IN THE COURT OF APPEALS OF IOWA

No. 1-181 / 90-1123

FILED
JUL 26 1991
CLERK SUPREME COURT

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STATE OF IOWA,

Appellee,

vs.

JAMES RAY FOSTER JR.,

Appellant.

Appeal from the Iowa District Court for Floyd County, Jon S. Scoles and Paul W. Riffel, Judges.

Foster appeals his conviction, following a jury trial, for the crime of willful injury. He contends the district court erred by refusing to give an instruction defining the term "assault." **REVERSED AND REMANDED.**

Roger L. Sutton, Charles City, for appellant.

Bonnie J. Campbell, Attorney General; Richard J. Bennett, Assistant Attorney General; Karl J. Horn, County Attorney; and Ralph A. Smith, Assistant County Attorney, for appellee.

Heard by Donielson, P.J., and Schlegel and Hayden, JJ.

SCHLEGEL, J.

Defendant James R. Foster Jr. appeals his jury conviction on the charge of willful injury. Foster contends the trial court erred in failing to instruct the jury on the definition of assault. We agree and therefore reverse the conviction and remand for a new trial.

On July 26, 1989, Foster was in his car with his girlfriend, parked in a Charles City grocery store lot. From his vantage point across the street in Central Park, Michael Pitz spotted Foster's car. Pitz sought to "finish a fight that was started a month before." Pitz approached and threw beer on Foster and the woman.

The two men scuffled until, Foster alleges, Pitz threatened to produce a knife. Foster retreated to his car. Pitz then spit in Foster's face, leaned on the passenger door of the car, and said that "he was going to kick [Foster's] ass and he was going to fuck [Foster's] girlfriend."

Pitz then stood in front of Foster's car waving some article of clothing in the fashion of a bullfighter. Driving the car, Foster chased Pitz around the parking lot. When Pitz began to return to Central Park, Foster, still driving the car, followed across the parking lot, over a curb, into the street, and up another curb.

The combatants' versions of succeeding events thereafter diverge. Foster asserted that when he pursued

Pitz with the car, he had intended only to scare Pitz and actually had not intended to strike him with the car. Foster claimed the car struck Pitz only because Pitz tripped or fell into the car's path. The State's evidence showed that Foster simply ran over Pitz and that he wanted to hurt Pitz.

Pitz suffered two broken legs and an injured hip. A doctor testified that both leg breaks were serious, that the hip was "essential[ly] shattered," and that the injuries posed a substantial risk of death to Pitz. There was also evidence that Pitz's injuries caused "protracted loss or impairment of function." See Iowa Code §§ 708.4 and 702.18.

Foster was charged with the crime of willful injury, a violation of Iowa Code section 708.4. A person commits the class "C" felony of willful injury by doing "an act which is not justified and which is intended to cause and does cause serious injury." The trial court gave the following instructions to the jury:

> Instruction No. 1
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> Members of the Jury: The Trial Information charges the defendant, James Ray Foster, Jr., with the crime of Willful Injury.
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> The charge of willful injury includes charges of the lesser crimes of (1) assault with intent to inflict serious injury, (2) assault causing bodily injury, and (3) assault.
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> * * *
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> Instruction No. 10
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> The State must prove all of the following elements of willful injury:
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> 1. On or about the 26th day of July, 1989, the defendant intentionally struck Michael Pitz with his automobile.

2. The defendant specifically intended to cause a serious injury to Michael Pitz.

3. Michael Pitz sustained a serious injury.

If you find the State has proved all of the elements, the defendant is guilty of willful injury. If the State has failed to prove any one of the elements, the defendant is not guilty of willful injury and you will consider whether or not the State has proven the elements of the lesser included offense of assault with intent to inflict serious injury.

If you find the State has proved both elements 1 and 2, the defendant is guilty of assault with intent to inflict serious injury. If the State has failed to prove either of the elements 1 or 2, the defendant is not guilty of assault with intent to inflict serious injury and you will consider whether or not the State has proven the elements of the lesser included offense of assault causing bodily injury.

The State must prove both of the following elements of assault causing bodily injury:

1. On or about the 26th day of July, 1989, the defendant intentionally struck Michael Pitz with his automobile.

2. Michael Pitz sustained a bodily injury.

If you find the State has proved both of these elements, the defendant is guilty of assault causing bodily injury. If the State has failed to prove either one of these elements, the defendant is not guilty of assault causing bodily injury and you will consider whether or not the State has proven the lesser included offense of assault.

If you find the State has proved only element number 1, the defendant is guilty of assault. If the State has failed to prove element number 1, then you will find the defendant not guilty.

Foster sought the inclusion of Iowa Criminal Jury Instruction 800.8. That instruction reads as follows:

> Concerning element number 2 of Instruction No._____, an Assault is committed when a person does an act which is meant to [cause pain or injury] [result in physical contact which will be insulting or offensive] [place another person in fear of immediate physical contact which will be painful, injurious, insulting or offensive] to another person, when coupled with apparent ability to do the act.

The jury convicted Foster on the charge of willful

injury. Foster appeals. He contends the trial court erred in refusing to give an instruction defining the term "assault." He argues that the definition was necessary to guide the jury's deliberations.

Jury instructions are designed to explain the applicable law to the jurors so the law may be applied to the facts proven at trial. State v. Cunningham, 463 N.W.2d 887, 889 (Iowa App. 1990) (citation omitted). The trial court's decision on instructions will not be disturbed absent an abuse of the trial court's discretion. Id. While "[t]here is no error in denying an instruction where the substance of the requested instruction is included in other instructions," State v. Freeman, 267 N.W.2d 69, 71 (Iowa 1978) (citations omitted), the court has the duty to instruct "'on the law applicable to the facts as disclosed by the evidence,'" id. at 72 (citing State v. Ritchison, 223 N.W.2d 207, 211 (Iowa 1974)), regardless of whether an instruction is actually requested, State v. Wiese, 162 N.W.2d 918, 921 (Iowa 1971). The trial court has a duty to ensure that the jury understands the law it must apply. Sanders v. Ghrist, 421 N.W.2d 520, 522 (Iowa 1988). In evaluating this, we must read all of the instructions together, not piecemeal or in artificial isolation. State v. Lynch, 197 N.W.2d 186, 189 (Iowa 1972).

In the present case, the trial court used the unqualified term "assault" throughout its instructions. The instructions first states that assault is a lesser

included offense of willful injury. The marshaling instruction states only that if the State merely proved that Foster intentionally struck Pitz he should be found guilty of assault. The Iowa Supreme Court has stated, "It is always incumbent upon the court to clearly, fully, and definitely define the crime charged and to instruct the jury as to the elements essential to be proven." State v. Richardson, 216 Iowa 809, 812, 249 N.W. 211, 212 (1933). The marshaling instruction is fatally deficient in failing to state what type of intent defendant must have in order commit "assault." Taking the instructions as a whole, we conclude that the instructions were insufficient to convey the applicable law to the jury. We therefore hold that the trial court committed an abuse of discretion in failing to give an instruction defining "assault."

Because the jury should have received a definitional instruction concerning assault, we reverse the judgment of conviction and remand for a new trial.

REVERSED AND REMANDED.

Hayden, J., concurs; Donielson, P.J., dissents.

DONIELSON, J. (dissenting)

I respectfully dissent. The majority has, in effect, determined that all alternatives of assault are lesser-included offenses of willful injury and, therefore, the jury instructions were "fatally deficient" in failing to define assault as requested by Foster. I disagree with the majority's premise and with its conclusion.

Foster asked the trial court to include the uniform jury instruction defining assault.[1] This instruction sets forth the alternative definitions of assault found in Iowa Code sections 708.1(1) and 708.1(2). Foster contended before the trial court that the failure to include the definitional instruction precluded a finding based upon a lesser-included offense. Foster does not argue that the instruction given did not adequately define assault as found in subsection 708.1(1) (act intended to cause pain or

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1. Foster sought the inclusion of Iowa Criminal Jury Instruction 800.8. That instruction reads as follows:

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Foster did not seek any specific alternative and we must therefore assume he requested all alternatives be included. However, we note the Comment to the instruction reads, "Omit that portion of the statute which is not charged or supported by the evidence."

injury). Instead, he argues the trial court erred in failing to instruct the jury that assault, as defined in subsection 708.1(2), may also be committed when a person does an "act which is intended to place another in fear of immediate physical contact which will be painful, injurious, insulting, or offensive * * *."

Foster contends assault is a basic element of willful injury and, therefore, assault must be defined. I find Foster is misguided in this contention. Willful injury is defined as follows: "an act * * * which is intended to cause and does cause serious injury to another * * *." Iowa Code section 708.4 (1989).

The portion of instruction number 10 relating to willful injury adequately states the law so that jurors of ordinary intelligence can understand it. A definition of "assault" was not necessary or even appropriate. Sufficient guidance concerning the law of willful injury was provided to the jury.

Foster next argues that he was denied his theory of defense. Foster contends he drove his car at Pitz with the intent to cause fear but not with the intent to injure. Foster contends that the trial court's failure to define assault as "any act intended to place another in fear of immediate physical contact which will be painful, injurious, insulting, or offensive", see Iowa Code section 708.1(2), deprived him of his theory of defense.

I find at least two problems with Foster's present contention. First, Foster did not urge this "theory of defense" before the trial court when he asked that the instruction defining assault be issued to the jury. Foster has therefore waived this specific contention on appeal. See Conner v. State, 362 N.W.2d 449, 453 (Iowa 1985).

Additionally, even had Foster raised this issue below, I find the definitional instruction requested was not a theory of defense and would have been properly rejected on that basis.

> A proper theory of defense instruction is one which sets forth a set of facts which would preclude a finding of guilt. See State v. Kase, 344 N.W.2d 223, 226 (Iowa 1984). Such an instruction is neither a marshalling instruction which sets forth the elements of the crime and requires the State to prove those elements, nor an instruction which defines one of the elements set forth in the marshalling instruction.

Id.

Foster's argument that he may have been guilty of a form of assault, but not of willful injury, is not a proper theory of defense. Foster asked that the district court instruct the jury on the definition of assault, which is not an element of willful injury. His request did not set forth an instruction asserting facts which would preclude a finding of guilt. If, however, Foster is unartfully attempting to claim the trial court erroneously failed to

instruct the jury on a lesser-included offense,[2] I reject this argument as well.

The question presented is whether the trial court was required to give an instruction based upon subsection 708.1(2). A jury must be instructed on all lesser-included offenses which meet the statutory elements approach. See State v. Jeffries, 430 N.W.2d 728 (Iowa 1988). If the statutory elements of a lesser offense are all included in a greater offense, so that the greater offense cannot be committed without also committing the lesser offense, and absent a stipulation to the element of the greater offense, the court must instruct the jury on both offenses. Id. at 737. Where an offense is defined alternatively, a trial court need not instruct the jury based upon all of the lesser offense alternatives simply because one of the lesser offense alternatives is included in the greater offense; the relevant definition is the one for the offense involved in the particular prosecution. State v. Waller, 450 N.W.2d 864, 865 (Iowa 1990) (citing State v. Sangster, 299 N.W.2d 661, 663 (Iowa 1980)).

The task before us is to apply the specific elements test to the alternative proffered by Foster. In applying this test, the court figuratively places the applicable statutes side by side and examines their elements in the

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2. Slight mention of this contention is included in Foster's motion for new trial and is also hinted at in appellant's brief. The State does address the contention in its appellate brief.

abstract. Jeffries, 430 N.W.2d at 730. The elements must match nearly perfectly, and if the lesser offense contains an element not included in the greater offense, it usually cannot be a lesser-included offense. Id. The elements of willful injury are:

1. An act;

2. Intended to cause serious injury;

3. Which does cause serious injury. Iowa Code § 708.4 (1989).

The elements of simple assault under section 708.1(2) are:

1. An act;

2. Intended to place another in fear of immediate physical contact which will be painful injurious, insulting, or offensive;

3. Coupled with the apparent ability to execute the act. Iowa Code § 708.1(2) (1989).

In applying the test, we look only to these elements, and not to the charge or the evidence. Jeffries, 430 N.W.2d at 740 (citing State v. Redmon, 244 N.W.2d 792, 801 (Iowa 1976)). Obviously the first element of assault under this alternative corresponds to the first element of willful injury.

The second element of the assault alternative under consideration requires an intent to place another in fear of immediate physical contact. Element two of willful injury requires an intent to cause serious injury. A person whose act evidences intent to cause serious injury

does not necessarily evidence an intent to place another in fear of physical contact which will be injurious. For example, assume a situation where the attacker is a sniper and has no intent that the victim know the attack is coming. Intent to cause injury does not always include an intent to induce fear in another. Given this difference between the statutes, it is apparent that willful injury may be committed without the intent required to commit assault as defined by section 708.1(2). Thus, assault under this alternative is not a lesser-included offense of the offense of willful injury with which Foster was charged.

Foster did not have a statutory right to an instruction on assault pursuant to Iowa Code section 708.1(2).

I would conclude the trial court did not err in refusing to define assault as requested by Foster. I would affirm.