IN THE COURT OF APPEALS OF IOWA

No. 8-599 / 07-0999
Filed October 1, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

EMMANUEL FOUNTAIN,
Defendant-Appellant.

Appeal from the Iowa District Court for Story County, Lawrence E. Jahn, District Associate Judge.

Defendant appeals his conviction for domestic abuse assault. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Stephen Holmes, County Attorney, and Keisha Cretsinger, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Eisenhauer, J., and Schechtman, S.J.*

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

SCHECHTMAN, S.J.

I. Background Facts & Proceedings

Levita Alexander cohabited with Emmanuel Fountain in an Ames apartment in October and November 2006. They are the parents of Carmello, who was then only a few months old, and Levita was pregnant. Levita moved to Chicago, leaving her clothing and personal belongings In Ames. On December 26, 2006, she returned to Ames, with Carmello, to obtain her "things."

After an original refusal because Fountain was miffed that Levita had left him, she was allowed to enter his apartment around 9:00 p.m. Some of his relatives were visiting. Levita saw her belongings, but was advised by Fountain that she could not remove anything. She decided to "just be nice so that eventually he would calm down and let me take my stuff." Levita consumed some time sorting through her clothes, and sat on Fountain's lap during a card game. Sometime after midnight, she fell asleep on his bed, while Fountain continued playing cards and drinking alcohol. Fountain woke her around 2:00 a.m. At his urging, they engaged in intercourse on three separate occasions over the following two hours, with intermittent arguments about her decision to leave.

Following another yelling match, Fountain placed his hand on her throat, causing Levita noticeable difficulty in breathing, followed again by disparaging remarks, culminated by punching at her face and body. Fountain eventually calmed down and exited to change Carmello's diaper. Levita called the police in his brief absence, and they arrived shortly. The officer (the only witness except

Levita) observed that Levita had a wound on her forehead, a bruise on her inner right thigh, and a mark on the left side of her neck.

The trial jury found Fountain "guilty of assault causing bodily injury." The jury also answered a special interrogatory, finding Fountain had a minor child with Levita. Consequently, Fountain was convicted of domestic abuse assault causing bodily injury. *See* Iowa Code § 708.2A(1) (2005). He was sentenced to 180 days in the county jail, and ordered to complete a batterer's education program. Fountain appeals his conviction.

II. Standard of Review

Fountain claims assault is a specific intent crime, and the district court erred by not giving the jury a specific intent instruction. He admits, however, that defense counsel did not object to the instructions that were given, or request a specific intent instruction.[1] Fountain alternatively claims ineffective assistance counsel due to defense counsel's failure to request a specific intent instruction, which the State correctly concedes does not bar a direct appeal. *See State v. Allison*, 576 N.W.2d 371, 374 (Iowa 1998). We limit our review to that claim.

We review claims of ineffective assistance of counsel de novo. *State v. Bergmann*, 600 N.W.2d 311, 313 (Iowa 1999). To establish a claim of ineffective assistance of counsel, a defendant must show (1) the attorney failed to perform an essential duty, and (2) prejudice resulted to the extent it denied defendant a fair trial. *State v. Shanahan*, 712 N.W.2d 121, 136 (Iowa 2006).

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[1] Fountain's brief subtly suggests "Counsel's failure to request the instruction is not subject to error preservation rules," citing *State v. Bennett*, 503 N.W.2d 42, 45 (Iowa 1993), as his authority. In *Bennett*, 503 N.W.2d at 44, counsel did object to the alleged erroneous instruction and is not authority for that pronouncement.

III. Analysis

Iowa Code section 708.1, entitled "Assault defined" provides:

> An assault as defined in this section is a general intent crime. A person commits an assault when, without justification, the person does any of the following:
>
> 1. Any act which is 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.
>
> 2. Any act which is intended to place another in fear of immediate physical contact which will be painful, injurious, insulting, or offensive, coupled with the apparent ability to execute the act.

The trial court gave the following general criminal intent instruction, which is Iowa Criminal Jury Instruction 200.1:

> To commit a crime a person must intend to do an act which is against the law. While it is not necessary that a person knows the act is against the law, it is necessary that the person was aware he was doing the act and he did it voluntarily, not by mistake or accident. You may, but are not required to, conclude a person intends the natural results of his acts.

The appellant contends that the trial court should have given the specific intent instruction, Iowa Criminal Jury Instruction 200.2, and his counsel was ineffective for not requesting it:

> "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 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 acts.

Our supreme court has struggled with the appropriate approach to assaultive intent. Scholars, legal writers, and legislatures have been similarly

puzzled in its application to real life circumstances. This muddle should not be further exacerbated. Trial courts, prosecutors, and defense attorneys deserve a resolution, at a minimum, a clear signal. But this court is reined by this record and the facts that generated it. Our sixteenth president, Abraham Lincoln, mused that "life is likened to a rowboat; that you cannot move forward without looking backward." The subject of criminal intent in Iowa deserves such a "look-back".

It is imperative that we juxtapose subsections (1) and (2) of section 708.1, the first being conduct intended to cause pain or injury, or result in physical contact; the other, conduct intended to place another in fear alone of that physical contact. Only the first prong, 708.1(1) was instructed and explained to the jury.[2] The jury found Levita had sustained "bodily injury" which would result from physical contact, not fear of it. Thus, we are dealing solely with an assault defined by section 708.1(1).

Domestic abuse assault is an assault as defined in section 708.1, which would include all three subsections.[3] Iowa Code § 236.2(2). The jury, by a special interrogatory, found Fountain and Levita to be the parents of the same minor child. *See* Iowa Code § 236.2(2)(c) (providing domestic abuse is an assault between parents of the same minor child).

Prior to 1978, the crime of assault was contained in seven separate sections of the code, separately labeled, with the penalty set forth in each

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[2] The jury was instructed, that "an assault is committed when a person, without justification, does any act which is intended to cause pain or injury or is intended to result in physical contact which would be offensive or insulting to another."

[3] Section 708.1(3) is not relevant in this controversy as it pertains to the use of firearms or other dangerous weapons.

section: assault and battery; pointing gun at another; intimidation while masked; assault while masked; assault with intent to commit a felony; assault with intent to inflict bodily injury; and assault with intent to commit certain crimes.[4]

The present section 708.1(1) was enacted as a part of the Iowa Criminal Code by the Sixty-Sixth General Assembly in 1976, effective January 1, 1978.[5] *See* 1976 Iowa Acts, ch. 1245, § 801. The penalties for the subject assault were assigned a separate section, 708.2, categorized by the severity of the assault. Through the years section 708.2 was amended to include intent to inflict serious injury, causing serious injury or bodily injury, use of a dangerous weapon, simple assault, and use of an object to penetrate the genitalia or anus of another. Willful injury was added, in a separate section, to encompass those acts intended to cause serious injury which do result in either serious or bodily injury. *See* Iowa Code § 708.4 (2005).

Prior to the adoption of the Iowa Criminal Code, the acts now defined in section 708.1(1), were contained in section 694.1 (1977) ("Whoever is convicted of an assault, or an assault and battery, where no other punishment is prescribed, shall be imprisoned in the county jail not exceeding thirty days, or be fined not exceeding one hundred dollars.") and section 694.6 ("If any person

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[4] Beginning in our 1946 Code, these assaults were set forth in sections 694.1 to 694.7, and sections 690.6 to 690.7. In the 1924 through 1939 Codes (no updates were published during World War II), they were in sections 12929-12935 and 12915-12916.

[5] The Act provided:

> An Act relating to a complete revision of the substantive criminal laws, criminal procedure laws, and sentencing and post-conviction procedure laws of this state; providing rules of criminal procedure; providing classifications of public offenses and their consequential penalties; and providing penalties for violations of laws of the state to accord with the revised classifications.

1976 Iowa Acts, ch. 1245.

assault another with intent to inflict great bodily injury, he shall be imprisoned in the county jail not exceeding one year, or be fined not exceeding five hundred dollars, or be imprisoned in the penitentiary not exceeding one year").

The common law offense of assault was judicially defined as an attempt to apply unlawful physical force to the person of another, coupled with the apparent present ability to execute the attempt, while assault and battery was the unpermitted and unlawful application of physical force to the person of another in a rude and insolent manner or with a desire to do physical harm. *State v. Yanda*, 259 Iowa 970, 971, 146 N.W.2d 255, 255 (1966) (citing *State v. Straub*, 190 Iowa 800, 801, 180 N.W. 869, 870 (1921)). Though these two offenses were separate and distinct, assault was the initial stage of an act, which was aggravated by a battery. *Id*., 146 N.W.2d at 255-56. The word "battery" is not employed in our present code, which uses "physical contact" in its stead, or "bodily injury" or "serious injury" for its aggravation. *See* Iowa Code ch. 708 (2005).

Though the statutory definition of assault or assault and battery, prior to 1978, did not contain the word "intent," most jurisdictions, including Iowa, established criminal intent (mens rea) as an essential element of the crime by judicial construction. *See State v. Redmon*, 244 N.W.2d 792, 797 (Iowa 1976); 6 Am. Jur. 2d *Assault and Battery* §16, at 24 (1999). Assault and battery was classified as a general intent crime. *Redmon*, 244 N.W.2d at 797. In *Redmon*, the supreme court defined specific intent as present "when from the circumstances the offender must have subjectively desired the specific result," whereas 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." *Id.* (citation omitted); *accord Bacon v. Bacon*, 567 N.W.2d 414, 417 (Iowa 1997); *Eggman v. Scurr*, 311 N.W.2d 77, 79-80 (Iowa 1981). General intent is distinguished from specific intent by whether the definition of the accused act requires proof of the offender's intent to do a *further* act or achieve some *additional* consequences. *Id*.; *see also State v. Heard*, 636 N.W.2d 227, 232-33 (Iowa 2001) (special concurrence).

Several cases determined section 708.1 to be a general intent crime. In *State v. Brown*, 376 N.W.2d 910, 913-15 (Iowa Ct. App. 1985), the Iowa Court of Appeals recognized that the mere use of the word "intent" in a statute does not render it a specific intent crime, and concluded that an assault, as defined in section 708.1, is a general intent crime.[6] The court offered three reasons for its conclusion: (1) the decision in *Redmon*, 244 N.W.2d at 797, which had classified the common law predecessor to the present assault statute as a general intent crime; (2) the overall statutory scheme, as a specific intent element is added to such crimes as assault to commit a serious injury and willful injury (sections 708.2(1) and 708.4), which would require proof of two specific intents for certain types of assaults, which is an "implausible result;" and (3) a compelling policy consideration, as the intoxication defense is limited to specific intent crimes, and it would be anomalous to allow that defense for the crime of simple assault, which is oftentimes committed while in that state. *Brown*, 376 N.W.2d at 914-15.

[6] We note *Brown*, 376 N.W.2d at 915, involved an assault under section 708.1(1) because the victim was hit on the head with a hammer, causing a laceration.

In *State v. Ogan*, 497 N.W.2d 902, 903 (Iowa 1993), a trial information charged Ogan with assault causing bodily injury in violation of sections 708.1 and 708.2(2), a serious misdemeanor. A separate trial information accused Ogan of assault with intent to inflict a serious injury, in violation of sections 708.1 and 708.2(1), an aggravated misdemeanor. *Ogan*, 497 N.W.2d at 903. Ogan contended the trial informations were inconsistent and one of the two should be dismissed. *Id*. In determining that the State was not precluded from charging a defendant in separate trial informations with mutually exclusive crimes, based upon the same facts and circumstances, our court declared an assault causing bodily injury to be a crime of general intent, whereas an assault with intent to inflict a serious injury is a specific intent offense. *Id.* at 904.

In *State v. Peck*, 539 N.W. 2d 170, 172 (Iowa 1995), the defendant was charged with burglary (having the intent to commit an assault enters an occupied structure) under sections 713.1 and 713.3. One of the issues on appeal was whether assault causing bodily injury and simple assault should have been submitted as lesser included offenses of first-degree burglary. *Peck*, 539 N.W.2d at 175. In concluding that it would be impossible to commit first-degree burglary without also committing assault or assault causing injury, the court found "all of these crimes involve general intent." *Id*.

The case of *Bacon v. Bacon*, 567 N.W.2d at 415, was a domestic abuse proceeding wherein Bacon contended that the evidence was insufficient to support a finding of an assault. Citing prior precedent, the court stated, "Assault

as defined in section 708.1 is a general intent crime." *Id*. at 417. The court remarked:

> Thus, to commit an assault, the offender need only to intend to do the act that constitutes the assault. If the prohibited result may reasonably follow from the offender's act, the offender is guilty of assault regardless of whether or not the offender subjectively desired the prohibited result. The offender need only be aware that he or she was doing the act. In addition, the offender must have done the act voluntarily, not by mistake or accident. In determining general intent, the fact finder may, but is not required, to conclude that the offender intends the natural results of his or her acts.

Id.

A violation of Iowa Code section 708.3A(3) was the subject of the trial information in *State v. Chang*, 587 N.W.2d 459, 460 (Iowa 1998), alleging an assault on a police officer in Cedar Falls.[7] Chang urged that the words "intended to cause" and "intended to place" used in paragraphs (1) and (2) of section 708.1, required the State to show that he acted with the intent to cause the consequences of his acts. *Chang*, 587 N.W.2d at 462. The State countered by directing the court to earlier cases, each of which had determined that section 708.1 was a general intent crime. *Id*. The supreme court stated, "The State's reading of *Bacon, Peck,* and *Ogan* appears to be correct . . . ." *Id*. The court concluded that even accepting the defendant's argument on the intent requirement, a jury is allowed to assume that an actor is presumed to intend the natural consequences of his or her acts. *Id*. The court found Chang was necessarily aware that the officer was placed in fear of painful or injurious contact

[7] Section 708.3A(3) applies to a "person who commits an assault, as defined in section 708.1, against a peace officer, . . . and who causes bodily injury or mental illness . . . ."

when Chang rammed another vehicle while the officer was draped over the front seat. *Id.*

This long period of consistently finding section 708.1, and its statutory and common law predecessors, to be a general intent crime, ended with the decision in *State v. Heard*, 636 N.W.2d 227, 228 (Iowa 2001). Heard entered a convenience store in Davenport wearing a paper bag over his head and white athletic socks over his hands. *Heard*, 636 N.W.2d at 228. He approached the counter and ordered the clerk to "give him the money." *Id.* The clerk did so along with some other bills under the cash register, and Heard exited. *Id.* The clerk admitted that he made no physical movement towards her nor did he utter any verbal threats of harm. *Id.* Heard was arrested a short time later and charged with robbery under Iowa Code section 711.1, using its assault alternatives.[8] After a bench trial, Heard was found guilty of the assault and immediate serious injury alternatives of robbery. *Id*. at 229.

Heard appealed contending there was insufficient evidence to uphold the conviction. *Id*. Heard argued that an assault cannot be based on an act which occurred outside the victim's presence, that is, the physical act of placing the bag and socks on his person; that this is a *covert* act, not an *overt* act as required to prove an assault.[9] *Id.* at 230. Additionally, Heard asserted that his disguised appearance could not give rise to an assault. *Id.* The Iowa Supreme Court confined its review to assault as defined in section 708.1(2). *Id.* The court reasoned, like the trial court, that the *use* of the bag and socks signaled his intent

[8] Section 711.1 provides, "A person commits a robbery when, having the intent to commit a theft, the person . . . commits an assault upon another . . . ."

[9] Assault requires an overt act. *State v. Smith*, 309 N.W.2d 454, 457 (Iowa 1981).

to do some further unauthorized act, placing her in fear of harm if she did not turn over the money. *Id*. at 231. The court apparently agreed with the State's argument that an assault should not be limited to physical action and movement, but a fact finder should consider the totality of the circumstances bearing on the offender's actions, both verbal and non-verbal. *Id*. The court defined an overt act as "an outward act done in pursuance of the crime and in manifestation of an intent or design, looking toward the accomplishment of the crime." *Id*. (quoting *Chavez v. United States*, 275 F.2d 813, 817 (9th Cir. 1960)).

The Iowa Supreme Court stated,

> Although in the past we have defined the assault alternative in section 708.1(2) as a general intent crime, *see State v. Ogan*, 497 N.W.2d 902, 903 (Iowa 1993), we now hold this alternative is a specific-intent crime. We overrule *Ogan* and those cases that hold otherwise.

Id. The court distinguished between general and specific intent, stating:

> When the definition of a crime consists of only the description of a particular act, without reference to intent to do a further act or achieve a further consequence, we ask whether the defendant intended to do the prescribed act. This intention is deemed to be a general criminal intent. When the definition refers to defendant's intent to do some further act or achieve some additional consequence, the crime is deemed to be one of specific intent.

Id. (citations omitted).

It is important to narrow this holding in *Heard* to subsection (2) of section 708.1. *Heard* did not specifically address or designate the acts that satisfied the elements of the crime. *Id*. at 232. Our analysis, after considering the case's definition of overt act and both intents, is that the overt act was the use of the disguise, coupled with his approach and his demand for money, *intended* to instill

fear in the clerk of immediate physical contact (if she did not deliver the cash) with the *intended* further consequence of achieving his purpose to pilfer the convenience store's money on hand. *Id*.

A special concurrence disagreed with the majority's reasoning believing that the use of the word "intent" in the statute did little more than state the obvious; that criminal acts are "intentional not accidental." *Id*. (special concurrence). The special concurrence "strongly disagree[d]" that the definition in section 708.1(2) meets the "intent to achieve some additional consequence" test of *Eggman*, 311 N.W.2d at 79. *Id*. at 232-33. "No additional or further consequence is contemplated by the definition of simple assault beyond the offensive act itself." *Id*. at 233. It also denigrated the majority for their lack of naming the additional consequence that this statute requires to qualify as a specific intent crime, but "merely says it is so and overrules all cases holding to the contrary." *Id*. Lastly, the special concurrence listed the concern that this decision will necessitate the proof of two separate intent elements in some assault crimes; muddling the lesser-included offense rationale, "already the source of confusion"; its impact on the prosecution of assaults involving intoxication and diminished responsibility, defenses in specific intent crimes, but not a defense in general intent crimes; and, the decision is unsound from a public policy standpoint and will emanate confusion to the bar and bench. *Id*. at 234.

Heard was filed on October 10, 2001, with rehearing denied on December 5, 2001. Four months later, the 2002 Iowa legislature enacted an amendment to section 708.1 on April, 8, 2002. 2002 Iowa Acts, ch. 1094, § 1. It prefaced the

terms of the statute with an enactment which read: "An assault as defined in this section is a general intent crime." Iowa Code § 708.1. This amendment, and its timing, is an obvious legislative response to *Heard*.

The Iowa Supreme Court had an opportunity to address the effect of the new statute about a year after its passage in *State v. Bedard*, 668 N.W.2d 598, 601 (Iowa 2003). Bedard swung his fists at the officer, a scuffle ensued, and Bedard was arrested, charged with assaulting a police officer in violation of Iowa Code sections 708.1 and 708.3A(4). *Bedard*, 668 N.W.2d at 599. After a bench trial, Bedard was convicted. *Id*. The court of appeals reversed concluding that the report did not create a reasonable suspicion of criminal activity and Bedard had a right to respond with reasonable force. *Id*. at 599-600.

The Iowa Supreme Court vacated the decision by the appeals court and affirmed the conviction. *Id*. at 601. The recent legislation was discounted as the "amendment did not alter the substantive content of the statute as it pertains to the elements of the crime." *Id*. The conviction was affirmed (1) because Bedard's conduct was not reasonable force necessary to defend himself; and (2) that a reasonable trier of fact could conclude "that Bedard's attempt to strike the officer was intended to place the officer in fear of immediate physical contact, which would be painful, injurious, insulting, or offensive." *Id*. at 600-601. Again, it is imperative that we acknowledge that *Bedard* referenced 708.1(2), and the issue was sufficiency of the evidence.[10] *Id*.

[10] *Bedard* does not state the nature or circumstance that was the intended further act or intended achievement of an additional consequence. *See Heard*, 636 N.W.2d at 232 (citing *Eggman*, 311 N.W.2d at 79).

In *State v. Taylor*, 689 N.W.2d 116, 121-22 (Iowa 2004), Taylor was convicted of Iowa Code section 708.2A.(1) by committing an assault as defined in section 708.1(1), which was domestic abuse as defined in section 236.2(2)(b), he being a separated spouse of the victim. He was also convicted of first degree burglary with the assault alternative. *Taylor*, 689 N.W.2d at 122. The parties disagreed on whether assault is a specific intent crime, but the court remarked that "we do not find it helpful to set our discussion in that context." *Id*. at 132. Rather, the court noted that irrespective of whether it is a specific or general intent crime, the State must prove the elements beyond a reasonable doubt. *Id*.

The court cited the inferences of intending the natural and probable consequences that usually follow from a voluntary act, as well as intent being inferred from the circumstances surrounding the assault. *Id*. The issue on appeal was the sufficiency of the evidence. *Id*. at 131. This was a bench trial. *Id*. at 121. The convictions were affirmed without answering the question as to whether section 708.1(1) was a general or specific intent crime. *Id*. at 132. The court cited *Chang*, 587 N.W.2d at 462, decided prior to *Heard*, for the proposition that "determining proof of intent required under section 708.1 was sufficient when natural consequences of defendant's act was to place victim in fear of painful or injurious contact." *Id*. at 132-33. The court did not cite *Heard* at all.

The next review was *State v. Keeton*, 710 N.W.2d 531, 532 (Iowa 2006), another bench trial, with the issue being sufficiency of the evidence to convict Keeton of robbery with the assault alternative under Iowa Code section 711.1(1). The district court found Keeton to have committed an assault under both

alternatives, sections 708.1(1) and 708.1(2). *Keeton*, 710 N.W.2d at 533. As Keeton was attempting to take money from a convenience store, he backed up and started approaching the clerk with his hand extended. *Id*. Keeton testified that he was only intending to commit a theft and not an assault, but did acknowledge on cross-examination, that he would have pushed past and went out the door, if the clerk had not stepped away from the door. *Id*. at 532.

The State asked, on appeal, that the sufficiency-of-evidence claim be resolved by limiting proof of the violations of sections 708.1(1) and 708.1(2) to only require a general intent element. *Id*. at 533. The Court answered this request accordingly:

> [T]he specific issue on appeal in this case only requires us to decide if the evidence in this case satisfies the statutory elements of the crime of assault. This question can be decided without considering whether the statutory language used to define the crime of assault requires a specific or general intent. *See In re M.S.*, 10 Cal. 4th 698, 42 Cal. Rptr. 2d 355, 896 P.2d 1365, 1383-84 (1995) (Mosk, J., concurring) (. . . "There is no need to attach one of the labels here. The issue is not implicated before this court. Indeed, there is a need *not* to attach either label. 'Specific intent' and 'general intent' have been notoriously difficult to define and apply and have proved to mischievous."). . . .
>
> We understand the need for answers to important legal questions faced by the bench and bar. However, fundamental principles of judicial restraint limit our role to deciding each case on the issues presented, and we refrain from deciding issues not presented by the facts.

Id. at 533-34 (citations omitted).

The court declined to revisit the issue of intent, stating that regardless of which label is attached, the State was required to prove, beyond a reasonable doubt, that Keeton possessed the mens rea required by the statute. *Id*. at 534. After turning to the evidence, and viewing it in the light most favorable to the

State, the court concluded that there was sufficient evidence to sustain a conviction under either prong or alternative. *Id*. at 535. "The multiple actions of the participants in this case and the inferences derived from those actions, as well as their testimony, are together sufficient to support a finding of the intent element of an assault under our statutory definition."[11] *Id*.

The most recent consideration of this issue was in *Wyatt v. Iowa Department of Human Services*, 744 N.W.2d 89, 91 (Iowa 2008), an administrative appeal. The central issue was whether a registered nurse in a neuroscience unit of the University of Iowa Hospitals, who sought to muffle the screams of a distressed patient by placing a pillow over his mouth to protect the health of a sensitive patient (noise could rupture an aneurysm), committed an assault under our domestic abuse statute. *Wyatt*, 744 N.W.2d at 92. Assault under the applicable administrative rule is the same as Iowa Code section 708.1. *Id.* The main question was whether the nurse had a specific intent to offend or insult the patient, or a lesser showing that the intended physical contact could be objectively viewed as insulting or offensive. *Id*. The court stated that *Heard*, 636 N.W.2d at 231-32, "overruled prior precedent and held that assault was a specific intent crime;" *Bedard*, 668 N.W.2d at 601, held that "notwithstanding the new language, specific intent, as outlined in *Heard,* remained a required element of assault;" and *Keeton*, 710 N.W.2d at 533-34, noted the two labels were difficult to

[11] These inferences appear to have been that one will ordinarily be viewed as intending the natural consequences that follow one's acts, and inferences from testimony that the victim was in fear of immediate physical contact. *Keeton*, 710 N.W.2d at 535.

apply, but emphasized that we focus on the elements of the crime involved.[12] *Id.* It was concluded that Wyatt did not have the requisite intent to harm, but only to muffle one patient's screams to protect another patient. *Id*.

The distinguishing character of the present case is that it involves an instruction. *Heard*, and all the cases that followed, were either bench trials or appeals challenging the sufficiency of the evidence. Here the trial court was faced with the need to give a general intent instruction (which it did) or a specific intent instruction (which it did not). The marshalling instruction may also have needed to be tailored to assure that the jury finds not only the overt act, but the further act or achievement of an additional consequence. The district associate court handled it appropriately, as before trial it advised counsel:

> We're still faced with the question of whether there ought to be a specific intent instruction on the assault. The Legislature defines

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[12] In analyzing *Keeton,* the *Wyatt* court said, "In order to prove assault, we held that the State must demonstrate not only that the defendant intended to make physical contact, but that the defendant intended that the physical contact be insulting or offensive." *Wyatt*, 744 N.W.2d at 94 (citing *Keeton*, 710 N.W.2d at 533-34). Rather, the *Keeton* opinion, stated:

> The State had to prove that Keeton did an act he intended either: (1) to cause the clerk pain or injury, (2) to make insulting or offensive physical contact with the clerk, or (3) to make the clerk fear immediate painful, injurious, insulting, or offensive physical contact.

Keeton, 710 N.W.2d at 534. *Keeton* cited with approval this statement from *Taylor*, 689 N.W.2d at 132:

> Regardless of whether assault is a specific intent or general intent crime, the State must prove by evidence beyond a reasonable doubt that the defendant intended his act to cause pain or injury to the victim or to result in physical contact that would be insulting or offensive to the victim.

Keeton, 710 N.W.2d at 534. The analysis by *Wyatt* references both parts of subsection (1) of section 708.1, as though it were one crime, *Wyatt*, 744 N.W.2d at 94, whereas *Keeton* recognized the distinction between these separate crimes, one being an intent to cause pain or injury, while the other part of the first paragraph is for an act intended to result in physical contact which will be insulting or offensive. *Keeton*, 710 N.W.2d at 534. Each are alternatives in Iowa Criminal Jury Instruction 800.1, plus the placing in fear of immediate physical contact that would have been painful, injurious, insulting, or offensive, from subsection (2) of section 708.1.

> assault as a general intent crime. There will certainly be an intent instruction. I believe in my set of instructions I have now, I have not given specific intent instruction, so if you want one, let me know on that.

Neither counsel requested a specific intent instruction or any amendment to the general intent instruction.

In looking at prior cases, *Heard*, 636 N.W.2d at 230-31, involved only section 708.1(2) and was a bench trial. In *Bedard,*, 668 N.W.2d at 559, a jury was waived, also it appeared to be decided under 708.1(2) as the assailant did not strike the officer. The case of *Taylor*, 689 N.W.2d at 121, was tried to the court, it did involve 708.1(1), but the court hesitated to label it a general intent crime relying on *Bedard.* In *Keeton*, 710 N.W.2d at 532, there was another bench trial which did involve both subsections (1) and (2). Sufficiency of the evidence was the issue, rather than a question of the correctness of the instructions; it did not address intent because the issue was not ripe under its facts. Finally, *Wyatt*, 744 N.W.2d at 91, was an administrative appeal. None of these cases fit into the mold with this jury trial and the issue on this appeal.

In this case, the issue arises as to whether Fountain received ineffective assistance due to defense counsel's failure to request a specific intent instruction. Fountain is claiming the jury should have been instructed on specific intent, instead of general intent. This raises the question of whether the general intent instruction, as we know it, is the appropriate jury instruction in these factual circumstances. The trial court answered in the affirmative. This court agrees.

The overt act(s) were the punching at her face, leaving a wound, and choking Levita, leaving a mark on her neck; these acts were intended to cause

pain or injury, or intended to result in physical contact that will be insulting or offensive to her. Pain and injury, together with physical contact, or the insulting and offensive nature of the acts, reasonably and naturally followed those overt acts. Fountain was aware of doing the acts and did them voluntarily, without justification. The description in section 708.1(1) does not refer to any further act or intent to achieve a further result. The legislature's use of the word "intended" in section 708.1(1) merely separates an "intended' act from one that is accidental. No further consequence or result is foreseen by the statute beyond the very act itself. The general intent instruction succinctly encompassed the applicable law on this charge.

These findings resolve the postconviction relief issue of ineffective assistance of counsel for failing to request a specific intent instruction, as the subject assault was not a specific intent crime, and the general intent instruction sufficiently explained the applicable law to the jurors.

The conviction and sentence is affirmed in all respects.

AFFIRMED.