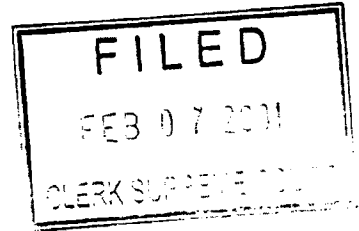


IN THE COURT OF APPEALS OF IOWA

No. 0-723 / 99-2014
Filed February 7, 2001



STATE OF IOWA,
Appellee,

vs.

QUOVADIS LEVI MARSHALL,
Appellant.

Appeal from the Iowa District Court for Black Hawk County, L. D. Lybbert,
Judge.

On appeal from his conviction for second-degree robbery, the defendant
argues the trial court erred in failing to instruct on the lesser included offense of
assault. **REVERSED AND REMANDED.**

Linda Del Gallo, State Appellate Defender, and Stephan J. Japuntich,
Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kristin Mueller, Assistant Attorney
General, Thomas J. Ferguson, County Attorney, and Joel Dalrymple, Assistant
County Attorney, for appellee.

Considered by Streit, P.J., and Vogel and Hecht, JJ.

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VOGEL, J.

Quovadis Marshall appeals the judgment and sentence entered upon his conviction of second-degree robbery in violation of Iowa Code sections 711.1 and 711.3 (1999). We reverse and remand for a new trial.

Background Facts. Marshall was arrested and charged with first-degree robbery in connection with the robbery of Mr. G's convenience store in Waterloo, Iowa. Marshall entered Mr. G's, threatened the store's attendant at gunpoint, and demanded he be given all the money in the store.

Following the close of the evidence, both the defense attorney and the prosecutor requested the district court give a marshalling instruction which would include the assault alternative under Iowa Code section 711.1 as well as instruct the jury on the lesser included offense of assault. The court declined their requests, stating that there was insufficient evidence of assault to merit such instruction.

On appeal Marshall contends the district court erred in failing to instruct on the lesser included offense of assault and requests a new trial on the charge of second-degree robbery.

Jury Instructions. We review a trial court's formulation of jury instructions for errors of law. Iowa R. App. P. 4; *Shinn v. Iowa Mut. Ins. Co.*, 610 N.W.2d 538, 541 (Iowa App. 2000). In formulating jury instructions, the trial court has a duty to instruct on offenses supported by substantial evidence and any lesser included offenses. See *State v. Johnson*, 328 N.W.2d 918, 919 (Iowa 1983); *State v. Liggins*, 557 N.W.2d 263, 267 (Iowa 1996). Evidence is

substantial when a reasonable mind would accept the evidence as adequate to reach a conclusion. *State v. Hogrefe*, 557 N.W.2d 871, 876 (Iowa 1996). In determining whether there is substantial evidence, we view the evidence in the light most favorable to the party requesting the instruction. *Id.*

Whether an offense is included within another is a question of law. *Johnson*, 328 N.W.2d at 919. Two tests must be satisfied. The first is the legal or element test. The lesser offense must be composed solely of some but not all elements of the greater crime. *State v. Wales*, 325 N.W.2d 87, 88 (Iowa 1982). The second, "factual" test is an ad hoc determination whether there is a factual basis in the record for submitting the included offense to the jury. *Id.*

Iowa Code section 711.1 provides the following definition of robbery:

A person commits a robbery when, having the intent to commit a theft, the person does any of the following acts to assist or further the commission of the intended theft or the person's escape from the scene thereof with or without the stolen property:

1. Commits an assault upon another.
2. Threatens another with or purposely puts another in fear of immediate serious injury.
3. Threatens to commit immediately any forcible felony.

Section 708.1 defines assault, in pertinent part, as any of the following:

1. Any act which is intended to cause pain or injury to, or which is intended to result in physical contact which will be insulting or offensive to another, coupled with the apparent ability to execute the act.
2. Any act which is 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.
3. Intentionally points any firearm toward another, or displays in a threatening manner any dangerous weapon toward another.

The marshalling instruction submitted to the jury included only the threat or fear alternative of robbery under section 711.1(2). The State, citing *State v. Welch*, 507 N.W.2d 580, 582 (Iowa 1993), argues that an instruction on the lesser included offense of assault is not warranted as the court need not instruct on a lesser included offense not embraced by the marshalling instruction. Marshall's argument on appeal encompasses the trial court's denial of the requested marshalling instruction under section 711.1(1). He contends there was sufficient evidence to support a marshalling instruction on the assault alternative, entitling him an instruction on the lesser included offense of assault. We agree. In the course of the robbery, Marshall threatened the store attendant's life, at one point pressing the gun into the small of his back. The attendant testified that he was put in fear of his life. This is adequate evidence of assault to require an instruction on the assault alternative to robbery under section 711.1(1) and, therefore, the lesser included offense of assault. See *Beyer v. Todd*, 601 N.W.2d 35, 38 (Iowa 1999) ("As long as a requested instruction correctly states the law, has application to the case, and is not stated elsewhere in the instructions, the court must give the requested instruction."); *State v. Steens*, 464 N.W.2d 874, 875 (Iowa 1991) ("[W]hen more than one statutory alternative of the major offense is submitted to the jury, and one of the alternatives includes a lesser offense, the defendant is entitled to have the lesser offense submitted as to that alternative."). We accordingly reverse and remand for a new trial.

REVERSED AND REMANDED.