

IN THE COURT OF APPEALS OF IOWA

No. 9-733 / 08-1041
Filed November 12, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MARK ALAN HEMINGWAY,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Don C. Nickerson,
Judge.

Defendant appeals his convictions and sentencing for willful injury,
domestic abuse assault with intent to cause serious injury, and assault on a
peace officer. **AFFIRMED.**

Jeffrey Mains, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Elisabeth Reynoldson, Assistant
Attorney General, John P. Sarcone, County Attorney, and Mark Sandon,
Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Potterfield, J., and Miller, S.J.*

Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

VOGEL, P.J.

Following a jury trial, Mark Hemingway appeals his convictions and sentencing for willful injury, in violation of Iowa Code section 708.4(2) (2007), domestic abuse assault with intent to cause serious injury, in violation of Iowa Code section 708.2A(2)(c), and assault on a peace officer, in violation of Iowa Code section 708.3A(2). We conclude there was sufficient evidence to support the convictions. Further, the district court did not err in determining that an assault on a peace officer while displaying a dangerous weapon is a forcible felony, and did not abuse its discretion in not severing the assault on a peace officer charge from the other charges. We affirm.

I. Background Facts and Proceedings

On Sunday, August 5, 2007, Mark and his wife, Christine, were involved in a domestic incident. Not surprisingly, both offered diametrically opposed versions of the events. Mark testified he was chasing Christine inside their home, attempting to calm her down, when she stumbled and fell down the basement stairs. Christine's version was that Mark pursued her as she tried to escape his rage, and he pushed her down the stairs. Each provided near minute-by-minute details of the incident. Eventually, Christine locked herself in an upstairs bathroom and called 911 on her cell phone. According to Mark, when the police arrived, he greeted them at the front door, and then pulled a cordless phone out of his pocket. Officer Gary Lang testified Mark drew a semi-automatic hand gun from his pocket. Christine later sought medical treatment for her injuries.

II. Scope of Review

Hemingway asserts we should apply a due process analysis to review his sufficiency of the evidence argument de novo. Such a constitutional argument was not made below in his motion for judgment of acquittal. We will not consider a new argument on appeal, even a constitutional issue, if not made and passed on below. *State v. Lewis*, 675 N.W.2d 516, 521 (Iowa 2004). Instead, we review sufficiency-of-the-evidence claims for correction of errors at law. *State v. Corsi*, 686 N.W.2d 215, 218 (Iowa 2004). We uphold a verdict if substantial evidence supports it. *State v. Biddle*, 652 N.W.2d 191, 197 (Iowa 2002). “Evidence is substantial if it would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt.” *Id.* Substantial evidence must do more than raise suspicion or speculation. *Corsi*, 686 N.W.2d at 218. We consider all record evidence not just the evidence supporting guilt when we make sufficiency-of-the-evidence determinations. *Id.* However, in making such determinations, we also view the “evidence in the light most favorable to the State, including legitimate inferences and presumptions that may fairly and reasonably be deduced from the record evidence.” *Biddle*, 652 N.W.2d at 197.

III. Sufficiency of the Evidence

After the close of the State’s evidence, Hemingway moved for judgment of acquittal under Iowa R. Crim P. 2.19(8), which was denied. The district court found there was “sufficient evidence for a reasonable juror to conclude that Mr. Hemingway is guilty beyond a reasonable doubt on each and every charge as contained in the trial information.”

On appeal, Hemingway asserts that critical to both the willful injury¹ and the domestic abuse assault charge,² the State was required, but failed to prove, he intended to inflict serious injury on Christine. The jury was instructed that a “serious injury is a bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement or extended loss or impairment of the function of any bodily part or organ.” Iowa Code § 702.18 (defining serious injury); *See also State v. McKee*, 312 N.W.2d 907, 912 (Iowa 1981) (setting forth four possible types of serious injury).

In finding Hemingway guilty, the jury necessarily accepted Christine’s version of the incident: that Hemingway pursued her, first in the garage, then inside the home, and upon catching her, threw her down the carpeted stairs as she tried to escape his hold. She testified that the force was strong enough that she did not land until her body reached the bottom of the staircase.³ Once able to reorient herself, the pursuit continued into a lower level office area, and back upstairs until Christine was able to grab her cell phone, lock herself in a bathroom, and wait for the police to come to the house. The jury was able to

¹ Iowa Code section 708.4. defines willful injury as:

Any person who does an act which is not justified and which is intended to cause serious injury to another commits the following:

1. A class “C” felony, if the person causes serious injury to another.
2. A class “D” felony, if the person causes bodily injury to another.

² Iowa Code section 708.2A(2)(c) defines domestic abuse assault as:

An aggravated misdemeanor, if the domestic abuse assault is committed with the intent to inflict a serious injury upon another, or if the person uses or displays a dangerous weapon in connection with the assault.

³ Mark testified Christine weighs approximately 110 pounds and he weighs approximately 165 pounds.

observe both Mark and Christine as they each offered their recollection of the details of the incident. From the verdicts rendered, it is clear the jury placed less credibility on Mark's version of the events, and chose to accept Christine's testimony. *Ward v. Loomis Bros., Inc.*, 532 N.W.2d 807, 812 (Iowa Ct. App. 1995) ("A jury, as a trier of fact, can accept or reject all or part of the testimony of any witness.").

Further, from the testimony offered and instructions given, the jury concluded Mark had the requisite intent to commit serious injury. Christine testified Mark picked her up and threw her down the stairs, causing her to suffer a broken nose, swelling on her face, and bruising on her knee, thigh, hip and elbows. On our review of the evidence, we conclude there was substantial evidence to support the convictions of willful injury, and domestic abuse assault with intent to cause serious injury. *State v. Bush*, 518 N.W.2d 778, 779 (Iowa 1994) (noting that when determining the sufficiency of the evidence, we review the evidence in a light most favorable to the State.).

Hemingway next contends there was insufficient evidence to prove he displayed a dangerous weapon in the presence of the officers when law enforcement arrived at the home. He claims he simply drew a cordless phone out of his pocket, not a handgun. Officer Lang, standing just "a couple feet" from Hemingway, testified Hemingway brought his right hand up to his chest, holding a handgun. Officer Lang specifically denied that it could have been a telephone, and described the movement and sound of Hemingway's hand as he was "racking the slide" on the semiautomatic weapon. On cross examination, this exchange occurred between defense counsel and Officer Lang:

Q. Now, you say that you're pretty sure that he had a handgun in his hand? A. No, I did not.

Q. I'm sorry. You said you were sure? A. I didn't say "pretty sure." I'm positive.

Other officers were not in such close range to view the object, and all took cover when Officer Lang repeatedly shouted, "gun." Again, the jury was free to believe Hemingway's version of the facts but chose to lend more credibility to the officer's testimony, thus providing sufficient evidence to prove Hemingway "displayed a dangerous weapon" under Iowa Code section 708.3A(2). *Ward*, 532 N.W.2d at 812. Therefore, we affirm the district court in finding substantial evidence to support Hemingway's conviction.

IV. Motion to Sever

Hemingway next contends the district court erred by denying his motion to sever the charge of assault on a peace officer from the other charges. We review for an abuse of discretion. *State v. Delaney*, 526 N.W.2d 170, 174 (Iowa Ct. App. 1994). Iowa law permits multiple charges arising from the same or multiple occurrences constituting parts of a "common scheme or plan" to be prosecuted in a single trial unless the trial court determines otherwise for good cause shown. Iowa R. Crim. P. 2.6(1). A "common scheme or plan" requires more than the commission of two similar crimes by a single person. *Delaney*, 526 N.W.2d at 174. In short, the offenses must be the products of a single or continuing motive. *State v. Oetken*, 613 N.W.2d 679, 688 (Iowa 2000). Factors indicating a common scheme or continuing motive include modus operandi, and temporal and geographic proximity of the crimes. *Id.*

Hemingway asserts he was prejudiced by allowing the jury to hear the testimony relating to his interaction with the police officers in the same trial as the domestic related charges. He claims the assault on a peace officer testimony was not related to what occurred between himself and Christine, and therefore the jury could have rendered its verdict on the domestic charges on an improper, emotional basis. The State asserts the events all took place within a short period of time, and cumulatively tell the full story of Hemingway attempting to keep the officers out of the home as the domestic incident was unfolding. Officer Lang testified Hemingway came to the door shouting in a “loud, angry tone,” attempting to explain the reported domestic incident by saying, “We’re just arguing.” While the officers were at the front door, Christine remained locked in the bathroom.

We agree with the State that the officers’ encounter with Hemingway and the resulting charge of assault on a peace officer stem from the events that brought the officers to the residence and occurred simultaneous to Christine still sheltered behind a locked bathroom door. Examining these facts as a whole, we conclude the charges were part of a continuing incident with a common scheme or continuing motive. We agree with the State that the district court did not abuse its discretion when it found “there is no legitimate basis to separate the three counts for trial.”

V. Forcible Felony

Finally, Hemingway asserts the district court erred in determining the charge of assault on a peace officer was a forcible felony. The State asserts error was not preserved, as defense counsel acknowledged at the time of

sentencing that Hemingway's conviction under Iowa Code section 708.3A(2) was a forcible felony. We agree, error was not preserved, but also that defense counsel was correct in his assessment. In order for the jury to have found Hemingway violated Iowa Code section 708.3A(2), they necessarily needed to find he committed an assault as defined in Iowa Code section 708.1:

A person who commits an assault, as defined in section 708.1, against a peace officer, . . . , who knows that the person against whom the assault is committed is a peace officer, . . . , and who uses or displays a dangerous weapon in connection with the assault, is guilty of a class "D" felony.

Iowa Code § 708.3A(2) The district court properly instructed the jury to include the necessary elements under Iowa Code section 708.3A as well as 708.1. At sentencing the court then applied Iowa Code section 702.11, which describes the crimes which constitute a forcible felony, including assault.⁴ See also *State v. Webb*, 313 N.W.2d 550, 552 (Iowa 1981).

We find no error in the district court's determination that Hemingway committed a forcible felony and was sentenced accordingly. Having considered all arguments Hemingway raised on appeal, we affirm his convictions and sentence.

AFFIRMED.

⁴ "The legislature has not defined felonious assault. This court has determined that a crime is a form of felonious assault if it is a felony and it necessarily includes an assault. See *State v. Webb*, 313 N.W.2d 550, 552 (Iowa 1981)." *State v. Long*, 490 N.W.2d 52 (Iowa 1992).