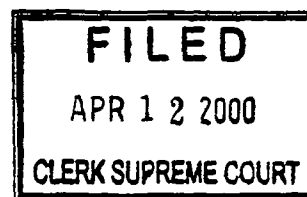


IN THE COURT OF APPEALS OF IOWA

No. 0-027 / 99-0370
Filed April 12, 2000



STATE OF IOWA,
Plaintiff-Appellee,

vs.

THOMAS WILLARD SMITH,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, D.J. Stovall, Judge.

On appeal from his convictions for attempt to commit murder and robbery in the first degree, defendant contends the court erred in failing to grant his motion for judgment of acquittal based on the insufficiency of the evidence.

AFFIRMED.

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

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney
General, John P. Sarcone, County Attorney, and Nan Horvat, Assistant County
Attorney, for appellee.

Considered by Huitink, P.J., Streit and Miller, JJ.

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MILLER, J.

Defendant Thomas Smith appeals his convictions following jury trial for attempt to commit murder and robbery in the first degree. He contends the trial court erred in denying his motion for judgment of acquittal. Smith was also convicted of going armed with intent and possession of a firearm by a felon, arising out of the same series of events, but those convictions are not at issue on appeal. We affirm.

Our review is for errors of law. Iowa R. App. P. 4. Denial of a motion for judgment of acquittal is reviewed on a "substantial evidence" standard. *State v. Talbett*, 590 N.W.2d 732, 733 (Iowa App. 1999). The evidence is viewed in a light most favorable to the State. *Id.* The reviewing court must consider all of the evidence and not just the evidence which supports the verdict. *Id.* Substantial evidence is "such evidence as could convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt." *Id.* (quoting *State v. Robinson*, 288 N.W.2d 337, 339 (Iowa 1980)).

By application of the above standard, we are satisfied the record fairly reveals the following facts. At about 3:45 a.m. on June 25, 1998, the defendant and another male attempted to steal a "Wave Runner," located outside a house in Urbandale by hooking its trailer to a van and pulling it away. The owner of the watercraft was awakened by vehicle noises outside her home, noticed the attempted theft, and called the police. She told the police what was happening, told them two men were involved and described the vehicle the thieves were using.

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The thieves abandoned the theft when a wheel of the watercraft's trailer became caught on a pole. They disconnected the trailer and started to leave in the van they were driving. By then the owner had been speaking to the police dispatcher for some time and was still doing so. Officer Simpson had been nearby and had been dispatched to the scene. The owner of the watercraft was able to keep the van in sight until Urbandale police arrived.

Just before he arrived at the owner's residence, Simpson observed the suspects' van. A high speed chase ensued, with speeds at times exceeding one hundred miles per hour. The driver of the van, Smith, decided to abandon the van without bringing it to a full stop. Simpson then chased Smith on foot, ordering him to stop. Smith instead turned toward Simpson and aimed a .38 caliber revolver at him. Simpson dove to the ground and Smith twice fired the revolver, loaded with hollow-point bullets, a particularly lethal type of bullet.

Simpson was only six to eight feet from Smith when Smith fired. Simpson was unable to see what direction Smith fired. After Simpson dove to the ground, Smith ran again and dove over a fence. Simpson got up and ran to the fence. Smith was standing in the grass between the sidewalk and the curb. Simpson pointed his gun at Smith and told Smith to drop his gun or Simpson would shoot. Smith did not drop his gun immediately, but did so when he observed another officer running down the sidewalk toward him.

Smith was arrested. The revolver he had shot still had four live rounds in it, in addition to the two spent rounds that he had fired.

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Smith's first contention is the trial court erred in granting his motion for judgment of acquittal¹ on the charge of attempt to commit murder. He asserts in his brief that the evidence "does not create anything more than speculation, suspicion or conjecture." In his motion for "directed verdict" at the close of the State's case Smith claimed the evidence was insufficient to submit the charge of attempt to commit murder because "there is no evidence by any witness that at the time the pistol was fired—at the time the revolver was actually shot, that it was pointed at the officer. And I think to submit it to the jury would allow them to wrongfully infer that there was an intent in this case when in fact there's no physical evidence to support where that gun was actually pointed when it was fired." This claim goes to the third element in the marshalling instruction on attempt to commit murder, whether Smith "specifically intended to cause the death of Officer Don Simpson."

In order to prove Smith guilty of the crime of attempt to commit murder, the State was required to prove, beyond a reasonable doubt, that Smith, with the intent to cause the death of Officer Simpson, did an act by which he expected to set in motion a force or chain of events which would cause or result in the death of Officer Simpson. Iowa Code § 707.11 (1997).

Intent, being a mental condition, must ordinarily be inferred from external circumstances. *State v. Clarke*, 475 N.W.2d 193, 197 (Iowa 1991). The State appears to correctly acknowledge that the only evidence of intent in this record is circumstantial. It is well established, however, that "direct and circumstantial

¹ At trial he moved for a "directed verdict." It appears the trial court and the prosecutor treated the motion as a motion for judgment of acquittal. We will also.

evidence are equally probative." Iowa R. App. P. 14(f)(16). The Iowa Supreme Court has often stated that circumstantial evidence may be considered by the jury in determining whether a motive to kill may be inferred. See, e.g., *id.*; *State v. Freie*, 335 N.W.2d 169, 172 (Iowa 1983). Circumstantial evidence is particularly valuable when proving a mental state like intent which is seldom susceptible to proof by direct evidence. *Clarke*, 475 N.W.2d at 197. Use of such circumstantial evidence is limited only by the rule that, like direct evidence, it must "raise a fair inference of guilt; it must do more than create speculation, suspicion, or conjecture." *Id.* (quoting *State v. Blair*, 347 N.W.2d 416, 421 (Iowa 1984)).

Whether Smith fired the shots in an attempt to kill Simpson, or was only trying to scare him off, are questions best left for the jury to decide. See *Clarke*, 475 N.W.2d at 197. Although there was no direct evidence that Smith was aiming the revolver at Simpson when he fired, there was considerable circumstantial evidence from which the jury could find he was attempting to do so. The desperation and intensity of Smith's attempt to elude and escape Simpson's pursuit is obvious from the record. Smith embarked on a dangerous, high speed chase through a metropolitan area, abandoned his vehicle before it came to a stop, and ran on foot despite Simpson's order to stop. Further, instead of firing his revolver while still running from Simpson, Smith stopped and turned toward Officer Simpson before firing. Smith had the revolver aimed at Simpson immediately before he fired. In a statement to police, Smith claimed he fired the gun between his feet. Despite the use of metal detectors, the police were unable to find any bullets at that location. The type of bullets fired, hollow-point bullets,

is circumstantial evidence of an intent to shoot someone, if necessary, rather than just shoot. Finally, the jury could find that even when Simpson was aiming his weapon at Smith and telling him to drop his weapon, Smith was still considering using his revolver against Simpson until he became aware another police officer was rapidly approaching. Thus, a reasonable jury could find Smith shot the revolver intending to kill Simpson, and not merely trying to scare him off. The evidence was sufficient to submit the charge of attempt to commit murder to the jury.

Smith's second contention on appeal is the trial court erred in not granting his motion for a judgment of acquittal on the charge of robbery in the first degree. He asserts in his brief that "evidence on the specific intent element of Robbery is lacking." In his motion for a "directed verdict" at the close of the State's case, Smith claimed that the evidence was insufficient to submit the charge of robbery because "the plain language of [Section 711.1] as well as the cases interpreting that language require a specific intent to commit a theft at the time either of the escape or of the assault. And I think the evidence is undisputed in this case that that intent to steal something was in fact abandoned."

In order to convict Smith of robbery in the first degree, the State had to prove that Thomas had the specific intent to commit a theft. Iowa Code § 711.1 (1997). The characteristic that distinguishes robbery from theft is the force or intimidation employed to accomplish or attempt the theft. See 4 John L. Yeager & Ronald L. Carlson, *Iowa Practice: Criminal Law & Procedure* § 252, at 68 (1979) (robbery is "primarily concerned with the use of violence or the threat of violence as a means of accomplishing a theft"). At common law, robbery only

existed if fear or force was used before or concurrently with the taking. *State v. Lewis*, 173 Iowa 643, 647, 154 N.W. 432, 433 (1915) (an assault to assist an escape or retain property is not a robbery). In 1976, the Iowa legislature enacted a new criminal code that expanded the time frame in which the required assault or threat may occur to include the period of escape. Kermit L. Dunahoo, *The New Iowa Criminal Code*, 29 Drake L. Rev. 237, 394 (1979); see 1976 Iowa Acts ch. 1245, §§ 1101-04 (codified at Iowa Code § 711.1 (1997)); see also *State v. Grice*, 515 N.W.2d 20, 22 (Iowa 1994) (statutory definition of robbery is much less restrictive than the common law definition of robbery).

Iowa Code section 711.1 sets out this expanded definition of robbery:

A person commits a robbery when, having the intent to commit a theft, the person does any of the following acts *to assist or further* the commission of the intended theft or *the person's escape from the scene thereof* with or without the stolen property:

1. Commits an assault upon another....

Iowa Code § 711.1 (1997) (emphasis added).

The Iowa Supreme Court held in interpreting section 711.1 in *State v. Terry*, 544 N.W.2d 449 (Iowa 1996),

any assault which helps a defendant get away falls within the terms of the statute. There is nothing in the common meaning of the words used by the legislature that would support the imposition of rigid time or geographical limitations on when a defendant is still in the process of escaping. . . . The focus of the statute is not on the state of mind of the pursuer, but on the situation of the thief: Did the assault assist or further the thief's escape from the crime scene?

Terry, 544 N.W.2d at 452.

By application of the *Terry* standard, we are satisfied there was sufficient evidence to submit the charge of robbery in the first degree to the jury. The

police pursuit began immediately after Smith abandoned the theft, just as he was leaving the scene of the attempted theft, and was continuous up to and beyond the point when the assault upon Simpson occurred. Contrary to Smith's contention, the plain language of section 711.1 and the cases interpreting that language do not require a specific intent to commit a theft at the time either of the escape or of the assault. Rather, section 711.1 only requires that the assault occur during the escape from either a theft or attempted theft. Whether the defendant still had the specific intent to commit theft at the time of the assault is irrelevant. The evidence was sufficient to submit the charge of robbery in the first degree to the jury.

AFFIRMED.

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