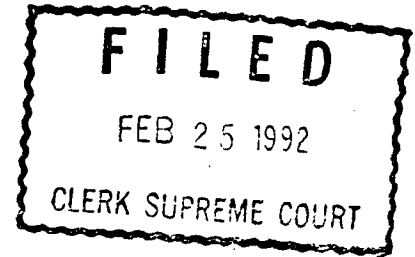


IN THE COURT OF APPEALS OF IOWA

No. 1-592 / 90-1208



STATE OF IOWA,

Appellee,

vs.

757

MICHAEL EMIEL HENLE,

Appellant.

Appeal from the Iowa District Court for Buena Vista County, Frank B. Nelson, Judge.

Henle appeals from his conviction, following a jury trial, for assault with intent to inflict serious injury.

AFFIRMED.

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds Lapointe, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General; Ann E. Brenden, Assistant Attorney General; and Corwin Ritchie, County Attorney, for appellee.

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

DONIELSON, P.J.

On January 15, 1990, Michael Henle ruthlessly beat another man with a baseball bat causing numerous, severe injuries to the victim. Charged with the crime of willful injury, Henle presented a defense of justification, arguing he had acted only to protect himself from deadly force. Henle claimed he struck the victim only because he feared for his life; he asserted that the victim had approached him with a baseball bat and had also threatened to shoot him. A jury found Henle guilty of the lesser-included offense of assault with intent to inflict serious injury, and he appeals from the resulting conviction.

Henle first argues the trial court erred in denying his motion for new trial. He contends the district court should have granted him a new trial due to the prosecutor's alleged misstatements of law during closing argument. He asserts the prosecutor misstated the legal principles applicable to his claim of self-defense.

Our scope of review is on assigned error only. Iowa R. App. P. 4. The trial court has broad discretion in ruling on motions for new trial, and we will not disturb the trial court's ruling in the absence of a clear abuse of that discretion. State v. Burkett, 357 N.W.2d 632, 638 (Iowa 1984). In order to show an abuse of discretion, one generally must show that the court exercised its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." State v. Blackwell, 238

N.W.2d 131, 138 (Iowa 1976) (quoting Weeks v. Burnor, 132 Vt. 603, 606, 326 A.2d 138, 140 (1974)).

Henle asserts the prosecutor made certain misstatements of law during closing arguments. The State asserts no timely objection was made to the prosecutor's statements, and as such, the issue was not properly preserved for review. See State v. Dahlstrom, 224 N.W.2d 443, 449 (Iowa 1974). Henle contends the statements were so flagrantly improper and evidently prejudicial that no objection was necessary. See; State v. Phillips, 226 N.W.2d 16, 19 (Iowa 1975); Shover v. Iowa Lutheran Hospital, 252 Iowa 706, 717, 107 N.W.2d 85, 91 (1961). Alternatively, Henle argues that if the issue is found to have been waived, then his trial counsel should be found to have rendered ineffective assistance in failing to properly preserve the issue.

We do not believe this issue was properly preserved for our review, and we will not address it. Any argument Henle may have on the issue of ineffective assistance of counsel is preserved for a later proceeding.

Henle next challenges the sufficiency of the evidence to support his conviction. He argues the State's evidence failed to negate his defense of justification. The standard of review in challenging the sufficiency of the evidence is well established. State v. Lampman, 342 N.W.2d 77, 81 (Iowa App. 1982). We will uphold a verdict where there is substantial evidence in the record tending to

support the charge. State v. Aldape, 307 N.W.2d 32, 39 (Iowa 1981).

When reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the state, including legitimate inferences and presumptions that fairly and reasonably may be deduced from the evidence in the record. State v. Hall, 371 N.W.2d 187, 188 (Iowa App. 1985); State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984). Direct and circumstantial evidence are equally probative so long as the evidence raises "a fair inference of guilt and [does] more than create speculation, suspicion, or conjecture." State v. Hamilton, 309 N.W.2d 471, 479 (Iowa 1981). It is necessary to consider all the evidence in the record, and not just the evidence supporting the verdict, to determine whether there is substantial evidence to support the charge. Hall, 371 N.W.2d at 188; Bass, 349 N.W.2d at 500. Substantial evidence means evidence which would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. Hall, 371 N.W.2d at 188; State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984).

Henle contends the State failed to negate his defense of justification. Pursuant to the jury instructions submitted, the State was only required to prove any one of five alternative elements in order to negate Henle's justification defense. If the State could prove that an

alternative course of action was available to the defendant, then Henle's defense would be negated.

Taken in the light most favorable to the State, the evidence adduced at trial shows that Henle and the victim, Mr. Walker, were both at the same party on the night of the beating. After being asked to leave the party, Walker was going down the steps when Henle jumped on his back and struck him in the left eye. Another party guest, codefendant Shivers, then kicked Walker.

Walker left the property in a hurry and without his jacket. After looking for his jacket in several locations, Walker decided to return to the party to search there for his jacket. Anticipating trouble from the two who had previously attacked him, Walker armed himself with a baseball bat. Walker approached the house and knocked on the front door. When no one answered, he approached the north side of the house. By that time, Henle was standing on the porch. The two men approached one another, and Walker dropped the bat, believing a one-on-one fight was about to occur.

Henle kicked the intoxicated Mr. Walker in the head, knocking him to the ground. Shivers began to hit Walker with a stick. Then Henle and Shivers continued to beat Walker with the baseball bat. When Walker got back up on one knee, Henle kicked him back down. Henle continued to beat Walker in the head with the bat as Walker lay on the ground.

Walker sustained serious injuries including a broken hand, broken cheekbone, an "explosive cut" to his head (which, in the absence of treatment, was life threatening), a concussion, a serious eye injury, a bloody nose, numerous bruises, and an injury to a shoulder blade.

We find substantial evidence in the record to support the jury's verdict. Henle was presented with an alternative course of action. He could have stayed inside the house and called the police.

We also find substantial evidence to support each element of the crime of assault with intent to inflict serious injury. We, therefore, affirm Henle's conviction.

The costs of this appeal are taxed to Henle. The State's motion to dismiss this appeal is denied.

For all the reasons stated, the judgment of the district court is affirmed.

AFFIRMED.