

IN THE COURT OF APPEALS OF IOWA

No. 8-053 / 06-1098
Filed February 27, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DANIEL LAWRENCE MASON,
Defendant-Appellant.

Appeal from the Iowa District Court for Cerro Gordo County, Bryan McKinley, Judge.

Defendant appeals his convictions for criminal trespass and assault.

AFFIRMED.

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

Thomas J. Miller, Attorney General, Robert P. Ewald and Patricia Houlihan, Assistant Attorneys General, and Paul L. Martin, County Attorney, for appellee.

Considered by Sackett, C.J., and Vaitheswaran, J., and Beeghly, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

BEEGHLY, S.J.**I. Background Facts & Proceedings**

Daniel Mason, a police officer, was acquainted with Marcia, who was the former wife of a fellow police officer. Marcia was a cosmetologist and she cut Mason's hair. The two would engage in flirtatious conversations in the hair salon. Marcia stated she felt this was a safe situation and she joked back. After Marcia was divorced Mason asked her out, but she was already dating another man, Craig. Mason and Marcia exchanged telephone calls and text messages. Mason also started calling Marcia in the middle of the night and coming over to her house, asking her to let him in. Marcia testified she did not respond to Mason's night-time calls or let him in the house.

On July 28, 2004, Marcia had a migraine headache and she accidentally left her back door unlocked. At about 3:00 a.m. she woke up and heard Mason walking into her bedroom. Mason asked her to have sex. He tried to take off her shirt and touched her clothing over the breast area. Marcia went into the bathroom and threw up. When she came out Mason was lying on her bed, and she told him he needed to go home. She then went back into the bathroom and threw up again. Eventually Marcia talked Mason into leaving the house. She told him Craig was due to stop by the house soon. Marcia testified Mason's appearance at her house made her feel, "[v]ery scared, very intimidated, very vulnerable."

Mason was charged with burglary in the second degree and assault with intent to commit sexual abuse. At the trial, Marcia testified as outlined above.

Mason testified he engaged in a sporadic sexual relationship with Marcia between February and July 2004. He stated that when they had an appointment to meet, Marcia would leave the back door unlocked for him and he would walk in.

Mason testified that he attempted to call Marcia several times in the early morning hours of July 28, but she did not answer her telephone, and he believed she was sleeping. He went over to her house anyway. He stated he tried the back door, and because it was unlocked he walked in. He asked Marcia if she left the door open for him, and she said she forgot to lock it. He stated Marcia was wearing about five shirts, and he grabbed the top one and asked why she was wearing so many shirts. Marcia replied she was ill and felt chilled. Mason tried to give her a kiss and she backed away, saying she had just thrown up. Mason stated he asked if he could stay the night with her, and she said he should go home, so he left. Mason quit calling Marcia after July 28.

The jury returned a verdict finding Mason guilty of the lesser included offenses of criminal trespass, in violation of Iowa Code sections 716.7 (2003) and 716.8(1), and assault, in violation of sections 708.1 and 708.2(6) (Supp. 2003). The district court denied Mason's motion for a new trial. Mason was sentenced to thirty days in jail on each count, to be served concurrently. He was ordered to have no contact with Marcia for a period of five years. Mason now appeals his convictions.

II. Sufficiency of the Evidence

Mason contends there is insufficient evidence in the record to support his convictions. He claims there is no evidence that an assault occurred, or that he had the intent to commit an assault. He asserts there was no evidence he displayed anger or force, and he states Marcia asked him to leave merely because she was not feeling well that evening. He also claims there is insufficient evidence to show he had an intent to commit an assault, which is an element of criminal trespass. He states he had been in Marcia's home many times while they had an affair, and he believes he entered the home with her permission.

We review challenges to the sufficiency of the evidence for the correction of errors at law. *State v. Schmidt*, 480 N.W.2d 886, 887 (Iowa 1992). A guilty verdict is binding on appeal, unless there is not substantial evidence in the record to support it, or the verdict is clearly against the weight of the evidence. *State v. Shortridge*, 589 N.W.2d 76, 80 (Iowa Ct. App. 1998). Substantial evidence means evidence that could convince a rational fact-finder that the defendant is guilty beyond a reasonable doubt. *Id.*

A. The jury was instructed that Mason engaged in "assault" if he committed an act: (1) which was intended to cause pain or injury; or (2) which was intended to result in physical contact which would be insulting or offensive; or (3) which was intended to place another person in fear of immediate physical contact which would be painful, injurious, insulting or offensive to another person,

when coupled with the apparent ability to do the act. See Iowa Code § 708.1(1), (2) (2003).

We find there is substantial evidence in the record to support the jury's verdict that Mason's conduct constituted an assault under section 708.1. Marcia testified Mason tried to take off her top, and he touched her breasts over her clothing. Mason also admitted that he grabbed her shirt. The jury could have found this physical contact was insulting or offensive to Marcia.

Furthermore, the jury could have found that Mason's actions of coming into Marcia's home in the middle of the night, uninvited and unannounced, and asking her for sex were actions which were "intended to place another in fear of immediate physical contact which will be painful, injurious, insulting, or offensive." See Iowa Code § 708.1(2). Marcia testified Mason's actions caused her to be "[v]ery scared, very intimidated, very vulnerable." We also consider that the telephone records which showed Mason often called Marcia prior to July 28, and then did not call her at all after July 28, could show a consciousness of guilt by Mason. See *State v. Cox*, 500 N.W.2d 23, 25 (Iowa 1993) (noting a defendant's activities following an offense may provide a legitimate basis for inferring consciousness of guilt).

We conclude there is sufficient evidence in the record to find Mason committed the crime of assault.

B. For the crime of criminal trespass, the jury was instructed it needed to find: (1) defendant entered Marcia's residence; (2) he did not have Marcia's

express permission; and (3) when he entered he had the specific intent to commit an assault. See Iowa Code § 716.7(2)(a).

We have already found there is sufficient evidence in the record to show Mason had the specific intent to commit an assault. Mason has also claimed there was insufficient evidence he did not have Marcia's express permission to enter her home. Mason's argument is based on his testimony that he had an ongoing sexual relationship with Marcia. Marcia denied having a sexual relationship with Mason, and denied giving Mason permission to enter her home. On cross-examination Mason revealed relatively little knowledge about the layout of Marcia's home, or about Marcia personally. Weighing the evidence and assessing the credibility of witnesses are matters left to the jury. *State v. Hutchison*, 721 N.W.2d 776, 780 (Iowa 2006). The jury could have decided not to believe Mason's testimony that he had a previous sexual relationship with Marcia.

We conclude there is sufficient evidence in the record to support the jury's verdict finding Mason guilty of criminal trespass.

We affirm Mason's convictions.

AFFIRMED.

SACKETT, C.J. (concur specially)

I concur specially. I agree with the result reached by the majority. In doing so I do not adopt the following language of the majority:

We also consider that the telephone records which showed Mason often called Marcia prior to July 28, and then did not call her at all after July 28, could show a consciousness of guilt by Mason. See *State v. Cox*, 500 N.W.2d 23, 25 (Iowa 1993) (noting a defendant's activities following an offense may provide a legitimate basis for inferring consciousness of guilt).

Our supreme court held that: "Admissions may be implied by the conduct of the defendant subsequent to a crime, including fabrication, when such conduct indicates a consciousness of guilt." *State v. Cox*, 500 N.W.2d 23, 25 (Iowa 1993). I am unwilling to determine that Mason's failure to call Marcia following the event is such conduct as can be implied an admission of guilt.