

IN THE COURT OF APPEALS OF IOWA

No. 4-489 / 93-1075

FILED

JAN 23 1995

CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

TORONTO J. CONNER,

Appellant.

Appeal from the Iowa District Court for Lee County,
John C. Miller, Judge.

Toronto Conner appeals the judgment and sentence entered upon his convictions, following a jury trial, of terrorism, going armed with intent, and carrying a weapon.

AFFIRMED.

Linda Del Gallo, State Appellate Defender, and John Fatino and Rachele Braverman Hjelmaas, Assistant State Appellate Defenders, for appellant.

Bonnie J. Campbell, Attorney General, Robert P. Ewald, Assistant Attorney General, David Andrusyk, County Attorney, and John G. Jellineck, Assistant County Attorney, for appellee.

Heard by Hayden, P.J., and Habhab and Huitink, JJ.

HAYDEN, P.J.

On April 21, 1993, Toronto Conner was charged by trial information with terrorism and going armed with intent in violation of Iowa Code sections 702.7, 702.11, 708.6, and 708.8 (1993). These charges stemmed from an April 10, 1993, incident during which Conner fired a nine-millimeter pistol approximately five to seven times in the vicinity of 1213 Angular Street in Burlington, Iowa. Conner pled not guilty and filed a notice of his intent to rely on the defense of self-defense. On May 28, 1993, Conner was charged by trial information with carrying a weapon in violation of Iowa Code section 724.4(1), a charge also arising from the April 10 shooting incident. Trial on the two consolidated charges took place on June 9, 1993.

Several witnesses gave their accounts of the April 10, 1993, incident at trial. Although there were some discrepancies, a consistent picture of the events emerged from the testimony. Sometime in the early evening Conner and three companions, Carl Lewis, Murray Cooper, and Adrian Campbell, met Tricia Ziegelmeyer at a gas station. Ziegelmeyer agreed to give the group a ride in her car and to let Lewis drive. Conner, Campbell, and Cooper sat in the backseat. The group eventually stopped in front of a house located at 1213 Angular Street. Lewis talked for a while with Robert Taylor, his cousin, and left again in the car. The car returned to 1213 Angular Street a short time later and this time parked in an alley facing the house.

Lewis and Conner got out of the car to talk to Robert. As they were talking, a group of men came out of the house at 1213 and started to walk towards the car. Lewis and Conner got back into the car and started to back away. Conner grabbed a gun on the backseat floor while Lewis started driving forward toward the men. Conner leaned out of Tricia's rolled-down window and fired the gun. The men ran back toward the house, and Conner and his companions drove away.

Conner, Cooper, Campbell, and Lewis testified at trial when the group of men came out of the house toward the car they felt threatened and scared. They saw one of the men reach into his pants to pull out a gun. Conner and Cooper testified they thought one man in the group had been involved in a confrontation the day before in which a gun was pulled on them.

No witness stated with certainty Conner was firing the gun at the group of men. Melvin Joiner, one of the men from the house, and Sommer Rey, who was present at the shooting, testified they saw Conner fire the gun up into the air. Conner also testified he shot the gun into the air.

At the close of the State's case Conner moved for a judgment of acquittal arguing the State had failed to prove Conner had an intent to shoot another person or he fired a gun within an assembly of people. The court denied the motion. At the close of all evidence Conner again moved

for a judgment of acquittal, and again the motion was denied.

The jury found Conner guilty of the offenses charged. Conner was sentenced not to exceed five years on his convictions of terrorism and going armed with intent. He was sentenced not to exceed two years on his conviction of carrying a weapon. The court ordered Conner's sentences run concurrently.

Conner appeals his convictions of terrorism and going armed with intent. He argues three issues on appeal. First, Conner contends the evidence was not sufficient to prove the element of intent to shoot another person because no witness testified he aimed a gun at another person. Second, Conner alleges the evidence was insufficient to prove the element of shooting a gun within an assembly of people because there was no evidence to show he fired his gun at the crowd. Third, Conner claims the State's evidence was insufficient because it failed to prove he was not acting in self-defense.

I. Scope of Review.

Our scope of review is on assigned error only. Iowa R. App. P. 4 The standard of review in challenging the sufficiency of the evidence is well established. State v. Lampman, 342 N.W.2d 77, 81 (Iowa App. 1982). We will uphold a verdict where there is substantial evidence in the record tending to support the charge. State v. Aldape, 307 N.W.2d 32, 39 (Iowa 1981).

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When reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State, including legitimate inferences and presumptions that fairly and reasonably may be deduced from the evidence in the record. State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984); State v. Hall, 371 N.W.2d 187, 188 (Iowa App. 1985). Direct and circumstantial evidence are equally probative so long as the evidence raises "a fair inference of guilt and [does] more than create speculation, suspicion, or conjecture." State v. Hamilton, 309 N.W.2d 471, 479 (Iowa 1981). It is necessary to consider all the evidence in the record, and not just the evidence supporting the verdict, to determine whether there is substantial evidence to support the charge. Bass, 349 N.W.2d at 500; Hall, 371 N.W.2d at 188. Substantial evidence means evidence which would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984); Hall, 371 N.W.2d at 188.

II. Going Armed with Intent.

Conner was convicted of going armed with intent, pursuant to Iowa Code section 708.8 (1993). Iowa Code section 708.8 reads as follows:

A person who goes armed with any dangerous weapon with the intent to use without justification such weapon against the person of another commits a class "D" felony.

In his motion for judgment of acquittal with respect to the going armed charge, Conner limited his argument to the

issue of "intent." Our supreme court has held the "intent to use" element of Iowa Code section 708.8 requires "proof of an intent to shoot another person when a firearm is involved." State v. Slayton, 417 N.W.2d 432, 434 (Iowa 1987).

A review of the evidence demonstrates the jury could have found Conner had intent to shoot another person with a firearm. Conner fired as many as eight shots. Statements made by defendant immediately before and after the shootings are also relevant. Murray Cooper testified when he saw the four men approaching he told Conner to get into the car. He further testified, "I said, 'Get in the car, Toronto,' and he got in the car, and he said 'Let them come. Let them come.' And about that time, he had pulled out his gun and reached around and just started shooting." After the shooting, there was testimony Conner put the gun back under the seat and said, "I told him not to ---- with me." (Expletive deleted.)

We conclude there is substantial evidence to convince a rational fact finder beyond a reasonable doubt of defendant's guilt. See State v. McFadden, 320 N.W.2d 608, 614 (Iowa 1982). We affirm on this issue.

III. Terrorism.

Conner was found guilty of the charge of terrorism, pursuant to Iowa Code section 708.6 (1991). Iowa Code section 708.6 reads as follows:

A person commits a class "D" felony when the person, with the intent to injure or provoke fear

or anger in another, shoots, throws, launches, or discharges a dangerous weapon at, into, or in a building, vehicle, airplane, railroad engine, railroad car, or boat, occupied by another person, or within an assembly of people, and thereby places the occupants or people in reasonable apprehension of serious injury or threatens to commit such an act under circumstances raising a reasonable expectation that the threat will be carried out.

Here the only contested issue is whether there is substantial evidence Conner shot "within an assembly of people." This case is governed by our supreme court decision in State v. Bush, 518 N.W.2d 778 (Iowa 1994). Bush held that a defendant fired a shot "within an assembly of people" where the shot was fired "straight into the air," and where there were two or three people approximately fifteen to twenty feet in front of him and about ten people the same distance behind him. Id. at 780. The court defined the statutory term "within" as meaning "into" or "through." Id.

Applying Bush to the instant case, we determine the jury could have concluded Conner fired one or more shots "into" or "through" the group of four men, rather than into the air. There was expert testimony one bullet hit the house at 1215 Angular Street, and this bullet had gained only eleven feet in altitude. Further, there were five or six bullets which hit the brick garage, and these were at a lower elevation.

Finally, the words "into" or "through" should not be taken so literally as to require the shooter actually hit

someone. If Conner had actually hit someone, he would be subjected to a more serious crime. By firing several shots in the direction of the men, Conner satisfied the statutory term "within" in its sense of "into" or "through." Id. There is sufficient evidence to support Conner's conviction on the terrorism charge. We affirm on this issue.

IV. Justification/Self-Defense.

The last issue on appeal is whether the State's evidence was insufficient because it failed to prove defendant was not justified or acting in self-defense. To establish no justification existed, the State must prove one of any of the following:

- (1) Defendant was the provocatur in initiating or continuing the difficulty which resulted in the shooting; or
- (2) an alternative course of action was available to defendant; or
- (3) defendant did not believe he was in imminent danger of death or injury and the use of force was not necessary to save him; or
- (4) defendant did not have reasonable grounds for the belief; or
- (5) the force used by defendant was unreasonable.

See State v. Thornton, 498 N.W.2d 670, 673 (Iowa 1993).

We hold the State carried its burden of proof on at least the second element, that an alternative course of action was available to defendant. Even assuming Conner truly believed the men to be armed, the evidence demonstrated he had the option of letting Lewis continue to back down the alley and make an escape. We conclude the jury could choose to disbelieve defendant and his claim of self-defense. We affirm on this issue.

AFFIRMED.