

FILED

JAN 31 1978

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**IN THE COURT OF APPEALS OF IOWA
CLERK SUPREME COURT**

STATE OF IOWA,

Filed January 31, 1978

Appellee,

v.

STEPHEN CRAIG LEONARD,

390
60794

Appellant.

Appeal from Buena Vista District Court - Tom Hamilton, Judge.

Defendant appeals judgment imposed upon conviction of going armed with intent, alleging error in failure to instruct on assault, which defendant claims is a lesser included offense of going armed with intent. Affirmed.

Christopher A. Bjornstad, of Cornwall & Avery, of Spencer, for appellant.

Richard C. Turner, Attorney General, and Phil C. Redenbaugh, Buena Vista County Attorney, for appellee.

Submitted to Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

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Defendant Craig Leonard was convicted by a jury of going armed with intent in violation of § 695.1, The Code 1975. He was sentenced to a term of not more than five years in the penitentiary and appeals from that judgment.

The sole issue presented is alleged error for failure to instruct on the crime of assault, which defendant claims is a lesser offense included within going armed with intent. Generally, failure to submit a lesser included offense is reversible error. *State v. Cox*, 196 N.W.2d 430, 433 (Iowa 1972); *State v. Pilcher*, 158 N.W.2d 631, 633 (Iowa 1968); see generally § 785.6, The Code 1975. However, because we conclude that assault is not a lesser included offense of going armed with intent, we find no error in this case and affirm the judgment imposed by the trial court.

The determination of whether to submit a lesser offense involves a two-step process requiring satisfaction of a (1) legal test, and (2) a factual test. *State v. Millsbaugh*, 257 N.W.2d 513, 516 (Iowa 1977); *State v. Rosewall*, 239 N.W.2d 171, 174 (Iowa 1976). Failure to satisfy either test obviates the necessity of submitting the lesser offense. *State v. Redmon*, 244 N.W.2d 792, 796 (Iowa 1976); *State v. Stewart*, 223 N.W.2d 250, 252 (Iowa 1974); *cert. den.*, 423 U.S. 904, 96 S.Ct. 205, 46 L.Ed.2d 134 (1975).

The legal test is recited in *State v. Redmon*, *supra*, at 796:

The first is a consideration of the elements. The lesser offense must be comprised solely of some but not all elements of the greater crime. The lesser crime must not require any additional element which is not needed to constitute the greater crime. The lesser offense is therefore said to be necessarily included within the greater.

Applying the legal test, the elements of assault are (1) an attempt to apply unlawful physical force to another; (2) coupled with the apparent present ability to execute the attempt. *State v. Yanda*, 259 Iowa 970, 971, 146 N.W.2d 255, 256 (1966). The elements of going armed with intent are (1) going armed with a weapon (as defined in § 695.1, The Code 1975); (2) with an intent to use the weapon unlawfully against the person of another. Section 695.1, The Code 1975.

Defendant argues that the legal test is met because the element of an intent to use the weapon unlawfully against the person of another composes all of the elements of an assault. He contends that the jury in the present case, in examining the facts and circumstances to determine whether there was a specific intent to unlawfully use a

weapon against a person, was considering whether there was an attempt to use unlawful force against another coupled with the present ability to do so. Defendant's position ignores the distinction between the legal and factual tests made in *State v. Habhab*, 209 N.W.2d 73, 75 (Iowa 1973):

When in *State v. Hawkins*, supra, we held the question of included offenses was to be determined in the light of the facts in any given case, we did not imply those facts could supply an included offense outside the elements of the major crime * * * it is quite possible to commit one crime in the act of committing another and yet not have it an included offense. It is not included if its elements are not entirely included as a part of the elements of the major offense.

In *State v. Arioso*, 218 N.W.2d 920 (Iowa 1974), the supreme court, relying upon *Habhab*, supra, found that assault with intent to do great bodily injury is not a lesser included offense of going armed with intent. In ruling that the legal test had not been met the court stated;

The fact that defendant may have committed two separate crimes and that he could have been prosecuted for either or both does not make one an included offense of the other.

* * *

[T]he crime of going armed with intent was complete and punishable before any assault with intent to commit great bodily injury occurred.

Because the only difference between an assault and an assault with intent to inflict great bodily injury is the specific intent to inflict an aggravated injury, *State v. Redmon*, 244 N.W.2d 792, 797 (Iowa 1976), *Arioso* is dispositive of this case. In terms of the legal elements, the *Arioso* court found that going armed with intent may be committed without an actual "attempt" to apply force having occurred. See also *State v. Buchanan*, 207 N.W.2d 784, 786-7 (Iowa 1973).

The judgment of the trial court is affirmed.

AFFIRMED.