IN THE COURT OF APPEALS OF IOWA

No. 1999-529 (9-790) / 98-1541
Filed February 9, 2000

STATE OF IOWA,

Appellee,

vs.

ERIC LAMONT JONES,

Appellant.

FILED
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CLERK SUPREME COURT

Appeal from the Iowa District Court for Scott County, C.H. Pelton, Judge.

Eric Jones appeals his convictions and sentences on charges of assault resulting in injury in violation of Iowa Code section 708.2(2) (1997) and domestic assault with intent in violation of section 708.2A(2)(c). **AFFIRMED.**

Kent A. Simmons, Davenport, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, William E. Davis, County Attorney, and Julie Walton and Donald Frank, Assistant County Attorneys, for appellee.

Considered by Mahan, P.J., and Zimmer, and Vaitheswaran, JJ.

ZIMMER, J.

Eric Jones appeals his conviction and sentence on charges of assault causing injury in violation of Iowa Code section 708.2(2) (1997) and domestic assault with intent to inflict serious injury in violation of section 708.2A(2)(c). We affirm.

The jury could have found the following facts. Jones had been living with Cynthia Ellis for over a year. On March 15, 1998, Ellis traveled to Davenport to visit her son and Jones went to visit relatives in Muscatine. When Ellis did not arrive in Muscatine as planned, Jones became concerned that she had lapsed back into her drug habit. Several times, Jones called a crack house that Ellis had frequented in the past. Those who answered stated they did not know Ellis' whereabouts.

Jones eventually drove to Davenport and arrived at the crack house around 2:00 a.m. on March 16. Eyewitnesses testified he kicked or pushed in the door and entered the house yelling and calling Ellis names. He kicked and punched her for ten to fifteen minutes and uttered death threats. Jones also grabbed a vase and struck Ellis with it repeatedly until it shattered. The assault ceased and Ellis left with Jones. The couple testified they had argued in the house, but claimed no physical assault occurred there. However, both admitted he struck her repeatedly in the car on the way back to Muscatine. Jones stopped at his brother's house; by that time, Ellis' face was swollen and bloody and her nose appeared broken.

In April of 1998, Jones was charged with two criminal offenses in a single trial information. Count I charged him with first-degree burglary and Count II charged him with domestic abuse assault with the intent to inflict serious injury. Jones was

tried and on July 8, 1998, the jury returned a verdict of guilty on the domestic assault charge but convicted him of the lesser-included offense of assault causing bodily injury on the burglary count. At sentencing, the trial court found "[t]he two offenses arise out of the same assault, and the Court imposes concurrent sentences for that reason." The court then entered judgment on both charges and imposed a two-year sentence for domestic abuse assault with intent and a one-year sentence for assault causing bodily injury. The sentences were ordered to be served concurrently.

Jones appeals. He contends only a single assault was committed against Ellis. Consequently, he asserts that for purposes of sentencing, his conviction on the lesser offense of assault causing injury should have been merged with his conviction on the greater offense of domestic assault with intent to inflict serious injury. Jones maintains the trial court should have imposed sentence only on the greater offense.

I. Scope of Review. Jones argues his sentence was illegal because the court failed to merge the two convictions in accordance with Iowa Code section 701.9. Since Jones does not raise constitutional double jeopardy issues, our review is at law. *State v. Anderson,* 565 N.W.2d 340, 342 (Iowa 1997) (applying at law review to appeal of illegal sentence involving merger issue); *State v. Perez,* 563 N.W.2d 625, 627 (Iowa 1997).

II. Merger. Jones correctly points out he cannot be sentenced on both assault causing bodily injury and the greater offense of domestic assault with intent if the charges arose from a *single* assault. *See* Iowa Code § 701.9; *see also State*

v. McKettrick, 480 N.W.2d 52, 56 (Iowa 1992). Generally, the lesser-included offense merges with the greater offense unless the State charges two or more separate acts and treats them as separate episodes. *See State v. Williams*, 334 N.W.2d 742, 743 (Iowa 1983); *State v. Flanders*, 546 N.W.2d 221, 224 (Iowa App. 1996). However, where the alleged acts occur separately and constitute distinct offenses, there can be no complaint one is a lesser-included offense of the other. *State v. Constable*, 505 N.W.2d 473, 478 (Iowa 1993) (finding five distinct sex acts occurred during defendant's single encounter with child such that defendant could be charged with five separate offenses); *Flanders*, 546 N.W.2d at 224. Here, the jury heard evidence regarding an assault in the house and another, distinct in time and place, in the car. Therefore, there is no merit to his claim that the convictions should have been merged. *See State v. Spilger*, 508 N.W.2d 650, 651-652 (Iowa 1993).

In such a situation, we may affirm where substantial evidence supports a verdict on both counts. *See State v. Truesdell*, 511 N.W.2d 429, 432 (Iowa App. 1993). Substantial evidence supports a finding Jones assaulted Ellis in the house, causing bodily injury. Three eyewitnesses who were in the house with Ellis testified he beat and kicked her for several minutes and struck her with a vase or bottle. Ellis testified there was a "scuffle and confrontation" in the house, although she later emphatically denied any beating took place in the house.

Substantial evidence also supports a finding that an assault with inten inflict serious injury took place in Jones' car. Both Jones and Ellis admitted h her many times in the car. Jones admitted he lost control in the car, struck

the face, and elbowed her in the side, knowing she was already hurt. Witnesses testified that shortly after the incident, Ellis' face appeared severely bruised and bloody. The jury could have concluded a separate assault in the car was inflicted with the intent to cause serious injury.[1] Where substantial evidence supports a finding of two separate assaults, there can be no complaint that one is the lesser included offense of the other. *See Flanders*, 546 N.W.2d at 224 (citations omitted). We conclude no merger was required and affirm the district court.

AFFIRMED.

[1] The way Jones handled his defense lends support to this conclusion. Jones appeared to treat the counts separately. He denied an assault occurred in the house while admitting he struck Ellis in the car.