

**IN THE COURT OF APPEALS OF IOWA**

No. 22-0862  
Filed October 11, 2023  
Amended October 11, 2023

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**MICHAEL WAYNE PASS,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Pottawattamie County,  
Jeffrey L. Larson, Judge.

Michael Pass appeals his conviction for willful injury causing bodily injury.

**AFFIRMED.**

Martha J. Lucey, State Appellate Defender, and Mary K. Conroy, Assistant Appellate Defender, for appellant.

Brenna Bird, Attorney General, and Bridget A. Chambers, Assistant Attorney General, for appellee.

Considered by Ahlers, P.J., Badding, J., and Gamble, S.J.\*

\*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2023).

**AHLERS, Presiding Judge.**

The State charged Michael Pass with willful injury causing serious injury<sup>1</sup> after he sprinted up to a random female stranger in her mid-fifties from behind and violently tackled her in a hallway connecting a casino to an adjoining hotel. The attack was captured on video. The woman remained on the floor after the attack due to pain in her hip. Pass immediately left the scene without providing any aid to the woman. The woman eventually had her hip replaced.

The case went to jury trial. Neither party objected to the district court's jury instructions. Those instructions included a marshaling instruction for the charged offense of willful injury causing serious injury along with marshaling instructions for the lesser-included offenses of willful injury causing bodily injury, assault causing serious injury, assault with intent to inflict serious injury, assault causing bodily injury, and assault. During deliberations, the jury sent a question to the court asking, "What is the difference between willful injury and assault?" The court responded, "Please refer to the jury instructions provided by the court for any further guidance in this regard." Nothing in the record suggests the parties objected to the court's response to the jury question.

The jury ultimately found Pass guilty of the lesser offense of willful injury causing bodily injury. Pass appeals his conviction. He challenges the sufficiency of the evidence supporting his conviction, attempts to challenge the marshaling instruction of the offense for which he was convicted, and argues the court should have altered the marshaling instruction in response to the jury's question.

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<sup>1</sup> See Iowa Code § 708.4(1) (2021).

We first address Pass's attempt to challenge the marshaling instruction. Pass cannot challenge the marshaling on appeal because he did not object to the instruction below. See *State v. Crawford*, 974 N.W.2d 510, 521 (Iowa 2022) ("If a party fails to alert the district court of the erroneous instructions, he cannot complain that the evidence was insufficient to support a legal proposition contrary to the one instructed to the jury. When that happens, we apply the law as set out in the instructions rather than the applicable law."); *State v. Davis*, 951 N.W.2d 8, 16 (Iowa 2020) ("We have repeatedly held that timely objection to jury instructions in criminal prosecutions is necessary in order to preserve any error thereon for appellate review." (citation omitted)). Still, Pass asks us to eliminate the need to object to jury instructions when constitutional rights are implicated. But even constitutional claims must first be raised in the district court before we may consider them on appeal. See *State v. McCright*, 569 N.W.2d 605, 607 (Iowa 1997) ("Issues not raised before the district court, including constitutional issues, cannot be raised for the first time on appeal."). And because we are unable to overturn supreme court precedent, which requires a timely objection to preserve error, we cannot reach the merits of Pass's challenge to the marshaling instruction.<sup>2</sup> See *State v. Beck*, 854 N.W.2d 56, 64 (Iowa Ct. App. 2014) ("We are not at liberty to overrule controlling supreme court precedent.").

We move on to consider the sufficiency of the evidence supporting Pass's conviction. Sufficiency-of-evidence claims are reviewed for correction of errors at

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<sup>2</sup> Pass would be able to challenge whether his counsel was ineffective for not objecting to the instruction in a postconviction-relief action. But we cannot consider his claim through the lens of ineffective assistance of counsel on direct appeal. See Iowa Code § 814.7.

law. *State v. Crawford*, 972 N.W.2d 189, 202 (Iowa 2022). Jury verdicts bind us if they are supported by substantial evidence. *Id.* Evidence is substantial if it is sufficient to convince a rational factfinder that the defendant is guilty beyond a reasonable doubt. *Id.* In assessing whether evidence is substantial, “we view the evidence in the light most favorable to the State, including all ‘legitimate inferences and presumptions that may fairly and reasonably be deduced from the record evidence.’” *Id.* (quoting *State v. Tipton*, 897 N.W.2d 653, 692 (Iowa 2017)).

Our precedent makes clear that jury instructions are the law of the case for purposes of sufficiency-of-the-evidence challenges when, as here, the instructions are not objected to at trial.<sup>3</sup> See *State v. Mathis*, 971 N.W.2d 514, 518 (Iowa 2022). The marshaling instruction for willful injury causing bodily injury required the State to establish:

1. On or about the 15th day of August, 2021, the defendant assaulted [the woman].
2. The defendant specifically intended to cause a bodily injury to [the woman].<sup>[4]</sup>
3. The defendant caused [the woman] a bodily injury.
4. The defendant acted without justification.

Another instruction explained that

an [a]ssault is committed when a person does an act which is meant to cause pain or injury or result in physical contact which will be

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<sup>3</sup> Pass attempts to get around this fundamental principle of our review process in a number of ways, but, as it is dictated by our supreme court, we must apply it. See *Beck*, 854 N.W.2d at 64 (requiring the court of appeals to follow supreme court precedent).

<sup>4</sup> The State concedes element 2 of the marshaling instruction is not a correct statement of law, as it should have required proof that Pass specifically intended to cause a serious injury rather than a bodily injury. See Iowa Code § 708.4 (defining willful injury as an act “which is intended to cause serious injury to another”). However, as the unchallenged jury instructions are the law of the case, we assess the sufficiency of the evidence in light of what the instructions say, not what they should have said. See *Mathis*, 971 N.W.2d at 518.

insulting or offensive or place another person in fear of immediate physical contact which will be painful, injurious, insulting or offensive to another person, when coupled with apparent ability to do the act.

And another explained, “‘bodily injury’ means physical pain, illness or any impairment of physical condition.”

Applying the facts of this case to these instructions, we conclude the State provided sufficient evidence to establish all four elements of the marshaling instruction. Pass’s tackling of the woman from behind without warning would permit a reasonable juror to conclude that Pass’s conduct constituted an assault because it was “physical contact which would be insulting or offensive.” A reasonable juror could also conclude that Pass intended to cause bodily injury to the woman, who was much smaller and older than Pass, because he ran up behind her, slammed into her with great force, wrapped his arms around her, and threw her to the ground. The woman’s testimony that the contact caused severe pain to her right hip and that she required a hip replacement shortly thereafter is sufficient to permit a reasonable juror to conclude that Pass caused bodily injury to the woman. Finally, the evidence would easily cause a reasonable juror to conclude Pass acted without any legal justification. In short, the jury’s verdict is supported by substantial evidence.

Finally, we address Pass’s contention that the district court abused its discretion in the manner in which the court responded to the jury question. Pass contends that, rather than directing the jury to re-read the instructions, the court should have corrected the now-challenged jury instruction. But nothing in the record establishes that Pass objected to the court’s response to the jury question, and he did not raise the issue in his motion for new trial. So we conclude he has

failed to preserve error on this issue as well. See *State v. Foley*, No. 17-0043, 2017 WL 4317328, at \*2 (Iowa Ct. App. Sept. 27, 2017); see also Iowa R. Crim. P. 2.19(5)(f)<sup>5</sup> (stating “rules relating to the instruction of juries in civil cases shall apply to the trial of criminal cases”); Iowa R. Civ. P. 1.924 (permitting challenges to revised or added jury instructions in a new trial motion when the changes occurred after the parties’ opportunity to object had passed).

In conclusion, Pass failed to preserve his challenge to the district court’s response to the jury’s question and to the marshaling instruction for willful injury causing bodily injury. Reviewing his sufficiency-of-the-evidence claim using the unchallenged marshaling instruction, we conclude Pass’s conviction is supported by substantial evidence.

**AFFIRMED.**

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<sup>5</sup> We refer to the Iowa Rules of Criminal Procedure prior to their July 2023 amendments.