IN THE COURT OF APPEALS OF IOWA

No. 0-241 / 09-0957
Filed July 28, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ROBERT GERALD CRAMER,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, James D. Birkenholz, Judge.

Defendant appeals from the conviction and sentence entered after he was found guilty of harassment in the second degree. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Martha J. Lucey, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, John P. Sarcone, County Attorney, and Jess W. Vilsack, Assistant County Attorney, for appellant.

Considered by Sackett, C.J., and Eisenhauer and Mansfield, JJ. Tabor, J., takes no part.

SACKETT, C.J.

Defendant, Robert Cramer, appeals from the conviction and sentence entered after he was found guilty of harassment in the second degree, in violation of Iowa Code sections 708.7(1)(a)(1) and 708.7(3) (2009). He contends (1) there was insufficient evidence in the minutes of testimony to support the guilty verdict, and (2) the court had no sentencing authority to issue a no-contact order prohibiting Cramer from contacting a person who was not a victim of the alleged harassment. We affirm.

I. BACKGROUND AND PROCEEDINGS. Defendant was charged, by trial information filed on May 4, 2009, with harassment in the second degree. The information initially listed Thomas Mallory as the victim but it was subsequently amended to include Jennie Hart as a victim. Hart was a former girlfriend of defendant and Mallory was Hart's current boyfriend.

The minutes of testimony stated the following persons would testify: Jennie Hart, Thomas Mallory, Detective Blom, and Officer Brewet. Hart would testify that on or about April 14, 2009, she received a letter from her former boyfriend, the defendant, from the Polk County Jail addressed to her address, and at the time she had a relationship with Mallory and defendant knew of the relationship. Hart would note the letter in part provided:

> I'll fuck Tom up. You can tell him that. . . . Tom's day of reckoning is coming. I personally guartee (sic) that. He directly interfered in my life! And that I can't overlook. He's worse than a nigger. I hate him more than a nigger. And I will beat him like a nigger. Enough of that. I'm biding my time.
> . . . .
> Laugh it up Tom. A day of payback will come to you Mr. Thomas Benjamin Mallory 7/14/52, Ha, Ha, Ha Ha. You robbed me of 5 1/2

> months of my life. You exconvict Des Moines Iowa, peice (sic) of shit. Tom, I swear this upon my death.

The minutes also stated that Hart would testify she was frightened by the threats against Mallory and she was afraid, in part, because she was familiar with defendant's history of violence and alcohol issues. The minutes noted Mallory would testify he was alarmed by the threats above and that he was alarmed in part because he too was familiar with defendant's history of violence and alcohol issues. Detective Blom would testify that Mallory showed him the letter that Hart received from defendant. Officer Brewet would testify that the defendant was in the Polk County jail when Mallory said the letter was received.

On June 5, 2009, the defendant filed a written waiver of a jury trial and a stipulation to a trial on the minutes of testimony. He then appeared before the court where he affirmed his waiver and stipulations, noting he had read it with his attorney and he had no questions and it was a knowing waiver. The court further stated:

> You are stipulating that the Court can review the minutes of testimony subject to the arguments as set forth by your counsel regarding their sufficiency, and that if I believe they are sufficient for the State to meet their burden of proof with respect to prove the charge of harassment second, which, in this case, communicated with another by writing, involving a threat to commit a forcible felony.

After considering the trial Information, the stipulation of the minutes of testimony, and the arguments of counsel the district court found:

> [T]he Trial Information is sufficient to find the defendant guilty of harassment second, in that the communication that Mr. Cramer wrote to Ms. Hart, and usually started out as a legitimate communication, i.e., love letter, or as [defense counsel] described, perhaps a letter saying goodbye. That he clearly understood that

> she was in a relationship with Mr. Mallory, and then . . . when he included the terminology quoted, "I'll fuck Tom up. You can tell him that," the legitimate basis of communication no longer existed, and there was an attempt to annoy Ms. Hart by such communication of threat of a bodily injury, which makes it a harassment second degree. Accordingly, Mr. Cramer, I'm finding you guilty of the charge of harassment in the second degree.

The defendant was sentenced to serve forty-five days in jail and was to obtain credit for time served. The court also issued a no-contact order prohibiting the defendant from having any contact with Hart or Mallory for five years. The defendant appeals contending there is insufficient evidence to support the finding he committed harassment in the second degree, and the court had no authority to issue a protective order forbidding contact with Mallory.

II. SUFFICIENCY OF THE MINUTES OF TESTIMONY TO PROVE HARASSMENT IN THE SECOND DEGREE. The defendant contends the minutes of testimony do not provide sufficient evidence to support a finding of harassment in the second degree. Our review of a criminal conviction is the same whether the district court or a jury is the fact finder. *State v. Lapointe*, 418 N.W.2d 49, 52 (Iowa 1988). We review challenges to the sufficiency of the evidence for corrections of legal error. *State v. Heard*, 636 N.W.2d 227, 229 (Iowa 2001). We look at all the evidence in the light most favorable to the State, without regard to contradiction or inconsistencies, and assisted by all reasonable inferences. *State v. Robinson*, 288 N.W.2d 337, 338 (Iowa 1980). The verdict must be supported by such evidence as could convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt. *Id.* at 339. The fact findings are broadly and liberally construed and in cases of ambiguity they will be

construed to uphold, rather than defeat, the verdict. *State v. Price*, 365 N.W.2d 632, 633 (Iowa Ct. App. 1985). Evidence meets the threshold criteria of substantiality if it would convince a rational factfinder that the defendant is guilty beyond a reasonable doubt. *State v. LeGear*, 346 N.W.2d 21, 23 (Iowa 1984).

A. LEGITIMATE PURPOSE. "A person commits harassment when, with intent to intimidate, annoy, or alarm another person, the person . . . [c]ommunicates with another by . . . writing . . . without legitimate purpose and in a manner likely to cause the other person annoyance or harm." Iowa Code § 708.7(1)(a)(1). If the harassment "involve[s] a threat to commit bodily injury" it is harassment in the second degree. *Id.* § 708.7(3). The defendant first contends the State failed to prove his letter was "without legitimate purpose." He claims he had a legitimate purpose in that the letter was a love letter expressing feelings about the end of his relationship with Hart and his dislike of Hart's new boyfriend, Mallory. The State recognizes that the defendant may have had a legitimate purpose in so writing but that defendant's legitimate purpose ceased when he threatened bodily injury to Mallory.

In *State v. Fratzke*, 446 N.W.2d 781, 783 (Iowa 1989), the court recognized that the harassment statute contains a "constitutional safety valve" so as to not punish merely unpopular speech. That safety valve is the requirement that the communication be "without legitimate purpose" to be actionable as harassment. Iowa Code § 708.7(1)(b); *State v. Button*, 622 N.W.2d 480, 485 (Iowa 2001). Because under Iowa Code section 708.7(1)(a), "there must be a specific intent to threaten, intimidate, or alarm, the only legitimate purpose that

will avoid the criminal status conferred by the statute would be a legitimate purpose to threaten, intimidate, or alarm." *State v. Evans [Evans I]*, 672 N.W.2d 328, 331 (Iowa 2003). There is no claim that such purpose existed in the present case.

Even if the defendant had a legitimate purpose in writing to Hart to express his feelings, this right does not include expressing his feelings in a manner intended to threaten, intimidate, or cause alarm. *See id.* (stating that even assuming the defendant had a first amendment right to publish photographs, that right did not include "a right to accomplish that objective in a manner that is intended to threaten, intimidate, or alarm the subject"). The manner in which the defendant communicates may show the purpose is not legitimate and may permit the criminalization of certain messages. The use of offensive language alone does not transform a legitimate purpose to an illegitimate purpose under the harassment statute, but restraint on speech is permitted if "fighting words" are used. *Fratzke*, 446 N.W.2d at 784-85. A message conveyed by "true threats" is also not constitutionally protected speech. *State v. Milner*, 571 N.W.2d 7, 14 (Iowa 1997). These threats of violence are outside of the First Amendment right to free speech out of concern for "protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." *Id.* at 13 (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388, 112 S. Ct. 2538, 2546, 120 L. Ed. 2d 305, 321 (1992)).

"Fighting words" are those personally abusive epithets which "'by their very utterance inflict injury or tend to incite an immediate breach of the peace.'" *Fratzke*, 446 N.W.2d at 784 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 62 S. Ct. 766, 769, 86 L. Ed. 1031, 1035 (1942)). The test is to determine whether the expression "'is directed to inciting or producing imminent lawless action'" after considering the actual circumstances surrounding the expression. *Id.* (quoting *Texas v. Johnson*, 491 U.S. 397, 409, 109 S. Ct. 2533, 2541-42, 105 L. Ed. 2d 342, 356-57 (1989)).

Iowa courts, in interpreting the words "threaten" or "threat," have applied the common meaning of the words. "Threaten" has been defined as "promise punishment, reprisal, or other distress to." *State v. Crone*, 545 N.W.2d 267, 271 (Iowa 1996) (quoting Webster's Third New International Dictionary 2382 (1993)). The court has defined the word "threat" as "an expression of an intention to inflict evil, injury or damage on another." *State v. Jackson*, 305 N.W.2d 420, 423 (Iowa 1981) (quoting Webster's Third New International Dictionary 2382 (1976)). The court further explained in *Crone*, 545 N.W.2d at 271, "the threat [must] be definite and understandable by a reasonable person of ordinary intelligence." In considering whether a reasonable person of ordinary intelligence would interpret another's statement as a threat, the statement is viewed in light of the surrounding circumstances. *State v. McGinnis*, 243 N.W.2d 583, 589 (Iowa 1976).

Defendant argues that "I'll fuck Tom up" are not fighting words. The State contends these are fighting words and a true threat, neither of which has a

legitimate purpose. In applying the ordinary meaning of the term threat as set forth above, we find the letter contains true threats. His letter states that he is going to beat Tom. The letter was not purely criticism of Tom, but a warning that the defendant intended to physically injure him. *See Milner*, 571 N.W.2d at 14 (finding defendant's statements that he was going to put a bomb outside a government building were true threats and not merely expressing dissatisfaction or criticism of the department of employment services). A reasonable person would interpret defendant's statements as a threat. Given our determination that the defendant conveyed a true threat, we need not decide whether the words also amounted to fighting words.

B. THREAT NOT COMMUNICATED TO THE RECIPIENT OF THE LETTER. The defendant next contends there is insufficient evidence to support his conviction because the statements threatening bodily injury were not directed at the recipient of the letter. He argues the threats were in a letter written and mailed to Hart but no threats to inflict bodily injury on Hart were made in the letter. He argues any threats were against Mallory but the letter was not directed to Mallory.

Whether communicating the threat directly to the intended victim is a requirement under the harassment statute has not been addressed by our courts. The issue has been referenced in interpreting what "intent" and "threat" is required under statutes prohibiting extortion and terrorism. In *State v. Brownlee*, 84 Iowa 473, 477, 51 N.W. 25, 27 (1892), the defendant was charged under an extortion statute for allegedly threatening personal injury on another with the

intent to extort money. The defendant, Brownlee, enlisted a man named Frank Duncan to assist in executing the plan. *Brownlee*, 84 Iowa at 474, 51 N.W. at 26. The victim of the extortion plot was intended to be O.P. Wright. *Id.* In discussing the plan, Brownlee stated several times that if Wright did not sign notes promising to pay Brownlee money, he would kill Wright. *Id.* at 474-75, 51 N.W. at 26. Brownlee made all of the threatening statements to the co-conspirator, Duncan, and none were made directly to, or in the presence of, Wright. *Id.* at 477, 51 N.W. at 27. Brownlee instructed Duncan not to communicate the information to Wright. *Id.* Duncan did communicate the information to Wright and the authorities, and Brownlee was arrested. *Id.* at 475, 51 N.W. at 26. Only after the arrest did Brownlee discover that Wright had learned of the extortion plot and threats. *Id.* at 475, 51 N.W. at 27.

Brownlee urged that his conviction be reversed because the threats were not made to, or in the presence of, the intended victim. *Id.* at 477, 51 N.W. at 27. The court interpreted the extortion statute to determine whether this was an essential element of the crime. *Id.* It found,

> [t]he meaning of the word used, "threat," implies that it is a menace of some kind, which in some manner comes to the knowledge of the one sought to be affected thereby. It may be made in person to the object of it, or it may be brought to his knowledge by written communication, or in any other manner.

Id. at 478, 51 N.W. at 27. It acknowledged that a threat could be communicated to a third party with the intention that it be conveyed to the intended victim. *Id.* at 478, 51 N.W. at 27. However, it concluded that Brownlee's conviction required

reversal because there was no evidence that he intended Wright to learn of the threat. *Id.* at 478-79, 51 N.W. at 27.

In *State v. Jackson*, 305 N.W.2d 420, 422 (Iowa 1981),[1] the defendant wrote a letter making threats to Iowa's governor and the governor's family. The governor's secretary read the letter and turned it over to security. *Jackson*, 305 N.W.2d at 422. In appealing her convictions of extortion and terrorism, the defendant argued reversal was required because there was no evidence the intended victim actually received the threatening communication. *Id.* The court noted that the terrorism statute did not explicitly require the intended victim to actually experience fear, anger, or injury. *Id.* at 423. In interpreting the statute,[2] the court stated "the focus is upon the accused's intent in communicating the threat, and remains upon his or her expectations that the threat be carried out." *Id*. It found the same rationale applicable to the extortion statute[3] because it "likewise centers on the actor's intent, and contains no requirement that the threat be communicated directly to its target." *Id.* Therefore, the court only

---

[1] Overruled on unrelated grounds by *State v. Lyman*, 776 N.W.2d 865, 873 (Iowa 2010).

[2] The terrorism statute in effect at the time provided in relevant part,

> A person commits a class "D" felony when the person does any of the following with the intent to injure or provoke fear or anger in another:
>
> . . . .
>
> 2. Threatens to commit a forcible felony under circumstances raising a reasonable expectation that the threat will be carried out.

Iowa Code § 708.6(2) (1979).

[3] The extortion statute in effect stated in pertinent part,

> A person commits extortion if the person does any of the following with the purpose of obtaining for oneself or another anything of value, tangible or intangible, including labor or services:
>
> 1. Threatens to inflict physical injury on some person, or to commit any public offense.

Iowa Code § 711.4(1) (1979).

looked at whether the defendant intended the threats to reach the governor and concluded that "[w]hether he actually received the threat is immaterial to defendant's clear intent that he do so." *Id.* at 424. It distinguished the case from *Brownlee* on the ground that the evidence showed Brownlee did not intend the victim to receive the message. *Id.* By contrast, in *Jackson*, "there [was] no evidence . . . defendant had any expectation the letter would not reach the governor." *Id.* It determined the required intent that the target receives the threat was established because the defendant addressed the letter to the governor personally and referred to him directly, not in the third person. *Id.*

We find the same interpretation applies to the statute prohibiting harassment. The harassment statute focuses on whether the actor's conduct is done "with the intent to intimidate, annoy, or alarm another person." Iowa Code § 708.7(1)(a). It requires the actor to "communicate[] with another" and it must be "in a manner likely to cause the other person annoyance or harm." *Id.* 708.7(1)(a)(1). Accordingly, we must determine whether the evidence shows the defendant intended to communicate with Mallory via the letter, or in other words, whether defendant intended the threats to reach Mallory. While not overwhelming, we do conclude there is sufficient evidence to support such a finding on the facts before us. The letter is addressed to Hart and primarily communicates to Hart. But there are two places where the defendant's intent to communicate threats to Mallory is clear. "I'll fuck Tom up. You can tell him that," shows defendant expected Mallory to learn of the threat. This is reinforced later

in the letter where defendant briefly addresses Mallory directly, not in the third person:

> Laugh it up Tom. A day of payback will come to you Mr. Thomas Benjamin Mallory 7/14/1952, Ha, Ha, Ha, Ha. You robbed me of 5 ½ months of my life. You exconvict Des Moines Iowa, peice (sic) of shit. Tom, I swear this upon my death.

Viewing the evidence in the light most favorable to the State, there is sufficient evidence that the defendant intended to communicate threats to Mallory.

C. INTENT TO INTIMIDATE, ANNOY, OR ALARM. The defendant also argues the minutes of testimony do not prove he communicated with the specific intent to intimidate, annoy, or alarm. He contends he wrote the letter simply to express his feelings about the relationship between himself and Hart and did not intend to intimidate, alarm, or annoy Hart. The district court determined that the letter, though initially started as a love letter or a letter to say goodbye to Hart, transformed into an attempt to annoy Hart when he threatened, "I'll fuck Tom up. You can tell him that."

Harassment is a specific intent crime. *State v. Evans [Evans II]*, 671 N.W.2d 720, 724 (Iowa 2003). Intent usually is not ascertainable through direct evidence. *Evans I*, 672 N.W.2d at 331. The specific intent element can be proved by circumstantial evidence. *Button*, 622 N.W.2d at 483. In addition, "a trier of fact may infer intent from the normal consequences of one's actions." *Evans I*, 672 N.W.2d at 331. Specific intent to annoy can be shown by one's use of disparaging or profane remarks. *Fratzke*, 446 N.W.2d at 783-84.

Substantial evidence supports the district court's conclusion that defendant's letter was specifically intended to annoy Hart. The defendant could

reasonably presume that Hart would be bothered by defendant's threats to physically hurt Mallory. After the threats, the defendant went on to disparage Hart, calling her ignorant, a witch, and partly controlled by satan. The recipient of such a letter would only naturally be annoyed if not alarmed. The minutes of testimony show Hart had such a reaction stating that she was willing to testify that the threats against Mallory in the letter frightened her and she was fearful due to defendant's history of violence.

III. ILLEGAL SENTENCE. As part of defendant's sentence, the court ordered defendant to have no contact with Hart or Mallory for five years. The defendant contends the court had no authority to prohibit contact with Mallory because Tom Mallory was not the victim of his offense. We review claims that a sentence is not authorized for correction of errors at law. *See* Iowa R. App. P. 6.907; *State v. Freeman*, 705 N.W.2d 286, 287 (Iowa 2005). If a sentence is not permitted by statute, it is void. *State v. Kapell*, 510 N.W.2d 878, 879 (Iowa 1994).

Iowa Code Chapter 664A sets forth the rules for establishing and enforcing no contact orders issued pursuant to certain public offenses, including those convicted of harassment. *See* Iowa Code § 664A.2(1) (stating "this chapter applies to no-contact orders issued for violations or alleged violations of sections . . . 708.7 . . . and any other public offense for which there is a victim"). When a defendant is convicted of a public offense involving a victim, the court may issue a no-contact order effective for up to five years from the date of judgment. *Id.* § 664A.5. The no-contact order requires "the defendant to have

no contact with the alleged victim, persons residing with the alleged victim, or members of the alleged victim's immediate family and to refrain from harassing" these persons. *Id.* § 664A.1(1). The term "victim" "means a person who has suffered physical, emotional, or financial harm as a result of a public offense . . . ." *Id.* § 664A.1(3); *State v. Hall*, 740 N.W.2d 200, 202-03 (Iowa Ct. App. 2007).

We conclude the court had authority under chapter 664A to issue a no-contact order prohibiting contact with Mallory. The threats of bodily injury were targeted at Mallory. As explained above, the defendant intended for Mallory to learn of the threats even if the letter was addressed to Hart. The minutes of testimony show Mallory suffered emotional harm as a result of the threats, stating he was alarmed by the threats and notified police of the letter. The minutes show Mallory was a victim as that term is used in Iowa Code section 664A.1(3); therefore, the court had authority to impose a no-contact order to protect him.

IV. CONCLUSION. We affirm defendant's conviction. Substantial evidence supports the court's findings that the defendant had no legitimate purpose in making the threats of bodily injury against Mallory in the letter to Hart. Circumstantial evidence shows the defendant intended the threats to reach Mallory and that defendant's purpose in writing the letter was to annoy or alarm Hart. The district court had authority under chapter 664A to issue a no-contact order prohibiting defendant from contacting Mallory.

AFFIRMED.