

IN THE COURT OF APPEALS OF IOWA

FILED

DEC 30 1981

U.S. SUPREME COURT

STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed December 30, 1981

vs.

)

KERMIT E. DELAY,

)

1-276

65140

Defendant-Appellant.

)

Appeal from Washington District Court - Ira Morrison, Judge.

Defendant appeals from his conviction for assault with intent to inflict serious injury in violation of section 708.1, The Code 1979, asserting: 1) trial court erred in failing to instruct the jury on the defense of justification; 2) the evidence of specific intent was insufficient to support the jury's verdict of guilty; and 3) improper remarks by the prosecutor during closing argument denied him a fair trial. REVERSED AND REMANDED FOR NEW TRIAL.

Emmit J. George, Iowa City, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Merle Fleming, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Defendant, Kermit E. Delay, appeals from his conviction for assault with intent to inflict serious injury in violation of section 703.1, The Code 1979. He asserts: 1) trial court erred in failing to instruct the jury on the defense of justification; 2) the evidence of specific intent was insufficient to support the jury's verdict of guilty; and 3) improper remarks by the prosecutor during closing argument denied him a fair trial. We reverse and remand for new trial.

Defendant was charged by county attorney's information on November 30, 1979, with two counts of assault with intent to inflict serious injury on two sheriff's deputies. The charges arose out of an incident in which two deputies stopped an automobile on a county road at about 3:30 a.m., November 10, 1979. A jury trial commenced on March 4, 1980, wherein deputy Redlinger testified that in the early morning of November 10, 1979, he and deputy Beal stopped an automobile in which defendant was a passenger and advised the occupants to leave the town of Wellman. Both deputies testified that, later that morning, the same car forced their patrol vehicle off the road, whereupon they pursued the car and stopped it a second time. At that time defendant was driving. Deputy Redlinger ordered defendant to get out of the car, but did not state that defendant was under arrest. When defendant replied "[w]hat for?", the deputy reached into the car and grabbed defendant with some force. Defendant then stomped on the accelerator and the car moved away, causing gravel to strike deputy Beal. The deputies further testified that the car then made a "power turn" and came back towards them, but stopped when the deputies drew their guns. Defendant, in contrast, testified that the car spun around and approached the deputies only after he lost control of it.

Prior to submission of the case to the jury, defendant made an objection to the court's failure to instruct the jury on the issue of justification. Trial court overruled this objection. Closing arguments were unreported and no bill of particulars was filed. During post-argument proceedings, in the chambers, defense counsel objected to several allegedly improper remarks made by the prosecution, particularly a statement by the county attorney that the jury must either believe him or believe that he was suborning perjury. Defense counsel also objected to the county attorney's reference to "hot pursuit" of the defendant, which defense counsel argued was a misstatement of the facts. The case was submitted to the jury which convicted defendant of both counts of assault. Defendant then made a motion for election of charges for the reason that the evidence required to support conviction on one count would suffice to convict on the

other count and that a conviction for both would result in double punishment. The State did not resist this motion and elected count I (assault on deputy Beal). Trial court dismissed count II (charge involving the assault on deputy Redlinger). This appeal followed.

I. Scope of Review. Since this is an action at law, our review is for correction of errors only. Iowa R. App. P. 4.

II. Instruction on Justification. Defendant argues, inasmuch as section 708.1, The Code, requires an assault occur without justification before a person can be convicted of the offense, that the State had the burden of proving lack of justification and that trial court thereby erred in refusing to instruct the jury on the issue of justification. We agree.

Trial court is required to instruct the jury fully and fairly. State v. Sellis, 262 N.W.2d 240 (Iowa 1978). It has the duty, in instructing the jury, to incorporate into the marshalling instructions all elements of the offense which it is incumbent upon the State to prove. State v. Conner, 241 N.W.2d 447, 462 (Iowa 1976); State v. Watts, 223 N.W.2d 234, 237 (Iowa 1974). The elements of assault are delineated in section 708.1, The Code, as follows:

A person commits an assault when, without justification, the person does any of the following:

1. Any act which is intended to cause pain or injury to, or which is intended to result in physical contact which will be insulting or offensive to another, coupled with the apparent ability to execute the act.
2. Any act which is intended to place another in fear of immediate physical contact which will be painful, injurious, insulting, or offensive, coupled with the apparent ability to execute the act.
3. Intentionally points any firearm toward another, or displays in a threatening manner any dangerous weapon toward another.

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.

Section 708.1, The Code, makes it clear that absence of justification is an element of assault. Since trial court failed to instruct the jury on the element of absence of justification, and we are unable to conclude that the evidence establishes as a matter of law that defendant's acts were without justification, a new trial is required in which the jury is properly instructed.

III. Sufficiency of the Evidence and Prosecutor Misconduct. Due to our conclusion in Division II, we need not address defendant's claim that the evidence was insufficient for conviction or that the prosecutor's improper remarks require reversal for a new trial.

REVERSED AND REMANDED FOR NEW TRIAL.

All judges concur except Carter and Donielson, JJ., who dissent.

CARTER, J. (dissenting)

I dissent. While it is difficult to ascertain from the record precisely what acts of defendants were believed by the jury to constitute the assault, I see no chance whatsoever that any possible acts in this regard could legally have been with justification. I find this assignment of error, as well as the others raised by defendants, is without merit and would affirm the trial court's judgment.

Donielson, J., joins in this dissent.