IN THE COURT OF APPEALS OF IOWA

No. 4-008 / 92-2002

FILED
MAY 26 1994
CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

PAUL ASBERRY,

Appellant.

Appeal from the Iowa District Court for Poweshiek County, Richard J. Vogel, Judge.

The defendant appeals his conviction for second-degree robbery. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, Andi S. Lipman, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Martha E. Boesen, Assistant Attorney General, Michael W. Mahaffey, County Attorney, and John Heinicke, for appellee.

Considered by Hayden, P.J., Sackett, J., and Schlegel, S.J.*

*Senior judge from the Iowa Court of Appeals serving by order of the Iowa Supreme Court.

HAYDEN, J.

The State charged Paul Asberry, by trial information, with robbery in the second degree under Iowa Code sections 711.1(1) and 711.3 (1991). The matter proceeded to a jury trial. The evidence at trial indicated Asberry and five or six others approached a college student, Seth Thompson, in a hallway joining two dormitories at Grinnell College. Asberry asked Thompson where the money was Thompson owed him. Thompson testified he had not met Asberry before and indicated to Asberry he had no money. Asberry then struck Thompson twice in the head with a closed fist. Thompson attempted to escape but members of the group caught him and began to kick him. After another college student entered the hallway, Thompson managed to escape. Asberry denied he ever intended to take money from Thompson. Asberry claimed he and his friends came to the dormitory looking for a fight.

Asberry requested the trial court submit to the jury assault causing bodily injury as a lesser-included offense of second-degree robbery. The court denied this request. The trial court also denied Asberry's request to waive an instruction on the lesser-included offense of assault while participating in a felony. The State apparently did not specifically object to the request. The court instructed the jury on second-degree robbery, assault while participating in a felony, and simple assault. Asberry did not attempt to waive the instruction on simple assault.

The jury found Asberry guilty of second-degree robbery. The court denied Asberry's motion for new trial, entered judgment on the verdict, and sentenced Asberry to up to ten years. Asberry appeals.

I. Asberry contends the trial court erred in refusing to submit the offense of assault causing bodily injury as a lesser-included offense of second-degree robbery.

Our review is on error. State v. Coffin, 504 N.W.2d 893, 894 (Iowa 1993) (citing Iowa R. App. P. 4). Whether one offense is included in another is a question of law. State v. Johnson, 328 N.W.2d 918, 919 (Iowa 1983) (citation omitted). The trial court has a duty to instruct on all lesser-included offenses. Iowa R. Crim. P. 6(3). In determining whether an offense is lesser included, our courts employ an impossibility test. Coffin, 504 N.W.2d at 894; see State v. Jeffries, 430 N.W.2d 728 (Iowa 1988). "That test is whether the greater offense cannot be committed without also committing all elements of the lesser offense." Coffin, 504 N.W.2d at 894. For a lesser offense to be included in the greater offense, our test requires the lesser offense must "be composed solely of some but not all of the elements of the greater offense." State v. Thornton, 506 N.W.2d 777, 780 (Iowa 1993) (citing Coffin, 504 N.W.2d at 896, accord State v. Jeffries, 430 N.W.2d 728, 736 (Iowa 1988)). We look to the statutory elements of the offenses rather than to the charge or the evidence in the case. State v. Welch, 507 N.W.2d 580, 582

(Iowa 1993) (citing Jeffries, 430 N.W.2d 728); Coffin, 504 N.W.2d at 895 (citation omitted).

Asberry was charged with second-degree robbery under Iowa Code section 711.1(1) (1991). Under section 711.1(1) assault is a lesser-included offense of second-degree robbery. State v. Law, 306 N.W.2d 756, 758 (Iowa 1981); see Johnson, 328 N.W.2d at 920. The issue in this case, however, is whether assault causing bodily injury is a lesser-included offense of second-degree robbery.

The trial court submitted the following instruction, in pertinent part, on second-degree robbery under section 711.1(1):

> 1. . . . the defendant had the specific intent to commit a theft.
> 2. In carrying out his intention to assist him in escaping from the scene, with or without the stolen property, the defendant committed an assault . . .

See II Iowa Crim. Jury Instr. 1100.2; Iowa Code § 711.1 (1991). The court submitted the following instruction on the definition of assault: "an assault is committed when a person does an act which is meant to cause pain or injury to another person, when coupled with apparent ability to do the act."

The elements of the offense of assault causing bodily injury are:

> 1. The defendant did an act which was meant to cause pain, or resulted in physical contact which was insulting or offensive, or placed the victim in fear of immediate physical contact which would have been painful, injurious, insulting or offensive to the victim.
> 2. The defendant had the apparent ability to do the act.

3. The defendant's act caused a bodily injury or disabling mental illness to the victim.

I Iowa Crim. Jury Instr. 800.4; Iowa Code § 708.2(2) (1991).

Asberry argues the serious misdemeanor assault under section 708.2(2) should have been submitted as a lesser-included offense of second-degree robbery. We disagree. The offense of assault causing bodily injury is "not composed solely" of the elements of second-degree robbery because of the added dimension that defendant's act must have "caused a bodily injury or disabling mental illness to the victim." See Thornton, 506 N.W.2d at 780 ("not composed solely" of because of the added dimension in lesser offense). A lesser offense is necessarily included in the greater offense only if the greater offense cannot be committed without committing the lesser offense. State v. Dominguez, 482 N.W.2d 390, 391 (Iowa 1992) (citing State v. McNitt, 451 N.W.2d 824, 825 (Iowa 1990)). "'If the lesser offense contains an element not required for the greater offense, the lesser cannot be included in the greater.'" Welch, 507 N.W.2d at 582 (quoting Jeffries, 430 N.W.2d at 740). In this case defendant could have committed the greater offense without committing the lesser offense. Assault causing injury was not a lesser-included offense of second-degree robbery. Therefore, the trial court did not err in refusing to submit it to the jury. We affirm on this issue.

II. Asberry claims the trial court erred in failing to allow him to waive the lesser-included offense instruction of assault while participating in a felony. We affirm the decision of the trial court on this issue.

The general rule is a defendant may expressly waive a lesser-included offense instruction. Jeffries, 430 N.W.2d at 737 (citing State v. Burkett, 357 N.W.2d 632, 635 (Iowa 1984); State v. Veverka, 271 N.W.2d 744, 749 (Iowa 1978)). The application of this rule, however, has been limited to cases in which a defendant is asserting an "all or nothing" defense. See State v. Douglas, 485 N.W.2d 619, 622 (Iowa 1992) (defendant specifically waived all lesser-included offense submissions); State v. Wallace, 475 N.W.2d 197, 199, 202 (Iowa 1991); Burkett, 357 N.W.2d at 635 (defendant requested all lesser offense instructions be waived and wished to go to the jury on offense charged only); Veverka, 271 N.W.2d at 749 (same).

In the case at hand, Asberry accepted and did not object to the submission of the lesser-included offense of simple assault. Asberry was not relying on an "all or nothing" defense when he objected to the submission of the instruction on assault while participating in a felony. See State v. Turecek, 456 N.W.2d 219, 223 (Iowa 1990) ("A defendant who requests an instruction as to the lowest degree of multiple lesser-included offenses should also be compelled to accept the submission of all higher degree lesser-included offenses."). The trial court did not commit

reversible error in submitting the instruction on assault while participating in a felony. We affirm the conviction of Paul Asberry.

AFFIRMED.