IN THE COURT OF APPEALS OF IOWA

FILED
NOV 30 1987
CLERK SUPREME COURT

STATE OF IOWA)

Plaintiff-Appellee,)

vs.)

DAVID L. RICHERS,)

Defendant-Appellant.)

Filed November 30, 1987 394

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87-95

Appeal from the Iowa District Court for Johnson County (No. 17438) - John R. Sladek, District Associate Judge.

Defendant appeals from his conviction, after a jury trial, of assault causing bodily injury, in violation of Iowa Code sections 708.1 and 708.2(2) (1985). **REVERSED AND REMANDED.**

Charles L. Harrington, Chief Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Mark J. Zbieroski, Assistant Attorney General; J. Patrick White, County Attorney; and Ann M. Lahey, Assistant County Attorney, for plaintiff-appellee.

Considered by Oxberger, C.J., and Donielson, and Sackett, JJ.

PER CURIAM

Defendant, David L. Richers, appeals from his conviction, after a jury trial, for the crime of assault causing bodily injury, a serious misdemeanor. See Iowa Code §§708.1, .2(2) (1985). The sole issue on appeal is whether the trial court erred in refusing to submit simple assault as an included offense. We reverse and remand for new trial.

The victim, Melinda Ann Rice, was defendant's girlfriend. On the date of the alleged offense defendant came to Rice's apartment. Defendant accused Rice of being unfaithful to him and demanded she return a diamond ring he had given her.

Over a period of three and one-half hours defendant and Rice argued. They called each other names and swore at each other. Defendant threw the contents of a glass of wine cooler in Rice's face. Defendant smashed a potted plant against the wall and punched a hole in a closet door.

Rice testified she received a black eye and bloody nose at one point when defendant struck her in the face. Defendant's version of the facts is that he shoved Rice away from him because she was trying to hit him. Defendant claims Rice's own arm struck her face as he shoved her away and her nose started bleeding.

The trial court submitted the case to the jury and instructed on the crimes of false imprisonment and assault causing bodily injury. Defendant requested an instruction on the included offense of simple assault, a simple misdemeanor. See Iowa Code §708.2(3) (1985). In refusing to submit simple assault as an included offense, the trial court stated, "... if the jury determines the facts as the defendant has described them, the court does not feel any crime has

been committed." The jury found defendant not guilty of false imprisonment and guilty of assault causing bodily injury.

It is the duty of the trial court to instruct the jury as to all lesser offenses of which the accused might be found guilty upon the evidence adduced. Iowa R. Crim. P. 6(3). Our task is to examine the record to determine whether there is a sufficient factual basis in the record for submitting the included offense. State v. Luckett, 387 N.W.2d 298, 299 (Iowa 1986).

We find under the evidence in this case a rational jury could find defendant guilty of simple assault. See State v. Sangster, 299 N.W.2d 661, 664 (Iowa 1980). For example, the jury might find a failure of proof on the issue whether Rice received bodily injury - her bloody nose - as a result of an assault by defendant, but sufficient proof to establish the intent and other elements of simple assault. Id. Defendant's throwing a drink on Rice could be found to constitute offensive contact. Defendant's actions in breaking the potted plant and punching the door could also be considered actions "intended to place another in fear of immediate physical contact which will be painful, injurious, insulting, or offensive, coupled with the apparent ability to execute the act." Iowa Code §708.1(2).

The trial court erred in refusing to submit simple assault as an included offense of assault causing bodily injury. The case must be reversed and remanded for new trial.

REVERSED AND REMANDED.