IN THE COURT OF APPEALS OF IOWA

No. 3-407 / 12-1248
Filed July 10, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

AREND DEBOER,
Defendant-Appellant.

Appeal from the Iowa District Court for Lyon County, David A. Lester, Judge.

Arend Deboer appeals his convictions for threat of terrorism and harassment in the second degree as a habitual offender. **REVERSED IN PART, CONDITIONALLY AFFIRMED IN PART, RULING ON MOTION FOR NEW TRIAL VACATED, AND REMANDED WITH DIRECTIONS.**

Mark C. Smith, State Appellate Defender, David Arthur Adams and Vidhya K. Reddy, Assistant Appellate Defenders, and Jessica Zachary, Student Legal Intern, for appellant.

Thomas J. Miller, Attorney General, Thomas Henry Miller, Assistant Attorney General, and Carl J. Petersen, County Attorney, for appellee.

Heard by Doyle, P.J., and Bower, J., and Huitink, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2013).

DOYLE, P.J.

Arend Deboer appeals his convictions for threat of terrorism and harassment in the second degree as a habitual offender. He contends the district court erred in denying his motion for judgment of acquittal and motion for new trial. We reverse in part, conditionally affirm in part, vacate the court's ruling on the motion for new trial, and remand with directions.

I. Background Facts and Proceedings

On September 7, 2011, Arend Deboer called the Rock Rapids branch of the Farm Service Agency at 10:00 a.m. His call was transferred to Carol Groen, the FSA county executive director. Deboer wanted to know details about the FSA's disaster relief programs with regard to land he farmed. As Groen explained the disaster relief protocol, Deboer became "very frustrated" and hung up.

Groen and Deboer had grown up in the same neighborhood in Little Rock, Iowa. As a farmer, Deboer "came in [to the FSA] to do business once in awhile." Groen recalled Deboer was usually "fine," although sometimes "[h]e may have gotten upset with government regulations or so forth, but many people do." And although Deboer had gotten frustrated in the past, he had not gotten "to the point that he would quit listening and just hang up."

Later that day, at 4:20 p.m., Deboer called the FSA again and was again transferred to Groen. This time Deboer had questions about the ownership of a particular property his ex-wife had received following the recent dissolution of their marriage. Deboer's demeanor and voice "was much different than the first conversation," and he had "a very, very high level of anger." Deboer told Groen if

he did not get his land back "he would blow the court and [Groen] away." As Deboer further stated, "I don't care if I have to sit in jail, you and the court will give my land back," and then he hung up. Groen recalled Deboer said it "very angrily" and that she "had no doubt in [her] mind" he meant what he said.

Groen made notes about the conversations she had with Deboer that day, as she was trained to do. Groen did not have an immediate concern about her staff because the office closes at 4:30 p.m. and "[t]hey were on their way out the door for the day at this time." Per "FSA procedure," Groen called her supervisor regarding the statements made by Deboer. Groen's supervisor stated he would contact the office of inspector general (OIG) the next morning so the OIG could "look into it" to "determine is this a valid threat or not." The supervisor also directed Groen to report the statements to the sheriff's office.

Sometime "[a]fter 5:00 p.m." Groen went to the Lyon County sheriff's office to make a report. No officers were present, but at approximately 6:30 p.m., an officer called Groen's cell phone to take her report. Groen was "adamant" the officer not talk to Deboer until the OIG completed its investigation and told the officer she "just wanted [the police] to know what happened in case there were any future problems." At her home that evening, Groen took "special precaution" to lock her door and let her dogs out.

The next morning, September 8, Groen's supervisor contacted her and they "reviewed the threat [she] had received from [Deboer] the day before." The supervisor then contacted the OIG "and put in a full report, which is the procedure at FSA." The OIG initiated an investigation and that day a special agent went to Deboer's residence "in attempt to interview him about the phone

call," but Deboer "was not at his residence so no interview was conducted at that time."

On September 21, the agent was able to interview Deboer and draft a report. Based on the agent's report and verbal discussion with United States attorney's office, the OIG decided not to prosecute Deboer.

On October 17, the State issued an arrest warrant for Deboer for threat of terrorism and harassment, based on his statements to Groen on September 7. The arrest warrant was personally served on Deboer on October 21, and he turned himself in later that day.

Deboer was subsequently charged with threat of terrorism, pursuant to Iowa Code section 708A.5 (2011) and harassment in the first degree, in violation of section 708.7(2), as a habitual offender.[1] A jury found Deboer guilty as charged of the threat of terrorism and guilty of the lesser offense of harassment in the second degree. For the threat of terrorism conviction, with the habitual offender enhancement, Deboer was sentenced to fifteen years of imprisonment, with a three-year minimum. He was sentenced to one year of incarceration on the harassment conviction, to be served concurrently.

Deboer appeals, claiming there was insufficient evidence to convict him on the threat of terrorism count. He also asserts the district court erred in applying an incorrect standard in denying his motion for new trial.

[1] Deboer stipulated to prior convictions for operating while intoxicated, third offense, and felon in possession of a firearm.

II. Standards of Review

Claims of insufficient evidence are reviewed for correction of errors at law. *State v*. *Hennings*, 791 N.W.2d 828, 832-33 (Iowa 2010). The jury's verdict is binding on appeal unless there is an absence of substantial evidence in the record to sustain it. *Id.* "Evidence is substantial if it would convince a rational trier of fact the defendant is guilty beyond a reasonable doubt." *State v*. *Jorgensen*, 758 N.W.2d 830, 834 (Iowa 2008). In assessing the sufficiency of the evidence, the court is to view the evidence "in the light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the evidence in the record," *State v*. *Leckington*, 713 N.W.2d 208, 213 (Iowa 2006), and the court should "find circumstantial evidence equally as probative as direct." *State v*. *Meyers*, 799 N.W.2d 132, 138 (Iowa 2011).

In regard to Deboer's claim that the district court erred in denying his motion for new trial because the verdict was contrary to the weight of the evidence, our standard of review is for abuse of discretion. *State v*. *Nitcher*, 720 N.W.2d 547, 559 (Iowa 2006).

III. Sufficiency of the Evidence

The jury was instructed the State would have to prove the following elements of threat of terrorism:

> 1. On or about the 7th day of September 2011, the defendant threatened to commit terrorism or cause terrorism to be committed. . . .
> 2. Defendant's threats caused a reasonable expectation or fear of imminent commission of such act of terrorism. . . .

The jury received the following instruction on "terrorism":

> "Terrorism" means an act intended to intimidate or coerce a civilian population, or to influence the policy of a unit of government by intimidation or coercion, or to affect the conduct of a unit of government by shooting, throwing, launching, discharging, or otherwise using a dangerous weapon at, into, or in a building occupied by another person, or within an assembly of people.

The crux of Deboer's appeal is that the State did not present sufficient evidence to prove a reasonable expectation he would *imminently* act on his threats. As the jury was instructed, "'Imminent' is defined as ready to take place, near at hand, hanging threateningly over one's head or menacingly near. The threat does not need to mean an immediate commission of an act of terrorism. However, it does mean a reasonable expectation the act is impending or about to occur."

This instruction mirrors the definition of "imminent" our supreme court has adopted for this crime. *State v. Lane*, 743 N.W.2d 178, 182 (Iowa 2007) (observing "[t]he legislature did not define the word 'imminent' as used in section 708A.5" and defining it as "'ready to take place,' 'near at hand,' 'hanging threateningly over one's head,' and 'menacingly near'" (quoting *State v. Shanahan*, 712 N.W.2d 121, 142 (Iowa 2006))).

In *Lane*, the court analyzed whether the State presented sufficient evidence to prove a reasonable expectation the defendant would imminently act on his threats. 743 N.W.2d at 181-82. In that case, the defendant was arrested for violating a protective order that required him to stay away from his mother. *Id.* at 180. While being handcuffed, the defendant told the officer: "Sheriff Kucera,

you can take this how you want. That Atlanta shooting[2] is not going to be the only thing that's going to happen. I am going to come down, get a court schedule, and I'm going to take care of all you mother fuckers." *Id.* at 180-81. Sheriff Kucera replied, "You don't even want to go there," and the defendant continued, "You guys are all going to be sorry when I get a court schedule." *Id.* at 181. In the booking room at the sheriff's office, the defendant stated, "You guys are going to be sorry. You know, I will get a court schedule and be down there." *Id.* at 181.

The court determined the defendant's threats did not satisfy the definition of "imminent." *Id.* at 182. The court observed the defendant was in custody when he made the statements to officers and "[a]s a practical matter, Lane would have been in jail until at least the next morning. Consequently, there was no reasonable likelihood Lane would imminently act on his threats." *Id.*

Deboer likens this case to *Lane*, and contends that because he had "at most" ten minutes to get to the FSA office before it closed after he hung up the phone "there was no reasonable likelihood [his] alleged threats could be carried out until the next morning"—therefore, the threats were not imminent. We disagree. In contrast to *Lane*, insofar as Groen knew, Deboer was not in custody or otherwise physically unable to act on his threat. Indeed, Groen was aware Deboer lived in the area and had previously conducted business at the FSA. For all Groen knew, Deboer could have been directly outside the FSA office while talking to her from his cell phone.

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[2] The Atlanta incident Lane referred to was "a courthouse shooting which occurred eight days earlier in Atlanta, Georgia. There, a man on trial for rape, overpowered his guard and then killed a judge, a court reporter, and a deputy sheriff before fleeing." *Id.* at 181.

However, the statute requires more than an ability to act on a threat. Section 708A.5 "require[s] a reasonable expectation the act is impending or about to occur." *Id.* ("[T]he statute requires a *'reasonable* expectation or fear of the *imminent* commission of such an act of terrorism.'" (quoting Iowa Code § 708A.5)).

Here, the jury reasonably could have found that Deboer called the FSA at 10:00 a.m., got frustrated talking to Groen, and hung up. At 4:20 p.m., Deboer called the FSA again and spoke to Groen. Groen could tell Deboer had been drinking, and he sounded intoxicated. Deboer would not listen to Groen's explanation regarding the ownership of a portion of his land that had been awarded to his wife in their recent divorce. He kept "talking over" Groen and eventually stated that if he did not get his land back "he would blow the court and [Groen] away." Deboer further said, "I don't care if I have to sit in jail, you and the court will give my land back," and then he hung up. This was not the first time Deboer had threatened Groen, but this time "he seemed more serious."

The FSA closed minutes later, at 4:30 p.m. Although Groen testified she was "afraid for [her] own personal safety" and for the safety of her staff, she took no immediate action to secure her safety or the safety of her staff. Groen "didn't think he would [come through the door], but [she] didn't know he wouldn't." Groen made notes about the conversations she had with Deboer. She then called her supervisor, who informed her that he would contact the OIG the next morning so the OIG could "look into it." Before she left the FSA office, Groen informed the program technicians at the office that she had received a threatening phone call "so they would be aware."

Sometime after 5:00 p.m., Groen left the FSA office and went to the sheriff's office to make a report. Because no officers were present, an officer called Groen's cell phone at approximately 6:30 p.m. to take her report. But Groen was "adamant" the officer not talk to Deboer until the OIG completed its investigation and told the officer she "just wanted [the police] to know what happened in case there were any future problems." At her home that evening, Groen locked her door and let her dogs out. The following day, Groen reviewed the safety procedures in place at the FSA office and the OIG initiated an investigation which it conducted over the course of several weeks and that culminated in no charges being filed against Deboer by federal authorities.

Viewing the evidence in the light most favorable to the State, we are unable to find that the facts and circumstances of this case give rise to a reasonable expectation that Deboer's action on his threat was impending or about to occur. Although Deboer's statements were intimidating and wholly inappropriate and there was no reason to believe Deboer did not have an ability to act on them, the actions of Groen, her supervisor, the sheriff, and the OIG in response to the statements do not convey an expectation that Deboer's threat was imminent. Indeed, Deboer's statements raised nothing more than a mere possibility that action on the threat would occur sometime in the future.

Moreover, the words of the threat itself contained a qualification: *if* the court and Groen did not give him his land back, *then* Deboer would blow them away. This contingency further removed Deboer's threat from being imminent. Just as a practical matter, Groen did not have the capability or authority to immediately transfer property; Deboer's statements acknowledged his belief that

the court would need to be involved in a decision to give him his land back. Upon our review, we do not find substantial evidence of a reasonable expectation or fear of the imminent commission of an act of terrorism.[3] *See* Iowa Code § 708A.5. We reverse Deboer's conviction and sentence under Count I and remand for entry of a judgment of acquittal on that count.[4]

IV. Motion for New Trial

Because we have reversed Deboer's conviction and sentence under Count I and remanded for entry of a judgment of acquittal, it is unnecessary to address his claim the trial court erred in overruling his motion for new trial as to that count. Our remaining analysis therefore relates only to Count II, the charge of harassment in the second degree.

Deboer contends the district court erroneously applied the "substantial evidence" standard to his motion for new trial and the ruling should be reversed and remanded for the court to rule on the motion applying the correct "weight of the evidence" standard. *See State v*. *Ellis*, 578 N.W.2d 655, 659 (Iowa 1998) (noting court is to consider motion for new trial to determine whether verdict is contrary to the weight of the evidence). The State concedes the district court applied the wrong standard in ruling on the motion for new trial and agrees this case should be remanded for the court to determine whether a new trial is warranted under the *Ellis* standard.

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[3] Deboer does not challenge his conviction for harassment in the second degree on sufficiency-of-evidence grounds.

[4] Deboer further supports his contention on appeal with a secondary claim regarding the legislature's intent of section 708A.5 and an alleged ambiguity of the term "threaten" in that section. We need not reach these issues in light of our conclusion on the crux of his contention, as set forth above.

We conditionally affirm Deboer's conviction and sentence under Count II, vacate the district court's ruling on the motion for new trial, and remand for the limited purpose of having the court determine whether the verdict is contrary to the weight of the evidence. The court shall do so on the basis of the existing record. If it denies Deboer's motion, our affirmance of his conviction shall stand. If it does not, it must set the conviction aside and order a new trial.

REVERSED IN PART, CONDITIONALLY AFFIRMED IN PART, RULING ON MOTION FOR NEW TRIAL VACATED, AND REMANDED WITH DIRECTIONS.