove intent by direct evidence, and it may be established by circumstantial evidence. *State v. Olson*, 373 N.W.2d 135, 136 (Iowa 1985). When, as here, specific intent is an element of the crime charged, a person may be convicted on a theory of aiding and abetting if the person participates either with the requisite intent or with knowledge that the principal possesses the required intent. *State v. Lewis*, 514 N.W.2d 63, 66 (Iowa 1994).

There was sufficient circumstantial evidence to show the person firing the shots had an intent to injure or to provoke fear or anger. Firing six to ten shots at an occupied personal residence shows an intent to injure or an intent to cause fear.

We need next address the question whether there was substantial evidence to show McGee was responsible by participating either as a principal, an aider and abettor, or through joint criminal conduct for the shots that were fired. We find substantial evidence McGee aided and abetted in the crime.

A person 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 in it or by some manner 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 from which to infer a defendant's participation in the crime. *State v. Johnson*, 534 N.W.2d 118, 123 (Iowa App. 1995).

The evidence showed the shots were fired from the passenger side of the car. Johnson was driving, and thus, either McGee or the unknown third person fired the shots. The gun powder residue tests of his hands were inconclusive, and therefore did not prove or disprove he had fired a gun. McGee admitted to Officer Baylock he was

present in the car at the time the shots were fired. Furthermore, McGee tried to elude arrest by running and hiding after the car went into the ravine. *See State v. Lockheart*, 410 N.W.2d 688, 693 (Iowa App. 1987) (aiding and abetting may be inferred from conduct after the commission of the offense); *State v. Brokaw*, 342 N.W.2d 864, 865 (Iowa 1984) (evidence of flight is relevant).

We affirm McGee's conviction. Costs are assessed to McGee.

AFFIRMED.

Habhab, J., concurs; Sackett, P.J., dissents.

I dissent.

The question is whether there is the necessary evidence to show defendant was responsible by participation either as a principal, an aider and abettor, or through joint criminal conduct for the shots that were fired. The majority has found him guilty as an aider and abettor. I disagree. I also do not find substantial evidence to show his participation as a principal or through joint criminal conduct.

To establish defendant was guilty of terrorism as a principal under Iowa Code section 708.6 (1995), the State must prove beyond a reasonable doubt that defendant fired the gun shots into Strode's home while there were people there thus placing the people in reasonable apprehension of serious injury.

No one saw defendant shoot a gun. He was not driving the car. There is evidence there was a third person in the car. Defendant admitted being in the car but denied shooting the gun. The gun residue tests did not prove defendant fired a gun. There were no fingerprints found on the casing collected from Strode's home. The gun was not found. The State argues there was the possibility defendant shot the gun, a possibility they say was strengthened because the shots came from the passenger side of the car and the shooter must have been defendant or the third person. The evidence was not sufficient to show defendant was the principal.

The State advances the evidence is stronger 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).

There is evidence defendant was at the scene and he knew who fired the gun. There is evidence the shots were fired from the passenger side of the car. There is evidence defendant ran after the car went in the ravine. The State contends it proved aiding and abetting in that it proved defendant was with Johnson and another person in the car when the shots were fired and defendant fled and later admitted the shots were fired while he was in the car. This is not sufficient to prove aiding and abetting.

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 State failed to introduce such evidence.

The evidence is defendant was in the car, knew the name of the person he alleged shot the gun, and ran from the car after it went in the ravine. This circumstantial evidence is not sufficient to convict defendant as an aider and abettor.

Defendant also contends the State failed to prove he was engaged in joint criminal conduct. The State contends, even if defendant did not aid and abet in the crime, the fact he was in the car would have allowed the jury to find he and the other men in the car were acting together while at least one of them fired the shots, and each person in the car was responsible for the act of the other in the shooting and the escape.

Joint criminal conduct is not the same as aiding and abetting. The aiding and abetting provision of Iowa Code section 703.1 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 312, 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.*

000732

4

The State can establish defendant was present at the scene where the terrorism took place but there is no evidence defendant committed the terrorism. That is, there is no evidence defendant shot the gun.

I conclude there was not sufficient evidence for the jury to find defendant guilty of the crime of terrorism with intent to injure. I would reverse.