IN THE COURT OF APPEALS OF IOWA

No. 5-448 / 94-1994

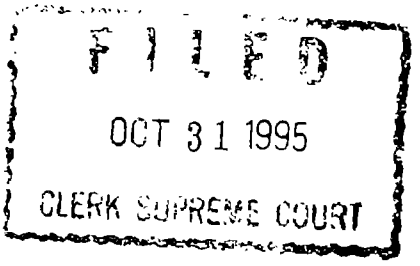
CITY OF COUNCIL BLUFFS,

Appellee,

vs.

DANIEL E. CURNYN,

Appellant.



Appeal from the Iowa District Court for Pottawattamie County, Edwin Weiss, Magistrate, Ordinance violation, and Charles L. Smith III, District Judge.

Daniel E. Curnyn was granted discretionary review of the district court's affirmance of judgment and sentences imposed upon his conviction of two counts of simple assault, in violation of Council Bluffs ordinance 8.22.010. **AFFIRMED.**

Daniel E. Curnyn, Council Bluffs, pro se appellant.

Darrin T. Hamilton, Assistant City Attorney, Council Bluffs, for appellee.

Considered by Donielson, C.J., and Hayden and Cady, JJ.

CADY, J.

Daniel Curnyn appeals his convictions of two counts of simple assault in violation of Council Bluffs ordinance 8.22.010. Upon our discretionary review, we affirm.

In June 1994, two Council Bluffs police officers, Officer Sellers and Officer Galvan, investigated a complaint of dirt clods being thrown at two minor girls, causing visible injury. They received information indicating Daniel Curnyn's two sons had thrown the clods. As the officers approached Curnyn's back yard, Curnyn shouted obscenities and told them to leave. The officers, upon the belief Curnyn was committing disorderly conduct, opened the gate to the back yard. Curnyn then opened the door to his dog kennel, allowing his two dogs to charge the officers. Both officers feared the dogs were about to attack, and attempted to pepper mace the animals. Curnyn went into his residence and refused to come out. The officers consulted their supervisor, obtained a warrant, and arrested Curnyn alleging disorderly conduct and assault a few days later.

Prior to his trial, Curnyn moved to have a verbatim recording of the proceedings. The motion was granted and tape recording equipment was provided by the city. A lay magistrate presided over Curnyn's bench trial. Curnyn alleged law enforcement officers forcibly entered his fence enclosed yard with no right or privilege to do so, and he was within his rights to challenge their presence on his property. At the close of the City's argument, Curnyn moved for a motion for

acquittal which was denied by the magistrate.

Curnyn was found guilty of two counts of simple assault in violation of Council Bluffs city ordinance 8.22.010. The magistrate fined Curnyn $100 and sentenced him to thirty days in jail.

Curnyn appealed to the district court solely contending his motion was improperly denied and he was justified in his actions. He as well moved to present further evidence because, due to a malfunction with the recording equipment, a complete record was not available for review. The district court denied the motion, concluding the magistrates notes of the testimony and the partial transcript available provided a sufficient basis for review. The district court further concluded substantial evidence existed to support the convictions and Curnyn's actions of resisting arrest were not justified.

Curnyn was granted discretionary review. He now raises several issues on appeal for the first time. Curnyn now contends the Iowa Rules of Criminal Procedure which do not require a verbatim record of misdemeanor proceedings violates due process and equal protection, the use of non-attorneys as magistrates for misdemeanor proceedings violates due process, the arrest warrant omitted material facts and constituted perjury, the magistrate's did not state sufficient findings of facts and conclusions of law, and the magistrate did not state sufficient reasons for the sentence imposed. The City contends all of Curnyn's claims of error were not preserved for review. Curnyn as well contends insufficient evidence exists to support

a guilty verdict. Curnyn in his reply brief raises two new issues, claiming the magistrate incorrectly stated he was "under arrest" at the time of his alleged actions, and his trial counsel rendered ineffective assistance.

I. Preservation of Error

Curnyn raises several issues in his appellate brief which were never raised at either the trial court level or in his appeal to the district court. The City contends all of these claims are not timely raised for appeal, as error was not preserved. We first address the issue of whether any or all of these claims were adequately and timely raised in order to preserve error.

A. Verbatim Record of Misdemeanor Proceedings

Curnyn argues for the first time he is constitutionally entitled to a verbatim record of his trial for a simple misdemeanor, and further urges an abolition of the Iowa Rules of Criminal Procedure pertaining to records in simple misdemeanor proceedings. In his brief he does not address how this issue is preserved for appeal.

We recognize when a defendant is alleging error involving a constitutional right, such as here, we make an independent evaluation of the totality of the relevant circumstances to determine if such an error was made. *Rinehart v. State*, 234 N.W.2d 649, 658 (Iowa 1975); *State v. Jeffries*, 417 N.W.2d 237, 239 (Iowa App. 1987). However, the error must be properly preserved in order for the appellate court to adequately evaluate the circumstances. *See* Kermit L. Dunahoo & Tim A. Thomas,

Preservation of Error and Making the Record in the Iowa Criminal Trial and Appellate Process, 36 Drake L. Rev. 45, 48 (1986-87).

We find Curnyn's claim of a constitutional violation was not timely preserved for appeal. Generally issues not raised in the trial court may not be raised for the first time on appeal. *State v. Taylor*, 366 N.W.2d 721, 726 (Iowa 1983). The requirement of preservation of error at the trial court stage grants "the trial court the opportunity to correct the alleged error and adds symmetry to the appellate process." *State v. Thomas*, 520 N.W.2d 311, 313 (Iowa App. 1994). Curnyn neither raised this issue at the trial court level, nor when he later discovered the tape recorder had malfunctioned. He merely requested to present additional evidence before the district court, which may be allowed at the discretion of the district court. *See* Iowa R. Crim. P. 54(2). He did not claim he was constitutionally entitled to a trial record. We find this issue was not raised at the proper time and is not preserved.

B. Non-Attorney Adjudicators

Curnyn similarly raises for the first time on appeal his due process rights and equal protection rights were violated by having a non-attorney adjudicate his misdemeanor proceedings, even though it is authorized by Iowa Code section 602.6404 (1993). He claims it would have been futile to raise the issue prior to this appeal, as his claim runs contrary to the Iowa Code.

Even though Curnyn's argument runs counter to existing Iowa statutory law, error must be preserved in a timely manner. As Curnyn failed to raise this issue at

either the trial court level or on appeal to the district court, we find error was not preserved.

C. Affidavit of Officer Sellers

Curnyn further raises for the first time on appeal his claim that Officer Sellers filed a perjured affidavit as it omitted material facts in order to justify his entry upon Curnyn's property. As with his other claims, Curnyn never raised this claim at the trial court level or on appeal to the district court.

Curnyn further alleges he need not preserve this issue as an appellate court may consider questions raised for the first time on appeal if necessary to prevent the denial of fundamental rights. Curnyn provides no argument nor cites any authority to support his claim that an appellate court need not examine whether error was preserved for appeal when necessary to prevent the denial of fundamental rights. Iowa Rules of Appellate Procedure provide "failure to argue or cite authority in support of an issue may be deemed a waiver of that issue." Iowa R. App. P. 14(a)(3); *Luke v. State*, 465 N.W.2d 898, 903 (Iowa App. 1990). As Curnyn has not adequately complied with the proper appellate procedure concerning his claim for preservation of error, we find he has waived his opportunity to argue error need not be preserved when necessary to prevent a denial of fundamental rights.

D. Sufficient Findings of Fact

Curnyn alleges for the first time on appeal the trial court did not state sufficient findings of fact and conclusions of law necessary under Rule 16(2) of the Iowa Rules

of Criminal Procedure. He claims he preserved error by his requirement to ask the trial court to file a statement of facts prior to the court's sentencing Curnyn. He argues however, that prior to his request the trial court only entered his conviction on the docket sheet. The City claims Curnyn waived this issue as he never made any request to the magistrate to file a statement of facts and conclusions of law.

Upon review of the record we find Curnyn made no request to the trial court to file a statement of facts and conclusions of law prior to sentencing. Again, issues not raised at the trial court generally cannot be raised on appeal. *State v. Thomas*, 520 N.W.2d at 313. Moreover, Curnyn never raised this issue on appeal to the district court. We find Curnyn failed to preserve error on his claim of insufficient findings of fact and conclusions of law.

E. Sufficient Reasons for Sentences Imposed

Curnyn further claims the trial court insufficiently stated reasons for the sentences imposed as required by Rule 23(3)(d) of the Iowa Rules of Criminal Procedure. He claims he has preserved error on this claim in his appeal brief to the district court. The City contends Curnyn failed to preserve error on this issue as the issue was never listed in the table of contents of Curnyn's brief to the district court as a specific issue for review.

Rule 14(a)(3) of the Iowa Rules of Appellate Procedure requires a statement of the issues presented for review. Curnyn in his brief, under the "Disposition of Court" heading states "[n]o reasons justifying the sentence imposed was given, as is

required by Rule 22(3)(d) of the Iowa Rules of Criminal Procedure." This court has held raising points solely in a footnote in an appellate brief is insufficient to preserve error on the issue for appeal. *State v. Reddick*, 388 N.W.2d 201 (Iowa App. 1986). We find Curnyn's brief statement in his disposition of court section is insufficient to preserve error for appeal.

II. Sufficiency of the Evidence

Curnyn claims the trial court erred in overruling his motion for judgement of acquittal, as the City failed to meet its burden of proof as to all the elements of the crime charged. We find Curnyn preserved error on this issue by making a motion of acquittal at the close of the City's case in chief.

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); *State v. Hunt*, 512 N.W.2d 285, 288 (Iowa 1994). 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.* The evidence is viewed 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). 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).

We find substantial evidence exists to support a guilty verdict. The magistrate specifically found Curnyn released his dogs from the kennel which was meant to cause pain or injury to Officers Sellers and Galvan or meant to place them in fear of an immediate physical contact which would have been painful, injurious or offensive to the officers. The district court as well affirmed this issue, holding the "Magistrate Court's findings are supported by substantial evidence and were sufficient to support a finding of guilt beyond a reasonable doubt."

We agree with the trial and district court that substantial evidence supports a finding of guilt beyond a reasonable doubt. When the officers attempted to open Curnyn's gate, Curnyn opened the door to his dog kennel, releasing two dog which charged the officers. There was evidence the dogs were purposely released. Both officers testified they were fearful the dogs were about to attack, the attack would be painful and injurious, and the attack would be imminent.

We also agree with the magistrate that sufficient evidence existed to show Curnyn was not justified in his actions. Curnyn claimed he was within his rights to challenge the officers' presence on his property. Iowa Code Section 804.12 (1993) states "[a] person is not authorized to use force to resist an arrest . . . even if that person believes that the arrest is unlawful or the arrest is in fact unlawful." The officers' affidavits and testimony indicated they felt Curnyn's actions constituted disorderly conduct, in violation of a Council Bluffs ordinance. We find substantial evidence exists to convince a rational trier of fact Curnyn was not justified in resisting

the officers and to convince a trier of fact he is guilty of two counts of assault beyond a reasonable doubt.

III. Reply Brief

Curnyn raises two issues for the first time in his reply brief. He first claims the trial court erred in stating he was under arrest at the time of the attack. He as well claims his counsel rendered ineffective assistance to him at trial.

When a party first raises an argument for the first time in a trial brief, the issue is not preserved for appeal. *Young v. Gregg*, 480 N.W.2d 75, 78 (Iowa 1992); Iowa R. App. P. 14(a)(3); Kermit L. Dunahoo & Tim A. Thomas, *Preservation of Error and Making the Record in the Iowa Criminal Trial and Appellate Process*, 36 Drake L. Rev. at 89 (1986-87). As Curnyn raises these issues for the first time in his reply brief, we find he has waived this issue for appeal.

AFFIRMED.