IN THE COURT OF APPEALS OF IOWA

No. 1-190 / 10-0574
Filed April 27, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

AKUR KUT GUANG,
Defendant-Appellant.

Appeal from the Iowa District Court for Buena Vista County, Gary E. Wenell, Judge.

A defendant appeals from her conviction for assault on a peace officer in violation of Iowa Code section 708.3A(4) (2009). **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Bradley M. Bender, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, David Patton, County Attorney, and James Earl McHugh, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Eisenhauer and Danilson, JJ. Tabor, J., takes no part.

DANILSON, J.

Akur Guang appeals from the judgment entered for assault on a peace officer in violation of Iowa Code section 708.3A(4) (2009). Guang seeks a new trial because the district court did not give her requested instruction on specific intent. The State concedes that assault is a specific intent crime, *see State v. Fountain*, 786 N.W.2d 260, 264 (Iowa 2010), but argues the failure to instruct the jury on specific intent was not reversible error. We agree.

The jury here was instructed that to find Guang guilty of assault on a peace officer, the State must prove:

> 1. On or about the 31st day of December, 2008, here in Buena Vista County, Iowa, the Defendant, Akur Guang, did an act which [sic] intended to cause pain or result in physical contact which would be insulting or offensive to John Bauer.
> 2. The Defendant had the apparent ability to do the act.
> 3. At the time, John Bauer was a peace officer.
> 4. At the time the Defendant knew that John Bauer was a peace officer.

Defense counsel requested "the standard instruction for specific intent." Iowa Criminal Jury Instruction 200.2 published by the Iowa State Bar Association reads:

> "Specific intent" means not only being aware of doing an act and doing it voluntarily, but in addition, doing it with a specific purpose in mind.
>
> Because determining the defendant's specific intent requires you to decide what [he] [she] was thinking when an act was done, it is seldom capable of direct proof. Therefore, you should consider the facts and circumstances surrounding the act to determine the defendant's specific intent. You may, but are not required to, conclude a person intends the natural results of [his] [her] acts.

Iowa Bar Ass'n, *Iowa Crim. Jury Instructions* 200.2 (*available at* http://iabar.net).

The district court rejected the requested instruction, stating:

> The Court overrules and denies the objection of the Defendant, believes that the facts of this case and the sections under which the charges are filed is a general intent crime.
>
> It's hard to see when evidence talks about a defendant spitting at an officer or attempting to bite an officer, there's really not anything additional to do. And that's what normally a specific intent instruction calls for is that some acts were done with some further intent to do something. And the Court doesn't find anything further or anything further—intended to do; and therefore, overrules and denies the Defendant's instruction and gives the general intent instruction as provided for in the instructions.

This case was tried in March 2010 and thus, the district court did not have the benefit of *Fountain*, which was decided on July 30, 2010. In *Fountain*, the supreme court stated:

> Since 2003, we have had the opportunity to address the intent requirement for assault multiple times. *See State v. Keeton,* 710 N.W.2d 531, 533 (Iowa 2006); *State v. Taylor,* 689 N.W.2d 116, 132 (Iowa 2004). In each of these cases, including the most recent case involving this issue, *Wyatt v. Iowa Department of Human Services,* 744 N.W.2d 89, 94 (Iowa 2008), we focused on the elements of the crime. In each of these cases, we found that regardless of the specific label attached to the crime—specific intent or general intent—the State must prove the elements of the crime and their accompanying mens rea beyond a reasonable doubt. *See, e.g., Keeton,* 710 N.W.2d at 534.
>
> The elements of assault under Iowa Code section 708.1 have not changed since our decision in *Heard.* Under this section, 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. Iowa Code § 708.1(1), (2). 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. *See Heard,* 636 N.W.2d at 231-32. Therefore, we adhere to our prior decisions holding that the 2002 amendment "did not alter the substantive content of the statute." *Bedard,* 668 N.W.2d at 601.

786 N.W.2d at 265.

The question in *Fountain* was whether trial counsel was ineffective in failing to seek a specific intent instruction. *See id.* at 265. The court concluded that "only trial strategy could explain counsel's failure to request a specific intent instruction," and because neither opening nor closing statements were reported, the court could not determine trial counsel's strategy on the record presented. *Id.* at 266-67. The court noted, however, that "[i]f the defense strategy is to deny that any assaultive contact occurred, the individual elements of assault become unimportant." *Id.* at 267.

This is precisely the strategy presented in the case before us. The police officer testified that Guang spit on him and attempted to bite him. A jury viewing the video recording from the police officer's vehicle could determine Guang spit at, attempted to bite, and spit again at the officer as the officer attempts to place a seatbelt around Guang. The defendant testified that she did not spit on the officer's face and did not bite him. Under these circumstances where the defendant denies the assaultive contact occurred, "the individual elements of assault become unimportant."

We are convinced the failure to give a specific intent instruction caused the defendant no prejudice. *See id.* We therefore affirm.

AFFIRMED.