

IN THE SUPREME COURT OF IOWA

NO. 17-0650

STATE OF IOWA,

Plaintiff- Appellee

vs

OWEN F. BENSON,

Defendant - Appellant

**APPEAL FROM THE IOWA DISTRICT COURT FOR
WOODBURY COUNTY**

HONORABLE JEFFREY L. POULSON

WOODBURY COUNTY CASE NO. SRCR 094105

APPELLANT'S FINAL BRIEF

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PROOF OF SERVICE

I hereby certify that on the 25th day of October, 2017, I served this final brief on all parties of record by EDMS and to Appellant via United States Postal Service.

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

Issue 1. There was insufficient evidence for the jury to find defendant guilty of Serious Assault and insufficient evidence for the jury to find the defendant guilty of Child Endangerment.

State v Arnold, 543 N.W.2d 600 (Iowa 1996)

State v Thompson, 2017 WL 1733146, final publishing decision pending. (Iowa App 2017)

State v Randle, 555 N.W. 2d 666, 671 (Iowa 1995)

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State v Liggins, 524 N.W. 2d 181 (Iowa 1994)

State v Thornton, 498 N.W. 2d 670,673 (Iowa 1993)

Iowa Code Section 708.1(2)(a)

Iowa Code Section 708.2(2)

Iowa Code Section 726.6(1)(a)

Issue 2. The trial court erred in instructing the jury in both general intent and specific intent without reference to any marshaling instruction.

Bacon on Behalf of Bacon v. Bacon, 567 N.W.2d 414, 417 (Iowa 1997).

Burkhalter v. Burkhalter, 841 N.W.2d 93, 97 (Iowa 2013).

State v. Becker, 818 N.W.2d 135, 141 (Iowa 2012))

State v. Rohm, 609 N.W.2d 504, 509 (Iowa 2000);

State v. Spates, 779 N.W.2d 770, 775 (Iowa 2010).

State v. Gansz, 376 N.W.2d 887, 891 (Iowa 1985).

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Summy v. City of Des Moines, 708 N.W.2d 333, 340 (Iowa 2006).

Iowa R.App. P. 6.907

ROUTING STATEMENT

Because this case involves the application of existing legal principles, therefore transfer to the Court of Appeals would be appropriate. Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Statement of the Case: This is an appeal from conviction and sentence following a jury trial on the charges of Assault Causing Bodily Injury in violation of Iowa Code Section 708.2(2) and Child Endangerment in violation of Iowa Code Sections 726.6(1)(a) and 726.6(7).

Course of the Proceedings: On April 20, 2016 a Trial Information was filed charging Appellant Defendant Owen Benson with Count 1, Serious Assault in violation of Iowa Code Section 708.2(2) and Count 2, Child Endangerment in violation of Iowa Code Section 726.6(1)(a) and 726.6(7) (App. p. 4). On April 27, 2016 the defendant appeared pro se for his arraignment. He entered a plea of not guilty (App. p. 6). On June 3, 2016, the defendant once again appeared pro se, he demanded a speedy trial and requested a firm trial date. Various motions in limine were filed and on January 6, 2017, a final pretrial conference was held. On January 12, 2017, the State filed a Motion to Amend Trial Information which changed the date

of the offense from March 9, 2016 to March 6, 2016. (App. p. 14). Over the Defendant's Objection the Trial Information was Amended (App. p. 16).

On January 17, 18 and 20th, 2017, a jury trial was held. On January 20, 2017, the jury found the defendant guilty of both counts (App. p. 18). On April 21, 2017 after ruling on the defendant's post trial motions, the Court sentenced him to a term of 14 days in jail with credit for time previously served, the minimum fines of \$315 and \$625 and surcharges were ordered and suspended. The defendant timely filed his notice of appeal on April 24, 2017.

STATEMENT OF FACTS

On March 6, 2016, Defendant Owen Benson was living with his fiance, Janet Wiener, and her four children, Benjamin Behrens, Gabrielle Behrens, Zachary Behrens and Samantha Weiner. They had been living as a family since November of 2013. (Trial Tr. p.156, lines 18-21, p. 178, lines 11-20). Owen had developed a good relationship with the children and spent time playing with them, going places with them and helping them with their homework. (Trial Tr. p. 157, line 25-p.158 line 6). The three oldest children lived half of the week with their mother and Owen and half of the week with their Father. (Trial Tr. p. 155, lines 17-25).

On March 6, 2016, the three oldest children attended the birthday party for a neighbor (Trial Tr. p. 162, lines 8-10). While they were gone, Owen took the car to be washed and Janet put Samantha down for a nap and laid down to take a nap herself (Trial Tr. p. 162, p.185, lines 3-9). While she was sleeping, Samantha opened the door and wandered off (Trial Tr. p. 185, line 12- p. 186 line 2). When she woke up and couldn't find Samantha, a search began. When Owen arrived home he helped out in the search driving around the neighborhoods looking for Samantha. (Trial Tr. p. 185, lines 14-17). After a brief search, they learned that someone had seen Samantha at a park 2 blocks from home and had called the police (Trial Tr. p. 163, lines 1-10). Janet contacted the police and left Owen with the three older children when she went to pick up Samantha (Trial Tr. p. 163. lines 15-23).

While Janet was gone, the three older children began playing with a ball in the house, something they had been told not to do. A lamp was accidentally broken and they were sent to their rooms as a time out for playing ball in the house (Trial Tr. p. 187, lines 13-18). While in their rooms, Owen discovered that they were damaging their dressers (Trial Tr. P. 187, lines 5-25, Exhibits 101-103). This wasn't the first time they had done

this, so Owen told them they would be getting a spanking and told them to go to the front porch to wait for him (Trial Tr, p.190 lines 17-23). The three children went outside and rather than wait on the porch, proceeded to run to a neighbor's yard to play (Trial Tr. p. 191, lines 1-5). Owen had them go back to the porch. He took the handle of a child's broomstick, approximately the width of a wooden spoon, he had Benjamin turn around and spanked him twice on the butt, then he had Gabrielle turn around and spanked her twice on the butt. (Trial Tr. P. 196, lines 10-25) Neither Benjamin nor Gabrielle suffered any bruises and there were no allegations that their spankings were child abuse.

Finally Owen had Zachary turn around. Zachary started squirming and crying and tried to sit down to avoid a spanking. Owen spanked Zachary twice with the same child's broomstick, but with the squirming, it hit Zachary on the back of his legs near his buttocks(Trial Tr p. 197, lines 6-p. 198 lines 2).

The children then stayed on the porch and waited for their father, Mark Behrens, to pick them up pursuant to the regular custody arrangement (Trial Tr. p. 198 lines 19-23).

On March 7, 2016. Mark Behrens noticed bruises on the back of

Zachary's legs. He took photos of them and reported them to the school counselor (Trial Tr. pp 57-58). The school counselor contacted the Department of Human Services and the police were contacted.

Following the investigation, Owen Benson was charged with Serious Assault and Child Endangerment for the spanking of Zachary. There were no charges filed for the spanking of the other two children.

At trial, Owen testified that he had previously spanked the children with his hand and they had just laughed it off (Trial Tr. p. 193). So, he researched and found that the Pope had recommended spanking children in February 2016 and that the Church said that the spanking had to sting. It also said that they should be aware of why they are being spanked and they explained how to spank correctly in the document he found (Trial Tr. p. 193-194).

ARGUMENT

Issue 1. There was insufficient evidence for the jury to find defendant guilty of Serious Assault and insufficient evidence for the jury to find the defendant guilty of Child Endangerment

Preservation of Error: The issue of sufficiency of the evidence was raised in a motion for judgment of acquittal both after the State's close of evidence (Trial Tr. 149-151) and at the end of the trial (Trial Tr. p. 218-220). The Court denied the motions. (Trial Tr. p.153, 220) The issue was once again raised in a motion for new trial, supplemental motion for new trial and a motion in arrest of judgment which was argued and denied at the sentencing hearing (Sent. Tr. p 5 line 11- p.8, line 2, p . 8, line 23 - p. 9 line 14)

Standard of Review: Standard of Review: Challenges to sufficiency of the evidence supporting a guilty verdict is for errors at law. Iowa R. App. P. 6.4, *State v Randle*, 555 N.W. 2d 666, 671 (Iowa 1995) "A jury verdict is binding upon this court, and we must uphold the verdict unless the record lacks substantial evidence to support the charge. Substantial evidence is evidence which 'Would convince a rational trier of fact that the [defendant is] guilty of the crime charged beyond a reasonable

doubt.” *State v Liggins*, 524 N.W. 2d 181 (Iowa 1994) citing *State v Thornton*, 498 N.W. 2d 670,673 (Iowa 1993).

“When reviewing the sufficiency of the evidence for a guilty verdict, we view the evidence in the light most favorable to the State, including all legitimate inferences and presumptions which may be fairly and reasonably deduced from the evidence in the record. We must consider all of the evidence and not just the evidence supporting the verdict.” *Id*

Discussion:Count 1: Assault Causing Bodily Injury

The relevant portion of Iowa Code Section 708.1(2)(a) states that a person commits assault when “without justification the person ... commits an act 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” (emphasis added)

Iowa Code Section 708.2(2) states “A person who commits an assault, as defined in section 708., and who causes bodily injury or mental illness, is guilty of a serious misdemeanor.

Iowa law recognizes a parent’s right to use corporal punishment in on their child, “but that right is restricted by moderation and reasonableness”, *State v Arnold*, 543 N.W.2d 600 (Iowa 1996). When a parent exceeds these restrictions, “His or her conduct becomes criminal.” *Id*. “The proper test is whether, under the particular circumstances, the amount of

force used or the means employed by the parent rendered such punishment abusive rather than corrective in character,” Id.

What constitutes unreasonable force “necessarily varies with age, physical condition, and other characteristics of a child as well as with the gravity of the child’s misconduct.”

State v Thompson, 2017 WL 1733146, *final publishing decision pending* (Iowa App 2017)

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In this case, three children were under the care of their stepfather, Owen Benson. They were acting up, playing with a ball in the house, for this they were all sent to their rooms for a time out (Trial Tr. p. 186, lines 13-18). Then, while in their rooms, they each began defacing the dressers in their room, the boys by picking off the veneer and Gabrielle by carving in the top of the dresser. (Trial Tr. p 187, lines 5-25, Exhibits 101-103). The children had done this in the past and been warned not to do it again (Trial Tr. p. 190. lines 17-23).

When Benson caught them defacing the dressers, he told them they were going to receive a spanking and to go to the porch. Instead of staying on the porch, the children ran off to a neighbors house. (Trial tr. p. 191, lines 1-5). After returning to the porch, all three children were spanked by Benson at the same time and place. The evidence presented was that the same force was used in spanking all three children. Benjamin Behrens testified that he was spanked on the butt by Benson and did not sustain any

bruises. (Tr. p. 28) He further testified that he thought Benson intended to spank Zachary Behrens on the butt. (Tr. p. 34) Gabrielle Behrens was also spanked on the butt and did not sustain any bruise or injury. (Tr. p. 31) Benson testified that he intended to spank Zachary on the butt, like he spanked Benjamin and Gabrielle. (Tr. p. 197) The only reason the spanking did not occur on Zachary's buttocks was because Zachary was 'squirming' and dropped down to his knees in an attempt to avoid the spanking. (Tr. pp. 50, 197)

The State failed to present any evidence that the force used on Zachary was any more excessive than that used to spank Benjamin and Gabrielle. Benjamin and Zachary testified that Owen spanked all three of the children exactly two times. (Tr. pp. 26, 50, 196-97, 201)

The State further failed to present any evidence that Benson spanked Zachary to satisfy his anger. In fact, the evidence showed that Benson was not angry or irate. (Trial Tr. pp. 48, 190) His only intent in spanking the children was to appropriately discipline them for their misbehavior. Own Benson testified that he did not intend to injure Zachary and any bruise left was purely accidental (Trial Tr. p. 201) The State presented no evidence that

contradicted this statement.

This was not an assault, it was legal corporal punishment as allowed by Iowa law. The evidence was insufficient to convict Mr. Benson of this charge and the district court should have granted a new trial following the verdict in this case.

Count 2: Child Endangerment.

Iowa Code Section 726.6(1)(a) states: “A person who is the parent, guardian, or person having custody or control over a child or minor under the age of eighteen with a mental or physical disability, or a person who is a member of the household in which a child or such minor resides, commits child endangerment when the person does any of the following: a.

Knowingly acts in a manner that creates a substantial risk to a child or minor’s physical, mental or emotional health or safety.”

As stated above Iowa law recognizes a parent’s right to use corporal punishment. This applies to the charge of child endangerment as well as the charge of assault. see Thompson, supra.

As stated above, all three children in this case were spanked at the same time, with the same object, the same force and in the same manner, yet the State only alleged child endangerment as to one of the three children.

The State's position is that the same spanking with the same object in the same manner on the same day didn't create a substantial risk to the physical, mental or emotional health or safety of Benjamin and Gabrielle, only to Benjamin. If the State felt the same risk was created, it undoubtedly would have filed child endangerment charges on all three children, it did not.

Additionally, the State failed to present any evidence that Benson was consciously aware that he was creating any risk to Zachary, much less a substantial risk. In fact, the evidence was to the contrary. Benson testified that he had researched what was appropriate when it came to disciplining children and was relying on statements by the Pope and information published by the church (Trial Tr. p. 193, line 7- p. 196, line 3) He was clearly taking steps to be sure that any discipline he used was both appropriate and effective.

The district court erred in failing to grant a new trial because the weight of the evidence is insufficient to sustain the verdict of guilty. *State v Ellis*, 578 N.W.2d 655 (Iowa 1998). If the court considers all of the evidence and not just the evidence in light most favorable to the State, the weight thereof supports a finding of not guilty.

Therefore, this Court should reverse the conviction in this matter and

enter an order of acquittal to each count or, in the alternative, remand the case for a new trial.

Issue 2. The trial court erred in instructing the jury in both general intent and specific intent without reference to any marshaling instruction.

Preservation of Error: The issue of the jury instructions was raised in the defendants requested jury instructions. The issue was also raised in a motion for new trial, supplemental motion for new trial and a motion in arrest of judgment which was argued and denied at the sentencing hearing (Sent. Tr. p 3 line 20 - p.5, line 10, p . 8, line 23- p.9 line 14)

Standard of Review: Challenges to jury instructions are reviewed for correction of errors at law. *State v. Heemstra*, 721 N.W.2d 549, 553 (Iowa 2006); *State v. Rohm*, 609 N.W.2d 504, 509 (Iowa 2000); see also Iowa R.App. P. 6.907. “We review the related claim that the trial court should have given the defendant's requested instructions for an abuse of discretion.” *Summy v. City of Des Moines*, 708 N.W.2d 333, 340 (Iowa 2006). Error in giving or refusing to give a particular instruction warrants reversal unless the record shows the absence of prejudice. *State v. Spates*, 779 N.W.2d 770, 775 (Iowa 2010). “When the error is not of constitutional magnitude, the test of prejudice is whether it sufficiently appears that the

rights of the complaining party have been injuriously affected or that the party has suffered a miscarriage of justice.” *State v. Gansz*, 376 N.W.2d 887, 891 (Iowa 1985).

Discussion:

In this case, the Court erred in denying the Defendant’s requested jury instructions. Specifically, the Defendant contends that inclusion of Instruction 14 (General Intent) (App. p. 8) and the form of Instruction 15 (Specific Intent) (App. p. 9) without instruction as to which marshaling instruction to which they applied was error.

Regarding Instruction 14 involving general intent, the trial court concluded that the General Intent instruction was appropriate. However, this is contrary to law.

In *State v. Bedard*, the Iowa Supreme Court stated:

In order for there to be a criminal assault, it must be shown that the act was either “intended to cause pain or injury to, or ... intended to result in physical contact which will be insulting or offensive to another,” or “intended to place another in fear of immediate physical contact, which will be painful, injurious, insulting, or offensive.” Iowa Code § 708.1(1), (2). These elements of proof have caused us to describe the basic assault offense, either standing alone, or as the predicate for a more serious felonious assault, as a specific-intent crime. *State v. Heard*, 636 N.W.2d 227, 231 (Iowa 2001). *State v. Bedard*, 668 N.W.2d 598, 600–01 (Iowa 2003).

By including the general intent instruction, the Court erred because the instruction could reasonably have misled or misdirected the jury. *State v. Hoyman*, 863 N.W.2d 1, 7 (Iowa 2015) (citing *State v. Becker*, 818 N.W.2d 135, 141 (Iowa 2012)). Further, by including both the instruction for General Intent and Specific Intent without reference to which charge the instructions applied, the jury was instructed on contradictory elements. The law is well-established that contradictory and confusing instructions will necessitate a new trial. *Burkhalter v. Burkhalter*, 841 N.W.2d 93, 97 (Iowa 2013). See also *State v. McCormack*, 293 N.W.2d 209, 211–12 (Iowa 1980) (requiring reversal when the jury instructions, when read together, were confusing because they “[l]ack[ed] a clear explanation” of the applicable law).

In Instruction 15 (App. p. 9), the Court included the pattern jury instruction for Specific Intent. Defendant requested the addition of the following language

“Specific intent is present when from the circumstances the offender must have subjectively desired the prohibited result.” *Bacon on Behalf of Bacon v. Bacon*, 567 N.W.2d 414, 417 (Iowa 1997). Inclusion of this language would more appropriately instruct the jury as to the elements in this case

and the court erred in failing to include this language. ¹

The Court erred in not giving the defendant's requested language and in giving instructions that were contradictory and confusing causing prejudice to the defendant. Therefore he requests that this court reverse his conviction and grant him a new trial.

CONCLUSION

Because there was insufficient evidence to convict the Appellant-Defendant on the charges of Assault Causing Bodily Injury and because the court erred in instructing the jury, this Court should reverse the convictions in this case and either enter acquittals as to both charges or remand for a new trial.

ORAL ARGUMENT NOT REQUESTED

Appellant does not request oral argument.

1. The record regarding jury instructions was made at pages 221-222 of the Trial Transcript. However it does not appear that the court's ruling on these objections was reported.

COST CERTIFICATE

I hereby certify that the cost of printing Appellant's Proof Brief was the sum of \$0.00.

/s/ Priscilla E. Forsyth
Priscilla E. Forsyth
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Iowa R. App. P. 6.903(1) or (2) because:
[x] this brief contains 3215 words, excluding the parts of the brief exempted by Iowa R. App. P 6.903(1)(g)(1) or
2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(f) because:
[X] this brief has been prepared in a proportionally spaced typeface using Word Perfect X5 in (Times New Roman 14 point)

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