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IN THE SUPREME COURT OF IOWA

STATE OF IOWA,	)	
	)	
Plaintiff-Appellee,	)	
	)	S. Ct. No 17-0650
v.	)	
	)	
OWEN BENSON,	)	
	)	
Defendant, Appellant.	)	

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

APPELLANT'S APPLICATION FOR FURTHER REVIEW OF THE
DECISION OF THE IOWA COURT OF APPEALS
FILED FEBRUARY 7, 2017

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QUESTIONS PRESENTED FOR REVIEW

Pursuant to Iowa R. App. P. 61103 (c)(1), the Defendant-Appellant hereby presents the following questions for review:

1. THE COURT OF APPEALS ERRED IN FINDING THAT THERE WAS SUFFICIENT EVIDENCE TO FIND THE APPELLANT/DEFENDANT GUILTY OF SERIOUS ASSAULT AND CHILD ENDANGERMENT.

2.THE COURT OF APPEALS ERRED IN FINDING THE DISTRICT COURT DID NOT ERR IN INSTRUCTING THE JURY IN BOTH GENERAL INTENT AND SPECIFIC INTENT WITHOUT REFERENCE TO A SPECIFIC MARSHALING INSTRUCTION

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STATEMENT SUPPORTING FURTHER REVIEW

Comes now, Defendant-Appellant Owen Benson and pursuant to Iowa R. App. P. 6.1103 makes Application for Further Review of the February 7, 2017 decision of the Iowa Court of Appeals in *State of Iowa v Owen Benson*, Supreme Court No. 17-0650.

This case involves the use of corporal punishment in disciplining children. This is an issue of public importance that should be decided by the Supreme Court.

Owen Benson used a toy broom handle to spank three children after misbehavior. There were no marks left on the first two and the third child who was squirming received a bruise that was unintentionally left on his leg. There was insufficient evidence to find this was an assault and child abuse rather than corporal punishment which is allowed by Iowa law.

STATEMENT OF THE CASE

Statement of the Case: This Application for Further Review is from the Court of Appeals denial of 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. On February 7, 2018, the Court of Appeals issued a ruling denying the Appellant/Defendant's appeal.

STATEMENT OF FACTS

On March 6, 2016, Defendant Owen Benson was living with his fiancé, Janet Wiener, and her four children, B. B., G. B., Z.B. and S.W.. 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 S.W. 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, S.W. opened the door and wandered off (Trial Tr. p. 185, line 12- p. 186 line 2). When she woke up and couldn't find S.W., a search began. When Owen arrived home he helped out in the search driving around the neighborhoods looking for S.W.. (Trial Tr. p. 185, lines 14-17). After a brief search, they learned that someone had seen S.W. 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 S.W. (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 B.B. turn around and spanked him twice on the butt, then he had G.B. turn around and spanked her twice on the butt. (Trial Tr. P. 196, lines 10-25) Neither B.B. nor G.B. suffered any bruises and there were no allegations that their spankings were child abuse.

Finally Owen had Z.B. turn around. Z.B. started squirming and crying and tried to sit down to avoid a spanking. Owen spanked Z.B. twice with the same child's broomstick, but with the squirming, it hit Z.B. 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 Z.B.'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 Z.B.. 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

THE COURT OF APPEALS ERRED IN FINDING THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO FIND THE DEFENDANT GUILTY OF SERIOUS ASSAULT AND CHILD ABUSE

Standard of Review: Challenges to the sufficiency of the evidence is reviewed for legal error. See Iowa R.App. P. 6.907; see also *State v. Rohm*, 609 N.W.2d 504, 509 (Iowa 2000). The jury's verdict will be upheld if it is supported by "substantial evidence." Id . (quoting *State v. Pace*, 602 N.W.2d 764, 768 (Iowa 1999)). The word "substantial" describes evidence from which a reasonable fact finder could determine a defendant's guilt

beyond a reasonable doubt. Id. The facts are reviewed in the light most favorable to the verdict and not only evidence bolstering the verdict is considered, “but all reasonable inferences which could be derived from the evidence.” Id.

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)

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 G.B. 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. B. B. 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 Z. B. on the butt. (Tr. p. 34) G. B. was also spanked on the butt and did not sustain any bruise or injury. (Tr. p. 31) Benson testified that he intended to spank Z.B. on the butt, like he spanked B.B. and G.B. (Tr. p. 197) The only reason the spanking did not occur on Z.B.'s buttocks was because Z.B. 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 Z.B. was any more excessive than that used to spank B.B. and G.B., B.B. and Z.B. 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 Z.B. 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 injury Z.B. 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 B.B. and G.B., only to B.B.. 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 Z.B., 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.

THE COURT OF APPEALS ERRED IN FINDING THE DISTRICT COURT DID NOT ERR 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 District Court erred in not giving the defendant's requested language and in giving instructions that were contradictory and confusing causing prejudice to the defendant. And the Court of Appeals erred in not reversing his conviction and granting him a new trial.

CONCLUSION

The Court of Appeals erred in finding that there was sufficient evidence to convict the Appellant-Defendant on the charges of Assault Causing Bodily Injury and that the District Court did not err in instructing the jury. The Appellant/Defendant requests that, this Court grant his

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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.

application for further review and reverse decision of the Court of Appeals, reverse his convictions and grant him a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Iowa R. App. P. 6.903(1) or (2) because:
   [] this brief contains 3275 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 12 in (Times New Roman 14 point)

/s/ Priscilla E Forsyth

Priscilla E. Forsyth

PROOF OF SERVICE

I hereby certify that on February 26, 2017 I served this proof brief on all parties of record by EDMS and to Appellant via United States Postal Service.

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