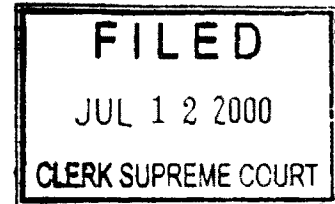


IN THE COURT OF APPEALS OF IOWA

No. 0-317 / 99-0890

Filed July 12, 2000



STATE OF IOWA,
Plaintiff-Appellee,

vs.

VICTORIA ANN HOWARD,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, James R. Havercamp, Judge.

Defendant appeals from her conviction and sentence for first-degree harassment **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Nan Jennisch, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, William E. Davis, County Attorney, and Kelly G. Raines, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Mahan and Miller, JJ.

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MAHAN, J.

Defendant appeals her conviction following a jury trial for harassment in the first degree. Howard contends (1) the evidence was insufficient to support a conviction of harassment in the first degree, (2) she received ineffective assistance of counsel due to counsel's failure to challenge the constitutionality of the harassment statute, and (3) the district court abused its discretion in imposing a sentence that was excessive. We affirm.

On the evening of November 22, 1998, Davenport police officers Steve Brown and Lynn Kindred became involved in the pursuit of DeEamest Hawkins, the defendant's grandson. Hawkins tried to run away on foot and Officer Brown caught up with him and wrestled him to the ground twice before he was able to handcuff him.

A crowd of about twenty or thirty people followed the officers during the pursuit and were throwing debris at them. Three women threw chunks of concrete and a plank of wood at Officer Brown as he was trying to secure Hawkins. Additional officers who had arrived followed these three women as they fled into a nearby apartment. Officers searched the apartment after obtaining consent from the owner. One of the three women was identified as Teneka Hayes, defendant's daughter.

Lieutenant Rick Chase observed a group of people gathered behind the apartment who "were starting to heckle and try[ing] to provoke the officers" Howard was observed as being a "very vocal" member of this group. Howard approached Chase and asked whether her son, Quinton, was inside. Chase

went into the apartment and returned with Quinton and released him to Howard's custody. A few minutes later, Howard asked Chase if Officer Brown was inside. Officer Brown agreed to talk to Howard but asked Chase to come along.

Officer Brown testified to the following exchange that took place between Howard and himself:

HOWARD: Hey Brown, are you still scared of me?

BROWN: I'll always be scared of you, especially when you make threats on my life.

HOWARD: Well, you should be cause Brian's¹ coming out - - out of jail, and he's going to shoot you, and I can promise you that I'm going to shoot you too.

BROWN: Okay

Officer Brown observed Howard's demeanor to be very adamant and aggressive during this exchange. She continued to be very vocal and extremely loud. He also felt the only reason Howard initiated contact with him was to make a threat against his life. Howard continued to threaten Officer Brown. She told him not to speak to her grandchildren again or he would have to deal with her. She also told him she had informed her lawyers and would be suing him. Officer Brown then returned to the apartment. Chase described him as being "visibly shaken." Howard was not arrested because the officers did not want to excite the crowd in light of an already "volatile situation."

On January 7, 1999, Howard was charged with harassment in the first degree. On April 19, 1999, a trial was held and two days later, the jury found Howard guilty as charged. On May 27, 1999, the district court sentenced Howard to sixty days in jail. Howard appeals.

¹ Brian Mitchell was a family friend of Howard. He had previously threatened Officer Brown.

I. Sufficiency of the Evidence. Our review of sufficiency of evidence challenges is for correction of errors at law. *State v. Thomas*, 561 N.W.2d 37, 39 (Iowa 1997). We will uphold the trial court's denial of a motion for judgment of acquittal if there is substantial evidence in the record to support the defendant's conviction. *State v. McPhillips*, 580 N.W.2d 748, 752 (Iowa 1998). The jury's findings of guilt are binding on appeal if supported by substantial evidence. *State v. Hopkins*, 576 N.W.2d 374, 377 (Iowa 1998); *State v. Allen*, 348 N.W.2d 243, 247 (Iowa 1984). Substantial evidence is such evidence as could convince a rational fact finder the defendant is guilty beyond a reasonable doubt. *Allen*, 348 N.W.2d at 247.

In deciding whether there is substantial evidence, we view the record evidence in the light most favorable to the State. *State v. Torres*, 495 N.W.2d 678, 681 (Iowa 1993). Direct and circumstantial evidence are equally probative. Iowa R. App. P. 14(f)(16). A verdict can rest on circumstantial evidence alone. *State v. Torres*, 506 N.W.2d 470, 472 (Iowa App. 1993). However, "[t]he evidence must at least raise a fair inference of guilt as to each essential element of the crime. Evidence which merely raises suspicion, speculation, or conjecture is insufficient." *State v. Casady*, 491 N.W.2d 782, 787 (Iowa 1992) (citations omitted).

Howard contends there was insufficient evidence to convict her on the charge of harassment in the first degree. She challenges only one element of the charge. She claims there is insufficient evidence to find on the date in question, she purposefully had personal contact with Officer Brown without a legitimate purpose. Howard alleges her purpose for speaking with Officer Brown

was to complain about police action. Therefore, because she had a legitimate purpose, the evidence was insufficient to prove harassment in the first degree.

The Constitution does not permit the states to assume that every expression of a provocative idea will incite violence. *State v. Fratzke*, 446 N.W.2d 781, 784 (Iowa 1989). Courts are required to carefully consider the actual circumstances surrounding such expression, asking whether the expression is directed to inciting or producing imminent lawless action. *Id.*

Restraints on the legitimate purpose of protesting government action can only be justified in the case of "fighting words." Fighting words are those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 62 S. Ct. 766, 769, 86 L. Ed. 1031, 1035 (1942). While this type of unprotected speech includes "fighting words," it can also include "other disorderly words, including profanity, obscenity, and threats" which are likely to cause acts of violence or breach of peace. *Id.*

In the *Fratzke* case, which Howard relies on, the court concluded the content and nature of the defendant's communication was not without a legitimate purpose and it did not rise to the level of "fighting words." *Fratzke*, 446 N.W.2d at 785. The defendant's words in the *Fratzke* case were written in a letter mailed to the clerk of court to express his criticism of speed laws, law enforcement priorities, and one state trooper. The court found the defendant's criticism was a legitimate purpose for writing the letter. This is distinguishable from this present case before us. Here, Howard made personal contact with Officer Brown. She then proceeded to make threats against his life.

Prior cases have defined the word "threaten" to mean "promise punishment, reprisal, or other distress to, and the word "threat" was defined to mean "an expression of an intention to inflict evil, injury or damage on another." *State v. Milner*, 571 N.W.2d 7, 11 (Iowa 1997). We find the holding in the *Milner* case to be controlling on this issue. The court in *Milner* further explained the threat must be definite and understandable by a reasonable person of ordinary intelligence. *Id.* To make this determination, the statement is viewed in light of the surrounding circumstances. *Id.*

We find the interpretation of "threaten" and "threat" applies here. Taken in the context and manner in which Howard made her statements to Officer Brown, a reasonable person of ordinary intelligence could construe these statements as a serious expression of an intent to cause physical harm to Officer Brown.

It is true, as Howard contends, peace officers may reasonably be expected to exercise a higher degree of restraint than the average citizen. *Fratzke*, 446 N.W.2d at 785. Our supreme court has previously stated in *Fratzke*:

The First Amendment protects a significant amount of verbal criticism and challenge directed at police officers. . . . The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.

Id. at 784.

During the exchange between Howard and Officer Brown, he did not attempt in any way to actively engage her. Officer Brown did not want to antagonize a situation which he felt was already volatile. We find Officer Brown did exercise a higher degree of restraint than the average citizen. However,

Howard's threats left Officer Brown visibly shaken. It is clear Howard's actions went beyond mere criticism of police conduct. They were threats. The First Amendment "does not protect speech that constitutes a true threat." *Milner*, 571 N.W.2d at 13-14. We therefore conclude there was substantial evidence to support the jury's verdict.

II. Ineffective Assistance of Counsel. We review claims of ineffective assistance of counsel de novo. *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996).

Ordinarily we preserve claims of ineffective assistance of counsel raised on direct appeal for postconviction proceedings to allow full development of the facts surrounding counsel's conduct. *State v. Atley*, 564 N.W.2d 817, 833 (Iowa 1997). "Even a lawyer is entitled to his day in court, especially when professional reputation is impugned." *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978). We will resolve ineffective assistance of counsel claims on direct appeal when the record is adequate to decide the issue. *State v. Arne*, 579 N.W.2d 326, 329 (Iowa 1998). However, only in "rare circumstances will the trial record alone be sufficient to resolve the claim." *State v. Rawlings*, 402 N.W.2d 406, 408 (Iowa 1987).

In the present case, Howard contends her trial counsel's failed to timely challenge the constitutionality of the Iowa harassment statute. In Howard's motion for arrest of judgment, her trial counsel contended the Iowa harassment statute violated her First Amendment right to free speech. However, she failed to raise this issue in a pretrial motion as required under Iowa Rule of Criminal Procedure 10(2). See *State v. Allen*, 565 N.W.2d 333, 336 (Iowa 1997). This

omission constitutes a failure to perform an essential duty only if Howard's constitutional challenge has merit.

A statute regulating speech "must be narrowly drawn or authoritatively construed so as 'to punish only unprotected speech . . .'" *Milner*, 571 N.W.2d at 13. We agree with the State section 708.7(1)(b) may be narrowly construed so as to punish only unprotected speech which falls outside the First Amendment.

For the reasons discussed previously, the content of Howard's conversation with Officer Brown does not qualify for First Amendment protection. Because we have rejected Howard's constitutional claim, we find her ineffective assistance of counsel claim has no merit.

III. Sentence. Howard challenges the sentence imposed. She was sentenced to sixty days in jail. Howard contends the jail sentence is excessive considering the circumstances of the case. She points to the nature of the offense and her criminal, family, and employment history.

The standard of review for defects in sentencing is correction of errors at law. *State v. Sailer*, 587 N.W.2d 756, 758 (Iowa 1998). Howard does not contend the district court failed to state reasons for the sentence or imposed a sentence outside the statutory limit. Instead, she specifically claims the district court abused its discretion by imposing a sentence which was excessive under the circumstances. Prior to imposing sentence, the district court noted eleven out of Howard's fifteen children had been involved in the criminal justice system. The court felt this posed a problem since Howard's influence on her extended family was great. Howard also had a previous charge of harassment in which she had received a suspended sentence of 240 days, a \$500 fine, and one year

supervised probation. In addition, the district court considered the specific facts and circumstances of this case.

The ~~sent~~ence the court imposed does not exceed the statutory maximum; consequently, we will interfere with the sentence only if the court abused its discretion. *State v. Turk*, 595 N.W.2d 819, 822 (Iowa App. 1999). Howard has failed to show an abuse of discretion, and we must affirm the sentence imposed.

AFFIRMED.