

IN THE COURT OF APPEALS OF IOWA

No. 6-381 / 95-0973

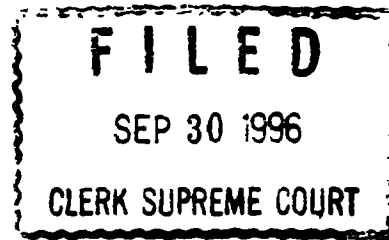
STATE OF IOWA,

Plaintiff-Appellee.

vs.

DENNIS DUANE HENDERSON,

Defendant-Appellant.



Appeal from the Iowa District Court for Lee County, John C. Miller, Judge.

Defendant appeals from his convictions of two counts of assault with intent to inflict serious injury and one count of attempted murder. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Ahmet S. Gonlubol, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General. Ann E. Brenden, Assistant Attorney General. and Robert Glaser, County Attorney, for appellee.

Heard by Sackett, C.J., and Huitink and Streit, JJ.

SACKETT, C.J.

On February 15, 1994, defendant-appellant Dennis Duane Henderson, while an inmate at the Iowa State Penitentiary, assaulted three prison kitchen employees and a correctional officer. As a result of these actions, defendant was charged with four counts of attempted murder. Defendant was convicted of two counts of assault to inflict serious injury and one count of attempted murder. We affirm.

At trial, there was evidence defendant, an African American and Muslim, was upset with treatment he and other African-American and Muslim inmates received from kitchen employees. Defendant hit employee David Englund, knocking him to the ground. Defendant, then armed with a part from an industrial can opener, went to the employee offices where he hit employee Robert Kurrle in the head, knocking him to the ground. Defendant next went to employee Glenn Jones' office. Defendant kept Jones from leaving the room and hit him a number of times before leaving. Defendant next encountered correctional officer Robert Alfred and hit Alfred in the head twice.

Defendant testified he did not intend to kill any of the people he assaulted. He says that if he had wanted to kill them, he could have. Defendant testified he meant to put stitches in Kurrle's head and he wanted to hurt Jones worse than he hurt Kurrle. When asked if he intended to injure Alfred, defendant responded, "I don't know. I was -- I was on a defensive thing then. I knew they were going to run in on me. So I was just trying to incapacitate them before they all jumped me."

The jury found defendant guilty of assaulting Englund. He was found guilty of assaulting Kurrle and Alfred with an intent to inflict a serious injury. He was found guilty of attempted murder of Jones.

Defendant contends his trial attorney was not effective because he failed to object to the submission of assault with intent to inflict serious injury and assault as lesser-included offenses of attempted murder. Defendant further contends there is not sufficient evidence of intent to kill to sustain his attempted murder conviction.

We first address defendant's claim his trial attorney should have objected to the trial court submitting assault with intent to inflict serious injury and assault as lesser-included offenses of attempted murder. Defendant claims it is possible to commit attempted murder without committing an assault.

We judge an attorney's performance under current law. *Snethen v. State*, 308 N.W.2d 11, 16 (Iowa 1981). To prevail on an ineffectiveness claim in which defendant complains of specific acts or omissions of counsel, defendant has the burden to show that (1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom. *Taylor v. State*, 352 N.W.2d 683, 684-85 (Iowa 1984). The test of ineffective assistance of counsel rests upon whether counsel's performance was reasonably effective; defendant must show that counsel's performance fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984).

Assault has been found to be a lesser-included offense of attempted murder. *See State v. Luckett*, 387 N.W.2d 298, 299 (Iowa 1986); *State v. Powers*, 278 N.W.2d 26, 28 (Iowa 1979). Defendant's trial attorney had no duty to object to submission of the lesser-included offense. *See Schertz v. State*, 380 N.W.2d 404, 410 (Iowa 1985).

Defendant's attorney breached no essential duty in failing to object to the submission of aggravated assault as a lesser-included offense of attempted murder. Defendant has failed on his claim of ineffective assistance of trial counsel.

The second issue is whether there is substantial evidence to prove beyond a reasonable doubt that defendant had a specific intention to kill Jones. Defendant contends the evidence shows he had trapped Jones in his office and could have killed him had he wished to do so.

When reviewing a challenge to the sufficiency of the evidence supporting a conviction, we view the evidence in the light most favorable to the State. *See State v. Hall*, 371 N.W.2d 187, 188 (Iowa App. 1985). We consider also those inferences and presumptions that may reasonably be made from the evidence introduced at trial. *See id.* Direct and circumstantial evidence are equally probative as long as the circumstantial evidence raises a fair inference of guilt and not just speculation or suspicion. *See State v. Hamilton*, 309 N.W.2d 471, 479 (Iowa 1981).

There was evidence defendant had a motive to attack Jones. He verbally expressed his intent to get Jones. Defendant admitted he wanted to put stitches in

Kurrie's head and hurt Jones more. The part of the can opener defendant used to hit Jones could have caused a fatal blow or a serious injury. *See State v. Phams*, 342 N.W.2d 792, 797 (Iowa 1983); *State v. Heinz*, 223 Iowa 1241, 1259, 275 N.W. 10, 21 (1937). The strength of the object and velocity of the blows were capable of causing death. Jones suffered two skull fractures and a contusion of the brain. These were life threatening injuries.

We affirm.

AFFIRMED.