IN THE COURT OF APPEALS OF IOWA

No. 0-309 / 09-0976
Filed July 14, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MARK VERN OSTRANDER,
Defendant-Appellant.

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

Mark Ostrander appeals his conviction for assault causing serious injury. **AFFIRMED.**

Gerald Feuerhelm, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, John P. Sarcone, County Attorney, and Jeff Noble, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Potterfield and Danilson, JJ. Tabor, J., takes no part.

VOGEL, P.J.

Mark Ostrander (Ostrander) appeals his conviction for assault causing serious injury in violation of Iowa Code sections 708.1 and 708.2(4) (2007).[1] He asserts the trial court erred in denying his motion for judgment of acquittal and motion for new trial. He also argues the imposition of a mandatory prison sentence was an equal protection violation, and was cruel and unusual punishment both facially and as applied to him. We affirm.

I. Background Facts and Prior Proceedings

Ostrander was found guilty of assault causing serious injury following an altercation with Mark West (West). Although the testimony from the State and defense witnesses differed significantly, the jury could have found the following facts pertinent to the issues raised on this appeal. In May 2007, Mark Ostrander, a member of the United States Air Force, and his brother, Matt, a United States Marine, were at the home of their parents, Vern and Peggy Ostrander. The Wests, neighbors of the Ostranders, were having a family gathering with their sons, Brandon, a special agent with the Division of Criminal Investigation, and Josh, a website designer. Loud music was playing in the surrounding area; Brandon and Josh, mistakenly believing the music was coming from the Ostranders, went to the Ostranders' home and requested Peggy turn the music down. After Peggy informed them that the music was not coming from her home,

[1] We note noncompliance with the rules of appellate procedure, requiring the name of each witness whose testimony is included in the appendix to appear at the top of each page where the witness's testimony appears. *See* Iowa R. App. P. 6.905(7)(*c*).
[2] Testimony varies greatly between the State and the defense witnesses as to how the

Josh yelled a profane remark at her, but then left. Peggy informed Vern of this incident.

When the music started up again, Brandon and Josh proceeded to further investigate the source of the music. They drove around the area and pulled into the Ostranders' driveway, where they encountered Vern. Brandon flashed his badge at Vern and requested they keep the music down. After attempting to inspect Brandon's badge, Vern accused Brandon of not being a real officer. Josh testified that Mark Ostrander then appeared in the driveway and began yelling profanities and threatening the "fake want-to-be" cop, telling them both to leave. Vern testified that as the brothers backed out of the driveway, their car nearly knocked him over. However, in his deposition, Vern described the incident as "the front left fender brushed my leg." Subsequently, Vern went to the Wests' residence, informed them what had transpired, explained that the music was not coming from their house, and left after a few minutes.

A short time later, the Ostranders again heard the Wests complaining about the music. Vern, Matt, and Mark Ostrander went back to the Wests to straighten out the situation. They found the Wests at their neighbor's, the Darrachs. Initially, Vern approached Mark West, and according to Darrach, "slammed him hard" in his chest with his hands. Darrach stepped in between the two and told them this could not occur on his property. At approximately the same time, Mark Ostrander approached Brandon in a threatening manner. Mark West stepped closer to monitor the situation, at which point Mark Ostrander turned to Mark West and said, "who the f*** are you?" They continued to move toward the West property as the dispute escalated into more yelling, profane

language, and threats. Mark Ostrander then shoved Mark West, and West responded by striking Ostrander in the face, knocking his glasses off. Mark Ostrander reacted by punching Mark West across the left side of his face, and then delivered at least one round-house kick to Mark West's side.[2] Mark West was taken to the hospital, where it was determined his left orbital socket had been broken in several places, requiring reconstructive surgery. He also sustained a bruise to his liver and right thigh, and his intestine was severed from his colostomy bag, likely from the one or more kicks to his side.

Ostrander was charged by trial information with one count of willful injury causing serious injury, in violation of Iowa Code section 708.4(1), a class C forcible felony. He filed a notice of self-defense and waived his right to a speedy trial. A jury found him guilty of the lesser included offense of assault causing serious injury, a class D felony, and he was sentenced to be imprisoned for a term not to exceed five years. He appeals.

II. Motion for Judgment of Acquittal

Ostrander asserts the trial court erred in denying his motion for judgment of acquittal, claiming the State failed to prove he did not act with justification or intend to cause a serious injury. Review of a district court's ruling on a motion for judgment of acquittal is for correction of errors at law. *State v. Corsi*, 686 N.W.2d 215, 218 (Iowa 2004). We will uphold a trial court's denial of a motion for judgment of acquittal if there is substantial evidence to support the defendant's

[2] Testimony varies greatly between the State and the defense witnesses as to how the fight began. The defense witnesses claimed Mark West took an aggressive wrestler-like stance, as if preparing to attack Ostrander. The State's witnesses testified that Mark Ostrander was using profane language and physically threatening various members of the West family, and initiated the attack.

conviction. *State v. Kirchner*, 600 N.W.2d 330, 333 (Iowa Ct. App. 1999). Evidence is substantial if it would convince a rational trier of fact the defendant is guilty beyond a reasonable doubt. *Id.* We review the evidence in the light most favorable to the State, including legitimate inferences and presumptions that may fairly reasonably be deduced from the evidence in the record. *State v. Webb*, 648 N.W.2d 72, 76 (Iowa 2002).

By relying on the affirmative defense of justification, Ostrander claims there was insufficient evidence to prove he used unreasonable force or initiated physical contact with Mark West. "A person is justified in the use of reasonable force when he or she reasonably believes that such force is necessary to defend himself or herself or another from any imminent use of unlawful force."[3] Iowa Code § 704.3; *State v. Delay*, 320 N.W.2d 831, 834 (Iowa 1982). The defense of justification is not available to one who is participating in a forcible felony, or initially provokes the use of force against oneself with the intent to use such force as an excuse to inflict injury on the assailant, unless the person reasonably believes that the person is in imminent danger of serious injury or the person withdraws from physical contact. *See* Iowa Code § 704.6. Once self defense is

[3] The jury was instructed that for a claim of justification "a person may use reasonable force to prevent injury to himself . . . only that amount of force a reasonable person would find necessary to use under the circumstances to prevent death or injury." The jury was also instructed that the justification defense fails if the State proved any of the following elements:

> 1. The defendant, or someone he aided and abetted, started or continued the incident which resulted in injury.
> 2. An alternative course of action was available to the defendant.
> 3. The defendant did not believe he was in imminent danger of death or injury and the use of force was not necessary to save his self.
> 4. The defendant did not have reasonable grounds for the belief.
> 5. The force used by the defendant was unreasonable.

raised, the burden is on the State to prove beyond a reasonable doubt that the asserted justification of self defense did not exist. *State v. Rubino*, 602 N.W.2d 558, 565 (Iowa 1999).

The evidence and testimony presented for the jury demonstrated that Mark Ostrander approached the Wests' property in an intimidating manner, yelling profanities and threats. Testimony from neighbor Darrach and his wife, as well as Mark West, his two sons and wife, supports Mark West's contention that Mark Ostrander approached the property, threatened West, then proceeded to punch and kick him. Given the evidence presented, a jury could find sufficient evidence demonstrated Mark Ostrander instigated or provoked a fight, or had the ability to retreat at any point during the altercation, but failed to do so. *See State v. McCaskill*, 160 Iowa 554, 142 N.W. 445, 449 (1913) (explaining that if a defendant returned to a house with the intention to provoke a difficulty, or to bring on a quarrel, he could not then claim to have acted in self-defense). While the evidence was in conflict as to who instigated the mêlée, we defer to the jury to sort out the facts and determine the more credible witnesses. *State v. McPhillips*, 580 N.W.2d 748, 753 (Iowa 1998) (explaining it is the jury's duty to determine what weight to give testimony). We find the court did not err in denying Ostrander's motion for judgment of acquittal, as sufficient evidence was presented for the jury to decide that the State proved each element of assault causing serious injury beyond a reasonable doubt including by the same standard, negating Ostrander's justification defense.

III. Motion for New Trial

Similarly, Ostrander asserts the court should have granted his motion for new trial. We review a motion for a new trial for an abuse of discretion. *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998). The district court may grant a new trial when "the verdict is contrary to law or evidence." Iowa R. Crim. P. 2.24(2)(*b*)(6). Appellate review is limited to a review of the exercise of discretion by the trial court, not of the underlying question of whether the verdict is against the weight of the evidence. *State v. Reeves*, 670 N.W.2d 199, 203 (Iowa 2003). Based on the evidence presented to the jury, Ostrander has failed to prove that the verdict was contrary to the weight of the evidence or a miscarriage of justice such that the district court should have granted his motion.

IV. Comparing Assault and Willful Injury under Equal Protection

Ostrander next asserts Iowa Code sections 708.2, 708.4, and 702.11 create a sentencing structure that violated his equal protection rights under both the federal and Iowa constitutions.[4] *Sanchez v. State*, 692 N.W.2d 812, 817 (Iowa 2005) ("Because neither party in this case has argued that our equal protection analysis under the Iowa Constitution should differ in any way from our analysis under the Federal Constitution, we decline to apply divergent analyses in this case."). Ostrander was convicted of assault causing serious injury under sections 708.1 and 708.2(4), a class D felony, which carries a five-year prison sentence and precludes consideration of a deferred judgment, deferred sentence, or a suspended sentence. Iowa Code § 907.3 (stating options of

[4] Although the defendant captioned this issue as a "due process" violation, his argument and citations are to whether this was an "equal protection" violation. As such, we address this issue as contained in the body of his appellate brief, rather than the incorrect caption.

deferred judgment, deferred sentence and suspended sentence are not available for forcible felonies); *State v. Peterson*, 327 N.W.2d 735, 736 (Iowa 1982). Although assault is not a specific intent crime, it is classified as a forcible felony. Iowa Code § 702.11 (classifying "assault" as a forcible felony); 708.1 (stating "assault" is a general intent crime). Because willful injury under section 708.4, a class D felony, is not classified as a forcible felony, Ostrander asserts the classification of the assault under section 708.2(4) as a forcible felony is unconstitutional on its face. We review the constitutional challenges raised by Ostrander de novo. *State v. Finnel*, 515 N.W.2d 41, 43 (Iowa 1994).

The legislature enjoys broad discretion in defining and classifying criminal offenses. *State v. Ceaser*, 585 N.W.2d 192, 196 (Iowa 1998), *overruled on other grounds by State v. Bruegger*, 773 N.W.2d 862, 871 (Iowa 2009). With respect to sentencing statutes, the legislature is free to impose disparate punishments for different crimes so long as the offenses are distinguishable on their elements. *Id.* It is within the province of the legislature to determine the most appropriate means of punishing and deterring criminal activity. *State v. Cronkhite*, 613 N.W.2d 664, 669 (Iowa 2000). No fundamental rights or suspect classifications are alleged or implicated by Ostrander's claim; hence we analyze the equal protection issue under the rational basis test. *See State v. Fagen*, 323 N.W.2d 242, 243 (Iowa 1982).

Ostrander was charged with willful injury causing serious injury, a class C felony, under section 708.4(1), which states, "Any person who does an act which is not justified and which is intended to cause serious injury to another commits . . . a class 'C' felony, if the person causes serious injury to another."

The jury was instructed, accordingly:

> 1. On or about the 28th day of May, 2007, the defendant struck Mark West.
> 2. The defendant specifically intended to cause a serious injury to Mark West.
> 3. Defendant's actions caused a serious injury to Mark West.
> 4. The defendant was not acting with justification.

The jury was instructed that should they find the State has failed to prove any of those elements, they should go on to consider the lesser included offense of assault causing serious injury, a class D felony, in accord with Iowa Code sections 708.1 and 708.2(4):

> A person commits an assault when, without justification, the person does an act intended to cause pain or injury coupled with the apparent ability to execute the act, and when that assault causes serious injury, a person is guilty of a class 'D' felony.

Accordingly, the jury was instructed:

> 1. On or about the 28th day of May, 2007, the defendant assaulted Mark West.
> 2. The assault caused a serious injury to Mark West.
> 3. The defendant was not acting with justification.

Assault was defined to the jury as: an act which is meant to

> 1. cause pain or injury; or
> 2. result in physical contact which will be insulting or offensive to another; or
> 3. place another in fear or an immediate physical contact which will be painful, injurious, insulting or offensive to another person, [w]hen coupled with the ability to do the act.

The jury was also instructed on willful injury causing bodily injury, a class D felony:

> 1. On or about the 28th day of May, 2007, the defendant struck Mark West.
> 2. The defendant specifically intended to cause a serious injury to Mark West.
> 3. Defendant's actions caused a bodily injury to Mark West.

4. The defendant was not acting with justification.

Ostrander asserts that it is unconstitutional to classify the general intent crime of assault causing serious injury as a forcible felony while exempting the specific intent crime of willful injury causing bodily injury from being classified as a forcible felony. *Eggman v. Scurr*, 311 N.W.2d 77, 79 (Iowa 1981) ("Specific intent is present when from the circumstances the offender must have subjectively desired the prohibited result. General intent exists when from the circumstances the prohibited result may reasonably be expected to follow from the offender's voluntary act, irrespective of any subjective desire to have accomplished such result.").

As instructed to the jury, willful injury requires specific intent to cause serious injury, and assault causing serious injury requires a showing the defendant "meant to" commit an assault. While these crimes carry different levels of intent, intent is not the sole basis used by the legislature for classifying criminal offenses. The two offenses in question each contain different resulting injuries; willful injury under section 708.4(2) being "bodily injury," and assault under sections 708.1(1) and 708.2(4) being "serious injury," thus the legislature may punish them differently. *Cronkhite*, 613 N.W.2d at 668-69 ("If elements of the offenses are not the same, persons committing the crimes are not similarly situated and, therefore, may be treated differently for purposes of the Equal Protection Clause." (*quoting Ceaser*, 585 N.W.2d at 196)).

Had the jury found Ostrander guilty of the crime charged, willful injury causing serious injury under section 708.4(1), he would have been found to have committed a higher level of felony, class C, punishable by up to ten years

imprisonment. Instead the jury found Ostrander guilty of a lesser, class D felony, punishable by up to five years in prison, albeit, also classified as a forcible felony. Of the verdict forms available to the jury, it did not choose the lesser included offense of willful injury causing bodily injury under section 708.4(2). Because the resulting injury of each offense varies by crime, there is a rational basis in directing the punishment in accordance to the severity of the resulting injury. *See Ceaser*, 585 N.W.2d at 199 (stating bodily injury does not result in as serious of an injury as serious injury and addresses different criminal conduct, thus it is for the legislature to decide how the differing conduct will be punished). The resulting "serious injury" in this case was more severe than a "bodily injury," and punishment was directed in accordance with the severity of the crime. Ostrander's constitutional right to equal protection has not been violated.

V. Mandatory Prison Sentence: Cruel and Unusual Punishment

Citing both the federal and Iowa constitutions, Ostrander contends the imposition of a mandatory prison sentence for assault causing serious injury is cruel and unusual punishment both on its face and as applied. *See Sanchez*, 692 N.W.2d at 817 (without an argument to the contrary, we apply the same analysis to both the federal and Iowa constitutions). A party making a facial challenge or a challenge as applied to him bears the burden of proving the unconstitutionality of the statute. *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 2101, 95 L. Ed. 2d 697, 708 (1987) (facial challenge); *State v. Kramer*, 235 N.W.2d 114, 116 (Iowa 1975) (as applied challenge).

The Eighth Amendment prohibits sentences that are grossly disproportionate to the crime committed. *Solem v. Helm*, 463 U.S. 277, 284, 103

S. Ct. 3001, 3006, 77 L. Ed. 2d 637, 645 (1983). Punishment may be cruel and unusual because it inflicts torture, is otherwise barbaric, or is so excessively severe it is disproportionate to the offense charged. *Bruegger*, 773 N.W.2d at 872 ("The clause embraces a bedrock rule of law that punishment should fit the crime."); *Cronkhite*, 613 N.W.2d at 669. Although Ostrander fails to specify what statute he is attacking, we assume it is based on his conviction under section 708.4(2), and from which the sentence was imposed under section 902.9 and 902.3. We assume, without deciding, error was preserved.

Ostrander first asserts it is facially cruel and unusual punishment to automatically classify assault causing serious injury as a forcible felony, resulting in a mandatory prison sentence. Our analysis begins with a threshold test that measures the harshness of the penalty against the gravity of the offense. *State v. Wade*, 757 N.W.2d 618, 623 (Iowa 2008); *see State v. Musser*, 721 N.W.2d 734, 749 (Iowa 2006) (discussing that first we examine the crime committed and the sentence imposed, and the *Solem* proportionality test is used only in the rare case where "a threshold comparison of the crime committed to the sentence imposed leads to an inference of gross disproportionality"). This is an objective analysis completed without considering the individualized circumstances of the defendant or the victim in the present case. *Wade*, 757 N.W.2d at 624.

As the State points out, Ostrander fails to challenge the length—five years—of his imposed sentence. Instead he asserts that assault causing serious injury under section 708.2(4) should not be classified as a forcible felony, when this crime does not contain the mens rea element that is required for willful injury under section 708.4 that is not a forcible felony. He then advances that a "million

dollar shot" that was not specifically intended to, but did cause serious injury should not be classified as a forcible felony. Therefore, he argues that it is cruel and unusual punishment for assault causing serious injury to be classified as a forcible felony because this classification results in a mandatory prison sentence. *See* Iowa Code § 907.3 (stating that a court may defer judgment, defer sentence, or suspend sentence, but that this does not apply to a forcible felony).

What Ostrander fails to acknowledge is that there is no constitutional right to probation. *State v. Wright*, 309 N.W.2d 891, 894 (Iowa 1981) (explaining that the power to grant probation is conferred by statute; it is a power not inherent in the judiciary). Essentially, Ostrander is trying to minimize the severity of his crime by arguing that it does not include the same mens rea requirement as willful injury causing bodily injury. However, as discussed above, one element of a crime does not establish the gravity of the offense. Assault causing serious injury requires a showing that the defendant intended to commit an assault and that assault resulted in serious injury to the victim—a less demanding mens rea element, but a more severe resulting injury than required for willful injury causing bodily injury. Moreover, we cannot say that balancing the gravity of the offense of serious injury under sections 708.1(1) and 708.2(4) against a five-year prison sentence under sections 902.3 and 902.9, creates a statutory scheme that is facially cruel and unusual. *See Solem*, 463 U.S. at 290, 103 S. Ct. at 3009, 77 L. Ed. 2d at 650 ("Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes.").

Ostrander also challenges his sentence as cruel and unusual as applied to him. In rare instances, a defendant who commits acts of lesser culpability within the scope of broad criminal statutes carrying stiff penalties should be able to launch an as-applied cruel and unusual punishment challenge. *Bruegger*, 773 N.W.2d at 884. This occurs in a case such as *Bruegger*, where an unusual combination of features converge to generate a high risk of potential gross disproportionality. *Id.* In reviewing the proportionality of the sentence to the crime committed, we look to the specific facts of the case. *Id.* at 878.

In this case, the parties stipulated that the injuries West sustained "fit the legal definition of serious injury under Iowa law." Those undisputed injuries included damage to West's left orbital socket, requiring reconstructive surgery, severe bruising on his liver and thigh, and severance of his intestine from his colostomy bag. We cannot say that the severity of the sentence was grossly disproportionate to the gravity of the crime committed, with the resulting serious injuries suffered by the victim.[5] *Solem*, 463 U.S. at 290-91, 103 S. Ct. at 3010. Accordingly, we hold that Mark Ostrander's contention that his sentence was cruel and unusual punishment is without merit, both on its face and as applied.

AFFIRMED.

[5] As presented to the district court and included in the State's brief on appeal, perhaps signaling an eye towards leniency, the length of time Ostrander must serve on his five-year sentence is in the hands of the Department of Corrections, through the services of the Parole Board.