

IN THE SUPREME COURT OF IOWA
Supreme Court No. 17-0650

STATE OF IOWA,
Plaintiff-Appellee,

vs.

OWEN F. BENSON,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR WOODBURY COUNTY
THE HONORABLE JEFFREY L. POULSON, JUDGE

APPELLEE'S BRIEF

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FINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES	3
STATEMENT OF THE ISSUES PRESENTED FOR REVIEW.....	4
ROUTING STATEMENT.....	5
STATEMENT OF THE CASE	5
ARGUMENT	9
I. There is Substantial Evidence Supporting the Jury’s Determination That the Defendant Committed Assault Causing Bodily Injury and Child Endangerment.	9
II. The District Court Correctly Instructed the Jury on General and Specific Intent.....	14
CONCLUSION	17
REQUEST FOR NONORAL SUBMISSION	17
CERTIFICATE OF COMPLIANCE.....	18

TABLE OF AUTHORITIES

State Cases

<i>Bacon v. Bacon</i> , 567 N.W.2d 414 (Iowa 1997)	16
<i>State v. Ambrose</i> , 861 N.W.2d 550 (Iowa 2015).....	14
<i>State v. Arnold</i> , 543 N.W.2d 600 (Iowa 1996)	11, 12
<i>State v. Ellis</i> , 578 N.W.2d 655 (Iowa 1998)	14
<i>State v. Gay</i> , 526 N.W.2d 294 (Iowa 1995)	10
<i>State v. Heard</i> , 636 N.W.2d 227 (Iowa 2001)	15
<i>State v. Hoeck</i> , 547 N.W.2d 852 (Iowa Ct. App. 1996).....	10
<i>State v. LeGear</i> , 346 N.W.2d 21 (Iowa 1984)	10
<i>State v. Thomas</i> , 561 N.W.2d 37 (Iowa 1997).....	9, 10
<i>State v. Thompson</i> , No. 16-0443, 2017 WL 1733146 (Iowa Ct. App. May 3, 2017)	11
<i>State v. Tipton</i> , 897 N.W.2d 653 (Iowa 2017)	15
<i>State v. Williams</i> , 695 N.W.2d 23 (Iowa 2005).....	9

State Codes

Iowa Code § 708.1.....	10
Iowa Code § 708.1(2)	15
Iowa Code § 708.2(2).....	10
Iowa Code § 726.6(1)(a).....	11

State Rule

Iowa R. App. P. 6.14(6)(a)	10
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**STATEMENT OF THE ISSUES PRESENTED FOR
REVIEW**

I. Whether There is Substantial Evidence Supporting the Jury's Determination That the Defendant Committed Assault Causing Bodily Injury and Child Endangerment.

Authorities

State v. Arnold, 543 N.W.2d 600 (Iowa 1996)
State v. Ellis, 578 N.W.2d 655 (Iowa 1998)
State v. Gay, 526 N.W.2d 294 (Iowa 1995)
State v. Hoeck, 547 N.W.2d 852 (Iowa Ct. App. 1996)
State v. LeGear, 346 N.W.2d 21 (Iowa 1984)
State v. Thomas, 561 N.W.2d 37 (Iowa 1997)
State v. Thompson, No. 16-0443, 2017 WL 1733146
(Iowa Ct. App. May 3, 2017)
State v. Williams, 695 N.W.2d 23 (Iowa 2005)
Iowa Code § 708.1
Iowa Code § 708.2(2)
Iowa Code § 726.6(1)(a)
Iowa R. App. P. 6.14(6)(a)

II. Whether the District Court Correctly Instructed the Jury on General and Specific Intent.

Authorities

Bacon v. Bacon, 567 N.W.2d 414 (Iowa 1997)
State v. Ambrose, 861 N.W.2d 550 (Iowa 2015)
State v. Heard, 636 N.W.2d 227 (Iowa 2001)
State v. Tipton, 897 N.W.2d 653 (Iowa 2017)
Iowa Code § 708.1(2)

ROUTING STATEMENT

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

STATEMENT OF THE CASE

Nature of the Case

The defendant, Owen F. Benson, appeals from the judgments and sentences entered upon his convictions of assault causing bodily injury in violation of Iowa Code sections 708.1(2) and 708.2(2), a serious misdemeanor; and child endangerment in violation of Iowa Code sections 726.6(1)(a) and 726.6(7), an aggravated misdemeanor. The Honorable Jeffrey L. Poulson presided at the jury trial.

On appeal, the defendant claims that there is insufficient evidence supporting his convictions of both offenses and that the district court erroneously instructed the jury on general and specific intent.

Course of Proceedings and Disposition

The State accepts the defendant's account of the course of proceedings and disposition as essentially correct.

Facts

At the time of the incident giving rise to the criminal charges in this case, the defendant; his fiancé, Janet Wiener; and Janet's four children, B.B., G.B., Z.B., and S.W.; were living as a family in the defendant's house. Trial Tr. p. 21, lines 18-25; p. 156, lines 11-23; p. 178, lines 4-20. The children were ages 11, 10, 8, and 3 at the time of trial, which took place about 10 months after the incident. Trial Tr. p. 1, lines 1-25; p. 18, line 3 – p. 19, line 6. The three oldest children lived there for half of each week and with their father for the other half. Trial Tr. p. 155, line 17 – p. 156, line 2; p. 178, lines 4-23.

On March 6, 2016, while the three oldest children were attending a birthday party next door, the youngest child, S.W., wandered away from home while her mother thought she was napping. Trial Tr. p. 22, line 8 – p. 23, line 3; p. 39, line 3 – p. 40, line 1; p. 162, line 4 – p. 163, line 6. After she heard that S.W. had been located by law enforcement officers, Janet Wiener went to pick her up and left the defendant in charge of the three oldest children. Trial Tr. p. 163, line 14 – p. 164, line 7.

When B.B., G.B., and Z.B. returned home from the birthday party, the defendant told them to go to their rooms and wait there

until their father picked them up. Trial Tr. p. 23, line 4 – p. 24, line 9. At some point, the three got their backpacks ready, put on their shoes and socks in preparation for their father’s arrival, and went outside to wait for him. Trial Tr. p. 24, line 10 – p. 25, line 10; p. 40, line 10 – p. 41, line 1.

While they were standing on the front porch, the defendant emerged from the house carrying a stick that had been part of a toy broomstick. Trial Tr. p. 24, line 10 – p. 25, line 25, p. 33, lines 12-17; p. 41, lines 3-25. He hit B.B. on the buttocks with the broom handle, moved on to G.B. and hit her on the buttocks with the broom handle, and then hit Z.B. on the back of his upper legs with the broom handle. Trial Tr. p. 26, line 4 – p. 27, line 7; p. 30, line 10 – p. 31, line 20; p. 49, line 1 – p. 50, line 7. The children cried when the defendant hit them, and they told their mother about it when she returned home. Trial Tr. p. 26, lines 10-11; p. 27, lines 15-21.

The father of B.B., G.B., and Z.B. arrived and picked them up for their stay at his home. Trial Tr. p. 56, line 5 – p. 57, line 14. The next night he noticed bruises on the back of Z.B.’s legs as he got Z.B. ready to take a shower. Trial Tr. p. 57, line 15 – p. 58, line 8. He discussed the bruising with a counselor at Z.B.’s school, and she

reported it to the Department of Human Services (DHS). Trial Tr. p. 58, line 9 – p. 59, line 2.

Investigator Ruth Stewart of the DHS conducted a home visit at the defendant's house, talked with the three older children, and observed the bruises on the back of Z.B.'s legs. Trial Tr. p. 77, lines 19-21; p. 80, line 17 – p. 82, line 15. The defendant arrived at the home and Stewart attempted to speak with him, but although he admitted to hitting Z.B., he would not fully answer her questions. Trial Tr. p. 85, line 15 – p. 86, line 19; p. 96, lines 14-19. Stewart called law enforcement because she felt Z.B.'s injuries were significant. Trial Tr. p. 84, lines 9-23; p. 97, lines 10-20. She also referred Z.B. to the Child Advocacy Center at Mercy Medical Center in Sioux City for a forensic interview. Trial Tr. p. 87, line 8 – p. 88, line 15.

At the request of the Child Advocacy Center, Dr. Michael Jung, a physician who practices medicine, teaches, and serves as the medical director for the Child Advocacy Center, reviewed photographs of Z.B.'s injuries. Trial Tr. p. 110, lines 11-24; p. 115, lines 4-14. He concluded that the bruising was the result of “an

inflicted, high impact, sudden deceleration injury with an object.”

Trial Tr. p. 122, lines 16-20.

The State will set forth additional facts in the course of its argument.

ARGUMENT

I. **There is Substantial Evidence Supporting the Jury’s Determination That the Defendant Committed Assault Causing Bodily Injury and Child Endangerment.**

Preservation of Error

The defendant’s motions for judgment of acquittal and the district court’s rulings on the motions preserved this claim of error for appellate review. Trial Tr. p. 149, line 9 – p. 153, line 12; p. 217, line 21 – p. 220, line 17; *State v. Williams*, 695 N.W.2d 23, 27 (Iowa 2005) (“[W]hen the motion for judgment of acquittal did not make reference to the specific elements of the crime on which the evidence was claimed to be insufficient, it does not preserve the sufficiency of the evidence issue for review.”).

Standard of Review

Review is for correction of errors at law. *State v. Thomas*, 561 N.W.2d 37, 39 (Iowa 1997). The reviewing court must determine whether there is substantial evidence supporting the verdict. Iowa R.

App. P. 6.14(6)(a); *State v. LeGear*, 346 N.W.2d 21, 23 (Iowa 1984). Substantial evidence is that from which a rational trier of fact could conceivably find the defendant guilty beyond a reasonable doubt. *Thomas*, 561 N.W.2d at 39. Direct and circumstantial evidence are equally probative. *State v. Hoeck*, 547 N.W.2d 852, 859 (Iowa Ct. App. 1996). The evidence is viewed in the light most favorable to the verdict, including all reasonable inferences that may be deduced from the record. *State v. Gay*, 526 N.W.2d 294, 295 (Iowa 1995).

Merits

To sustain a conviction of assault causing bodily injury, the State had to prove the following beyond a reasonable doubt:

1. On or about the 6th day of March, 2016, Owen Benson did an act which was intended to cause pain or injury to [Z.B.] or which was intended to result in physical contact which was insulting or offensive to [Z.B.].
2. Owen Benson had the apparent ability to do the act.
3. Owen Benson's act caused bodily injury to [Z.B.] as defined in Instruction No. 19.

Jury Instruction No. 16; App. 10; see Iowa Code §§ 708.1, 708.2(2).

To sustain a conviction of child endangerment, the State had to prove the following:

1. On or about the 6th day of March, 2016, Owen Benson was a person having custody or control of [Z.B.].

2. [Z.B.] was under the age of fourteen years.
3. Owen Benson acted with knowledge that he was creating a substantial risk to [Z.B.'s] physical, mental, or emotional health or safety.

Jury Instruction No. 20; App. 11; see Iowa Code § 726.6(1)(a).

The defendant claims his conduct constituted neither an act intended to cause pain or injury or to result in offensive physical contact nor the creation of a substantial risk to Z.B.'s health or safety, but rather was "legal corporal punishment as allowed by Iowa law." Appellant's Brief at 15.

"Iowa law recognizes parents' rights to use corporal punishment on their child, but that right is restricted by moderation and reasonableness." *State v. Thompson*, No. 16-0443, 2017 WL 1733146, at *2 (Iowa Ct. App. May 3, 2017) (quoting *State v. Arnold*, 543 N.W.2d 600, 603 (Iowa 1996)); see Jury Instruction No. 22; App. 12. Conduct exceeding those restrictions is 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.* Whether physical punishment constitutes unreasonable force

depends upon the “age, physical condition, and other characteristics of a child as well as with the gravity of the child’s misconduct.” *Id.*

In the present case, the jury’s determination that the defendant’s conduct crossed the line from legal corporal punishment to assault causing bodily injury and child endangerment is supported by substantial evidence. The defendant did not merely slap Z.B.’s buttocks with an open hand, but rather used the handle of a broom and struck the child’s legs with such force that it left bruises that were visible for several days. *See* State’s Exs. 1-6 (photos of Z.B.’s legs). Dr. Jung noted that Z.B.’s injuries involved a shearing of the tissue and bleeding from the capillaries and that such injuries required a “fairly high velocity or impact to do that.” Trial Tr. p. 119, line 5 – p. 121, line 4. The bruising occurred despite the fact that Z.B. was wearing jeans at the time. Trial Tr. p. 50, lines 12-16; p. 165, lines 5-6. The amount of force used, the fact that the defendant was carrying the broom handle when he emerged from the house, and the defendant’s apparent anger when he struck Z.B. support the jury’s conclusion that the defendant intended to cause the injury to Z.B. and knew he was creating a substantial risk to Z.B.’s physical or emotional health or

safety. *See* Trial Tr. p. 23, line 20 – p. 24, line 2; p. 25, lines 11-17; p. 33, lines 12-17; p. 41, lines 3-12; p. 43, lines 10-13.

The defendant claims B.B., G.B., and Z.B. had accidentally broken a lamp in the house, marred their dressers, and failed to stay on the front porch while they were waiting for their father to arrive; thus, he argues, discipline was necessary. Both B.B. and Z.B. testified at trial and said nothing about breaking a lamp or damaging their dressers. They admitted that they had left the front porch and were playing in the yard but said the defendant had not instructed them to remain on the porch. Trial Tr. p. 24, line 10 – p. 25, line 7; p. 40, line 25 – p. 41, line 15. The defendant further claims he intended to hit Z.B. on the buttocks but that Z.B. sat down before he struck him. However, although Z.B. said that he squirmed when the defendant was about to strike him, he testified that he was standing up at the time he was struck, not trying to sit or lie down. Trial Tr. p. 42, lines 16-20; p. 50, lines 17-21. B.B. assumed that Z.B. was trying to sit down when he was struck because he saw Z.B. sitting down afterwards, but B.B. did not actually see the actual hitting. Trial Tr. p. 31, line 21 – p. 32, line 19; p. 33, lines 3-11.

The jury could conclude from the evidence that the defendant intended to cause the injuries to Z.B. and that he knowingly created a substantial risk to Z.B.'s health or safety.

The defendant also claims that the jury's verdict was contrary to the weight of the evidence, apparently relying on the defendant's assertion that he researched what constituted appropriate punishment. Appellant's Brief at 17; *see State v. Ellis*, 578 N.W.2d 655, 658-59 (Iowa 1998). Because the defendant's self-serving assertion cannot outweigh all of the evidence previously discussed, the district court did not err in overruling the defendant's motion for a new trial. *See* Sentencing Tr. p. 8, line 23 – p. 9, line 14.

II. The District Court Correctly Instructed the Jury on General and Specific Intent.

Preservation of Error

The defendant's objection to the general intent and specific intent instructions preserved this claim of error for appellate review. Trial Tr. p. 222, lines 2-14; *see State v. Ambrose*, 861 N.W.2d 550, 555 (Iowa 2015). Although the record does not contain the court's ruling on the objection, the instructions given to the jury did not reflect the deletion or modification the defendant requested.

Standard of Review

Review of “[a]lleged errors in the submission or refusal to submit jury instructions” is for correction of errors at law. *State v. Tipton*, 897 N.W.2d 653, 694 (Iowa 2017) (citation omitted). Errors in instructing the jury are presumed prejudicial unless the contrary is shown beyond a reasonable doubt. *Id.* (citation omitted). The reviewing court considers the instructions as a whole in determining whether they accurately state the law. *Id.* (citation omitted).

Merits

The defendant claims the district court erred in giving a general intent instruction and further erred in failing to tie the specific intent instruction to the offense of assault causing bodily injury. *See* Jury Instruction Nos. 14, 15; App. 8-9; *State v. Heard*, 636 N.W.2d 227, 231-02 (Iowa 2001) (determining that assault alternative set forth in Iowa Code section 708.1(2) is a specific intent crime). He claims in addition that the court erred in failing to include language in the specific intent instruction requiring the offender to have “subjectively desired the prohibited result.” *See* Appellant’s Brief at 19-20.

Inclusion of the general intent instruction could not have caused the jury to incorrectly analyze the elements of the offenses.

The general intent instruction is a vague one that does not prevent the jury from applying the more precise language of the marshaling instructions or indeed the specific intent instruction. The specific intent instruction in this case is identical to the model jury instruction. *Compare* Jury Instruction No. 15 *with* Iowa Criminal Jury Instruction No. 200.2. Although the court did not tie it directly to the marshaling instruction for the assault offense, the marshaling instruction itself made it clear that the defendant had to have a specific purpose in mind as he carried out his acts and spelled out what that purpose had to be. Jury Instruction No. 15; App. 9.

With regard to the language requested by the defendant which would have required the jury to find he subjectively desired the prohibited result, there was no need for such language. Although the Iowa Supreme Court has used the language in discussion to distinguish between general and specific intent, it has never required that the language be included in the specific intent jury instruction. *See Bacon v. Bacon*, 567 N.W.2d 414, 417 (Iowa 1997). The marshaling instruction on the assault offense clearly informed the jury regarding the intent element of that offense.

A new trial is not warranted.

CONCLUSION

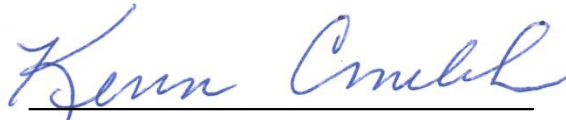
For all of the reasons stated above, the State respectfully requests that this Court affirm Owen Benson's convictions and sentences.

REQUEST FOR NONORAL SUBMISSION

The State requests that this matter be submitted nonorally.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa



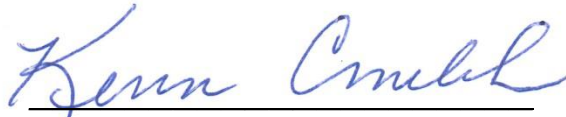
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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

1. This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **2,548** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: October 26, 2017



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