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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	366
vs.	)	
LARRY STARR,	)	8-471 87-1312
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Linn County (No. 10192), Lynne E. Brady and William L. Thomas, Judges.

Defendant appeals from his conviction and sentence following a jury trial for terrorism. **AFFIRMED.**

Larry Leroy Starr, pro se.

Thomas J. Miller, Attorney General; Julie Ann Halligan, Assistant Attorney General; and Jerry Vander Sanden, Assistant Linn County Attorney, for plaintiff-appellee.

Considered by Oxberger, C.J., and Donielson and Schlegel, JJ.

DONIELSON, J. 367

Defendant appeals from his conviction and sentence, following his jury trial, for terrorism. He contends the verdict was not supported by substantial evidence. Defendant urges that he was denied due process when the trial court denied his motion for new trial based on newly-discovered evidence. Also, defendant claims he was denied a fair trial when the court failed to instruct on the lesser-included offense and that this failure was due to ineffective assistance of counsel.

I. The defendant claims he was denied due process of law when the trial court overruled his motion for judgment of acquittal. He contends there was insufficient evidence for a guilty verdict because the State failed to prove even the first element of terrorism.

On appeal, this court will view the evidence in the light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the evidence in the record. State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984). A jury verdict 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). Substantial evidence is evidence which would convince a rational trier of act that the defendant is guilty of the crime charged beyond a

reasonable doubt. State v. Schertz, 328 N.W.2d 320, 321 (Iowa 1982). Direct and circumstantial evidence are equally probative so long as the evidence raises "a fair inference of guilt." State v. Hamilton, 309 N.W.2d 471, 479 (Iowa 1981).

In a criminal case, all the elements of the crime charged against the defendant must be proved by the government beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368, 375 (1970). The elements of terrorism as given in the jury instructions are the following:

> 1. That on or about the 3rd day of December, 1986, the defendant discharged a handgun at or into a vehicle which was occupied by Robin Starr.
>
> 2. That the handgun was a dangerous weapon.
>
> 3. That when the defendant discharged the handgun, it was with the intent to injure or provoke fear or anger in Robin Starr.
>
> 4. That Robin Starr actually experienced apprehension of serious injury and her apprehension was reasonable under the circumstances existing at that time.

See Iowa Code § 708.6 (1987).

With these principles in mind, the jury could have found the following. The marriage between the defendant, Larry Starr, and the victim, Robin, was dissolved on December 15, 1986. The couple had separated on June 11, 1986, and in July, Robin and her two children moved in with her mother, Virginia Willett.

That July, Robin received and tape-recorded a phone call from the defendant. The defendant was upset and wanted his children back. He spoke of "an Uzi" that would take care of Robin. He said it "bangs off fifty rounds in a second, baby--(inaudible)--your fucking head." A second threatening phone call was received and recorded in November. Defendant wanted the children for Thanksgiving. When Robin refused his request, he said, "I'll take this little thing and plug you right in the head."

The incident in question occurred on December 3, 1986. The jury could have found that Robin was alone in her car at a stop light in Cedar Rapids at approximately 5:00 p.m. As she waited at the light, the defendant, who was alone, pulled his car alongside of hers. Robin testified that defendant smiled at her and then reached over to the passenger side and pulled a gun out of a box and pointed it at her. Robin said that no gun was fired at that time and the windows were up in both cars.

Robin testified that she was scared so she pulled her car forward. When the light changed, she turned right and defendant followed her. As Robin drove towards the police station, the defendant stayed behind her, but accelerated towards her three or four times without ever hitting her car.

As Robin was driving eastbound on E Avenue Northwest, the defendant again pulled alongside her in the left lane.

She did not look at him, but she heard a pop and something hit her car. This frightened Robin because she thought defendant had fired at her. She looked at the defendant and his window was now down and he was leaned over in the car.

Robin continued to drive to the police station where she gave a statement. The police officer testified that Robin was very upset, nervous, and scared. The officer inspected the car and found a dent, but no bullet holes. The dent was not there previously.

According to Ms. Willett, at approximately 5:30 or 5:45 that day, defendant arrived at Ms. Willett's home to pick up the children for a visit. He was driving his own car and had his brother with him.

When the children returned home that evening, they had a Styrofoam gun box with them. The daughter testified that her dad had shown her his gun that evening and gave them the box. The girl further testified that about a month before she saw her father purchase a black gun in the Styrofoam box. She also saw the gun at defendant's brother's house on the evening of the incident.

After the incident, according to Robin, defendant called the victim at work. He admitted having the gun, but denied firing it, saying he had thrown a pop bottle at her car.

At trial, defendant denied having a gun and said he did not shoot Robin that day. Defendant said he was at his brother's from 3:00 p.m. on. However, this testimony was in conflict with defendant's brother, who said Larry arrived at 3:45 p.m. It is the job of the jury to resolve issues of credibility and to determine which testimony to believe. State v. Steffey, 234 N.W.2d 92, 96 (Iowa 1975).

The jury was presented with substantial evidence to prove each element of terrorism. There is sufficient evidence to support the guilty verdict. Therefore, defendant has not been denied due process of law.

II. Defendant contends he was denied due process of law as guaranteed by the fourteenth amendment when the trial court denied his motion for a new trial based upon newly-discovered evidence. We agree with the State that his claim is without merit.

In order to prevail on a motion for a new trial based on newly-discovered evidence, defendant must show: (1) that the evidence was discovered earlier in the exercise of due diligence; (2) that it could not have been discovered earlier in the exercise of due diligence; (3) that the evidence is material and not merely cumulative or impeaching; and (4) that the evidence probably would have changed the result of the trial. State v. Allen, 348 N.W.2d 243, 246 (Iowa 1984). The defendant fails to satisfy his burden.

The defendant contends that the newly-discovered evidence comes in the form of recanted testimony by the alleged victim. He alleges that during the hearing to determine whether terrorism is a forcible felony, the victim voluntarily changed her testimony and said in essence that she did not know if defendant actually shot at her because if he had, she thought the noise would have been louder and there would have been a bullet hole.

Reviewing the testimony in question, we find that the trial court did not err by denying the request for the new trial based on the alleged recantation by the victim. It cannot be said that Robin's later testimony "probably would have changed the result" because much of the later testimony is similar to the first. Through cross-examination at the trial, Robin said: she did not know for sure if a gun was fired in her direction; that she heard a "pop"; she did not know what kind of gun it was; and because she was not looking, she did not know whether defendant threw something at her instead.

Robin never testified that she knew a gun was fired. Both times, she testified as to her observations and made similar remarks. The trial court did not abuse its broad discretion by denying the motion for new trial based on Robin's subsequent testimony. State v. Jackson, 223 N.W.2d 229, 233 (Iowa 1974).

III. Defendant complains he was denied a fair trial when the trial court failed to instruct the jury on assault as a lesser-included offense. The State maintains that defendant failed to preserve error on this issue.

Timely objection to jury instructions in criminal prosecutions is necessary in order to preserve error for appellate review. State v. Burkett, 357 N.W.2d 632, 634-35 (Iowa 1984). Defendant failed to object and in fact, stated he had no objection to the proposed instructions after the court and counsel engaged in a thorough review of them. Therefore, this issue has not been preserved by defendant.

Defendant asserts that the failure to preserve error can be attributed to ineffective assistance of counsel. We prefer to reserve the question of ineffective assistance of counsel for postconviction proceedings when counsel can defend against the charge. We, therefore, decline to consider whether defendant's counsel was ineffective. His right to raise that issue by postconviction proceedings is reserved. State v. Williams, 285 N.W.2d 248, 271 (Iowa 1979); State v. Poyner, 306 N.W.2d 716, 719 (Iowa 1981). The record is insufficient at this point to review counsel's conduct.

AFFIRMED.