IN THE COURT OF APPEALS OF IOWA

No. 0-086 / 09-0634
Filed August 11, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

REYNOLD JOSEPH GOGEL,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Scott D. Rosenberg, Judge.

A defendant appeals from his conviction for assault on a peace officer in violation of Iowa Code section 708.3A(4) (2007). **REVERSED AND REMANDED FOR A NEW TRIAL.**

Mark C. Smith, State Appellate Defender, and Stephan Japuntich, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, John P. Sarcone, County Attorney, and Jess Vilsack, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., Eisenhauer, J., and Mahan, S.J.* Tabor, J., takes no part.

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

VOGEL, P.J.

Reynold Gogel appeals from the judgment entered for assault on a peace officer in violation of Iowa Code section 708.3A(4) (2007). Gogel testified he did not intend to injure the officer, but the jury was not correctly instructed as to specific intent—the marshalling instruction was inaccurate and the jury was not given an instruction on specific intent. We reverse and remand for a new trial.

Gogel raises the issue of the faulty instructions both as error of the district court and in the alternative, as an ineffective-assistance-of-trial-counsel claim for failure to object to the instructions given. As the issue was not preserved by an objection at trial, we will address the appeal as an ineffective-assistance-of-counsel claim. *See State v. Fountain*, ___ N.W.2d ___, ___ (Iowa 2010) (discussing that generally an objection must be made to jury instructions in order to preserve the issue for appeal, but ineffective-assistance-of-counsel claims are an exception to the traditional error-preservation rules). We review ineffective-assistance-of-counsel claims de novo. *State v. Stewart*, 691 N.W.2d 747, 750 (Iowa 2004). Although we ordinarily preserve ineffective-assistance-of-counsel claims for postconviction proceedings, we find that in the present case the record is adequate to decide the claim. *See id*. at 751.

The district court instructed the jury in the marshalling instruction on the elements required to find Gogel guilty as charged:

> The State must prove all of the following elements of the crime of Assault on a Peace Officer:
>
> 1. On or about the 22nd day of November, 2008, the defendant did an act which was:
>
> a. intended to cause pain or injury or intended to result in physical contact which was insulting or offensive to Officer Kalar;

> b. or place Officer Kalar in fear of an immediate physical contact which would have been painful, injurious, insulting or offensive to Officer Kalar.
>
> 2. The defendant had the apparent ability to do the act.
>
> 3. The defendant knew or should have known that Officer Kalar was a peace officer.
>
> If the State has proved all of the elements, the defendant is guilty of Assault on a Peace Officer. If the State has proven elements 1 and 2, but failed to prove element 3, the defendant is guilty of Assault. If the State has failed to prove elements 1 or 2, the defendant is not guilty.

See Iowa Crim. Jury Instruction 800.1 (Assault—Elements). Under section 1(b), the instruction should have stated "*or intended* to place Officer Kalar in fear of an immediate physical contact . . . ." *See* Iowa Code § 708.1. Gogle asserts that the jury was not properly instructed as to specific intent because (1) the words "intended to" were omitted from section 1(b) of the marshalling instruction[1] and (2) the jury was not given a specific intent jury instruction.

Our supreme court recently filed *State v. Fountain*, ___ N.W.2d ___ (Iowa 2010), in which it reaffirmed its position that assault is a specific intent crime. It reasoned that under Iowa Code section 708.1,

> [A] defendant must commit an act that he intends to cause pain or injury to the victim or to result in physical contact that would be insulting or offensive to the victim or to place the victim in fear of physical contact that will be injurious or offensive. Because the elements of these assault alternatives include an act that is done to achieve the additional consequence of causing the victim pain, injury or offensive physical contact, the crime includes a specific intent component.

Id. at ___ (citations omitted).

[1] During deliberations, the jury in a note asked whether they must agree on both points (a) and (b), to which the district court answered no. On appeal, the State admits that the instruction "misinstructs in one respect."

As reaffirmed in *Fountain*, Gogel is correct in asserting that the trial court "erred in failing to instruct on specific intent because the crime of assault includes a specific intent element."

Although Gogel was tried prior to the *Fountain* decision, *Fountain* did not alter the Supreme Court's prior rulings, that certain elements of assault require a specific intent finding. *See Fountain*, ___ N.W.2d at ___. Therefore, we agree with Gogel's assertion that his counsel was ineffective for failing to object to the lack of instruction on specific intent, as the marshalling instruction was inaccurate and the jury was not instructed on specific intent. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984) (providing that in order to prevail on an ineffective-assistance-of-counsel claim, a defendant must prove that (1) counsel failed to perform an essential duty and (2) prejudice resulted). We reverse and remand for a new trial with the jury properly instructed on specific intent.

REVERSED AND REMANDED FOR NEW TRIAL.