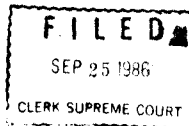


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed September 25, 1986
vs	)	
JEFFREY SCOTT GLASS,	)	$\frac{6-194}{85-1159}$
Defendant-Appellant.	)	

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Appeal from the Iowa District Court for Polk County (No. 27836), Ray A. Fenton, Judge.

Defendant appeals his conviction of assault with intent to commit sexual abuse resulting in serious injury, asserting that the district court erred by submitting to the jury instructions on two lesser-included offenses of second-degree sexual abuse and that there was insufficient evidence to permit a jury to find that the victim had suffered "serious injury." **AFFIRMED.**

Charles L. Harrington, Appellate Defender, and B. John Burns, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Ann DiDonato, Assistant Attorney General; and A. Patricia Houlihan, Assistant Polk County Attorney, for plaintiff-appellee.

Considered by Oxberger, C.J., Snell, and Hayden, JJ.

OXBERGER, C.J.

The appellant appeals from a jury verdict finding him guilty of assault with intent to commit sexual abuse resulting in serious injury. His contentions are: (1) that the trial court erred in instructing the jury on the offenses which were not charged in the trial information; and (2) that the evidence was insufficient to support the jury's finding of "serious injury." We affirm.

In the trial information, the appellant was charged only with sexual abuse in the second degree in violation of Iowa Code sections 709.1 and 709.3 (1985). At trial, however, the jury was also instructed on the lesser included offenses of assault with intent to commit sexual abuse resulting in serious injury and assault with intent to commit sexual abuse resulting in bodily injury other than serious injury, found in Iowa Code section 709.11 (1985).

It is well established that jury instructions must be objected to at the trial court level in order to adequately preserve an alleged error for appellate review. Iowa R. Crim. P. 18(5)(f); State v. Burkett, 357 N.W.2d 632, 634 (Iowa 1984). The defense counsel did not object to the instructions given in the instant case; thus, we are precluded from considering this claim on appeal.

The appellant contends that his attorney's failure to challenge the instructions constituted ineffective assistance of counsel. "Ordinarily we do not decide questions of the ineffective assistance on direct appeal preferring to reserve it for postconviction proceedings when counsel can defend against such a charge." State v. Poyner, 306 N.W.2d 716, 719 (Iowa 1981). Accordingly, we decline to address this claim prior to a full hearing at which counsel have had an opportunity to respond.

The appellant next asserts that the evidence was insufficient to support the jury's finding of "serious injury" within the meaning of Iowa Code section 702.18 (1985). We disagree. Our inquiry in reviewing this contention is whether

the conviction is supported by substantial evidence. Substantial evidence is defined as "such evidence as could convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt." State v. Robinson, 288 N.W.2d 337, 339 (Iowa 1980). In determining whether a conviction is supported by substantial evidence, we review the evidence in the light most favorable to the State without regard to contradiction or inconsistencies and assisted by all reasonable inferences. Id. at 388. Where the verdict is clearly against the weight of the evidence or contrary to the law, a new trial should be granted. Id.

Iowa Code section 709.11 defines assault with intent to commit sexual abuse as follows:

Any person who commits an assault, as defined in section 708.1, with the intent to commit sexual abuse is guilty of a class "C" felony if the person thereby causes serious injury to any person and guilty of a class "D" felony if the person thereby causes any person a bodily injury other than a serious injury. The person is guilty of an aggravated misdemeanor if no injury results.

"Serious injury" is defined as "disabling mental illness, or bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." Iowa Code § 702.18 (1985)(emphasis added). This definition was further clarified in State v. Phams, 342 N.W.2d 792 (Iowa 1983), where the supreme court elaborated upon the meaning of a "substantial risk of death" as follows:

... [S]erious injury means something more than the "pain or injury" element in the assault statute, section 708.1(1). [Authority]... [A] substantial risk of death means more than just any risk of death but does not mean that death was likely. If there is a "real hazard of danger of death," serious injury is established. [Authority]

Id. at 796 (quoting State v. Anderson, 308 N.W.2d 42, 47 (Iowa 1981)).

Applying these principles, the supreme court held in State v. Anderson that a substantial risk of death had occurred where an eighty-five-year-old woman was sexually abused and suffered two broken ribs and several bruises after her body and head were beaten. 308 N.W.2d at 47. In reaching this conclusion, the court noted that "[a]lthough death was not certain or expected, there was a threat to her life even if not a 'major risk.'" Id. The court found that a substantial risk of death within the meaning of the statute had occurred because "death of this victim from the injuries was 'certainly possible.'" Id. See also State v. Coburn, 315 N.W.2d 742, 748 (Iowa 1982)(evidence of lacerations, bruises, and lesions requiring surgical vaginal reconstruction and creating a risk of peritonitis and septicemia found to establish substantial risk of death); State v. Epps, 313 N.W.2d 553, 557 (Iowa 1981)(substantial risk of death where victim was shot in the nose, causing him to undergo hospitalization for six days and to suffer periodic migraine headaches); State v. Cross, 308 N.W.2d 25, 26 (Iowa 1981)(court suggested that substantial risk of death occurred where victim suffered choking, a gash in the head, bites and bruises).

We think it clear that a rational trier of fact could find the evidence adduced in the instant case sufficient to establish that the appellant inflicted serious injury upon the victim. When the victim refused the appellant's sexual advances, he grabbed her by her hair, pulled her into the men's restroom, and told her that if she screamed, he would stick her head down a toilet. He then bit her on the cheek. He pushed her up against a wall, picked her up, and banged her head into the wall. He then forced her to take off her clothes and proceeded to abuse her sexually.

Following the attack, the victim was taken to Broadlawns Medical Center. Her examining physician described her injuries as including three large bumps on the back of her head, and several abrasions, bruises, scrapes, and scratches.

In addition, the physician testified that she was concerned about the bite on the victim's cheek because of the risk of infection attendant with human bites, and the possibility of scarring. The physician also testified with respect to her concern about the possibility of a concussion resulting from the victim's head having been beaten against the wall; the physician found only contusions from this beating, however.

In light of the above, we cannot say that the jury's finding of serious injury was not supported by substantial evidence. We think that a risk of death within the meaning of the statute occurred when the appellant beat the victim's head against the wall. Although there may not have been a major risk of death, it was "certainly possible." Pursuant to the court's holding in State v. Anderson, it is this possibility that the statute envisioned. Accordingly, we conclude that the appellant's conviction should be affirmed.

AFFIRMED.

Hayden, J., concurs; Snell, J., dissents.

SNELL, J. (dissenting)

As I am of the opinion that there is no evidence submitted in this case supporting the jury's finding that Voigt suffered serious injury within the meaning of Iowa Code section 702.18 (1985), I respectfully dissent.

Serious injury is defined in Iowa Code section 702.18 (1985) as "disabling mental illness, or bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." Our supreme court in State v. Anderson, 303 N.W.2d 42 (Iowa 1981), adopted the definition of "substantial risk of death" contained in II Iowa Uniform Jury Instructions (Criminal) No. 219 (1978). That definition states that "[a] bodily injury which creates a substantial risk of death is such an injury which causes or is likely to cause a real hazard or danger of death."

In the present case, I can find no evidence from which a jury could find a serious injury within the meaning of section 702.18. The evidence demonstrated that Voigt received bumps, bruises, and a bite from the attack by Glass. There was no testimony that Voigt in any way suffered a disabling mental illness. Neither was there medical testimony that Voigt suffered bodily injury creating a substantial risk of death. Furthermore, no evidence indicated that Voigt would have serious permanent disfigurement or protracted loss or impairment of the function of any body member or organ. I conclude that there was not sufficient evidence to convince a rational trier of fact that Voigt was seriously injured.

The only issue with which we are presented by Iowa Code sections 709.11 and 702.18 (1985) is the degree of injury which was actually caused by the assault. The injuries listed by the majority are "three large bumps on the back of her neck, and several abrasions, bruises, scrapes, and scratches." Although the majority points out that Voigt's physician was "concerned" about infection and

the "possibility" of scarring because of the bite on Voigt's cheek, there is no evidence showing that either result occurred, thus being caused by the assault. Similarly, the evidence showed that, in fact, no concussion actually resulted from the assault.

Iowa Code section 709.11 (1985) mandates that the classification of the guilt of an individual who commits an assault with intent to commit sexual abuse and, consequently, the sentence of that individual depends upon the injury caused to the victim by the assault. "Possibility" and "concern" of injury is not enough.

The majority relies upon our supreme court's decision in Anderson where, given the facts of that case, the court held that a "substantial risk of death" was demonstrated. Anderson involved the beating of a frail eighty-five-year-old woman which left her with two broken ribs, several lacerations and bruises, and hospitalized for ten days. At trial in that case, a physician testified that the death of the victim due to injuries sustained in the assault was "certainly possible." I can find nothing in the present record demonstrating that when Glass beat Voigt's head against the wall, he similarly rendered death "certainly possible." I note once again that Anderson defines "substantial risk of death" as injury creating a "real hazard or danger of death." That criterion was met in Anderson. The evidence does not demonstrate that it has been satisfied in the present case.

I do not think, however, that this finding requires a new trial in this case. The jury found the defendant to be guilty of assault with intent to commit sexual abuse and further found that this assault resulted in serious injuries to Voigt. Glass was consequently adjudged guilty of a class C felony and sentenced accordingly pursuant to Iowa Code section 902.9(3). I would hold only the finding as to serious injury erroneous as a matter of law. The jury's verdict of guilty of

assault with intent to commit sexual abuse is supported by substantial evidence and should stand.

Glass does not deny that Voigt suffered bodily injuries as a result of the attack. He concedes as much in his brief when he argues that the "bruises, bumps and abrasions" suffered by Voigt did not amount to "serious injury." Such injuries are sufficient, however, to constitute "bodily injury other than a serious injury" resulting from an assault with intent to commit sexual abuse under Code section 709.11. As such, the perpetrator is guilty of a class D felony. I would find no error in this case except for the insufficiency of the evidence to prove the single element necessary to elevate the crime from a class D to a class C felony.

The present case lends itself to the analysis we employed in State v. Lampman, 342 N.W.2d 77 (Iowa Ct. App. 1982). In Lampman, defendant had been convicted of first-degree burglary based upon a jury finding that he possessed a dangerous weapon at the time of the burglary. We held the evidence to be insufficient as a matter of law to show that defendant possessed a dangerous weapon at the time of the burglary. As that finding was the sole error in the jury's verdict, however, and all the elements of second-degree burglary were found to exist by the jury, the case was remanded with instructions to enter an amended judgment of guilty of burglary in the second degree. Id. at 81. See State v. Liles, 11 Wash. App. 166, 172-73, 521 P.2d 973, 977 (1974); 5 Am. Jur. 2d Appeal and Error § 938 (1962 & Supp. 1985); 24B C.J.S. Criminal Law § 1946 (1962 & Supp. 1986).

The authority given us in criminal appeals by Iowa Code section 814.20 states, in pertinent part, that

the appellate court, after an examination of the entire record, may dispose of the case by affirmation, reversal or modification of the district court judgment....

The appellate court may also order a new trial, or reduce the punishment, but cannot increase it.

Consequently, I would remand the case for entry of an amended judgment of guilty of assault with intent to commit sexual abuse which resulted in bodily injuries and for resentencing of the defendant accordingly. See Iowa Code section 902.9 (1985).