

IN THE COURT OF APPEALS OF IOWA

No 6-781 / 95-2230

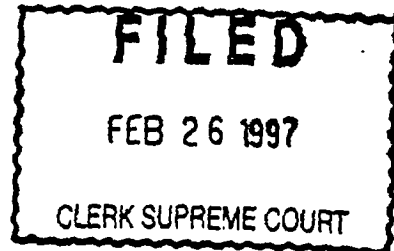
STATE OF IOWA,

Plaintiff-Appellee,

vs.

LAYTON WILLIAM VICK,

Defendant-Appellant.



Appeal from the Iowa District Court for Dickinson County, Cameron B. Arnold, District Associate Judge.

Defendant appeals from the judgment and sentence entered upon his conviction of interference with official acts with bodily injury in violation of Iowa Code section 719.1 (1993). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, Christopher A. Cooklin and Annette L. Hitchcock, Assistant State Appellate Defenders, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Edward Bjornstad, County Attorney, and Ney Tullos McDaniel, Assistant County Attorney, for appellee.

Heard by Habhab, C.J., and Streit and Vogel, JJ. Sackett, J., takes no part.

HABHAB, C.J.

Defendant Layton William Vick owns a small general store. A judgment was entered against him in Dickinson County. His creditor obtained a writ of general execution requiring the sheriff's office to levy on the contents of the cash register at the store. When Deputy Dodds and Deputy Reekers arrived to execute the writ on July 22, 1994, defendant was verbally abusive and refused to open the register. A physical confrontation occurred and defendant was arrested. Defendant was charged with assault resulting in bodily injury and interference with official acts resulting in injury.

Prior to trial, the State filed a motion in limine seeking to prohibit the introduction of testimony from one of defendant's witnesses, Alan Slater. It was anticipated Slater would testify about an alleged threatening gesture Deputy Reekers had made in a confrontation with him in 1991. The court reserved ruling on this matter until trial. At trial, the court granted the motion and excluded Slater's testimony. The jury acquitted defendant on the assault charge and found him guilty of interference with official acts resulting in bodily injury.

On appeal, defendant argues the court erred in granting the State's motion in limine and excluding Slater's testimony. Defendant contends the testimony would have directly affected the issues of self defense, his state of mind, and Deputy Reekers' credibility. Defendant also argues there was insufficient evidence to support

his conviction. He contends the State failed to prove he knowingly resisted or obstructed the deputies from serving civil process and that he inflicted bodily injury on a deputy.

In response, the State argues defendant has not preserved error with respect to the trial court's exclusion of Slater's testimony. The State contends defendant never made an offer of proof regarding the substance of the testimony Slater would have given if allowed to testify. Even if the court reaches the merits of defendant's argument, the State contends the testimony was properly excluded and defendant has not established any prejudice from its exclusion.

I. Testimony of Alan Slater. Defendant argues the district court abused its discretion in excluding Slater's testimony as irrelevant. The defense asserts Slater's testimony should be admitted under Iowa Rules of Evidence 405(b) and 404(b)(2). No offer of proof was made at trial. The only indication as to what the content of Slater's testimony would have been is contained within the State's memorandum brief submitted at trial. This information is not part of the record for error preservation purposes. See *Tolnader v. Farmers' Nat'l Bank*, 452 N.W.2d 422, 424-25 (Iowa 1990); *State v. Higginbotham*, 351 N.W.2d 513, 516 (Iowa 1984) (memorandum brief not part of record for purposes of error preservation; error not preserved if matter only mentioned therein).

This court considers offers of proof so important that we require them to preserve error. We will not presume prejudice when the answer to

the question is not obvious and the proponent made no offer of proof. Nor will we consider error preserved without such an offer unless the whole record makes apparent what is sought to be proven.

State v. Lange, 531 N.W.2d 108, 114 (Iowa 1995).

The defense's failure to make an offer of proof has left us unable to address defendant's claimed error. *See id.* We find that as defendant has not adequately preserved error for our review with regard to this issue, we need not consider it further.

II. Sufficiency of the Evidence. When reviewing criminal convictions for sufficiency of the evidence, we review the evidence in a light most favorable to the State. *State v. McGrew*, 515 N.W.2d 36, 37 (Iowa 1994). A conviction is reversed only if there is no substantial evidence in the record supporting the verdict or the verdict is clearly against the weight of the evidence. *Id.* at 37-38.

Substantial evidence is evidence which could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. *Id.* at 38. A fair inference of guilt with respect to each element of the crime charged is sufficient to uphold a verdict. *Id.* We consider all of the evidence, not merely that supportive of the conviction, in determining the sufficiency of the evidence to support a guilty verdict. *State v. Robinson*, 288 N.W.2d 337, 340 (Iowa 1980).

Defendant contends there was insufficient evidence to support his conviction of interference with official acts resulting in bodily injury in violation of Iowa Code

section 719.1(1). The jury was instructed, in part, that to convict defendant of this offense the following findings must be made:

1. On or about the 22nd day of July, 1994, the defendant knew Clark Reekers was a peace officer who was attempting to serve or execute civil process within his lawful duty or authority;
2. The defendant knowingly resisted or obstructed Clark Reekers in serving civil process;
3. The defendant inflicted a bodily injury.¹

The jury was also instructed "resist" is defined as "to oppose intentionally, interfere or withstand." "Obstruct" was defined for the jury as "to hinder intentionally, retard or delay."

Defendant argues there is no substantial evidence in the record which could support a finding under the second and third elements of the offense set forth above. Specifically, he maintains the altercation which took place occurred after he received service and as the levying process began.

The record reveals defendant was irritated and upset with the deputies' arrival. He was disrespectful and verbally abusive to the officers when they entered the establishment.² He referred to the deputies as "Gestapo" and stated, "This is a bunch of crap," and "This is a bunch of bull shit," repeatedly.

¹ We note defendant did not object to this instruction on any basis other than contending there was insufficient evidence of interference with official acts to submit the instruction to the jury.

² We note verbal abuse alone does not constitute "resistance" or "obstruction" unless accompanied by the "present ability and apparent intention to execute a verbal threat physically." Iowa Code § 719 3.

Defendant grew increasingly upset after the deputies indicated they would take the cash register with them if he did not cooperate in opening the drawer. He had been leaning against a glass showcase while speaking with the deputies and then began to rise up toward them. At that point, Deputy Reekers informed defendant he was under arrest. Defendant then clenched his left fist. Deputy Dodds grabbed his left arm to restrain him, believing he intended to strike Deputy Reekers. At that time Deputy Reekers attempted to handcuff defendant. Defendant resisted. He forced his fingers into Deputy Reekers' mouth and pushed him back. The two men then fell into the glass showcase, shattering it. The evidence reflects that a large red mark was left on Deputy Reekers' chin after the incident. He also suffered minor bruises and cuts.

Throughout the incident, Deputy Dodds was instructing defendant to calm down. He asked defendant on three occasions to comply. Each time, defendant declined. After Deputy Dodds' third plea to defendant, he turned to Deputy Reekers and asked, "What do we do now?" Deputy Reekers replied that the cash register would have to be taken. Defendant stated, "No, you're not. You're not taking that."

We have considered all of defendant's arguments challenging the sufficiency of the evidence and find there was substantial evidence which could convince a rational trier of fact defendant was guilty of the crime charged beyond a reasonable doubt. The jury is free to believe or disbelieve any part or all of a witness's testimony and is in the best position to judge whom and what to believe. See *State v. Knox*, 536

N.W.2d 735, 742 (Iowa 1995), *State v. Frake*, 450 N.W.2d 817 (Iowa 1990). We find the jury could have reasonably concluded from substantial evidence within the record that the defendant “resisted or obstructed” the deputies in serving civil process.

AFFIRMED.