FILED
MAY 31 1983
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Plaintiff-Appellee,)
vs.)
GEORGE NAYLOR, JR.,)
Defendant-Appellant.)

Filed May 31, 1983

3-85
68620

Appeal from Woodbury District Court - James P. Kelley, Judge.

Defendant appeals his conviction and sentence for terrorism in violation of Iowa Code § 708.6 and assault while participating in a felony in violation of Iowa Code § 708.3. AFFIRMED IN PART; VACATED IN PART; AND REMANDED FOR RESENTENCING.

Frank Hoyt, Appellate Defender, and Linda Del Gallo, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Teresa Baustian, Assistant Attorney General, for plaintiff-appellee.

Considered by Oxberger, C.J., Donielson, Snell and Schlegel, JJ. Hayden, J., takes no part.

PER CURIAM

Defendant appeals his conviction and sentence for terrorism in violation of Iowa Code section 708.6 and assault while participating in a felony in violation of Iowa Code section 708.3. He claims the trial court erred in giving a flight instruction to the jury since the evidence in the record did not warrant such instruction. He also alleges that he received ineffective assistance of counsel with regard to his sentencing and in other particulars. We affirm in part, vacate in part, and remand for resentencing.

Defendant was involved in a bar fight with another patron. The patron hit defendant and knocked him over, upon which defendant drew a gun and apparently fired it. The patron with whom defendant was fighting later testified that his thumb was bleeding slightly after the incident; it was thought that this minor injury might have been caused by the shot. Since the bullet was retrieved from the bar's air conditioning unit, there is little question that the shot was actually fired. After trial to a jury, defendant was found guilty on both the charge of terrorism and the charge of assault while participating in a felony (terrorism). The jury also returned an interrogatory stating that the crime was commited with a firearm. Defendant was sentenced to incarceration for up to five years on both convictions, with the statutory minimum for crimes committed with a firearm of five years pursuant to Iowa Code section 902.7. The two sentences were to run concurrently. Defendant's motions in arrest of judgment and for new trial were overruled and he brought this appeal.

I. Defendant first claims that there was insufficient evidence in the record to justify the trial court giving the jury the following flight instruction:

> If you find the offense charged or included in the Information was committed, and that the defendant thereafter fled from the scene of the crime for the purpose of avoiding or retarding prosecution, then such flight is a circumstance you may consider in determining the guilt or innocence of the defendant.

> The credit and weight, if any, to be given such circumstance is for the jury to determing from a consideration of all the evidence in the case.

"When evidence creates a question concerning a defendant's reason for leaving [the scene of the crime] shortly after the commission of a crime, it is proper for the trial court to submit an instruction on flight." State v. Webb, 309 N.W.2d 404, 409 (Iowa 1981).

We believe the record contains sufficient evidence to justify the instruction as given. The patron with whom defendant was fighting and the other people present ran out of the tavern upon seeing the gun. It appears that defendant chased the patron down an alley behind the building; however, the patron hid and defendant broke off the pursuit, leaving the scene with his girlfriend in a car. Defendant was stopped and arrested by a police officer about two blocks from the tavern. It was for the jury to determine whether defendant's actions constituted flight indicating a consciousness of guilt. Webb, 309 N.W.2d at 409. The trial court did not err in so instructing the jury.

II. Defendant next claims that his trial counsel rendered ineffective assistance in a number of ways, one of which involved counsel's failure to object to the court's action in sentencing defendant on both terrorism and assault while participating in a felony (terrorism). This contention depends in turn on defendant's claim that, in this case, assault while participating in a felony is a lesser included offense of terrorism. If this argument is valid, then the trial court erred in sentencing defendant on both charges. See Iowa Code § 701.9 (if a person is convicted of two public offenses, one of which is "necessarily included" in the other, the person may be adjudged guilty only of the greater offense.)

Initially, we are puzzled by the manner in which defendant raises this issue. He claims that his trial counsel was ineffective for failing to assert this claim below, but he does not directly challenge the legality of the double sentence here on appeal. If the sentence is illegal, defendant was not prejudiced by anything his

attorney did or did not do because the concept of preservation of error is not relevant where a void or illegal sentence has been imposed. Gatton v. Brewer, 268 N.W.2d 185, 188 (Iowa 1978). In any event, we consider the legality of the double sentence on our own motion. This in turn requires a determination whether assault while participating in a felony (in this case, terrorism) is a lesser included offense of terrorism.

The lesser-included-offense doctrine is codified in Iowa Code section 701.9:

> No person shall be convicted of a public offense which is necessarily included in another public offense of which the person is convicted. If the jury returns a verdict of guilty of more than one offense and such verdict conflicts with this section, the court shall enter judgment of guilty of the greater of the offenses only.

To determine whether one offense is necessarily included within another, two tests are applied:

> 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. 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.

State v. Furnald, 263 N.W.2d 751, 752 (Iowa 1978) (emphasis in original). The greater offense necessarily includes the lesser if it is impossible to commit the greater without also committing the lesser; but if the lesser offense contains an element not required for the greater, then the lesser is not included in the greater. State v. Sangster, 299 N.W.2d 661, 663 (Iowa 1980). We determine the elements of an offense by examining the statute defining the offense rather than by the charge or the evidence. Id. "If the minor offense is defined alternatively, the offense is included if any of the alternatives are included." Id. at 664.

The elements of terrorism are set forth in Iowa Code section 708.6:

> 708.6 Terrorism. A person commits a class "D" felony when the person, with the intent to injure or provoke fear or anger in another, shoots, throws, launches, or discharges a dangerous weapon at, into, or in a building, vehicle, airplane, railroad engine, railroad car, or boat, occupied by

> another person, or within an assembly of people, and thereby places the occupants or people in reasonable apprehension of serious injury or threatens to commit such an act under circumstances raising a reasonable expectation that the threat will be carried out.

The relevant definition for that offense in this particular case is that found in the first part of section 708.6, the pertinent elements being: 1) discharges a dangerous weapon; 2) in an occupied building; 3) with the intent to injure or provoke fear or anger in another; and 4) placing the occupants in reasonable apprehension of serious injury. "Assault while participating in a felony" is defined in Iowa Code section 708.3:

> 708.3 Assault while participating in a felony. Any person who commits an assault as defined in section 708.1 while participating in a felony is guilty of a class "C" felony if the person thereby causes serious injury to any person; if no serious injury results, the person is guilty of a class "D" felony.

The "felony" involved here, of course, is terrorism. The definition of "assault" referred to in section 708.3 states in part as follows:

> 708.1 Assault defined. A person commits an assault when, without justification, the person does 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 offense 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. . . .

We conclude that the first test for determining the existence of a lesser included offense--the legal element test--is satisfied in this case. The relevant elements of "assault" in this case are found in section 708.1(1), specifically: 1) any act intended to cause pain or injury, 2) coupled with the apparent ability to

execute that act. The supreme court has indicated that "assault" to this extent is a lesser included offense of terrorism as defined in section 708.6:

> Because terrorism under the portion of [former] section 708.6(1) relied on here requires the doing of an act intended to cause injury or place another in fear, a person could not commit that offense without first having the intention required for assault coupled with the apparent ability to execute the act which is threatened in an assault. Terrorism is one means of carrying out such an act. Therefore the crime charged here could not have been committed without also committing an assault.

State v. Young, 293 N.W.2d 5, 8 (Iowa 1980). This analysis is not changed by the minor alterations in section 708.6 accomplished in 1981 Iowa Acts ch. 204, section 5. The only other element contained in the alleged lesser offense in this case (assault while participating in a felony (terrorism)) is the "participation" element. We believe it is clear that acts of terrorism performed as that offense is defined in section 708.6 necessarily require "participation" in those acts. See Iowa Code § 702.13 (definition of "participating in a public offense"). Under this analysis, all of the elements of assault while participating in a felony (terrorism) as defined in section 708.3, are included in the terrorism elements. It would be impossible for a person to commit the relevant terrorism offense without also committing assault while participating in the felony of terrorism. Therefore, this assault offense passes the legal test as an included offense of the terrorism offense.

We also believe it passes the factual test for being an included offense. Again, that test requires a determination whether the record evinces a factual basis for submitting the included offense to the jury. Furnald, 263 N.W.2d at 752. The record in this case contains sufficient evidence to justify the submission of the lesser offense—assault while participating in a felony (terrorism). In fact, this offense was submitted to the jury in Instruction Number 25. The trial court was justified in doing so.

We therefore conclude that assault while participating in a felony (terrorism) under Iowa Code section 708.3 is a lesser included offense of terrorism

under Iowa Code section 708.6. This being true, judgment of conviction should only have been entered upon the charge of terrorism and he should have been sentenced only on the greater offense; in this case, terrorism. Iowa Code § 701.9. Since defendant was in fact found guilty and sentenced on both convictions, the judgment of guilty of assault while participating in a felony must be stricken and the sentences imposed must be vacated and the matter remanded for resentencing on the charge of terrorism only.

III. Finally, defendant raises two other claims of ineffective assistance of counsel: (1) trial counsel's failure to object to a witness's statement that defendant had told her the "best plea bargain he could get would be five years . . ." and (2) failure to object to the court's failure to submit simple assault as a lesser included offense of terrorism and assault while participating in a felony. We do not believe the record is sufficiently complete to enable us to determine trial counsel's competence regarding these claims and therefore do not choose to address them at this time.

Defendant's conviction of terrorism is affirmed. The sentences are vacated and the case is remanded for resentencing in conformity with this opinion.

AFFIRMED IN PART; VACATED IN PART; AND REMANDED FOR RESENTENCING.