

IN THE COURT OF APPEALS OF IOWA

No. 4-376 / 93-1382

FILED

OCT 25 1994

CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

KENNETH HEPPERLE,

Appellant.

Appeal from the Iowa District Court for Black Hawk County, George L. Stigler, Judge.

Defendant appeals his conviction of assault with intent to commit sexual abuse with no injury in violation of Iowa Code section 709.11 (1993). **REVERSED AND REMANDED WITH DIRECTIONS.**

Linda Del Gallo, State Appellate Defender, John F. Fatino, Assistant State Appellate Defender, and B. John Burns, Assistant Public Defender, for appellant.

Bonnie J. Campbell, Attorney General, Ann E. Brenden, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Shawn Wehde, Assistant County Attorney, for appellee.

Considered by Donielson, C.J., and Cady and Huitink, JJ.

HUITINK, J.

Kenneth Hepperle appeals his conviction of assault with intent to commit sexual abuse with no injury, in violation of Iowa Code section 709.11 (1993). We reverse and remand with directions to dismiss the charge.

Hepperle was charged by trial information with second-degree sexual abuse of a child in violation of section 709.3(2) (1993). A jury trial commenced on July 23, 1993.

Upon conclusion of the evidence, the court instructed the jury as to the charged offense of second-degree sexual abuse. It also submitted the lesser-included offenses of (1) assault with intent to commit sexual abuse and (2) assault to the jury. The jury returned a verdict of guilty of assault with intent to commit sexual abuse with no injury resulting, in violation of section 709.11. The court entered judgment upon the verdict and sentenced Hepperle to a term of incarceration not to exceed two years.

Hepperle contends assault with intent to commit sexual abuse is not a lesser-included offense of second-degree sexual abuse and it was error for the trial court to instruct otherwise, citing State v. Constable, 505 N.W.2d 473, 475-77 (Iowa 1993). The State concedes this point but argues Hepperle failed to preserve error on this issue. The State claims Hepperle did not object to the lesser-included instruction with sufficient specificity so as to

alert the trial court of the error he now claims on appeal.

Our review is for errors at law. Iowa R. App. P. 4. Objections or exceptions to instructions must be specific so as to alert the trial court to any alleged error to be corrected. State v. Aldape, 307 N.W.2d 32, 39 (Iowa 1981). Moreover, if the defendant makes an objection to an instruction at trial, he is bound by that objection on appeal. State v. LeCompte, 327 N.W.2d 221, 223 (Iowa 1982) (citations omitted). In addition, a defendant cannot amplify or change the objection on appeal. Id. (citation omitted).

At the conclusion of the evidence on July 21, Hepperle's counsel requested:

that no lesser included offenses be given to the jury, that the -- only the charge of Sexual Abuse in the Second Degree and a not guilty be provided to the jury as an alternative.

The court indicated it leaned toward giving lesser-included instructions but gave both sides the opportunity to argue the issue the next day.

When court resumed on July 22, defense counsel again objected to the submission of lesser-included offenses, stating:

he [Hepperle] has made a determination that he wishes to rely upon an all-or-nothing defense, and we would urge the court to allow him to -- to stand on that decision and not submit lesser included offenses in this case.

The court chose to submit to the jury the lesser-included offenses of assault with intent to commit sexual abuse and assault.

The form of the objection was the same during the hearing on Hepperle's postverdict motion in arrest of judgment. At that time Hepperle's counsel stated:

defendant's Motion in Arrest of Judgment is basically a restatement of our request that the defendant be allowed to rely upon his all-or-nothing defense that was raised at the time of trial, raised in the request for jury instructions and objections to the jury instructions. The court overruled our request at that time. We would at this time stand upon the arguments made previously in this regard.

It is clear counsel made general objections to the submission of lesser-included offenses as a whole because Hepperle maintained an all-or-nothing defense. The objections did not alert the court that assault with intent to commit sexual abuse should not be submitted because it was not a lesser-included offense of second-degree sexual abuse. See Constable, 505 N.W.2d at 476-77.¹

General objections preserve nothing for review. See State v. Hubbs, 268 N.W.2d 188, 189 (Iowa 1978). Having failed to alert the trial court to his present contention by appropriate objection, Hepperle is precluded from relying on it now. LeCompte, 327 N.W.2d at 223.

1. Although Hepperle does not raise this issue, it appears submission of assault as a lesser-included offense was also erroneous. See Constable, 505 N.W.2d at 476-77; State v. Lampham, 345 N.W.2d 142, 145 (Iowa 1984) (citing State v. Tague, 310 N.W.2d 209, 213 (Iowa 1981)).

As an alternative argument, Hepperle alleges his counsel's failure to preserve error constitutes a specific instance of ineffective assistance of counsel.

We have recognized in some circumstances a mistake in failing to preserve error may be sufficiently egregious to deny a defendant his right to effective assistance of counsel. State v. Miles, 344 N.W.2d 231, 233 (Iowa 1984) (citation omitted). To prove a claim of ineffective assistance of counsel, Hepperle must prove (1) counsel failed to perform an essential duty and (2) prejudice resulted. Id. at 233-34.

The failure to preserve an issue for appellate review constitutes a failure to perform an essential duty. See Fryer v. State, 325 N.W.2d 400, 413 (Iowa 1982). Once the court made it clear it was going to instruct the jury on lesser-included offenses, counsel had a duty to object to any lesser-included offenses which were erroneous. Reliance on an all-or-nothing defense does not excuse the failure to object.

It is obvious prejudice resulted from counsel's failure to object: Hepperle was convicted of, and is now imprisoned for, a crime with which he was not charged. We reject the State's argument that Hepperle was merely lucky, having "benefited from the jury's having been given the choice of a lesser offense." We determine Hepperle has met his burden of proof on both prongs of the Miles test.

Double jeopardy prohibits retrial on the greater offense of second-degree sexual abuse because the jury acquitted Hepperle of it. See State v. Douglas, 485 N.W.2d 619, 623 (Iowa 1992) (citations omitted). And, for double jeopardy purposes, it makes no difference that the jury rendered a verdict on the incorrect lesser-included offense. See State v. Taft, 506 N.W.2d 757, 761 (Iowa 1993) (citation omitted). Therefore, we reverse Hepperle's conviction on assault with intent to commit sexual abuse and remand with directions to dismiss the charge of second-degree sexual abuse.

REVERSED AND REMANDED WITH DIRECTIONS.