IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

No. 1-372 / 00-1533
Filed June 29, 2001

STATE OF IOWA,
Plaintiff-Appellee,

vs.

STEVEN ALBERT HERNANDEZ, JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, C.H. Pelton, Judge.

The defendant appeals from his conviction for attempting to elude a pursuing law enforcement vehicle in violation of Iowa Code section 321.279(3) (1999). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and James G. Tomka, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Darrel L. Mullins, Assistant Attorney General, William E. Davis, County Attorney, and Michael J. Walton, Assistant County Attorney, for appellee.

Considered by Hayden, P.J., Habhab, J., and Honsell, S.J.*
*Senior judges assigned by order pursuant to Iowa Code section 602.9206 (1999).

HAYDEN, S.J.

Defendant Steven Hernandez, appeals from a judgment and sentence entered following his conviction by a jury for attempting to elude a pursuing law enforcement vehicle in violation of Iowa Code section 321.279(3) (1999). He claims there was insufficient evidence to support his conviction for felony eluding.

We set out some of the State's pertinent facts and testimony presented at the trial as follows: A Davenport, Iowa, police officer, Ronald Waline, testified he first observed defendant's white pickup truck leave the parking lot of the Locust Street Tap in Davenport, Iowa. The truck tires were squealing and there was a small black sedan following close behind. Officer Waline saw both cars run a red light down the street. He turned on the pursuit lights and later the siren to his vehicle and then gave chase. The small black car stopped. Defendant's truck did not stop, but sped away. His truck did not stop for at least four stop sign intersections. According to Waline "he was just blowing right through them." Defendant drove erratically at speeds in excess of sixty miles per hour up to seventy miles per hour in twenty-five mile per hour and thirty mile per hour residential zones. At one point defendant's truck went into a side-ways slide and he went up over the boulevard and crossed it into the opposite on-coming lane of travel. Defendant turned north at the first intersection and Waline followed him in hot pursuit.

Officer Waline saw officer Welke's patrol car on the south side of Locust Street in the east-bound lane. Welke's patrol car had its red lights on and the wig-wags, which are the head lights. They flash off and on when the emergency lighting equipment is activated. He saw officer Welke throw down a "stop stick"

across the street in front of defendant's truck. When a stop stick is run over, it slowly deflates the tires. At that point defendant headed directly toward Sergeant Welke. Waline's words were: "it was a bee line right to where Sergeant Welke was standing." He lost Welke in the silhouette of the truck and he did not know if Welke had been struck or not. Officer Welke testified about deploying the stop sticks and estimated defendant's speed at sixty-five to seventy miles per hour at the time he veered toward him.

There were two police cars setting up a road block at the intersection of Harrison Street. Officer Waline had the siren and pursuit lights activated the entire time he chased the defendant. The defendant's pick-up stopped and officer Waline pulled up behind him and ran to the front of the defendant's truck with his weapon drawn and screamed for defendant to shut the truck off. Defendant revved the truck and lurched it toward Waline, who was two feet in front of him and pivoted out of the truck's way. Waline fired two shots into the left rear tire of the truck.

Officer Koehler testified he was in his patrol car about a block away from the defendant when he turned onto Main Street. Defendant was going too fast for the turn and he could not make it. He slid into the corner and up over the curb on the northwest side of the intersection. There was a utility pole that defendant made contact with (grazed) and he went up over the curb. Officer Koehler pulled up to about twenty feet from the defendant and noticed officer Waline was pulling up on the north side of the defendant where he had stopped. We note officer Koehler corroborates officer Waline's testimony from this point on.

Andrew Waggoner testified he saw officer Hegland pick up a shot gun off the floor of the pick-up. They both observed the shot gun was loaded. This was admitted as an exhibit into evidence. The State and the defendant stipulated the 410 gauge shot gun measured eighteen and one-half inches in length. Further, it could be entered into evidence. Robert Hegland collected fifteen one hundred dollar bills from defendant's truck. There was also forty-one rounds of ammunition for the sawed-off shot gun recovered from the defendant's truck.

The parties also stipulated .21 grams of cocaine be admitted into evidence. We note the defendant had the cocaine in a packet in his billfold when he was taken to the police station.

We recite defendant, Steven Hernandez's, testimony relative to the charge of attempting to elude pursuing law enforcement vehicle: During the day of July 13, 1999, defendant helped his brother, Tony, move his household items. He quit working somewhere between 10:00 and 11:00 p.m. and started for home. On his way home he stopped at the Rusty Nail tavern and consumed beer for an hour and a half or so. He was going to return to his brother's and return his keys and some other things that were in the truck. On his return to his brother's he stopped at Jack's Locust Street Tap on the corner of Iowa and Locust Street. Defendant dropped his billfold and a one hundred dollar bill of his money fell out. Two men walked up to him, asked him if he knew them, ordered drinks and eventually left.

A few minutes before 2:00 a.m., closing time, he left that tavern and got into his pick-up truck. Two men in a small vehicle cut him off from leaving the parking lot. One of the men jumped out of the car and at gun point demanded

his money. There was verbal confrontation also and defendant took off out of the parking lot and went east onto Locust Street. The small car followed him. When asked if he had run the red light his answer was, "I may have run the light, yes." The men were following him and he was afraid, just panicked. He described the route he drove and the fact he ran through several stop signs without stopping. He stated he did not know a police officer followed him until he got to the bottom of Bridge Street.

At Bridge Street defendant was going too fast and slid through it and jumped over the embankment and turned his vehicle up a side street and eventually onto Locust Street. This was the first time he realized there was a cop following him. The cop was going in the opposite direction than the defendant was. The defendant assumed the cop was following the black car. Defendant continued speeding and driving too fast. He noticed the squad cars when he got to Iowa Street. He noticed lights on Harrison Street. Near Brady Street he saw a strip of something in the road and he attempted to swerve around it. He did not attempt to hit the police officer. Two tires on the right side of his truck were flat.

Defendant slid into a pole at the intersection of Locust and Main. He bounced back from the pole, put the truck in reverse, and heard some one shooting at him so he took off to the right. He did not see who fired the shots. He denied seeing a police officer in front of him. He did not attempt to run over a police officer. He drove north on Main Street and eventually into an alley and stopped. He admitted the cocaine in a packet in his billfold was his. He denied any knowledge of the shot gun shells. He was not aware the shot gun shells or the sawed off shot gun were in the truck.

Defendant testified he did not see officer Waline until he got to Bridge Street. He did not hear the sirens blaring, he did not look in his rear view mirrors until he saw a cop go by. Defendant's driver's side window was down during the time of the chase.

Brent Bennett testified he was in the tavern and had talked with the defendant and left a few minutes before 2:00 a.m. He walked out the back door into another parking lot. He heard people yelling in the other parking lot. One was Steve's voice and there were two others. He said it sounded like a fight was going to happen. He started in that direction toward Steve then he heard tires burning off. He assumed Steve was getting out of there.

Defendant's wife, Christina Hernandez's testimony essentially was defendant had a gun he kept for hunting and upon her insistence he removed it from their house one to two years before trial. Since that time there has been no gun of any kind in her house.

Chris Kastaneda, defendant's uncle, testified Tony Hernandez moved a week or two before July 13, 1999. On cross-examination he stated that it was two weeks before that time.

In rebuttal the State called William Thomas to testify. He testified defendant advised him this whole thing was a result of two gang bangers pulling a gun on him in a parking lot at a tavern. Defendant was afraid when he saw the suspects and the gun, and he left the parking lot in his vehicle at a high rate of speed. Defendant knew he was wrong when he ran from the police, but he was afraid. Defendant indicated to him that he saw the police.

In instruction No. 31 the trial court instructed the jury:

> The State must prove all of the following elements of Attempting to Elude Pursuing Law Enforcement Vehicle as charged under Count IV:
>
> 1. On or about the 13th day of July, 1999, the defendant Steven Hernandez, Jr., was driving a motor vehicle.
> 2. The defendant willfully attempted to elude a marked official law enforcement vehicle driven by a uniformed peace officer after being given a visual and audible signal to stop.
> 3. In doing so the defendant exceeded the speed limit by 25 miles per hour or more.
> 4. At the time the defendant:
>
> (a) was knowingly in possession of an offensive weapon; or
>
> (b) was knowingly in possession of cocaine.

The jury returned a verdict of guilty. We affirm.

Our review is for the correction of errors of law. Iowa R. App. P. 4. Substantial evidence means that which would convince a rational trier of fact that the defendant is guilty of the crime charged beyond a reasonable doubt. *State v. Astello,* 602 N.W.2d 190, 197 (Iowa Ct. App. 1999). The relevant inquiry is "whether, after viewing all of the evidence in the light most favorable to the prosecution, any rational trier of facts could have found the essential elements of the crime beyond a reasonable doubt." *State v. Anderson,* 517 N.W.2d 208, 211 (Iowa 1994). The appellate court broadly and liberally construes the fact-finder's conclusions and in cases of ambiguity, will uphold rather than defeat a jury verdict. *State v. Price,* 365 N.W.2d 632, 633 (Iowa Ct. App. 1985).

The defendant alleges in this appeal the evidence does nothing more than create speculation, suspicion or conjecture, and the jury had to guess in reaching the verdict. Defendant further alleges when the record as a whole is considered, the evidence on whether he committed this crime is insufficient to raise a fair inference of guilt. Defendant relies upon *State v. LaPointe,* 418 N.W.2d 49 (Iowa

1988). That case stands for the proposition "evidence which merely raises suspicion, speculation or conjecture is insufficient." *LaPointe,* 418 N.W.2d at 51. We do not disagree with this principal. It is not applicable to the factual situation of this case.

Direct and circumstantial evidence are equally probative. Iowa R. App. P. 14(f)(16). All legitimate inferences and presumptions fairly and reasonably deduced from the record go to the State. *State v. Blair,* 347 N.W.2d 416, 418-19 (Iowa 1984). It is axiomatic that a jury is entitled to believe all, some, or none of the witnesses' testimony. *State v. McPhillips,* 580 N.W.2d 748, 753 (Iowa 1998). A jury sits in the better position to evaluate witnesses credibility. *State v. Weaver,* 608 N.W.2d 797, 804 (Iowa 2000).

We hold the State presented sufficient credible evidence to support the jury's verdict.

AFFIRMED.