IN THE COURT OF APPEALS OF IOWA

No. 9-148 / 08-0525
Filed March 26, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TRENT ANTHONY VIKEL,
Defendant-Appellant.

Appeal from the Iowa District Court for Johnson County, Sylvia A. Lewis, Judge.

A defendant appeals his conviction and sentence for false reports to a law enforcement authority, contending that there was insufficient evidence to show that he reported the occurrence of a criminal act and that he was incorrectly sentenced for a serious misdemeanor while only being convicted of a simple misdemeanor. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Thomas Gaul, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney General, Janet M. Lyness, County Attorney, and Anne Lahey and Rachel Zimmermann, Assistant County Attorneys, for appellee.

Considered by Vogel, P.J., and Vaitheswaran and Eisenhauer, JJ.

VAITHESWARAN, J.

Trent Vikel appeals his judgment and sentence for false reports to a law enforcement official. He contends (1) he did not "report" the commission of a crime and (2) he should have been sentenced for a simple rather than a serious misdemeanor.

I. Background Facts and Proceedings

An Iowa City cab driver gave Vikel a ride to his mother's home. During the ride, Vikel disclosed that he did not have cash but his mother would pay the fare. Upon arrival, Vikel's mother was not at home and Vikel could not find money in her house. The cab driver contacted her dispatcher, who, in turn, contacted the police.

After officers arrived at the scene, Vikel told them that the cab driver touched him inappropriately. Vikel was otherwise uncooperative. The officers arrested him for theft and interference with official acts. They spoke to the cab driver, who denied inappropriately touching Vikel. On the way to jail, Vikel elaborated on his earlier assertions about the cab driver.

Police concluded that Vikel's accusations against the cab driver were unwarranted. The State charged him with false reports of an indictable offense to law enforcement based on his communications on the day of his arrest.[1] Iowa Code § 718.6(1) (2007). That provision allows the crime to be classified as a simple or serious misdemeanor, depending on the facts. *Id.*

[1] Vikel made additional communications on later dates, but the trial information refers only to the date of arrest.

A jury found Vikel guilty and the district court imposed a sentence of forty-five days, with all but seven days suspended, which is consistent with the sentencing provisions for a serious misdemeanor. *Id.* § 903.1(1)(b). This appeal followed.

II. Reports

Vikel contends that the State failed to prove he "reported" false information as required by Iowa Code section 718.6(1). The State counters that error was not preserved. *See State v. Crone*, 545 N.W.2d 267, 270 (Iowa 1996) (stating that in order to have error preserved by a motion for judgment of acquittal, defendant must mention elements that he is asserting have not been proven). While we question whether trial counsel sufficiently articulated the argument that is now being made, we will afford Vikel the benefit of the doubt and proceed to the merits.

Vikel argues that *State v. Ahitow*, 544 N.W.2d 270 (Iowa 1996), is dispositive. The court there stated that the definition of "report" "envisions some affirmative action by the person providing the information in initiating the communication." *Ahitow*, 544 N.W.2d at 272. The court concluded that Ahitow did not take such affirmative action when he simply responded to an officer's question, albeit falsely. *Id.* at 273.

In this case, a reasonable juror could have found that Vikel took affirmative action in making the false report about the cab driver. Specifically, Vikel initiated the conversation about the driver, telling police that she grabbed him or touched him inappropriately. According to one of the officers, Vikel said "the driver had touched him in the groin, and that there were probably bruises in

his groin area as a result of that touching." Vikel also used the phrase "sexual assault" in describing the events and said he "wanted her arrested" and he "wanted that recorded." This amounts to substantial evidence in support of the finding that Vikel "reported" the information. Accordingly, we affirm the jury's finding of guilt.

III. Simple or Serious Misdemeanor

As noted, Iowa Code section 718.6(1) allows the crime of false reports to be classified as a simple or serious misdemeanor:

> A person who reports or causes to be reported false information to a . . . law enforcement authority . . . knowing that the information is false, or who reports the alleged occurrence of a criminal act knowing the act did not occur, commits a simple misdemeanor, unless the alleged criminal act reported is a serious or aggravated misdemeanor or felony, in which case the person commits a serious misdemeanor.

Vikel concedes that the State's trial information charged the crime as a serious misdemeanor but argues that the jury was not instructed on this version.

The pertinent jury instruction stated:

> The State must prove each of the following elements of the crime of False Reports to Law Enforcement beyond a reasonable doubt:
>
> 1. On or about the 16th day of August, 2007, the defendant did report to law enforcement that Helene Lubaroff had assaulted him causing him injury and/or that she committed a sexual assault against him.
>
> 2. The defendant knew, as defined in instruction 11, that the allegations were false.
>
> If the State has proved all of the elements, the Defendant is guilty of False Reports to Law Enforcement. If the State has failed to prove any one or more of the elements, the Defendant is not guilty.

Vikel notes that the district court simply set out the elements of the crime without identifying it as a serious misdemeanor. While he acknowledges he did not

object to this instruction, he argues that he is not challenging its substance but the sentence that flowed from a finding of guilt under it. Vikel also raises this issue under an ineffective assistance of counsel rubric, contending that his attorney should have objected to the sentence imposed upon him.

Although the jury instruction did not identify the crime as a serious misdemeanor, we have no trouble concluding that it referred to this version of the crime. Specifically, the instruction required the State to prove that Vikel reported the crimes of assault causing injury, sexual assault, or both. Those crimes are classified as a serious misdemeanor and a felony, respectively. *See* Iowa Code §§ 708.2(2) (assault causing bodily injury being a serious misdemeanor), 709.2–.4 (sexual abuse being a felony). Therefore, the jury necessarily made a finding that the report concerned these heightened crimes and the district court's sentence for a serious misdemeanor comported with this finding. *Cf. State v. Roe*, 642 N.W.2d 252, 254–55 (Iowa 2002) (noting that jury instructions omitted reference to a stipulated element of the crime, requiring vacation of the sentence). In light of our conclusion, we need not address Vikel's ineffective assistance of counsel claim.

We conclude the district court did not err in sentencing Vikel for a serious misdemeanor.

AFFIRMED.