IN THE COURT OF APPEALS OF IOWA

No. 9-594 / 08-1845
Filed September 2, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MARK THOMAS HENNINGS,
Defendant-Appellant.

Appeal from the Iowa District Court for Webster County, Joel E. Swanson, Judge.

Mark Hennings appeals from his conviction for assault in violation of individual rights with the intent to commit a serious injury and from the sentences imposed on his convictions. **CONVICTIONS AFFIRMED; SENTENCES VACATED AND REMANDED FOR RESENTENCING.**

Mark C. Smith, State Appellate Defender, and Theresa Wilson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney General, Timothy N. Schott, County Attorney, and Ricki Osborn & Jennifer Bonzer, Assistant County Attorneys, for appellee.

Considered by Vaitheswaran, P.J., Mansfield, J., and Zimmer, S.J.*

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

MANSFIELD, J.

Mark Thomas Hennings appeals his conviction following a jury trial for assault in violation of individual rights with intent to commit a serious injury. Hennings challenges the adequacy of the State's proof that his actions were committed "because of" the race of his victim. Hennings also claims the trial court failed to provide reasons for imposing consecutive rather than concurrent sentences on this conviction and the separate conviction for willful injury causing bodily injury. We affirm Hennings's convictions, but vacate the sentences and remand for resentencing.

I. Background Facts and Proceedings.

Based on the trial evidence, a rational juror could have found the following facts: On the morning of Saturday, June 2, 2007, twelve-year-old Aerean, thirteen-year-old Jalen, fourteen-year-old Darquell, eleven-year-old Darwin, and thirteen-year-old Kwane, met at the Frontier Days Parade in Fort Dodge. Aerean and Jalen are brothers, their cousins Darquell and Darwin are brothers, and those four boys are friends with Kwane. All five boys are African-American.

The boys decided to go swimming at the Expo Pool in Fort Dodge following the parade. They walked to Aerean and Jalen's home to pick up swim trunks, and then planned to walk to the home of Aerean and Jalen's grandmother to pick up money for the pool. On the way to the grandmother's home, the boys cut through a bank parking lot and began walking east in the 300 block of Central Avenue. They walked in the street instead of the sidewalk so they could spread out and walk side-by-side. At the time, traffic was light, and there were few parked cars in the area.

The boys soon heard a pickup truck approach from behind. Hennings, a Caucasian, was later identified as the truck's driver and sole occupant. Darwin testified that the boys were walking in the middle of the street, but Aerean testified that they were off to the side and the truck had room to go around them. Regardless, they moved to the side when they realized the truck was behind them. Some of the boys testified the truck honked at them. Darquell testified that some of them cussed at the truck. Aerean testified that Hennings told them to "get the f___ off the road." All of the boys testified that Kwane talked back. According to Aerean, Kwane said that he "ain't scared of him." Kwane testified that the only thing he said was "we don't have to get the f___ off the street."

After passing the boys, Hennings stopped his truck near a stop sign at the end of the block. Hennings emerged from the truck carrying a pocket knife with a blue handle and a serrated blade between three and four inches long. Hennings took several steps toward the boys, and Jalen testified that Hennings verbally threatened to use it. After standing still for a second, the boys ran away toward the parking lot they had cut through a minute ago. Kwane, however, stopped running after a couple of steps and stood his ground. Kwane testified that he knew Hennings was outnumbered, and asked, "Why are we running?" He also testified that he told Hennings "to drop the knife, we'll beat his ass." Hennings remained standing near his truck this time, and Kwane testified that he did not hear Hennings say anything back to him.

When the boys realized that Kwane had stayed behind, they ran back toward him to get him to run away too. Some of the boys testified that Kwane and Hennings were arguing back and forth at this time, but they could not

understand what was said. As the boys arrived at Kwane's side, Hennings turned around and walked back to his truck. Darwin testified that Hennings called the boys "f___ing niggers" as he re-entered his truck. No one else heard the racial slur. Kwane, who was closest to Hennings, testified that the word "nigger" infuriates him, and he would remember it if he heard it. Darwin's testimony is the only evidence of anyone using racial slurs during the incident.

Hennings sped off in his truck, turning right to head south on Fourth Street, and then left to head east by the Fort Dodge Public Library along the south side of the town square. The boys, believing the encounter was over, continued walking east along Central. Aerean quickly realized he had dropped his swim trunks back by the parking lot. He turned to retrieve his trunks while the other boys continued walking ahead.

Meanwhile, Hennings was circling around the town square. The boys saw him again when he turned left from the north end of the town square to drive south on Fourth Street. Some of the boys testified that Hennings drove through the stop sign at this intersection. At this time the four boys were crossing the street at the intersection of Central Avenue and Fourth Street, directly in the truck's path. Aerean was a short distance behind the other boys after retrieving his trunks.

When the four boys saw the truck drive toward them, they ran. Hennings adjusted his direction as they ran across the intersection, continuously aiming straight for the boys. Witnesses testified that Hennings drove his truck in the center of the street as he aimed for the boys. Some witnesses testified that his truck went onto the sidewalk and grass, but no marks were found in the grass

afterwards. Witnesses estimated his speed between twenty-five and thirty-five miles per hour. The four boys made it to the town square before Hennings reached them, and some of them hopped onto a brick retaining wall in front of the library for protection.

When the four boys reached safety, Hennings changed direction again, this time aiming for Aerean as he lagged behind. Aerean ran toward the other boys, but soon realized he could not reach them in time. He ran south away from Hennings, and ran evasively side-to-side hoping to fool Hennings, but Hennings swerved his truck to follow Aerean's maneuvers. Aerean quickly fell to the ground, either because he tripped and fell on his own or because the truck hit him, and the truck's passenger-side tires drove over him. Hennings then left the scene without ever slowing down.

Two bystanders, both Caucasian, observed the incident and testified at trial. The first bystander, Beth Cox, was working that morning at Builder's Showcase, located at the corner of Fourth Street and Central Avenue just to the west of the library. From her desk in the building's window, she witnessed Hennings stop, threaten the boys, and drive away. When Cox later saw Hennings turn back onto Fourth, she went to the phone to dial 911, and then looked back out her window to see Aerean injured in the street. The second bystander, Daryl Beall, witnessed the incident from his car parked along Fourth Street twenty-five to thirty feet north of Central Avenue. He saw the truck drive toward the boys during the first incident. A couple minutes later he saw Hennings drive past him, aim for the four boys, and then strike Aerean. He was the first person to reach a 911 operator.

After Hennings left the area, Aerean stood and began to walk, but could only take two steps before collapsing. Witnesses stayed with Aerean as they waited for an ambulance, comforting him in his obvious pain.

Aerean arrived at the hospital frightened and in distress. He had "road rash" abrasions on his face, head, shoulders, elbows, and thigh. He also had pain in his abdomen, which was caused by a laceration to his liver. Internal bleeding from a liver laceration is potentially fatal, but Aerean's liver healed without treatment. He spent two days in the hospital for observation. Aerean's wounds had healed by the time of the trial, but the abrasions left permanent scarring and discoloration across his body, including on his face.

Fort Dodge Police Officer Brad Wilkins investigated the scene. He interviewed witnesses and obtained descriptions of the truck and the driver and a license plate number. When Wilkins ran the number, he found it matched a truck registered to Hennings. Wilkins was already familiar with Hennings, and knew he matched the description of the driver.

Early the next morning, Wilkins and another officer drove to Hennings's home in Rinard, about twenty minutes west of Fort Dodge. They found a truck matching witness descriptions parked outside the home, took pictures of it, and returned to Fort Dodge. The boys identified Hennings from a photo lineup, and Cox identified the truck from the pictures taken that morning. The officers used that information to obtain a warrant.

Later that afternoon, Wilkins, another Fort Dodge police officer, and a Calhoun County deputy returned to Hennings's home to seize the truck and search for the knife. Upon arrival, they first encountered Hennings's father, Bill,

outside Hennings's home. Bill lives next door to his son. Hennings's mother soon joined them. Wilkins told them they were there to investigate an accident, and Hennings's mother went into his home to get her son. Hennings emerged from his home with clenched fists, which he relaxed after his father told him to put them down.

Officer Wilkins recorded the encounter on a digital recorder. Part of the recording was played for the jury at trial, and a corresponding transcript of those recorded conversations was also admitted into evidence. When Wilkins asked Hennings about an accident the previous day, Hennings said in part,

> I came around the corner . . . there's a big group of monkeys standing in the f___in road . . . grabbing every which way . . . I didn't think I hit any of 'em . . . I think I hit a pothole in the road . . . .
>
> . . . .
>
> I came around the corner . . . they were all standing out in the road . . . I beeped my horn and they just fled . . . completely across the road.
>
> . . . .
>
> Some went that way . . . I started hitting the brake trying to . . . go for openings but they just . . . keep going like this . . . like a normal f___in monkey.
>
> . . . .
>
> What . . . f___in nigger don't have enough sense to stay out the f___in road . . . they deserve to get hit.

When Hennings's mother asked her son why he did not wait for the boys to move, he responded, "When they're standing in f___in road like stupid monkeys?"

Hennings's father explained that the Hennings family is well known in Fort Dodge and not well liked because of their racial views. Wilkins thought the family was making a race issue, and he emphasized that they had both black and white

witnesses. Hennings's father continued to explain that black children frequently picked on Hennings as a child.

Wilkins asked Hennings if he threatened the boys with a knife, and he denied having a knife. When Wilkins informed Hennings that the police had a warrant to search and seize the truck, Hennings tried entering the passenger side of his truck. Wilkins grabbed his arm to stop him, and Hennings resisted violently, cursing and kicking at the officers. The three officers plus Bill held onto him until he calmed down.

Eventually, Wilkins searched the truck and found a silver-handled knife in the glove compartment. Hennings denied knowledge of the knife, and claimed it must belong to the truck's previous owner. Wilkins then entered Hennings's home, and found a knife inside his bedroom dresser. The knife had a blue handle and serrated blade, consistent with the description given by witnesses.

The officers left the premises, taking the truck with them as evidence. Wilkins testified that Hennings never asked about Aerean's condition or showed remorse for his actions.

A criminalist for the Iowa Division of Criminal Investigation laboratory later analyzed the truck and Aerean's clothing. He found marks on the truck's underbody, dust on Aerean's shirt, and damage to the truck's grille that were consistent with the truck running over Aerean. The physical evidence supported the eyewitness testimony that Hennings had swerved his truck to the right, hit Aerean, and then driven away.

The State charged Hennings with attempted murder in violation of Iowa Code section 707.11 (2005), willful injury causing serious injury in violation of

section 708.4(1), and assault in violation of individual rights with the intent to commit a serious injury in violation of sections 708.2C(1), 708.2C(2), and 729A.2(1).[1] On the first two counts, a jury found Hennings guilty of the lesser offenses of assault with Intent to inflict serious injury in violation of section 708.2(1) and willful injury causing bodily injury in violation of section 708.4(2). On the third count, a jury found Hennings guilty as charged.

The district court then merged Counts I and II, on the ground that the Count I conviction involved a lesser-included offense of the Count II conviction. The court later sentenced Hennings to five years each Counts II and III, with the terms to run consecutively.

Hennings appeals his conviction for assault in violation of individual rights with the intent to commit a serious injury. Hennings claims the evidence was insufficient to allow a jury to conclude beyond a reasonable doubt that he acted because of Aerean's race. Hennings also appeals his sentence. He contends the district court did not provide reasons on the record for imposing consecutive terms of imprisonment.

II. Scope and Standard of Review.

We review Hennings's insufficiency of evidence claim for errors at law. *State v. Rohm,* 609 N.W.2d 504, 509 (Iowa 2000). The jury's verdict is binding upon a reviewing court unless there is an absence of substantial evidence in the record to sustain it. *State v. Schrier*, 300 N.W.2d 305, 306 (Iowa 1981). "'Substantial evidence' is evidence upon which a rational finder of fact could find

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[1] Chapter 729A is Iowa's Hate Crimes chapter.

a defendant guilty beyond a reasonable doubt." *Rohm*, 609 N.W.2d at 509 (citing *State v. Pace*, 602 N.W.2d 764, 768 (Iowa 1999)).

> When reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the evidence in the record.

State v. Leckington, 713 N.W.2d 208, 213 (Iowa 2006) (citing *State v. Casady*, 597 N.W.2d 801, 804 (Iowa 1999)).

We also review Hennings's improper sentencing claim for errors at law. Iowa R. App. P. 6.4; *State v. Thomas*, 547 N.W.2d 223, 225 (Iowa 1996). A sentence will not be disturbed on appeal unless the defendant demonstrates an abuse of discretion or a defect in the sentencing procedure. *State v. Sandifer*, 570 N.W.2d 256, 257 (Iowa Ct. App. 1997) (citing *State v. Loyd*, 530 N.W.2d 708, 713 (Iowa 1995)). When a sentence is not mandatory, the district court must exercise its discretion in determining what sentence to impose. *Sandifer*, 570 N.W.2d at 257. Further, the district court must demonstrate that it exercised its discretion by stating on the record its reasons for imposing a particular sentence. *Thomas*, 547 N.W.2d at 225; *see also State v. Garrow*, 480 N.W.2d 256, 259-60 (Iowa 1992) (statement of reasons sufficient if it demonstrates exercise of discretion and reveals motive for particular sentence imposed). Failure to do so calls for a vacation of the sentence and a remand for resentencing. *State v. Uthe*, 542 N.W.2d 810, 816 (Iowa 1996).

III. Analysis.

A. Sufficiency of the Evidence that Hennings Assaulted the Victim "Because of" His Race.

The first issue on appeal is whether the evidence was sufficient to convict Hennings under Iowa's Hate Crimes statute. *See* Iowa Code chapter 729A.[2] Under section 729A.2, "hate crime" is defined as an enumerated offense that was committed because of a person's race, color, or other specified status, belief, or affiliation. Assault in violation of individual rights under section 708.2C is one of the enumerated offenses. *See id.* § 729A.2(1).

In order for a jury to convict Hennings under sections 708.2C[3] and 729A.2(1),[4] each element of the offense had to be proved beyond a reasonable doubt. Thus, the State had to establish that there was an underlying assault, that the assault was conducted with the intent to inflict a serious injury upon another, and that the assault was committed "because of" the victim's race or color. *Id.* §§ 708.2C, 729A.2.

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[2] Our supreme court has previously upheld chapter 729A's predecessor against a constitutional challenge, *State v. McKnight*, 511 N.W.2d 389 (Iowa 1994), but has not expressly addressed the quantum of evidence needed to sustain a conviction under that statute.

[3] Iowa Code section 708.2C provides, in part, as follows:

> 1. For the purpose of this chapter, "assault in violation of individual rights" means an assault, as defined in section 708.1, which is a hate crime as defined in section 729A.2.
>
> 2. A person who commits an assault in violation of individual rights, with intent to inflict a serious injury upon another, is guilty of a class "D" felony.

[4] Section 729A.2 provides, in part, as follows:

> "Hate crime" means one of the following public offenses when committed against a person or a person's property because of the person's race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, or disability, or the person's association with a person of a certain race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, or disability:
>
> 1. Assault in violation of individual rights under section 708.2C.

Hennings's appeal does not challenge the first two elements. His sole argument is that there was insufficient evidence to prove beyond a reasonable doubt that his assault was motivated by racial hostility. This requires us to consider the specific meaning of the words "because of" in section 729A.2.

Hennings concedes that the jury had a basis for concluding he was a racist. He has made no effort to contest this. However, the hate crime charge requires more than proof that the defendant was a racist, or that the victim was a member of a particular protected class. It must be shown that the assault occurred "because of" the victim's race. *Id.* § 729A.2. Hennings insists that it is "just as likely" he assaulted Aerean because the boys had been blocking the roadway or because of the comments Kwane made to him, rather than because of Aerean's race.

On their face, the common words "because of" are susceptible of several potential interpretations. Those meanings proceed along a spectrum that ranges from exclusive causation on one end to a minor contributing factor at the other extreme. The statutory language could be taken to require that racial animosity be the sole or exclusive cause, the primary cause, a significant cause, or even a relatively negligible but determinable cause.

Neither section 708.2C nor section 729A.2 includes any qualifying language that would require us to apply the most stringent interpretation. If the General Assembly had wanted to, it could have included limiting language as it has with certain discrimination laws. *See, e.g.*, Iowa Code §§ 515D.6 (providing restrictions for denying insurance coverage "*solely because of* age, residence, sex, race, color, creed, or occupation" (emphasis added)); 523I.307 (prohibiting

denial of internment in a cemetery "*solely because of* the race, color or national origin of [a] deceased person" (emphasis added)). The legislature did not choose to restrict the scope of the hate crime statute by qualifying it with words such as "exclusively" or "solely." Therefore, we conclude that mixed-motivation or dual-intent assaults are not excluded from the scope of section 729A.2.

California's hate crime statutes have similar language to Iowa's. *See* Cal. Penal Code §§ 422.55, 422.6. They prohibit or provide enhanced punishment for certain acts committed "because of" the victim's race, color, or other listed characteristic. As in Iowa, the meaning of "because of" is not further defined in the legislation. Upon reflection, we believe it makes sense to follow the well-developed California judicial precedents here. [5]

In *In re M.S.*, 896 P.2d 1365 (Cal. 1995), the California Supreme Court parsed the "because of" terminology in California's hate crimes law. It held that "nothing in the text of the statute suggests the Legislature intended to limit punishment to offenses committed exclusively or even mainly because of the prohibited bias." *M.S.*, 896 P.2d at 1377. Rather, "the Legislature has simply dictated the bias motivation must be a cause in fact of the offense, whether or not other causes also exist." *Id.* At the same time, the court added that "[w]hen multiple concurrent motives exist, the prohibited bias must be a substantial factor in bringing about the crime." *Id.*; *see also People v. Superior Court (Aishman)*, 896 P.2d 1387, 1390 (Cal. 1995) (construing the "because of" language in

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[5] The General Assembly also did not choose to employ the language found in some other states' hate crimes statutes, i.e., that the defendant "intentionally selected" his or her victim because of race. *See* 11 Del. Code § 1304; Haw. Rev. Stat. § 846.51; R.I. Gen. Laws § 12-19-38; Tex. Code Crim. Proc. art. 42.014; Va. Code Ann. § 18.2-57. That language may pose different interpretation issues that we do not address here.

another part of the California hate crimes statute similarly that bias motivation must be a substantial factor in the offense).

In a concurring opinion in *M.S.*, Justice Kennard elaborated on the meaning of the majority's standard. *M.S.*, 896 P.2d at 1384. Justice Kennard noted, "Deceptively simple in appearance, the words 'because of' as used in these criminal statutes mask a host of difficult problems. These problems may generally be divided into two categories: problems of proof and problems of interpretation." *Id.* Regarding the proof problems, Justice Kennard noted that hate crimes prosecutions typically require reliance on the defendant's out-of-court statements to establish motive. *Id.* However,

> the use of a defendant's past statements and associations to prove motive, if not carefully controlled, may have a chilling effect on First Amendment freedoms, and thus the inquiry generally must be confined to statements or conduct of the defendant reasonably close in time or context to the charged acts.

Id. Turning to the matter of interpretation, Justice Kennard borrowed from Restatement (Second) of Torts section 432 to maintain that the "cause in fact" element of the majority's test may be satisfied

> if either (1) the conduct would not have occurred in the absence of the bias motives, or (2) the bias and nonbias motives are independent of each other and the bias motives would have been sufficient to produce the conduct even in the absence of all non-bias motives.

Id. at 1386. In other words, if the defendant would not have committed the act but for the victim's race (or other characteristic), *or* if the defendant's feelings about the victim's race (or other characteristic) coincided with other motives and the racial (or other improper) motivation by itself would have triggered the act, the "cause in fact" element has been met. *Id.*

To give a crude (and perhaps psychologically inaccurate) numerical illustration of the California standard, suppose that 100 total units of motivation were the minimum required to trigger an act of assault by the defendant, i.e., to tip the defendant over the edge. If non-racial motives provided fifty units and racial motives provided seventy-five units, then the hate crimes statute would apply. The accused would not have committed the assault but for the victim's race and race was a substantial factor in the accused's commission of the assault. Similarly, if non-racial motives provided 125 units and racial motives provided 125 units, the hate crimes statute still would apply. In this instance, although the accused would have committed the assault anyway, the racial motives by themselves would have been enough to bring about the assault and clearly were a substantial factor.[6]

The *M.S.* test has been reiterated in a recent California decision. *People v. Lindberg*, 190 P.3d 664, 693-95 (Cal. 2008) (applying the *M.S.* framework and holding that sufficient evidence supported a hate-murder special circumstance even though the evidence also supported the jury's additional finding that the defendant murdered the victim because he wanted to eliminate him as a witness to the attempted robbery).

Iowa has generally embraced the same tort causation principles that the California Supreme Court relied upon in *M.S.* In *Gerst v. Marshall*, 549 N.W.2d 810, 815-18 (Iowa 1996), quoting from Restatement (Second) of Torts section

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[6] In the foregoing hypothetical, we suppose that the "substantial factor" requirement could be used to eliminate the case where the defendant had 99 units of nonracial motivation and one unit of racial motivation, so that racial motivation was technically a but-for cause but only a minor consideration.

432, our supreme court held the plaintiff must prove one of two things to establish causation-in-fact: (1) the defendant's negligence was a but-for cause of the plaintiff's injuries; or (2) there were concurrent causes of those injuries, and the defendant's fault by itself would have produced those injuries. The *Gerst* court suggested that tacking a "substantial factor" requirement onto this framework might no longer be necessary; rather, "substantial factor" could potentially be viewed as an aspect of the "proximate cause" inquiry. *Gerst*, 549 N.W.2d at 817. However, since *Gerst*, "substantial factor" continues to be recognized in Iowa as a component of causation-in-fact. *See, e.g., Estate of Long ex rel. Smith v. Broadlawns Med. Ctr.*, 656 N.W.2d 71, 83 (Iowa 2002). Accordingly, we believe it is appropriate to follow California case law here.

With these legal principles in mind, we now turn to the sufficiency of evidence in this case. Hennings argues there is only "scant" evidence that he used a racial slur at the time of the encounter. He points out that the testimony of Darwin, who claimed to have heard the word "nigger," was contradicted by that of the other boys, including Kwane who was nearest to Hennings. Thus, Hennings distinguishes this case from others in which one or more racial epithets were clearly used at the time of the offense. *See, e.g.*, *People v. Davis*, 674 N.E.2d 895, 898 (Ill. App. Ct. 1996) (upholding a finding that the defendant acted "by reason of" the victim's race given his use of a racial epithet before beating the victim); *In re S.M.J.*, 556 N.W.2d 4, 6-7 (Minn. Ct. App. 1996) (upholding a

finding that defendant acted "because of" the victim's race when he called the victim a "nigger" before and during the assault).[7]

However, contemporaneous racial epithets aside, there is strong evidence in this case that Hennings was motivated by racial animus to drive his truck over Aerean. When questioned about the incident the next day by the police, presumably after his emotions had a chance to cool, Hennings in a disturbing way blamed his twelve-year-old victim, and specifically his victim's race. *Each* time he referred to the boys he used a racial epithet, thereby dehumanizing them. Hennings suggested the boys walked the way they did because they were "monkeys." He said that a "nigger" who does not have sense to stay out of the road "deserve[s] to get hit." Clearly, Hennings had mastered his emotions enough to lie about the incident, for example about whether he had a knife, but he was unable to suppress his racial feelings about the same incident.[8]

All in all, we believe these after-the-fact statements are perhaps *more* persuasive evidence of racial motivation than a single use of a racial slur in the heat of the moment. See *Commonwealth v. Ferino*, 640 A.2d 934, 938 (Pa. Super. 1994) (finding insufficient evidence to convict the defendant of ethnic

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[7] *But see State v. Hendrix*, 813 P.2d 1115, 1118 (Or. App. 1991) (holding evidence was sufficient to convict defendant under hate crimes statute, even though the defendant personally did not utter racial epithets; other members of his group did use such epithets during their assault on two minority victims; "the trier of fact could reasonably infer beyond a reasonable doubt that defendant was motivated to act because of his and the group's perception of the victims' race or national origin"); *In re Vladimir P.*, 670 N.E.2d 839, 845 (Ill. App. Ct. 1996) (holding similarly that defendant need not have personally uttered racial epithets during the assault).

[8] In some respects, the facts of this case are reminiscent of those in *McKnight*, which as noted did not involve a sufficiency of the evidence challenge. That case also began as a roadway confrontation, turned into an assault, and involved the defendant's repeated use of racial epithets to characterize his victim when later questioned by the officers. *McKnight*, 511 N.W.2d at 390.

intimidation when the defendant said “I’m going to kill you, you f___ing nigger” and then fired the gun in the direction of two potential victims, one of whom was white; the court observed the defendant’s conduct was “isolated in nature, brief in its execution and unattended by any trappings consistent with malicious intent ‘motivated by a hatred toward race’”). In addition to Hennings’s statements, the jury was also entitled to consider the nature of this assault. After the confrontation was seemingly over, Hennings drove away, only to return and then intentionally drive his truck at the boys. A jury could reasonably conclude that conduct with this degree of senselessness was motivated by more than ordinary “road rage.” Something else had to be present in Hennings’s mind, and a jury was entitled to conclude that the “something else” was racial hostility.

We now turn to Hennings’s primary sufficiency of evidence argument, namely that he was a belligerent individual who “would have reacted in a similar way regardless of the race of the boys blocking the road.” Hennings notes that he “also did not react well when Wilkins attempted to keep him away from his truck.” According to Hennings, it would require speculation for a jury to conclude that he ran his truck over Aerean “because of” his race, rather than for other reasons. We disagree.

As we have previously pointed out, we do not believe the State had to show Hennings assaulted Aerean solely or exclusively because of his race. Rather, it had to offer proof from which a rational juror could conclude that Hennings would not have committed this assault “but for” Aerean’s race and that

race was a "substantial factor."[9] We believe the State met this burden. Hennings's dehumanizing and derogatory rants about the race of the boys, his implication that the boys walked as they did because of their race, and his comment that Aerean—a "nigger"—deserved to be hit by the truck all support a jury finding that the same crime would not have been committed if the boys had been white. They also support a finding that the boys' race was an important consideration in Hennings' decision to steer his truck at them.

To some degree, Hennings's real quarrel is with the concept of "hate crimes" legislation itself. From the large volume of academic literature in this area, Hennings cites us to one professor's critique of hate crimes laws. *See* Marc Fleisher, *Down the Passage Which We Should Not Take: The Folly of Hate Crime Legislation*, 2 J.L. & Pol'y 1 (1994). Fleisher's article points out that ascertaining and weighing "motives" is an exceedingly difficult task:

> Proof that the defendant intended harm may be inferred from the conduct itself. Yet it may often remain a mystery why a particular act of violence occurred. It may be described as senseless, gratuitous, or arbitrary. Indeed, up until the very day of sentencing, the defendant's motives may remain enigmatic, even to himself.

Id. at 9-10. Hennings cites an example provided by Professor Fleisher of a white student who, while drunk at party, observed his former girlfriend with a black student. *Id.* at 14. Enraged, the white student hurled racial epithets at the black student. *Id.* Later that night, after being evicted from the party, the white student and his friends stalked and attacked the black student with a baseball bat. *Id.* In this case, the white student was prosecuted for both assault and a hate crime.

[9] Or, alternatively, that Hennings's racial hostility was such that he would have committed the assault even if only the racial factors had been present. *See M.S.*, 896 P.2d at 1377, 1384.

Id. at 14-15. Yet it also turned out that this white student had many black friends who had slept over at his house. *Id.* at 16. Professor Fleisher (and now Hennings) ask how a jury can be expected to sort out the potential motives for this assault, ranging from jealousy and humiliation to racism. *Id*. at 14-17.

We agree that an accused's state of mind is often inscrutable. Yet long before we had hate crimes legislation, we relied on jurors to make these kinds of determinations. For example, a willful and intentional killing that is "premeditated" becomes first-degree rather than second-degree murder. "Premeditation" in turn requires the jury not only to consider the motive or motives for the offense, but when they were formed. We are comfortable with juries making those decisions, even though some of the lines may be difficult to draw. Similarly, the General Assembly has decided to treat assaults that occurred "because of" of the victim's race more severely than other assaults. It has determined that jurors are capable of distinguishing the two types of assaults.[10] As in the murder example, the conduct is criminal anyway, so the jury determination effectively relates only to the punishment. In short, we do not see Iowa's hate crimes legislation as crossing a new bridge that has never been crossed before. Nor are we alarmed by Professor Fleisher's (and Hennings's) real-world example, since it turned out the white student there was acquitted of

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[10] We note again that the supreme court rejected a constitutional challenge to Iowa's then-current version of the hate crimes law in *McKnight*, although that challenge was based on the First Amendment and overbreadth, rather than vagueness. 511 N.W.2d at 390, 396; *see M.S.*, 896 P.2d at 1375-76 (rejecting a vagueness challenge to California's hate crimes law and noting that "because of" is a term in common usage); *State v. Pollard*, 906 P.2d 976, 980-82 (Wash. App. 1995) (rejecting a vagueness challenge to Washington's hate crimes law, and finding sufficient evidence to sustain the defendant's hate crimes conviction even assuming the defendant assaulted his victims "in part because he was blind drunk and insulted by the boys' ridicule").

the hate crimes charge, even while being convicted of assault. *Id*. at 17. Assuming there was reasonable doubt in that case whether his attack on the black student occurred because of the victim's race, the system worked.

For the foregoing reasons, we hold the evidence was sufficient to convict Hennings of assault in violation of individual rights with intent to commit a serious injury.

B. Consecutive Sentencing.

Hennings has also appealed his sentence. He contends the district court did not give any reasons for imposing consecutive sentences on the two counts. *See* Iowa R. Crim. P. 2.23(3)(*d*). The State agrees and joins in Hennings' request for a resentencing. Upon our review of the record, we agree that while the district court clearly gave thought to Hennings's sentence, it did not explain why it was sentencing him consecutively on the two counts. *See Uthe*, 542 N.W.2d at 816 (holding that where a district court failed to give its reasons for imposing consecutive sentences, the sentences must be vacated and remanded for resentencing). Accordingly, we vacate Hennings's sentences and remand this case for resentencing.

CONVICTIONS AFFIRMED; SENTENCES VACATED AND REMANDED FOR RESENTENCING.