IN THE COURT OF APPEALS OF IOWA

No. 0-33 / 89-452

FILED
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CLERK SUPREME COURT

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STATE OF IOWA,

Appellee,

vs.

DAN LENZE,

Appellant.

Appeal from the Iowa District Court for Madison County, Peter A. Keller, Judge.

The defendant appeals from his conviction, following a jury trial, for assault with intent to inflict serious injury, an aggravated misdemeanor. **AFFIRMED.**

Susan K. Janssen, Winterset, for appellant.

Thomas J. Miller, Attorney General; Ann E. Brenden, Assistant Attorney General; and A. Zane Blessum, County Attorney; for appellee.

Considered by Oxberger, C.J., and Schlegel and Hayden, JJ.

PER CURIAM

On September 24, 1988, the phone rang in the home of Amanda and Dan Lenze, the defendant. The call was from the Lenzes' thirteen-year-old daughter who was upset and crying. Marian said Danny Dhabalt was chasing both her and her brother with a bar and was beating on her bike. She told her mother she was scared half to death. Amanda told her husband, the defendant, who immediately left to go find his daughter. He eventually found Marian. After being told by his children Danny's mother had yelled and cussed at them, he walked over to the Dhabalt house door. A fight ensued between the two couples.

The defendant was charged with assault with intent to inflict a serious injury on another in violation of Iowa Code section 708.2(1). After a trial, the jury found Lenze guilty of that crime. He was sentenced to incarceration for up to two years.

The defendant has appealed from his conviction and sentence raising four issues for our review.

The defendant challenges the sufficiency of the evidence to support the conviction. He contends the evidence did not establish he had the intent to inflict a serious injury.

Defendant also contends the district court erred by submitting to the jury the lesser offense of assault without intent to inflict serious injury but resulting in

bodily injury. Defendant argues the latter crime is not a lesser-included offense of the crime charged because the latter includes an element which is not an element of the greater crime. The State concedes the lesser offense is not legally included in the greater offense, but argues the instruction submitting the lesser offense caused the defendant no prejudice.

Defendant challenges the admission into evidence of his statement, allegedly made a few minutes after the fight, that he would kill the victim if the victim pressed charges. Lenze argues this evidence was irrelevant to anything which occurred during the actual fight.

Finally, defendant contends the district court abused its sentencing discretion by imposing the maximum sentence of up to two years in prison, and by failing to state on the record its reasons for choosing that sentence.

We affirm defendant's conviction and sentence.

1. **SUFFICIENCY OF EVIDENCE.** Lenze argues the verdict of aggravated assault with intent to inflict serious injury requires "something more" than an ordinary battery. He maintains the injuries sustained by Dhabalt were not severe enough to fall within the classification of serious injury. He states the verdict is not supported by evidence he intended to seriously injure the victim. In support of this argument, he refers us to case law which indicates something more than mere bodily injury has been required

for convictions of aggravated assault with intent to inflict serious injury verdicts.

Our scope of review is on assigned error only. Iowa R. App. P. 4. The standards governing a challenge to the sufficiency of the evidence are well established.

> We will uphold a verdict where there is substantial evidence in the record tending to support the charge. 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 which may fairly and reasonably be deduced from the evidence in the record. 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. 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. Substantial evidence means evidence which would convince a rational factfinder that the defendant is guilty beyond a reasonable doubt.

State v. Wheeler, 403 N.W.2d 58, 60 (Iowa App. 1987). (Citations omitted.)

Defendant argues there was insufficient evidence of intent to inflict a serious injury upon the victim. We disagree.

There is substantial evidence in the record from which a jury could reasonably have found this assault was with the intent to inflict serious injury on the victim. From the moment the Dhabalts came to their door, the defendant verbally and then physically assaulted them. He hit Mr. Dhabalt in the face, threw him against the air conditioner,

hit him in the ribs, threw him to the pavement, sat on him, and continued the attack. When the victim freed himself, Lenze threw a chair at him.

When we view all the evidence in the record in the light most favorable to the State, including legitimate inferences and presumptions reasonably deduced, we find the evidence sufficient to convince a rational factfinder the defendant is guilty beyond a reasonable doubt. We affirm the trial court on this issue.

2. **DEFENDANT'S SENTENCE.** Lenze asserts the trial court abused its discretion in failing to consider all the factors relative to sentencing and in failing to state on the record the reasons for imposing the maximum sentence. We do not agree.

Assault with intent to inflict a serious injury is an aggravated misdemeanor. Iowa Code § 708.2(1). When a person is convicted of an aggravated misdemeanor and a specific penalty is not provided for, the maximum penalty shall be imprisonment not to exceed two years. Iowa Code § 903.1(2).

When a sentence is imposed within statutory limits, it will be set aside only for an abuse of discretion. State v. Gibb, 303 N.W.2d 673, 687 (Iowa 1981). Our supreme court has stated an abuse of discretion will not be found unless it can be shown discretion was exercised on grounds clearly untenable, or, to an extent, clearly

unreasonable. State v. Brumage, 435 N.W. 2d 337, 341 (Iowa 1989), citing to State v. Morrison, 323 N.W.2d 254, 256 (Iowa 1982).

Defendant claims the trial court did not adequately state the reasons behind its choice of sentence. Contrary to this assertion, the trial court did state the reasons for the sentence. The court stated:

> In making this sentence, the Court has considered the facts and circumstances of the case as revealed by the record, the recommendations of the county attorney, the opportunity for rehabilitation of the defendant, the protection of the community from further offenses of the defendant, and all other matters made a part of the record in this case which are a part of the file. The court has determined that this is not a case in which to grant probation and finds that probation would unduly depreciate the seriousness of this offense and is unwarranted because of the need to protect the public from further criminal activity of the defendant.

The court clearly considered all of the appropriate factors in sentencing Lenze. It considered and rejected the possibility of probation. Iowa case law indicates a statement of the court's rationale for the sentence imposed, even if terse, is sufficient as long as it evidences the exercise of discretion. See State v. Stanley, 334 N.W.2d 564, 568 (Iowa App. 1983). Defendant is not entitled to resentencing.

III. LESSER-INCLUDED OFFENSE. Lenze contends the trial court committed reversible error when it submitted the lesser-included offense of assault without intent to inflict serious injury because assault without intent is not a lesser-included offense of aggravated assault.

At the time of trial defendant objected on the ground that inclusion of "without intent to inflict serious injury" would cause confusion. Because Lenze did not raise the issue of the lesser included offense at the time of trial, the court was unable to rule on the grounds asserted on appeal. We affirm the trial court.

IV. MOTION IN LIMINE. Prior to trial, defendant filed a motion in limine asking the court to exclude Lenze's response to the statement from the Dhabalts that they were going to sue him or press charges. Lenze allegedly replied, "If you do I'll kill you." The trial court overruled the motion, and testimony of the statements was admitted. Defendant now contends those statements were inflammatory and irrelevant to the fight that had already occurred. We do not agree.

Defendant must demonstrate the trial court abused its discretion in admitting this evidence. See State v. Cott, 283 N.W.2d 324, 329 (Iowa 1979). Because he has failed to do so, we affirm the trial court's denial of the motion in limine.

AFFIRMED.