



IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed September 20, 1979

vs.

)

HENRY WALTER OSBORN, JR.,

)

III
61785

Defendant-Appellant.)

Appeal from Cedar District Court - Nathan Grant, Judge.

Defendant appeals from conviction for malicious threats to extort in violation of section 720.1, The Code 1977, and sentencing as habitual offender under section 747.5, The Code. Reversed and Remanded.

Philip B. Mears, Iowa City, for appellant.

Thomas J. Miller, Attorney General of Iowa, Lona Hansen, Assistant Attorney General, and Edward W. Kemp, Cedar County Attorney, for appellee.

Heard by Oxberger, C. J., Donielson, Snell, Carter and Johnson, JJ.

DONIELSON, J.

Defendant, Henry Osborn Jr., appeals conviction for malicious threats to extort in violation of section 720.1, The Code 1977, and sentencing as an habitual offender under section 747.5, The Code. Defendant alleges several errors. We reverse on the issue of incorrect instructions that extended the scope of the offense beyond that charged in the information.

Defendant was charged by county attorney's information on January 17, 1978 with two counts of extortion in violation of section 720.1, which reads in pertinent part:

If any person, either verbally or by any written or printed communication, maliciously threaten to accuse another of a crime or offense, or to do any injury to the person or property of another, with intent to extort any money or pecuniary advantage whatever, or to compel the person so threatened to do any act against his will, he shall be imprisoned

Count I of the information alleged defendant "did maliciously threaten to do injury to the person of Delano L. Gehrls with the intent to extort money or pecuniary advantage" Count II alleged defendant "did maliciously threaten to do injury to the person of Delano L. Gehrls with the intent to compel [him] to do acts against his will"

The trial court instructed the jury, over defense objection, a person is guilty of the crime of making malicious threats to extort if he or she maliciously threatens to accuse another of a crime or offense. Defendant contends malicious threats to accuse another of a crime is a separate and distinct offense not charged in the information. Alternatively, defendant contends even if it is not a separate offense, the jury instructions vary fatally from the information, and the State made no amendment to conform to the proof. Sections 773.43-.46, The Code. See State v. Cooper, 223 N.W.2d 177, 180 (Iowa 1974).

Section 720.1 defines two separate and distinct offenses, the crime of malicious threats to extort money and the crime of malicious threats to compel a person to do an act against his will. State v. Wilbourn, 219 Iowa 120, 121, 257 N.W. 571, 573 (1934); State v. Essex, 217 Iowa 157, 158, 250 N.W. 895, 896 (1933). Threats to accuse another of a crime or to do injury to person or property are alternative means by which an offense can be committed, Wilbourn, 219 Iowa at 121, 257 N.W. at 573; Essex, 217 Iowa at 159, 250 N.W. at 896, and an information need not allege a particular method. State v.

Bakker, 262 N.W.2d 538, 542 (Iowa 1978); State v. Hochmuth, 256 Iowa 442, 445, 127 N.W.2d 658, 659 (1964).

In this case, however, the State specified in the information the manner in which each offense was committed — defendant threatened to do injury. Having specified the means by which the crime was committed, defendant could not be convicted on a finding it was committed by other means. Bakker, 262 N.W.2d at 542; State v. Upton, 167 N.W.2d 625, 627 (Iowa 1969); Hochmuth, 256 Iowa at 445, 127 N.W.2d at 659; State v. Haesemeyer, 248 Iowa 154, 159, 79 N.W.2d 755, 758 (1956). The trial court's instructions opened to the jury the option of finding defendant guilty of committing the offense by malicious threats to accuse another of a crime. Some evidence supporting such a finding was introduced. The challenged instructions were erroneous.

A conviction should not be reversed for errors in instructions unless there is a reasonable basis for finding defendant suffered prejudicial error. See State v. Rullestad, 259 Iowa 209, 215, 143 N.W.2d 278, 281 (1966). Although a close question, we conclude the presence of instructions seven and nine forms a reasonable basis for finding that the jury could have found defendant guilty by maliciously threatening to accuse another of a crime. See State v. Lynch, 197 N.W.2d 186, 190 (Iowa 1972). This impermissible finding prejudiced defendant's rights to a fair trial.

Because we reverse and remand on this particular issue, we find it unnecessary to reach defendant's other issues.

REVERSED AND REMANDED.