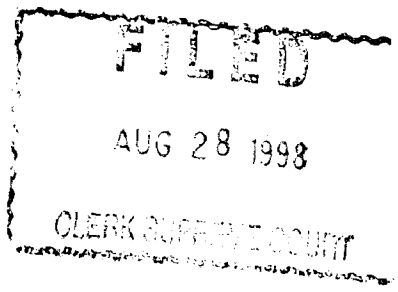
IN THE COURT OF APPEALS OF IOWA

No. 8-352 / 97-1476
Filed August 28, 1998



STATE OF IOWA,
Appellee,

vs.

MONTRELL DESHAWN ANDERSON,
Appellant.

Appeal from the Iowa District Court for Black Hawk County, K.D. Briner, Judge.

Montrell Anderson appeals from his conviction following a jury trial, for terrorism in violation of Iowa Code section 708.6 (1997). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and John P. Messina, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and D. Raymond Walton, Assistant County Attorney, for appellee.

Considered by Sackett, P.J., and Huitink and Vogel, JJ.

HUITINK, J.

Montrell Anderson appeals from his conviction for terrorism in violation of Iowa Code section 708.6 (1997), following a jury trial. Anderson contends he was denied effective assistance of counsel.

I. Background Facts and Proceedings.

Montrell Anderson was involved in a fight outside an apartment building with Darian Campbell. Campbell's girlfriend, Sherrita Stokes, who lived in the building, and others gathered to watch the fight. Shortly after the fight had broken up, Anderson drove by the apartment building and fired three to four shots. A bullet was found in Stokes' apartment and several shots struck a garage in the rear of the building.

Anderson was charged and convicted for terrorism. The district court sentenced him to an indeterminate ten-year prison term.

Anderson appeals. He contends his trial counsel was ineffective for failing to adequately move for a judgment of acquittal and to object to the marshaling instruction on terrorism. Anderson argues the State failed to prove anyone was placed in "reasonable apprehension of serious injury" by the gun shots as required under Iowa Code section 708.6. In particular, he states Stokes was unaware a bullet had entered her apartment and Campbell did not even hear the shots. Anderson also argues the jury instruction, by requiring that one or more persons "on the property" experienced fear of serious injury, improperly broadened this element of the crime to

include persons who were not occupants of the building or within an assembly of people who would qualify as terrorism victims under the statute.

The State argues, among other things, that counsel did preserve error on these issues.

II. Ineffective Assistance of Trial Counsel.

Anderson claims he was denied effective representation of counsel. Established principles govern our review of appellant's Sixth Amendment claim his counsel was ineffective. When considering this claim, our ultimate concern is with "the fundamental fairness of the proceeding whose result is being challenged." *Strickland v. Washington*, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984). In deciding this we must consider whether "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686, 104 S. Ct. at 2064, 80 L. Ed. 2d at 692-93. "In examining counsel's conduct we review de novo the totality of relevant circumstances." *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987) (citations omitted). "Defendant bears the burden of proving by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted." *Id.* at 131-32.

In proving the first prong of this test, appellant must overcome the strong presumption counsel's actions were reasonable under the circumstances and fell within the normal range of professional competency. *State v. Hildebrant*, 405

N.W.2d 839, 841 (Iowa 1987). To prove the second prong of this test appellant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698 (1984). With these principles in mind we now turn to appellant's specific claims.

Anderson asserts two separate bases for his ineffective assistance of counsel claim. First, he contends he was denied his Sixth Amendment right when his trial counsel failed to preserve error on the sufficiency of the evidence challenge to the terrorism charge. Second, he contends he was denied effective assistance of counsel by his trial counsel's failure to preserve error on a challenge to the marshaling instruction given to the jury on the terrorism charge. We find both claims to be without merit.

We view trial counsel's performance in a light mindful of the presumption of competent representation and that a criminal defendant is not entitled to perfect representation, but only to that which is within the range of normal competency. *Cuevas v. State*, 415 N.W.2d 630, 632 (Iowa 1987).

We find trial counsel did adequately preserve error on the issues raised here by Anderson. First, Anderson's trial counsel did timely move for a directed verdict and judgment of acquittal based upon the sufficiency of the evidence presented regarding the terrorism charge. The district court specifically found that sufficient

evidence had been presented and denied the motion. Second, the record indicates Anderson's counsel objected to the marshaling instruction given to the jury as being overly broad. In fact, the record reveals Anderson's trial counsel argued the same grounds presented on appeal. After hearing arguments from both parties, the district court modified the proposed instruction, specifically taking into account the arguments made by Anderson's counsel.

Because we find Anderson's counsel adequately preserved the errors asserted here, Anderson has not overcome the presumption of competent representation, and likewise has not fulfilled his burden under the first prong of the *Strickland* test.

III. Sufficiency of the Evidence.

After finding that error was properly preserved on the sufficiency of the evidence claim, we review it separately here. Where a defendant challenges the sufficiency of the evidence supporting a jury verdict, our standard of review is that the verdict will be upheld if there is substantial evidence to support it. *State v. Convers,* 506 N.W.2d 442, 444 (Iowa 1993); *accord, State v. Barrett,* 445 N.W.2d 749, 753 (Iowa 1989). Evidence is "substantial" if it would have convinced a rational fact finder that the defendant is guilty of the crime charged beyond a reasonable doubt. *State v. Constable,* 505 N.W.2d 473 (Iowa 1993). When considering insufficiency of the evidence challenges, we examine the evidence in a light most favorable to the State. *State v. Robinson,* 288 N.W.2d 337, 340 (Iowa 1980). We consider all evidence presented at trial, not just the evidence supporting the verdict.

Id. All legitimate inferences and presumptions that can fairly and reasonably deduced from the evidence are resolved in favor of the State. *State v. Bass,* 349 N.W.2d 498, 500 (Iowa 1984).

Anderson contends on appeal the State failed to establish sufficient evidence that he discharged a dangerous weapon either: (1) at or into a building occupied by another person; or (2) within an assembly of people, and thereby placed the occupants or people in reasonable apprehension of serious injury. *See* Iowa Code § 708.6. Applying the appropriate standard of review and viewing the evidence presented to the jury in the light most favorable to the State, we find this contention to be without merit.

At trial, the State presented evidence which, if believed, would allow a rational juror to conclude that Anderson's act placed the occupants of the apartment house in reasonable apprehension of serious injury. The same analysis holds true with respect to the smattering of people assembled on the property at 205 Argyle Street.

Specifically, witness Kimberly Campbell testified there was a group of about six people were congregated in the parking lot of the apartment house at 205 Argyle Street when Anderson drove by in a vehicle, shooting in the direction of the building. She also testified the people in the parking lot appeared to be excited, nervous, and appeared to be running and taking cover from the gunfire.

Witness Carla Campbell testified that when she ran into the apartment house, she encountered Serrita Stokes and Darian Campbell, who appeared to be scared and requesting someone to call the police department concerning the shots fired.

Finally, Carla and Kimberly Campbell were passing Anderson's vehicle on the street as he discharged the handgun at the apartment building. Carla Campbell testified she was worried about getting injured or killed by a bullet form Anderson's weapon.

Based upon this testimony, a rational juror could conclude Anderson fired the handgun into the apartment complex or within an assembly of people. A rational juror could also conclude beyond a reasonable doubt that those persons in the building and/or those people assembled in the adjacent parking lot were placed in reasonable apprehension of serious injury. We find Anderson's conviction is supported by sufficient evidence.

IV. Jury Instructions.

Anderson contends the marshaling instruction given to the jury was overly broad and thus gave the jury too much room to find his conduct within that proscribed by Iowa Code section 708.6. The marshaling instruction given to the jury states, in pertinent part:

> 1. On or about the 30th day of March, 1997, the defendant discharged a firearm:
>
> a. At or into a building at 205 Argyle which was occupied by another person; or
>
> b. Within an assembly of people.

2. The Firearm was a dangerous weapon as defined in Instruction No.15.

3. One or more persons on the property at 205 Argyle actually experienced fear of serious injury, and that fear was reasonable under the existing circumstances.

Anderson asserts the "persons on the property at 205 Argyle" language contained in subpart (3) makes the instruction too broad. Although the challenge to the jury instruction on terrorism is shrouded in an ineffective assistance of counsel claim, we decide the issue on direct appeal, as we feel the issue was properly preserved by trial counsel. We review the challenge to the marshaling instruction for errors at law. Iowa R. App. P. 4.

Jury instructions are designed to explain the applicable law to the jurors so the law may be applied to the facts proven at trial. *State v. Freeman*, 267 N.W.2d 69, 71 (Iowa 1978). The instruction in this instance was not a misstatement of applicable law. The instruction took into account the two possible categories of persons Iowa Code section 708.6 was designed to protect: persons inside an occupied structure, and an assembly of people. *See State v. Leasman*, 137 Iowa 191, 114 N.W. 1032 (1908)(focusing on Iowa Code § 4810 (1897)[1], a statutory predecessor to Iowa Code § 708.6). "We think it is apparent from the language of the statute that the intention was not to punish an attempt to injure particular persons who might be upon a railroad train, or the particular railroad company owning or having possession of the train, but

[1] Iowa Code section 4810 provides: "If any person throw any stone or present or discharge any gun or other firearm, at any railroad train, car or locomotive engine, he shall be guilty of a misdemeanor."

rather the attempt to do an act which was calculated to imperil the safety of persons upon such train." *Leasman*, 137 Iowa at 93, 114 N.W. at 1033.

Anderson's claim may be better stated as challenging whether the group of about six people congregated in the parking lot immediately next to the apartment house constitutes an "assembly of people" within the meaning of Iowa Code section 708.6. Applying the analysis of *State v. Bush*, 518 N.W.2d 778 (Iowa 1994), we hold the group of people in the adjacent parking lot does constitute an "assembly of people" as contemplated in the statute. "Within an assembly of people" is defined as "into or through two or more persons at the same place." *Id.* at 780. The people gathered in the parking lot were standing directly next to the apartment house when Anderson fired the shots and they were also within the range of his hand gun. *See id.* We, therefore, conclude the group of six or more people in the adjacent parking lot constituted an assembly of people, and the marshaling instruction adequately informed the jury of the proper statement of the applicable law.

AFFIRMED.