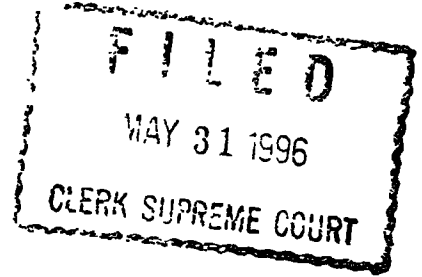


IN THE COURT OF APPEALS OF IOWA

No. 6-245 / 95-837



STATE OF IOWA,
Appellee,

vs.

JOSEPH ANDREW ELLIS, JR.,
Appellant.

Appeal from the Iowa District Court for Black Hawk County, James D. Coil,
Judge.

Defendant appeals conviction and sentence for aggravated domestic abuse.

AFFIRMED.

Linda Del Gallo, State Appellate Defender, and James G. Tomka, Assistant
State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney
General, Thomas J. Ferguson, County Attorney, and Renee Snetitzer, Assistant
County Attorney, for appellee.

Considered by Cady, P.J., Huitink, J., and Hayden, S.J.* Vogel, J., takes no
part.

*Senior judge from the Iowa Court of Appeals serving by order of the Iowa Supreme
Court.

HAYDEN, S.J.

The defendant, Joseph Ellis, appeals from his conviction of aggravated domestic abuse. He argues there was insufficient evidence to support the conviction. He also claims the trial court erred in denying his request for an instruction on the “sport, social or other activity” exception to an assault charge. We affirm.

I. Sufficiency of the Evidence.

The defendant moved for a judgment of acquittal arguing the State failed to prove beyond a reasonable doubt he committed aggravated domestic abuse. Specifically, he claimed the State failed to prove the intent element of assault and any injury the victim incurred was unintentional.

When reviewing criminal convictions for sufficiency of the evidence, we review the evidence in a light most favorable to the State. *State v. McGrew*, 515 N.W.2d 36, 37 (Iowa 1994). A conviction is reversed only if there is no substantial evidence in the record supporting the verdict or the verdict is clearly against the weight of the evidence. *Id.* at 37-38. Substantial evidence is evidence which could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. *Id.* at 38. A fair inference of guilt with respect to each element of the crime charged is sufficient to uphold a verdict. *Id.* We consider all of the evidence, not merely that supportive of the conviction, in determining the sufficiency

of the evidence to support a guilty verdict. *State v. Robinson*, 288 N.W.2d 337, 340 (Iowa 1980).

A review of the record reveals the defendant and victim resided together at 1037 Fulton street in Waterloo, Iowa. At about 3:15 a.m. on October 21, 1994, a crying female placed a 911 call from that residence and a man could be heard yelling in the background.

Three police officers were dispatched to the residence and found the victim crying and extremely upset. She was bleeding from the mouth and told the officers the defendant had hit her numerous times. She claimed to be scared of the defendant. The officers observed some disarray consistent with a struggle in the home.

The victim told the officers the defendant had assaulted her when she told him she was HIV positive. When the defendant was asked how the victim's lip had been cut, the defendant told the officers "she drinks a lot and she falls down a lot." The defendant was arrested and charged with domestic abuse. While being transported to the police station the defendant told the officers the victim was having a hard time handling the fact she was HIV positive.

At the time of the trial, the victim recanted and claimed her injury was merely the result of "horsing around, shadow boxing and Indian wrestling" with the defendant. The defendant denied he had hit the victim and said any injury the victim had incurred was unintentional and a result of their horseplay.

The officers testified both the victim and defendant appeared intoxicated when they responded to the 911 call. Neither the victim nor the defendant was able to satisfactorily explain at trial who had made the 911 call or why it had been made. While they both testified the victim's cut lip was the result of horseplay and wrestling, neither had told the officers this when they had appeared at the home.

This is not a case in which the only incriminating evidence is so inconsistent or self-contradictory as to be insufficient to sustain a conviction. *See e.g., State v. Smith*, 508 N.W.2d 101 (Iowa App. 1993). Here we have a 911 call and the testimony of three officers who observed the victim's injury and distraught state. The victim told the officers the defendant had hit her numerous times. The evidence indicated the defendant was upset over the victim's HIV status and assaulted her. Despite the victim's recantation, there was clearly sufficient evidence to support the conviction.

II Jury Instruction.

The defendant requested the jury be instructed on the exception to the assault statute applicable to a sport, social or other activity. The statute, in relevant part, provides --

Provided, that where the person doing any of the above enumerated acts, and such other person, are voluntary participants in a sport, social or other activity, not in itself criminal, and such act is a reasonably foreseeable incident of such sport or activity, and does not create an

unreasonable risk of serious injury, or breach of the peace, the act shall not be an assault.

Iowa Code § 708.1(3) (1995).

In construing this exception, our court has held it is not applicable to sadomasochistic activity. *State v. Collier*, 372 N.W.2d 303, 307 (Iowa App. 1985), or to conduct which occurred after a sporting activity had officially ceased. *State v. Floyd*, 466 N.W.2d 919, 922 (Iowa App. 1990). We appear not to have had the occasion to address the application of this statute to alleged acts of horseplay.

In carving out this exception to the assault statutes, the legislature intended to excuse conduct which was committed in furtherance of the object of a sporting or social activity. *See Floyd*, 466 N.W.2d at 922. The exception assumes the existence of one of the types of intentional conduct defined in subsections 708.1(1) -(3), but such conduct is excepted from prosecution because of the social or sporting context in which it occurred.

In denying the defendant's requested instruction, the trial court concluded the exception did not apply because it presumes the existence of an intent to cause pain or injury or to place another in fear of physical conduct. Given that defendant had denied such intent, the court found the exception would not apply.

Ordinarily, a trial court must instruct the jury on all material issues raised by the evidence. *State v. Babers*, 514 N.W.2d 79, 82 (Iowa 1994). However, to warrant the submission of a defense to the jury the defendant must produce substantial

evidence to support the theory. *Id.* at 83. Here the defendant denied the requisite intent necessary to support an assault charge. Absent such intent, the sport or social activity exception would not apply, and the trial court did not err in denying the requested instruction.

AFFIRMED.

Huitink, J., concurs; Cady, P.J., dissents.

CADY, J. (dissenting)

I respectfully dissent. The majority concludes the defendant was not entitled to an instruction on the sport, social or other activity exception to the assault statute because he denied acting with the requisite intent to support the commission of an assault.

A defendant is entitled to assert alternative defenses to a criminal charge. Application of the statutory exception to the crime of assault may presume the existence of an intent to cause pain or injury or to place another in fear, but evidence to support this intent may come from sources other than the defendant. In this case, the majority concedes there was sufficient evidence to support each element of the crime of assault. Thus, it is inconsistent to conclude the exception does not apply because there is no substantial evidence to support it.