IN THE COURT OF APPEALS OF IOWA

No. 7-395 / 06-0258
Filed December 12, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

WILLIAM JOSEPH PINEGAR,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Joel D. Novak, Judge.

William Pinegar appeals from his convictions and sentences for homicide by vehicle, eluding, and operating a motor vehicle without the owner's consent. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Patricia Reynolds, First Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, John P. Sarcone, County Attorney, and Michael T. Hunter, Assistant County Attorney, for appellee.

Heard by Huitink, P.J., and Vogel and Baker, JJ.

HUITINK, P.J.

William Pinegar appeals from his convictions and sentences for homicide by vehicle, a class "B" felony, in violation of Iowa Code section 707.6A(1), eluding, a class "D" felony, in violation of section 321.279, and operating a motor vehicle without the owner's consent, an aggravated misdemeanor, in violation of section 714.7 (2003). We affirm in part, reverse in part, and remand.

I. Background Facts and Proceedings

On February 13, 2004, the State filed a three-count trial information charging Pinegar with homicide by vehicle, a class "C" felony, in violation of section 707.6A(2), eluding, a class "D" felony, in violation of section 321.279, and theft in the second degree, a class "D" felony, in violation of sections 714.1 and 714.2(2). The trial information was subsequently amended to charge Pinegar with homicide by vehicle, a class "B" felony in violation of section 707.6A(1). Pinegar pleaded not guilty to all offenses charged and timely filed notices of defenses, including compulsion and necessity.

The record includes evidence of the following: On January 19, 2004, Polk County Deputy Sheriff Cass Bollman attempted to stop a vehicle driven by Pinegar for speeding. According to Bollman's version, he initially activated his lights and later his siren in an effort to stop Pinegar's vehicle. Bollman testified he pursued Pinegar after Pinegar failed to stop and in the course of the pursuit Pinegar ran stop signs, red lights, and drove at speeds in excess of the posted speed limits. Pinegar's vehicle eventually collided with another vehicle, drove through a fence, struck a tree, and came to rest on its passenger side. Melissa Sayles, a passenger in Pinegar's vehicle, was ejected from the vehicle and died

of resulting head injuries. Police officers found a semi-automatic pistol near her body. Troy McDaniels, another passenger in Pinegar's vehicle, was also injured.

Pinegar told investigators he used methamphetamine and marijuana earlier that day. A subsequent blood test confirmed the presence of both substances, as well as amphetamines, in his system.

Pinegar and McDaniels told investigators that Sayles had also used methamphetamine that day. They also told investigators that Sayles told Pinegar not to stop because the vehicle was stolen and threatened Pinegar with a pistol if he refused to comply. Although McDaniels initially told investigators he did not see the pistol or hear any shots fired, he testified Sayles fired the pistol out of the window in the course of the pursuit. Bollman testified he did not see or hear any gunshots from Pinegar's vehicle during the pursuit.

At the close of the evidence, Pinegar objected to the trial court's proposed jury instruction on the eluding count because it failed to include the requisite willfulness element of that offense. Pinegar also claimed the State failed to prove Bollman was in uniform, a statutory element of eluding. Pinegar also requested instructions on both his necessity and compulsion defenses. The trial court overruled Pinegar's objections to the eluding instruction and declined to submit the necessity defense. The trial court's ruling states:

> [Y]ou established the, basically the prima facie case. You are entitled to a compulsion defense based on the evidence, because that's what I think you were claiming was do or die. The Court does not believe you are also entitled to the necessity defense. And so your request for that requested instruction will be overruled and denied.

On December 19, 2005, the jury returned a verdict finding Pinegar guilty of homicide by vehicle, eluding, and operating a motor vehicle without the owner's consent. Pinegar was subsequently sentenced to a term of imprisonment not to exceed twenty-five years on the homicide by motor vehicle count, five years on the eluding count, and two years on the operating a motor vehicle without the owner's consent count. The terms of imprisonment for the first two counts were ordered to be served consecutively, and the term of imprisonment for the last count was ordered to be served concurrent with the other two counts.

After Pinegar's trial, trial counsel discovered for the first time that State's exhibit 37, a woman's style wallet that was admitted into evidence, contained two notes apparently written by Sayles to "Billy." Testimony at trial revealed Pinegar and Sayles had an on-again-off-again romantic relationship. Pinegar's trial counsel obtained affidavits from two jurors indicating the jurors had discovered the notes, discussed them during deliberations, and at least one juror commented that Sayles would not have held a gun to the head of someone she loved. Other matters of fact and record will be referred to as necessary to resolve the issues on appeal.

On appeal, Pinegar contends: (1) the trial court erred in refusing to instruct the jury on his necessity defense; (2) trial counsel was ineffective in a number of particulars; and (3) the record contains insufficient evidence to support his eluding conviction.

II. Necessity Defense

We review a trial court's refusal to give a proffered jury instruction for errors of law. *State v. Kellogg*, 542 N.W.2d 514, 516 (Iowa 1996) (citing Iowa R.

App. P. 4; *State v. Breitbach*, 488 N.W.2d 444, 449 (Iowa 1992)). A defendant is entitled to a jury instruction on a defense if he or she has made a timely request, the request is supported by the evidence, and the request sets forth a correct statement of the law. *State v. Johnson*, 534 N.W.2d 118, 124 (Iowa Ct. App. 1995) (citing *United States v. Brake*, 596 F.2d 337, 339 (8th Cir. 1979)).

The necessity defense has long been recognized in Iowa. *See State v. Ward*, 170 Iowa 185, 191, 152 N.W. 501, 503 (1915) (holding the defendant was entitled to pursue this defense for killing a deer that destroyed his crop). Historically, this defense was only available in cases involving physical forces; however, the Iowa Supreme Court has held it is also available in cases involving human forces. *State v. Walton*, 311 N.W.2d 113, 114-15 (Iowa 1981) (citing *State v. Reese*, 272 N.W.2d 863, 866 (Iowa 1978); W. LaFave & A. Scott, *Handbook on Criminal Law* § 50, at 381 (1972) [hereinafter LaFave & Scott]; R. Perkins, *Criminal Law* 956 (2d ed. 1969)).

"The rationale of the necessity defense lies in [the] defendant being required to choose the lesser of two evils and thus avoiding a greater harm by bringing about a lesser harm." *Id.* at 115. According to one commentator, "'the law ought to promote the achievement of higher values at the expense of lesser values, and sometimes the greater good for society will be accomplished by violating the literal language of the criminal law.'" *State v. Bonjour*, 694 N.W.2d 511, 512 (Iowa 2005) (quoting 2 Wayne R. LaFave, *Substantive Criminal Law* § 10.1 (2d ed. 2003)).

The necessity defense only applies in emergency situations "where the threatened harm is immediate and the threatened disaster imminent." *Walton*,

311 N.W.2d at 115. In addition, if a defendant "is not personally at fault for creating the situation calling for the necessity," we must consider the following factors: "(1) the harm avoided, (2) the harm done, (3) the defendant's intention to avoid the greater harm, (4) the relative value of the harm avoided and the harm done, and (5) optional courses of action and the imminence of disaster." *Id.* (citing LaFave & Scott, *Handbook on Criminal Law* § 50, at 385-88). However, "[i]f all of the requirements of the defense are not addressed in the defendant's evidence, [the] trial court is not obligated to submit the issue to the jury." *Id.* (citing *United States v. Campbell*, 609 F.2d 922, 924-25 (8th Cir. 1979), *cert. denied*, 445 U.S. 918 (1980)); *see also State v. Harrison*, 473 N.W.2d 242, 243 (Iowa Ct. App. 1991) (holding the evidence the defendant presented did not generate a fact question on necessity).

Based on our review of the record, we conclude the trial court correctly declined Pinegar's proffered jury instruction on necessity. Pinegar was personally at fault in creating the situation giving rise to the claimed necessity because he was speeding and driving under the influence of marijuana and methamphetamine. Moreover, a necessity defense assumes a reasoned decision or choice. *Walton*, 311 N.W.2d at 115; *see also United States v*. *Baily*, 444 U.S. 394, 410 100 S. Ct. 624, 634, 62 L. Ed. 2d 575, 590 (1980). The trial court's observation that "what . . . you [are] claiming was do or die" captured the essential element distinguishing the necessity defense from the compulsion defense submitted to the jury. We accordingly affirm on this issue.

III. Eluding/Substantial Evidence

We review challenges to sufficiency of the evidence for correction of errors at law. *State v. Thomas*, 561 N.W.2d 37, 39 (Iowa 1997) (citing *State v. Randle*, 555 N.W.2d 666, 671 (Iowa 1996)). A jury's verdict is binding on appeal if it is supported by substantial evidence. *State v. LeGear*, 346 N.W.2d 21, 23 (Iowa 1984) (citing *State v. Schrier*, 300 N.W.2d 305, 306 (Iowa 1981)). Substantial evidence is "such evidence as could convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt." *State v. Gay*, 526 N.W.2d 294, 295 (Iowa 1995) (citing *State v. Taft*, 506 N.W.2d 757, 762 (Iowa 1993)). Evidence, however, that only raises "'suspicion, speculation, or conjecture'" does not constitute substantial evidence. *Randle*, 555 N.W.2d at 671 (quoting *State v. Barnes*, 204 N.W.2d 827, 829 (Iowa 1972)).

When reviewing challenges to 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. Hoeck*, 547 N.W.2d 852, 859 (Iowa Ct. App. 1996) (citing *State v. Bass*, 349 N.W.2d 498, 500 (Iowa 1984); *State v. Hall*, 371 N.W.2d 187, 188 (Iowa Ct. App. 1985)). "Although direct and circumstantial evidence are equally probative, the inferences to be drawn from the proof in a criminal case must 'raise a fair inference of guilt as to each essential element of the crime.'" *State v. Speicher*, 625 N.W.2d 738, 741 (Iowa 2001) (quoting *State v. Casady*, 491 N.W.2d 782, 787 (Iowa 1992)). Finally, we must consider all of the evidence, not just that which supports the jury's verdict. *State v. Conroy*, 604

N.W.2d 636, 638 (Iowa 2000) (citing *State v. Kostman*, 585 N.W.2d 209, 211 (Iowa 1998)).

Both the jury instruction on eluding submitted in this case and section 321.279(3) require the peace officer be in uniform. *See* Iowa Code § 321.279(3) ("The driver of a motor vehicle commits a class "D" felony if the driver willfully fails to bring the motor vehicle to a stop or otherwise eludes or attempts to elude a marked official law enforcement vehicle that is driven by a uniformed peace officer. . . .").

There is no dispute concerning the absence of any direct evidence indicating Bollman was in uniform at the time he attempted to stop Pinegar's vehicle. The State, nevertheless, argued, "Well, Judge, my understanding is the officer testified that he was on duty that day. He showed up in court in uniform. I think the jury can infer that when he is on duty he is in uniform."

It is the State's burden to prove the essential elements of the crime charged beyond a reasonable doubt. *State v. Gray*, 216 N.W.2d 306, 307 (Iowa 1974). In appropriate circumstances, the State's burden can be met by inference. *Speicher*, 625 N.W.2d at 741 (citing *Casady*, 491 N.W.2d at 787). To "infer" means to "'derive by reasoning (or) implication or conclude from facts or premises.'" *Henderson v. Scurr*, 313 N.W.2d 522, 525 (Iowa 1981) (quoting Webster's Third New International Dictionary 1158 (1961)). A permissive inference allows but does not require the trier of fact to infer an elemental fact from a basic fact. *Id.* (citing *County Ct. of Ulster County, N.Y. v. Allen*, 442 U.S. 140, 157, 99 S. Ct. 2213, 2224, 60 L. Ed. 2d 777, 792 (1979)). The elemental fact to be established must be reasonably and generally inferred from the facts

shown. *Carter v. MacMillan Oil Co.*, 355 N.W.2d 52, 56-57 (Iowa 1984) (citing *Stenberg v. Buckley*, 245 Iowa 622, 627-29, 61 N.W.2d 452 455-56 (1953); *Gilmer v. Neuenswander*, 238 Iowa 502, 506, 28 N.W.2d 43, 45 (1947)). Here the State was required to prove Bollman was in uniform at the time he attempted to stop Pinegar. *See* Iowa Code § 321.279(3). Because the record contains no direct evidence of that fact, the jury was required to make that determination by inference based on other facts in the record. Contrary to the State's claim, none of the facts cited by the State support the requisite inference in the exercise of ordinary deductive reasoning. In other words, the fact that the officer was on duty or wore his uniform to court is insufficient to support the jury's implicit finding that he was in uniform at the time he attempted to stop Pinegar. *See, e.g., State v. Hudson*, 932 P.2d 714, 717-18 (Wash. App. 1997); *State v. Fussell*, 925 P.2d 642, 644-45 (Wash. App. 1996) (stating evidence officer in marked car and on duty insufficient for jury to infer beyond reasonable doubt that officer was in uniform). Moreover, we are not inclined to diminish the State's burden of proof by permitting the suggested inference, especially in view of the relative ease with which the uniform element of eluding can be established. Because the evidence was not sufficient to establish all of the essential elements of eluding, we reverse Pinegar's conviction on that count and remand for entry of a judgment of acquittal. *See State v. Boggs*, ____ N.W.2d ___, ___ (Iowa 2007) (stating conviction reversed for insufficient evidence is the equivalent of an adjudication of not guilty) (citing Iowa Code § 816.3(3) (2001); *United States v. DeFrancesco*, 449 U.S. 117, 131, 101 S. Ct. 426, 434, 66 L. Ed. 2d 328, 341 (1980); *State v. Swartz*, 541 N.W.2d 533, 537 (Iowa Ct. App. 1995)).

IV. Ineffective Assistance of Counsel

We review ineffective assistance of counsel claims, arising from a defendant's Sixth Amendment right to counsel, de novo. *State v. Westeen*, 591 N.W.2d 203, 207 (Iowa 1999) (citing U.S. Const. amend VI; *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996)).

In general, we preserve ineffective assistance of counsel claims for postconviction relief proceedings "where preserving the claim[s] allow[ ] the defendant to make a complete record of the claim, allow[ ] trial counsel an opportunity to explain his or her actions, and allow[ ] the trial court to rule on the claim." *State v. Shanahan*, 712 N.W.2d 121, 136 (Iowa 2006) (citing *State v. Bass*, 385 N.W.2d 243, 245 (Iowa 1986)). If, however, the record is adequate to determine that the defendant is not able to establish either prong of an ineffective assistance of counsel claim as a matter of law, we will affirm the defendant's conviction without preserving the ineffective assistance of counsel claims for postconviction relief proceedings. *State v. Taylor*, 689 N.W.2d 116, 134 (Iowa 2004) (citing *State v. Reynolds*, 670 N.W.2d 405, 411 (Iowa 2003); *State v. Liddell*, 672 N.W.2d 805, 809 (Iowa 2003)). Because the record is inadequate and trial counsel should be afforded an opportunity to explain his actions, we preserve Pinegar's remaining ineffective assistance of counsel claims for postconviction relief proceedings.

V. Conclusion

Based on the foregoing, we affirm Pinegar's homicide by vehicle conviction, reverse his eluding conviction, and preserve his ineffective assistance

of counsel claims for postconviction relief proceedings. We also remand to the trial court for further proceedings in conformity with our opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.