IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

No. 1999-454 (9-711) / 98-1887
Filed February 23, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

STEVE BUTLER,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Jon Fister, Judge.

Steve Butler appeals from the judgment and sentence entered upon his conviction of terrorism in violation of Iowa Code section 708.6 (1997). **AFFIRMED.**

Jason P. Happel of Singer, Pasley, Holm, Timmons, Mathison & Curtis, L.L.P., Ames, for appellant.

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

Considered by Sackett, C.J., and Vogel and Hecht, JJ.

HECHT, J.

Steve Butler ("Butler") appeals from the judgment and sentence entered upon his conviction of terrorism in violation of Iowa Code section 708.6 (1997). We affirm.

I. Factual Background and Proceedings. On April 19, 1998, Steve Butler ("Butler"), Robert Lanier ("Lanier"), and Phillip Harris ("Harris") entered Lillian Lanier's apartment. Lillian is Lanier's mother and lives in the apartment with him and his two siblings. Butler, Lanier, and Harris came into the apartment together. Harris was holding a gun to Lanier's head. While Lillian sat at her kitchen table, Harris led Lanier into one of the back rooms of the apartment. Butler remained near the doorway of the apartment and did not go into the back with Harris and Lanier. While Harris and Lanier were in the back room, Harris fired two shots. After the first shot, Lillian approached Butler and asked him to go to the rear of the apartment and "see what was going on." Butler told her "everything would be all right," and that Harris "just wanted to scare" her son. After the second shot, Harris and Butler left the apartment together. Butler drove them away in his car.

Jury trial in this matter commenced on August 18, 1998. The jury found Butler guilty of terrorism. Butler appeals contending (1) the district court erred by not granting his motion for directed verdict; (2) the district court erred in overruling trial counsel's objections to several jury instructions; and (3) his trial counsel was ineffective in various respects.

II. Standard of Review. When reviewing motions for directed verdict, our review is for errors at law. *State v. Taggart,* 525 N.W.2d 877, 880 (Iowa App. 1994). In considering Butler's challenge to the sufficiency of the evidence, we

examine the record in the light most favorable to the State. *See State v. Crone*, 545 N.W.2d 267, 270 (Iowa 1996). We look for substantial evidence, including any inferences arising from the evidence, to support the verdict. *Id.* A verdict will be upheld where there is substantial evidence in the record tending to support the charge. *State v. Terry*, 544 N.W.2d 449, 451 (Iowa 1996). Substantial evidence means evidence that would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. *Id.*

Our review of alleged errors in jury instructions is for correction of errors at law. *State v. Rains*, 574 N.W.2d 904, 915 (Iowa 1998). This court's task is to determine whether the instructions that were given correctly state the law. *State v. Mesch*, 574 N.W.2d 10, 12 (1997).

We review claims of ineffective assistance of counsel de novo. *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996); *State v. Query*, 594 N.W.2d 438, 444 (Iowa App. 1999).

III. Motion for Directed Verdict. Butler maintains there was insufficient evidence to support his conviction for terrorism and the district court erred by not granting his motion for directed verdict. He argues the evidence presented at trial only proved he was present at the scene and knew the Lanier family. He also argues the State failed to prove the requisite intent to terrorize Lanier.

We disagree with Butler's assessment of the record. There is substantial circumstantial evidence of his aiding and abetting Harris, who clearly intended to terrorize Lanier by discharging a weapon. Butler drove Harris and Lanier to the scene of the crime. He entered the Lanier apartment with Harris who was holding a gun to Lanier's head. After shots were fired, Butler told Lillian everything was going

to be all right and Harris "just wanted to scare [Lanier]." Butler and Harris left the scene together and got in Butler's car. Butler drove them away. Although knowledge and proximity to the scene are not alone sufficient to establish aiding and abetting, those factors, in conjunction with others, such as companionship with other perpetrators and conduct before and after the offense is committed, can be enough from which to infer the defendant's participation in the crime. *State v. Lewis*, 514 N.W.2d 63, 66 (Iowa 1994). The jury could reasonably conclude from this evidence Butler knew of Harris's intent to scare Lanier. We conclude the district court did not err by denying the motion for directed verdict.

IV. Jury Instructions. When jury instructions are challenged on appeal, we review them to determine whether they correctly state the law and are supported by substantial evidence. *State v. Predka*, 555 N.W.2d 202, 204 (Iowa 1996). Evidence is substantial if it would convince a reasonable person of the facts sought to be proven. *Id.* Even if a jury instruction should not have been given, reversal is not required unless the error is prejudicial. *State v. Brown*, 589 N.W.2d 69, 75 (Iowa App. 1998). The court may phrase the instructions in its own words as long as the instructions given fully and fairly advise the jury of the issues it is to decide and the law which is applicable. *State v. Stallings*, 541 N.W.2d 855, 857 (Iowa 1995). When an instruction is challenged, it will be judged in context with other instructions relating to the criminal charge, not in isolation. *State v. Liggins*, 557 N.W.2d 263, 267 (Iowa 1996).

A. Use of "Defendants" and "Verdict" in Instructions. Butler argues the district court erred in overruling trial counsel's objection to the term "defendants" and the

term "verdict" when instructing the jury.[1] He contends the use of these words implies to the jury that its verdict should have been the same for both defendants. A review of the instructions discloses Butler's contention is without merit.

In Instruction No. 2, the district court properly instructed the jury to consider all of the instructions together. The jury was also cautioned in Instruction No. 6 to consider the guilt or innocence of each defendant separately:

> The defendants have been jointly charged. You may not consider the joint charge or joint trial as any evidence of guilt. The guilt or innocence of each defendant must be determined solely upon the individual participation in the crime.
>
> If you cannot reach a verdict as to both defendants, you shall reach a verdict only as to the defendant upon whom you can unanimously agree.

Taking the instructions together, as we must, we find no improper suggestion that the defendants should be held equally culpable or that the jury must return the same verdict for both defendants. We find no merit in Butler's challenge to these instructions.

B. Aiding and Abetting Instruction. Butler next contends the district court erred in its instruction to the jury regarding aiding and abetting. Specifically, Butler objects to Instruction No. 17 which states, in relevant part:

> Proof of nearness and knowledge, however, in addition to circumstantial evidence such as presence, companionship, and conduct before and after the offense is committed, may be sufficient to support an inference that the person participated in the offense.

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[1] Defendant objects specifically to the cover page of the jury instructions and to Instruction No. 1. The cover page stated, in relevant part, "[b]y Trial Information filed in this case, the State of Iowa has charged the defendants with the crime of Terrorism With Intent. This charge includes the lesser offenses of Terrorism and Assault. The defendants have pled not guilty." Jury Instruction No. 1 stated, in relevant part, "[t]he duty of the jury is to determine if the defendants are guilty or not guilty. In the event of a guilty verdict, you have nothing to do with punishment." Instruction No. 2 stated, in relevant part, "[y]ou must determine the defendant's guilt or innocence from the evidence and the law . . . ."

Butler argues this sentence allowed the jury to convict Butler by inference using a standard lower than beyond a reasonable doubt. We disagree.

An inference is a reasonable deduction from proven facts; a permissible finding based on the existence of other facts. *State v. Simpson*, 528 N.W.2d 627, 631 (Iowa 1995). "Inferences and presumptions are a staple of our adversary system of factfinding." *Id.* at 632 (quoting *Ulster County Court v. Allen*, 442 U.S. 140, 156, 99 S. Ct. 2213, 2224, 60 L. Ed. 2d 777, 791 (1979)). To prove aiding and abetting, knowledge may be inferred from circumstances surrounding the act. *State v. Buttolph*, 204 N.W.2d 824, 825 (Iowa 1972); *State v. Johnson*, 534 N.W.2d 118, 123 (Iowa App. 1995). The district court properly instructed the jury to consider inferences from the evidence and to convict Butler only if the State met its burden of proving guilt beyond a reasonable doubt. Thus, the jury instructions did not diminish the State's burden of proof. Furthermore, the aiding and abetting instruction was supported by substantial evidence in the record.

C. Marshalling Instruction. Butler next objects to the marshalling instruction. Jury Instruction No. 21 informed the jury of the State's burden to prove Butler "had knowledge that Philip Harris, Jr., shot or discharged a firearm with the specific intent to injure or cause fear or anger in one or more persons occupying the building." Butler contends this instruction is flawed because it fails to instruct the jury as to the appropriate temporal consideration regarding his knowledge of Harris's specific intent. Butler must have had knowledge of Harris's specific intent to injure or cause fear or anger at or before the time the crime was committed in order to be guilty of the charge. *See Lewis*, 514 N.W.2d at 66; *Johnson*, 534 N.W.2d at 123.

Even if the district court erred by failing to clarify when Butler must have known of Harris's specific intent, reversal is not merited unless the defendant is prejudiced as a result. *State v. Kellogg*, 542 N.W.2d 514, 516 (Iowa 1996); *Gavin v. State*, 425 N.W.2d 673, 677 (Iowa App. 1988). To be convicted of aiding and abetting, there must be substantial evidence that Butler "assented to or lent countenance and approval to the criminal act either by active participation in it or by some manner encouraging it *prior to or at the time of its commission*." *Johnson*, 534 N.W.2d at 123 (quoting *State v. Lott*, 255 N.W.2d 105, 107 (Iowa 1977) (emphasis added)). The uncontroverted evidence establishes Butler entered the Lanier apartment with Harris who was holding a gun to Lanier's head. His knowledge of Harris's intent to terrorize Lanier was proved by his declaration to the victim's mother after the first gunshot rang out. Butler informed Mrs. Lanier that Harris wanted to scare her son, suggesting he knew precisely what Harris's intent was. Thus, the evidence Butler knew of Harris's intent before the weapon was discharged is overwhelming, and any failure of the challenged instruction to expressly address whether Butler had prior knowledge of Harris's intent to terrorize resulted in no prejudice.

D. Verdict Forms. Butler argues the district court erred in submitting only one verdict form for each defendant. He claims this somehow suggested to the jury that it should find him guilty of terrorism. Butler asserts the district court should have given the jury multiple verdict forms for each defendant in accordance with the Model Jury Instructions.[2] Jury Instruction No. 32 directed the jury as follows:

[2] Model Jury Instruction No. 20 illustrates the use of multiple verdict forms.

> I am submitting one verdict form for each of the defendants. Your verdict shall be unanimous as to each defendant.
>
> As to each defendant, you shall first consider the offense of Terrorism With Intent and shall only consider the lesser included offenses in the event that you have a reasonable doubt as to whether the State has proven Terrorism With Intent by evidence beyond a reasonable doubt. Then and only then shall you consider the lesser included offense of Terrorism. In the event that you have a reasonable doubt as to whether the State has proven the lesser included offense of Terrorism by evidence beyond a reasonable doubt, then and only then shall you consider the additional lesser included offense of Assault.

Trial courts are not required to use uniform jury instructions. *See State v. Harrington*, 284 N.W.2d 244, 250 (Iowa 1979); *State v. Holtz*, 548 N.W.2d 162, 164 (Iowa App. 1996). However, we generally prefer the uniform instructions be followed by trial courts. *See State v. Weaver*, 405 N.W.2d 852, 855 (Iowa 1987). Nevertheless, we cannot conclude the trial court erred in this case when it used a single verdict form. The jury instructions and the verdict form fairly defined the jury's task and, under the circumstances, they were adequate. We also conclude no prejudice resulted from the district court's failure to utilize the multiple verdict format. *See Holtz*, 548 N.W.2d at 164. We conclude Butler suffered no prejudice from the district court's use of a single verdict form.

V. Ineffective Assistance of Counsel. Butler argues trial counsel was ineffective by failing to file a request for severance of his trial from his co-defendant's trial and by failing to object to the composition of the jury panel. Generally, ineffective assistance of counsel claims are preserved for postconviction proceedings to allow trial counsel an opportunity to respond and to allow full development of the facts surrounding counsel's conduct. *State v. Atley*, 564 N.W.2d 817, 833 (Iowa 1997); *Query*, 594 N.W.2d at 444. Accordingly, we

preserve Butler's claims of ineffective assistance of counsel for postconviction relief proceedings.

AFFIRMED.