IN THE COURT OF APPEALS OF IOWA

No. 1-347 / 00-1020
Filed October 12, 2001

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KYLE J. BONER,
Defendant-Appellant.

FILED
OCT 12 2001
CLERK SUPREME COURT

Appeal from the Iowa District Court for Lee County, Cynthia H. Danielson, Judge.

Kyle Boner appeals from his convictions and sentences for assault with intent to inflict serious injury, promoting or possession of contraband, and interference with official acts using a dangerous weapon and inflicting serious injury in violation of Iowa Code sections 708.2(1), 719.1(2), and 719.7(4)(a) (1999 Supp.). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Robert P. Ranschau, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kristin Mueller, Assistant Attorney General, Michael Short, County Attorney, and Robert J. Glaser, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Vogel and Vaitheswaran, JJ.

VAITHESWARAN, J.

A jury convicted inmate Kyle Boner of: (1) assaulting a correctional officer with the intent to inflict serious injury; (2) promoting or possessing contraband; and (3) interfering with official acts while using a dangerous weapon or inflicting serious injury. On appeal, Boner challenges the sufficiency of the evidence to support the convictions and contends the district court should have merged the sentences for the first and third offenses. We affirm.

I. Background Facts and Proceedings

A jury could have found the following facts. Correctional Officer Adam Hyatt was patrolling one of the cell blocks at the Iowa State Penitentiary when an inmate came out of his cell, chased him, and stabbed him eight times with a homemade knife.

The State charged Boner with attempted murder, promoting or possessing contraband, and interference with official acts while using a dangerous weapon or inflicting serious injury. *See* Iowa Code §§ 707.11(1999), 719.1(2) and 719.7(4)(a) (1999 Supp.). Boner claimed he was locked in his cell at the time and, therefore, could not have committed the crimes. A jury disagreed, convicting him of assault with intent to inflict serious injury,[1] promoting or possessing contraband, and interference with official acts while using a dangerous weapon or inflicting serious injury. Boner filed an application to merge the sentences for assault and interference with official acts. The district court denied the application and sentenced Boner to prison terms not exceeding two years on the assault charge, ten years on the contraband charge, and ten

[1] This crime is a lesser-included offense of attempted murder. *See State v. Winstead*, 552 N.W.2d 651, 653 (Iowa Ct. App. 1996).

years on the interference charge, to be served concurrently. This appeal followed.

II. Sufficiency of the Evidence

Boner argues the evidence is insufficient to support his convictions. As a preliminary matter, the State maintains Boner did not preserve error on this issue. We disagree and, accordingly, proceed to the merits.

We review challenges to the sufficiency of the evidence on error, upholding a finding of guilt if substantial evidence supports the verdict. *State v. Atkinson*, 620 N.W.2d 1, 3 (Iowa 2000).

A. Assault with Intent to Commit Serious Injury. The jury was instructed the State needed to prove the following elements:

1. On or about the 3rd day of September, 1999, the Defendant did an act which was meant to cause pain or injury to Adam Hyatt.
2. The Defendant had the apparent ability to do the act.
3. The act was done with the specific intent to cause a serious injury.

Boner maintains that he was not Officer Hyatt's assailant and could not have been because he was locked in his cell. He further points to his professed religious beliefs as evidence he lacked the specific intent to commit the crime. Although readily admitting he once was involved in "shadier enterprises," he asserts that extensive reading following his incarceration allowed him to experience a spiritual, cultural, and political awakening, which, in turn, helped him control his anger and eschew violence.

We find sufficient evidence from which a jury could have concluded Boner assaulted Officer Hyatt with the specific intent to cause a serious injury. An officer testified that not all the cells were locked on the day of the assault. Officer

Hyatt testified he was "[a] hundred percent" certain that Boner was the inmate who exited his cell and attacked him. He testified Boner hit him in the head and stabbed him. Another officer also positively identified Boner as the man with whom she had made eye contact during the altercation. A fourth officer stated he saw Boner shaking and breathing heavily after the incident. He also noticed Boner was dressed with unusually heavy clothing relative to the weather conditions, a sign he may have been using the clothing as armor. Finally, the officer noted that Boner's belongings were packed as if he was anticipating being locked up.

Boner responds that much of this inculpatory conduct has a more benign explanation. He claims he was wearing heavy clothing because his faith required him to engage in ritual purification by sweating. He further claims he was shaking and breathing heavily not because he just committed the assault but because he just witnessed the assault. Finally, he states his prison belongings were packed because he anticipated certain prisoners hostile to his religious practices would attack him, forcing him to defend himself and risk placement in lock-up. The jury, however, was free to disregard Boner's explanation of his conduct. *See State v. Maring*, 619 N.W.2d 393, 395 (Iowa 2000). We affirm the conviction for assault with intent to commit serious injury.

B. Promoting or Possessing Contraband. The jury was instructed the State was required to prove the following:

> 1. On or about the 3rd day of September, 1999, the Defendant was confined at the Iowa State Penitentiary.
> 2. Iowa State Penitentiary was an institution under the management of the Iowa Department of Corrections.
> 3. On that date the Defendant was in possession of a knife or dangerous weapon.

Boner only disputes the third element. We find sufficient evidence from which a jury could have concluded Boner possessed a dangerous weapon. Officer Hyatt testified he saw Boner carrying "a long, thin weapon." A weapon matching this description was later found at a location where Boner had been sighted. Hyatt's injuries, consisting of eight small puncture wounds, establish the dangerous nature of the weapon. In light of this evidence, we affirm the conviction for promoting or possessing contraband.

C. Interference with Official Acts. The jury was instructed the State would have to prove the following elements:

> 1. On or about the 3rd day of September, 1999, the Defendant knew Adam Hyatt was a correctional officer performing official duties.
> 2. The Defendant knowingly resisted, obstructed or interfered with Adam Hyatt's performance of his official duties.
> 3. The Defendant used a dangerous weapon and inflicted a serious injury on Correctional Officer Adam Hyatt.[2]

Again, there was sufficient evidence to support this conviction. Officer Hyatt testified he was investigating the passing of cigarettes and tobacco between cells when Boner came out of his cell, took a swing at him, and stated "[t]his is what you get for treating us this way." Boner then followed him toward the office door, stating, "[i]f you are going to fight back, I'm going to kill you." Boner hit and stabbed Hyatt before Hyatt got into the office. In light of this evidence, we affirm the interference conviction.

---

[2] Iowa Code section 719.1(2) requires use of a dangerous weapon **or** infliction of a serious injury. (Emphasis added).

III. Merger

Boner finally contends assault with intent to cause serious injury is a lesser-included offense of interference with official acts. In his view, therefore, the district court should have merged the two sentences. We disagree.

Iowa Code section 701.9, addressing the merger of lesser-included offenses, states "no person shall be convicted of a public offense which is necessarily included in another public offense of which the person is convicted." In deciding whether one public offense is necessarily included in another, our highest court has most recently applied the "impossibility test." *State v. Hickman*, 623 N.W.2d 847, 850 (Iowa 2001). Under this test, we examine the elements of each crime to determine if the greater offense can be committed without also committing the lesser offense. *Id.*

The greater offense in this case is interference with official acts using a dangerous weapon or inflicting serious injury. We believe this crime can be committed without also committing the lesser offense of assault with intent to inflict serious injury. As noted previously, the jury was instructed that the interference crime required proof Boner "knowingly resisted, obstructed, or interfered" with Officer Hyatt's official duties and "used a dangerous weapon and inflicted a serious injury" on Officer Hyatt. The assault crime required proof that Boner "did an act which was meant to cause pain or injury . . . .with the specific intent to cause a serious injury." Comparing the elements of these crimes, we note Boner could have knowingly interfered with Officer Hyatt's duties and, in the course of doing so, seriously injured him without specifically intending to inflict a serious injury. Therefore, he could have committed the interference crime

without also committing the assault crime, which, by its terms, requires proof of specific intent. *See State v. Heacock,* 521 N.W.2d 707, 711 (Iowa 1994) (finding no merger where one offense required act intended to cause injury and other offense did not); *State v. Ogan*, 497 N.W.2d 902, 903 (Iowa 1993) (noting one offense was general intent crime and other was specific intent crime). For this reason, we conclude assault with intent to commit serious injury is not necessarily included in the crime of interference with official acts using a dangerous weapon or inflicting serious injury. Accordingly, the district court was not required to merge the two sentences.

AFFIRMED.

Vogel, J., concurs; Sackett, C.J., concurs in part, and dissents in part.

SACKETT, C.J. (*concurs in part and dissents in part*)

I concur with the well-written majority opinion in all respects except I believe that assault with intent to cause serious injury is a lesser included offense of interference with official acts and I would find the district court should have merged the two sentences.