IN THE COURT OF APPEALS OF IOWA

No. 0-442 / 89-1608

FILED
NOV 29 1990
CLERK SUPREME COURT

386

STATE OF IOWA,

Appellee,

vs.

JOSEPH W. HONEY,

Appellant.

Appeal from the Iowa District Court for Dubuque County, George L. Stigler, Judge.

Defendant appeals his conviction of terrorism and carrying a concealed weapon. **AFFIRMED.**

Douglas C. Scovil of Ruud, Scovil & Neppl, Rock Island, Illinois, for appellant.

Thomas J. Miller, Attorney General; Julie A. Halligan, Assistant Attorney General; Fred H. McCaw, County Attorney; and Ralph P. Potter, Assistant County Attorney, for appellee.

Heard by Schlegel, P.J., and Hayden and Habhab, JJ.

HABHAB, J.

Joseph Honey was convicted of terrorism and carrying a concealed weapon. He appeals from this conviction claiming the evidence to support the terrorism charge was insufficient and, in addition, raises several challenges to the marshaling instruction. In the alternative, he argues that the terrorism statute is unconstitutionally vague. We affirm.

I.

Our standard of review is well settled. A verdict will be upheld where there is substantial evidence to support the charge. State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984). Substantial evidence means such evidence as could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. Id.

When we view the evidence, we do so in the light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the record. State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984). In addition, we consider all the evidence at trial, not just the evidence that supports the verdict. State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980). A jury verdict of guilty is binding upon this court unless there is no substantial evidence in the record to support it, or such finding is clearly against the weight of the evidence. State v. Overstreet, 243 N.W.2d 880, 884 (Iowa 1976).

With the foregoing standard of review in mind, a reasonable finder of fact could have found as follows: On May 3, 1988, at approximately 5:40 a.m., Susan Thone was driving with her sister, Jane Thone, to work. As they drove by defendant's home, they saw him striking his wife out on the front lawn. Defendant was beating her with his fists. As Susan slowly approached, she sounded her car horn hoping the defendant would stop. She pulled her car within twelve to fifteen feet of the defendant. At this point, the defendant "picked up a gun, lowered it and fired [it]" at Susan, who was still in the car with her sister. Susan saw the gun and saw the flash of the gun and heard a "pop sound" when the defendant fired the gun. When this occurred, Susan was "startled" and "scared" of being "shot at again." Susan testified she feared serious injury.

There is testimony from which the jury could find that the defendant pointed the gun "right at the car." Jane testified she was scared and she wanted to get out of there and try to get help. She further testified, "I thought we got shot at for trying to help somebody." In addition, there is testimony from Mark Lieb, who was riding his bicycle to work that morning, that the defendant "came up with a gun and shot at the . . . car." It appeared to Mr. Lieb that the defendant was aiming the gun at the Thone vehicle and the barrel was pointed toward the car. He heard the shot being fired.

II.

The statute in question, section 708.6, provides in pertinent part:

> A person commits a class "D" felony when the person, with the intent to injure or provoke fear or anger in another, shoots . . . or discharges a dangerous weapon at, into, or in a . . . vehicle . . . occupied by another person . . . and thereby places the occupants or people in reasonable apprehension of serious injury . . . .

The defendant contends "that when all of the evidence in this record is reviewed, it is clear that the defendant did not intend to injure anyone, nor did the 'victims' experience any apprehension of serious injury." We disagree.

In State v. White, 319 N.W.2d 213, 215 (Iowa 1982), defendant was charged with the offense of terrorism in going armed with intent. Our supreme court in that case held:

> In the present case, we find the state of mind of both the actor and the victim is made an element of terrorism under subsection (1). The actor must intend to injure or to provoke fear or anger in another. In addition, the victim--here the occupant of the car--must experience "apprehension of serious injury." Furthermore, this apprehension must be reasonable under the circumstances. In other words, an unjustified apprehension, one for which a jury might find no basis in fact, will not suffice.

We find there was ample evidence from which the jury reasonably could find that the defendant had the intent to injure or provoke fear or anger in the Thone sisters. We also find there is sufficient evidence from which the jury could find that the Thone sisters experienced apprehension

of serious injury and that this apprehension was reasonable under the circumstances. We affirm on this issue.

III.

Before discussing the issue raised under this division, we note by way of background that this case was first tried to a jury during the month of March 1989. The jury at that time returned a verdict of guilty of the crime of terrorism and the crime of carrying a concealed weapon. Those verdicts were set aside and a new trial ordered because during the course of deliberation the male court attendant on his own gave the jurors, after they requested a definition of the word "at," a handwritten note defining the word "at" as from a dictionary.

This is the second trial. To avoid the problems experienced in the first trial, the trial judge here, as a part of his instructions, defined the word "at." The defendant contends the court erred when it instructed the jury as to the meaning of the word in question for the word itself is a common, nontechnical, nonlegal word and, as such, it need not be defined or explained to the jury.

We agree that where a term is in common usage and such as can be understood by a person of ordinary intelligence, it is usually not necessary for the court to define or explain its meaning. State v. Mentzer, 230 Iowa 804, 806, 298 N.W. 893, 894 (1941). Thus the court could have declined to define the word in question. Id.

However, we disagree with the defendant's contention that it is error to define in the instructions words of common usage. That argument does not represent the law of this state. Mentzer and a number of cases since its filing have permitted, even though it is not required, the defining of words of common usage in instructions. Id., 230 Iowa at 806, 298 N.W. at 894; State v. Wallace, 145 N.W.2d 615 (Iowa 1966); see Henneman v. McCalla, 148 N.W.2d 447, 457 (Iowa 1967), where the court held "it (the word the court had before it was 'impossible') is a word of common and generally-accepted meaning which permits, but does not compel, a definition when used in the giving of instructions to a jury."

The question we focus on is whether the definitional instruction was correct. In this respect, the jury was instructed that to find the defendant guilty of terrorism, they must find that "on or about the 3rd day of May, 1988, the defendant shot or discharged a dangerous weapon at a vehicle." (Emphasis added). The trial court defined the word "at" as follows: "you are instructed that the word "at" as used in Instr. No. 14, element no. 1 is defined as toward or near, or near to or in the vicinity of or in the proximity of, close to, by or near."

Others might have chosen to define the word "at" in a different manner. However, in the context of this case, we are unable to find error or prejudice in the giving of the instruction.

The court in Henneman v. McCalla, 148 N.W.2d 447, 456 (Iowa 1967), cited with approval the following statement taken from Law v. Bryant Asph. Co., 175 Iowa 747, 753, 157 N.W. 175, 178, 7 A.L.R. 1189 (1916):

> It is probably true that no instruction or charge to a jury has ever been drawn with such perfect clearness and precision that an ingenious lawyer in the seclusion and quiet of his office with a dictionary at his elbow cannot extract therefrom some legal heresy of more or less startling character. The real test of the meaning and effect of an instruction for the purpose of review by an appellate court ought to be, and we think is, the idea which the language objected to is fairly calculated to convey to the minds of jurors drawn from the ordinary walks of life; and the fact that, upon a minute technical or hypercritical analysis some other interpretation can be placed thereon, may be disregarded.

The court in Henneman also cited with approval the following from In re Will of Smith, 245 Iowa 38, 40, 60 N.W.2d 866, 867 (1953), relative to jury instructions:

> We are not concerned with the niceties of the English language, but only with whether the jury properly understood the terminology used by the court.

148 N.W.2d at 457.

We are unable to find that the word as used in the instructions misled the jury to the prejudice of this defendant. We find no basis upon which to conclude the jury was swayed, misled, or reached a decision by reason of any misconception of the meaning of the word "at." Accordingly, we affirm on this issue.

IV.

Finally, the defendant complains that the Iowa terrorism statute is void for vagueness under the due

process clause. We have set forth under Division I the statute in question.

The unconstitutional vagueness of a criminal statute must be demonstrated beyond a reasonable doubt. State v. Duncan, 414 N.W.2d 91, 95 (Iowa 1987). Further, "a statute is not unconstitutionally vague if the meaning of the words can be fairly ascertained by reference to similar statutes, other judicial determinations, the common law, the dictionary, or the common and generally accepted meaning of the words themselves." State v. McKee, 392 N.W.2d 493, 494 (Iowa 1986). In view of the above, defendants challenge to the statute must fail. The terrorism statute gives a person of fair intelligence notice of what is prohibited. Further, notwithstanding the court's definition of the word "at," the word itself is not vague because its meaning can be ascertained by the generally accepted usage of the word. We find the statute withstands constitutional scrutiny.

We also find that the trial court was correct in submitting the instructions it submitted to the jury and find no error.

AFFIRMED.