IN THE COURT OF APPEALS OF IOWA

No. 4-106 / 93-497

FILED
MAY 26 1994
CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

DAVID LEE ARENDS,

Appellant.

Appeal from the Iowa District Court for Franklin County, Paul W. Riffle, Judge.

Arends appeals his convictions, following a jury trial, of assault while participating in a felony, criminal mischief in the second degree, and escape in violation of Iowa Code sections 708.3, 716.1, 716.4, and 719.4 (1993). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Kevin Cmelik, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General; Mary Tabor, Assistant Attorney General; and James M. Drew, County Attorney, for appellee.

Considered en banc.

DONIELSON, C.J.

In the early morning hours of June 7, 1993, David Arends entered the house of his estranged wife, Christa Arends. Christa says he broke in, but David claims he entered through an unlocked door. Once in the house, David began beating Christa with a baseball bat. Christa's boyfriend, Jeff Wiarda, soon became involved in the conflict and the fight moved outside. Wiarda and Christa ended up fleeing separately.

The State prosecuted David for two counts of burglary in the first degree and several other charges. The trial information alleged that the burglaries were in violation of Iowa Code section 713.3 (1993) because David was in possession of a dangerous weapon, the baseball bat.

At trial, the marshaling instruction for the burglary charges involved a different charging alternative, that of a person who intentionally or recklessly inflicts bodily injury while committing a burglary. David did not object to the jury instructions.

The jury returned guilty verdicts for one count of assault while participating in a felony, two counts of criminal mischief in the second degree, and misdemeanor escape. David moved for new trial, alleging the verdict form did not comply with the facts. The district court overruled the motion.

David appeals. We affirm the decision of the district court.

Our standard of review is for correction of errors of law. Iowa R. App. P. 4. The district court has discretion in granting or denying a new trial. State v. Holland, 485 N.W.2d 652, 655 (Iowa 1992). We review the district court's decision only for abuse of that discretion. Id. The complaining party has a heavy burden of proving the trial court abused its discretion and prejudice resulted. State v. Lindsey, 302 N.W.2d 98, 101 (Iowa 1981) (citing State v. Gartin, 271 N.W.2d 902, 910 (Iowa 1978). The trial court has this discretion because it is "in as good or better position than the appellate court to make a determination in accordance with the demands of justice." Gartin, 271 N.W.2d at 910.

Arends argues the jury could not convict him of assault while participating in a burglary yet find him innocent of the burglary under the facts of this case. We disagree. Arends acknowledges a burglary need not be committed for a participant to be found guilty of assault while participating in a burglary. State v. Mead, 318 N.W.2d 440, 446 (Iowa 1982). We determine Mead and Iowa Code section 702.13 (1993) are controlling in this case. Iowa Code section 702.13 reads:

> A person is "participating in a public offense," during part or the entire period commencing with the first act done directly toward the commission of the offense and for the purpose of committing that offense, and terminating when the person has been arrested or has withdrawn from the scene of the intended crime and has eluded pursuers, if any there be. A person is "participating in a public offense" during this

> period whether the person is successful or unsuccessful in committing the offense.

Id. (emphasis in original). By entering the house, Arends committed the "first act" required by statute for participation.

The Iowa Supreme Court, applying this section in Mead, stated:

> The question is whether the State had to prove, on the charge of assault while participating in burglary, that defendant actually committed the burglary in order to be participating in it. The answer is controlled by section 702.13 of the Code: . . .
>
> The result is that assault while participating in burglary can be committed without committing the burglary, hence burglary is not necessarily included in the assault.

Mead, 318 N.W.2d at 446-47.

In Mead the defendant was convicted of both burglary and assault while participating in a burglary. This factual difference, however, does not affect the validity of the court's analysis or its application of section 702.13. The definition of "participating" in section 702.13 is an expanded definition. State v. Mayberry, 411 N.W.2d 677, 686 (Iowa 1987). The court's interpretation expressed in Mead has been approved repeatedly. Mayberry, 411 N.W.2d at 686; State v. Phams, 342 N.W.2d 792, 795 (Iowa 1983). Given the expanded statutory definition of participating and the supreme court's clear application of that definition, we cannot agree with Arends a verdict of acquittal on the burglary charge is inconsistent with a verdict of guilty on assault while participating in a

burglary. Arends asserts:

> Under either necessary finding by the jury, elements required to substantiate a charge of burglary were missing [entry without right and intent to assault], but by the same token, if neither of these elements existed it is also impossible to find the defendant was participating in the commission of a burglary.

Appellant's brief at 10. Arends argues the jury had to find either he had the right to enter the house or that he did not have the intent to commit the assault. We find this argument without merit.

Nor does participating in a burglary necessarily require a defendant also be guilty of attempted burglary. Attempt requires one to try but fail to commit the offense. Participation only requires involvement in one act toward the offense. The legislature defined them as distinct offenses. The elements of attempt are not the same as participation.

In a footnote to his statement on preservation of error in his brief Arends states:

> If this Court finds that defense counsel had a duty to alert the court's attention to the conflict through a timely objection or waive error, the defendant would submit that trial counsel was ineffective. If the Court finds that it is unable to decide this issue on direct appeal, the defendant would ask the issue be preserved for postconviction relief. See State v. Bass, 385 N.W.2d 243, 245 (Iowa 1986).

Appellant's brief at 8. Raising these issues in a footnote is insufficient. See State v. Reddick, 388 N.W.2d 201, 203 (Iowa App. 1986); Iowa R. App. P. 14(a)(3). We consider these issues to be waived.

For the reasons stated, we conclude the district court did not abuse its discretion in denying Arends' motion for a new trial. We determine any other issues the parties may have raised are either covered by this opinion or are without merit.

AFFIRMED.

All judges concur except Sackett and Hayden, JJ., who dissent.

SACKETT, J. (dissenting)

I dissent.

Defendant contends the trial court should have granted him a new trial on the conviction of assault while participating in a felony because that finding was not consistent with the jury's refusal to convict him of burglary. I agree and would reverse and remand for a new trial on the charges of assault.

It is basically undisputed defendant entered a structure occupied by his estranged wife and, after entering the structure, his estranged wife came to the kitchen. Defendant found a man in her bed and assaulted one or both of them.

The facts surrounding defendant's entry were disputed. Defendant's wife testified he broke a locked door and obtained entry. Defendant testified he entered the structure about midnight through an unlocked door without knocking.

The jury acquitted defendant of burglary but found him guilty of committing an assault while participating in a burglary.

The question we need address is whether it was consistent for the jury to find defendant not guilty of burglary and then find him guilty of assault while participating in a burglary. The only conclusion that can

be drawn from the evidence is the actual assault took place after defendant entered the structure.

I agree with defendant that it is not consistent for a jury to find he did not commit a crime (in this case burglary) and then find he committed an assault while participating in the crime they found he did not commit.

Hayden, J., joins this dissent.