IN THE SUPREME COURT OF IOWA
Supreme Court No. 16-1980

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DUSTIN JAMES ORTIZ,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE JEANIE K. VAUDT, JUDGE

APPELLEE'S BRIEF

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ROUTING STATEMENT

The State agrees that this case presents substantial issues of first impression regarding how to instruct juries on our recently revised robbery statutes. Iowa Rs. App. P. 6.1101(2)(*c*). County attorneys as well as the defense bar could all benefit from clarification of how to properly instruct juries in cases involving third-degree robbery as a lesser-included offense. Iowa R. App. P. 1.1101(2)(*f*). Retention is appropriate.

STATEMENT OF THE CASE

Nature of the Case

In Polk County case number FECR296305, Dustin James Ortiz was charged by trial information with robbery in the first degree in violation of Iowa Code sections 711.1–.2 *See* Trial Info.; App. 4-5. Ortiz proceeded to a jury trial where he was found guilty of the lesser included robbery in the second degree. *See* Order Following Trial; App. 19-21.

On appeal, Ortiz argues: (1) the court erred in denying to accept his proposed modification to the second degree robbery jury instruction, (2) there was insufficient evidence to find an assault, and (3) the legislature's addition of robbery in the third degree makes the culmination of the three robbery offenses vague and overbroad.

Course of Proceedings

The State accepts the defendant's course of proceedings as adequate and essentially correct. Iowa R. App. P. 6.903(3).

Facts

On June 15, 2016, Patricia Chavez was working at La Estrellita Fashion, a clothing and tailoring store in Des Moines. *See* T.Tr. 148:8-21. Chavez was working alone sewing when a man—later identified as Ortiz—stole a skirt off a mannequin on display outside the store. *See* T.Tr. 149:3–150:12, .

Chavez went outside and ran after the man because she wanted to get the skirt back. *See* T.Tr. 151:11-17. The person she pursued was a tall, thin white male, and he was wearing a black shirt and shorts. *See* T.Tr. 151:18–152:7. He also had a black backpack. *See* T.Tr. 152:8-12.

While Chavez was pursuing the male, he showed her a knife and she became scared and broke off her pursuit. *See* T.Tr. 152:13-24, 153:13-17, 166:17-19. Chavez ran back to her store and locked the door because after seeing the knife she "was thinking the worst." *See* T.Tr. 153:13-17.

After calling the police, Chavez was taken to the site where they had a suspect—Ortiz—detained. *See* T.Tr. 160:6-21. Chavez identified Ortiz as the male who stole the skirt. *See* T.Tr. 162:18-20. Ortiz was wearing the same shorts, had the same hair, and had the same backpack as the man Chavez saw steal the skirt. *See* T.Tr. 161:5–163:3. Inside Ortiz's backpack was the stolen skirt. *See* T.Tr. 163:4-16.

While the police had Ortiz detained they found a pocketknife in the front pocket of his shorts. *See* T.Tr. 191:7-18; State's Ex. 8; Ex. App. 10-11. Ortiz was taken to the police station where he removed a second pocketknife from his waistband and handed it to a police officer. *See* T.Tr. 200:1-21; State's Ex. 7; Ex. App. 8-9.

ARGUMENT

I. The Court did Not Err by Declining Ortiz's Modification to the Proposed Robbery Jury Instructions, and if the Court did Err, such Error was Harmless.

Preservation of Error

The State agrees error is preserved. Dustin James Ortiz requested modification to the second degree robbery jury instruction and the court denied his request. *See* T.Tr. 238:19–255:16.

Standard of Review

Courts review preserved challenges to jury instructions for correction of errors at law. *State v. Frei*, 813 N.W.2d 70, 73 (Iowa 2013), *overruled on other grounds by Alcala v. Marriott Intern., Inc.*, 880 N.W.2d 699, 708 n.3 (Iowa 2016) (overruling cited cases insofar as they incorrectly extend abuse of discretion standard of review for failure to give a requested instruction). The Court's "review is to determine whether the challenged instruction accurately states the law and is supported by substantial evidence." *State v. Hanes*, 790 N.W.2d 545, 548 (Iowa 2010).

Error in giving a particular instruction does not require reversal unless the instruction was prejudicial to the complaining party. *Id.* (citing *State v. Spates*, 779 N.W.2d 770, 775 (Iowa 2010)). The State disagrees with Ortiz's assertion that harmless error does not apply because there was a "structural error." *See* Appellant's Br. p. 22. Ortiz essentially argues the jury was "improperly instruct[ed] . . . on an element of the offense," and not a "defect affecting the framework within which the trial proceeds" such as an erroneous reasonable-doubt instruction. *See Johnson v. U.S.*, 520 U.S. 461, 468-69 (1997) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991)).

The preserved error alleged here is whether Ortiz's requested addition to the proposed second-degree robbery instruction was incorrectly denied. If Ortiz's assertion is correct, this error is analogous to the jury being improperly instructed on an element of the crime. As such, if the complained of instructional error is found, harmless error analysis applies. *See id*.

Merits

During trial, Ortiz requested an addition to the second-degree robbery instruction. Ortiz requested that the wording of assault for second-degree robbery be modified to read, "committed an assault with the intent to inflict serious injury." *See* T.Tr. 243:17-21 (reasoning that this was the only non-simple assault alternative remaining under the evidence after excluding assault with a dangerous weapon, which is covered by first-degree robbery). Ortiz argued that without this addition, second and third degree robbery require identical conduct as instructed.

The State resisted, arguing that adding this language essentially added an additional element that needed to be proven when all that is required is that an assault needs to be established. *See* T.Tr. 252:20–

253:3. The court agreed and declined to add the additional language Ortiz requested. *See* T.Tr. 255:3-16.

The State submits that inclusion of this additional language was not error in this case because (1) the additional language exceeded the statutory definition of robbery and Ortiz's request was correctly denied, (2) it is not improper if the two statutes criminalize the same behavior, and (3) any error was harmless. The State further disagrees with Ortiz's claim of prosecutorial vindictiveness.

A. Ortiz's Request to Add Language Above and Beyond the Statutory Definition and Elements of Robbery was Appropriately Denied.

Regarding the assault element of second-degree robbery, the jury was instructed as follows:

> To carry out [the specific intent to commit a theft] or to assist him in escaping from the scene . . . the defendant:
>
> a. Committed an assault on Patricia Chavez or
>
> b. Threatened Patricia Chavez with or purposefully put Patricia Chavez in fear of immediate serious injury.

Jury Instr. No. 19; App. 12. This language comes from the Iowa State Bar Association's model criminal jury instructions, merely omitting a third inapplicable alternative for assault ("Threatened to immediately

commit [a forcible felony]"). *See* Iowa State Bar Ass'n, Iowa Criminal Jury Instr. 1100.2 (2016).

Ortiz requested that the language of paragraph (a) be modified to read "a. Committed an assault with the intent to inflict serious injury on Patricia Chavez." *See* T.Tr. 243:17-21. Ortiz argued that this was the only way to differentiate between the second and third degree robbery instructions. Ortiz essentially attempts to differentiate between a "simple assault" under Iowa Code section 708.2(6) and the remaining "serious assaults" under section 708.2(1)-(5). Because subsection (3) (using or displaying a dangerous weapon) is necessarily covered by first-degree robbery, and the facts did not support subsections (2) (bodily injury), (4) (serious injury), or (5) (penetration of genitalia or anus), Ortiz reasoned that the second-degree robbery instruction should include language from subsection (1), and third-degree robbery could remain simply as a generic assault. *See* Iowa Code §§ 708.2, 711.3, .3A; *see also* T.Tr. 242:20–243:3. The State submits that inclusion of this additional language would have incorporated an additional intent element not required by the robbery statute.

Iowa Code section 711.1 defines robbery:

> A person commits a robbery when, having the intent to commit a theft, the person does any of the following acts to assist or further the commission of the intended theft or the person's escape from the scene thereof with or without the stolen property:
>
> a. Commits an assault upon another.
>
> b. Threatens another with or purposely puts another in fear of immediate serious injury.
>
> c. Threatens to commit immediately any forcible felony.

Iowa Code § 711.1. While Ortiz wants the various alternatives from section 708.2 incorporated into the second degree robbery instruction, that is simply not what is required by the definition of robbery. *See id*. Adding this language into the statute essentially requires the State to prove elements not part of the statutory definition. *See id*. at 711.1, .3.

While third-degree robbery incorporates assault under section 708.2(6), second-degree robbery does not explicitly incorporate that section or the remaining subsections of 708.2. There is nothing that explicitly adds the requirement that one of the alternative of sections 708.2(1)-(5) need to be proven in order to establish second-degree robbery. *See id*. at 711.3.

Because Ortiz's requested additions exceed the statutory requirements of second-degree robbery, this Court should reject Ortiz's argument and affirm his conviction.

B. Even if Robbery Second and Third Required Identical Conduct in this Matter, There is Nothing Improper About Criminal Conduct Being Covered by Multiple Statutes Subject to Prosecutorial Discretion.

Ortiz bases much of his complaints about the second-degree robbery instruction on the fact that it could be read as requiring the same criminal conduct as third-degree robbery. However, even if this is the case, it is not improper for criminal conduct to be covered by multiple criminal statutes.

> [E]ven if the statutes did overlap, common group would not be problematic. Overlap only prevents double convictions or double punishments, not a single conviction on one charge based on the prosecutor's charging discretion. As we have explained:
>
> > When a single act violates more than one criminal statute, the prosecutor may exercise discretion in selecting which charge to file. This is permissible even though the two offenses call for different punishments. It is common for the same conduct to be subject to different criminal statutes.

State v. Alvarado, 875 N.W.2d 713, 718 (Iowa 2016) (quoting *State v. Perry*, 440 N.W.2d 389, 391-92 (Iowa 1989)). "When there is sufficient evidence to charge a suspect with a particular crime, it does not matter that his conduct may also constitute a violation of a lesser offense with a lighter penalty. . . . [T]he prosecutor has discretion to choose what charges to file." *State v. Anspach*, 627 N.W.2d 227, 233 (Iowa 2001) (citing *State v. Caskey*, 539 N.W.2d 176, 177-78 (Iowa 1995)). "It often happens that a defendant, by the same criminal act, violates more than one criminal statute. And it is not true as a legal proposition that, if his criminal act is covered by one statute, it cannot be covered by another." *State v. Johns*, 140 Iowa 125, 118 N.W. 295, 298 (1906). Even if second and third degree robbery were instructed similarly, and require similar conduct for a conviction, this does not itself make the instructions—or a charging decision to charge the more serious offense—invalid.

Further, Ortiz complains that the lesser-included offense instruction would be read as instructing them to convict Ortiz of the most serious proven offense. The instructions states in part, "You will convict the defendant of the highest of said above names offenses of which he is proven guilty beyond a reasonable doubt." *See* Jury Instr.

No. 17; App. 10. This is simply a correct statement of the law. *See, e.g.*, Iowa Code § 701.9 (requiring merger of offenses into "the greater of the offenses"); *see also State v. Rodriguez*, 238 Iowa 18, 20, 25 N.W.2d 732, 733 (1947) ("This paragraph of the instruction directs the jury to acquit the defendant of any and all offenses of which they have a reasonable doubt, and convict him, if at all, of the highest offense submitted of which they are satisfied beyond a reasonable doubt he is guilty. . . . The paragraph is . . . clear and could not be misunderstood.").

The "redundancy" of the instructions should not be a factor requiring remand because it is necessarily true that lesser included offenses will have redundant elements and the jury is supposed to convict the defendant of the most serious proven offense. This Court should decline to reverse merely because the second and third degree robbery instructions require similar criminal conduct.

C. Even if the Court Erred in Declining Ortiz's Addition to the Second Degree Robbery Instruction, Such Error was Harmless.

Appellate courts will not reverse because an objected to jury instruction was given in error unless the instruction was prejudicial to

the complaining party. This harmless error analysis has two dimensions:

> "When the error is not of constitutional magnitude, the test of prejudice is whether it sufficiently appears that the rights of the complaining party have been injuriously affected or that the party has suffered a miscarriage of justice." When the alleged instructional error is of constitutional magnitude, the burden is on the state to prove lack of prejudice beyond a reasonable doubt.

Frei, 831 N.W.2d at 73 (citations omitted) (quoting *State v. Marin*, 788 N.W.2d 833, 836 (Iowa 2010), *overruled on other grounds by Alcala*, 880 N.W.2d at 708 n.3) (citing *Hanes*, 790 N.W.2d at 550). Here, Ortiz's claim falls in the first category, as it does not rise to constitutional magnitude because it is merely an argument over the proper elements for second-degree robbery. Ortiz was neither injuriously affected nor did he suffer a miscarriage of justice.

Even if the court should have accepted Ortiz's request to include "with the intent to inflict a serious injury" there is no prejudice. As discussed in Division II below, there was substantial evidence to find Ortiz was armed with a knife (dangerous weapon or not). Because the jury necessarily found Ortiz had an intent to assault the shopkeeper with a knife, Ortiz would still have been convicted had the additional

language been included. Further, the alternative to assault under which the jury could have found Ortiz guilty required similarly that he "[t]hreatened Patricia Chavez with or purposefully put [her] in fear of immediate serious injury." *See* Jury Instr. No. 19; App. 12. There is no prejudice by omitting Ortiz's addition to second-degree robbery.

In the interest of candor, the State would note that the prosecuting attorney appeared ready to concede the prejudicial effect of the jury instructions during sentencing. *See* Sent. Tr. 10:8-25. However, the State submits that the State's changing positions below merely highlight the fact that the bar is having difficulty reconciling precisely how to instruct robbery in light of the legislature's addition of third-degree robbery.

This Court should find that Ortiz was not prejudiced by the court's refusal to accept the requested language.

D. If Remand for a New Trial is Necessary, it is Premature to Evaluate Any Claims of Prosecutorial Vindictiveness as There has been No Retrial and No Attempt by the State to Add Additional Charges or Enhancements.

In the event a remand for a new trial is appropriate for this case, Ortiz appears to request an order preventing the State from filing a habitual offender enhancement based on perceived threats of

prosecutorial vindictiveness. The State submits that this claim is not ripe and respectfully requests that this Court decline to evaluate the claim as no additional charges have been filed. In the event additional charges are actually filed on remand, Ortiz can then pursue his claim of prosecutorial vindictiveness in the district court.

Preventing the State from pursuing additional charges without additional record is premature and this Court should decline to evaluate the claim before any "vindictiveness" has even occurred.

If this Court does decide to evaluate the claim, however, the State submits that filing a habitual offender enhancement in this case would not amount to prosecutorial vindictiveness. The alleged "vindictiveness" Ortiz cites is in fact the defense explaining that the State had indicated that because the habitual offender enhancement did not apply to Ortiz's original charge, robbery in the first degree, were he to receive a new trial on robbery in the second degree the habitual offender enhancement *would* apply. *See* Sent Tr. 4:2-15. This is not vindictiveness but is simply a proper application of the criminal statutes.

The State pursued the most serious charge against Ortiz in his first trial (first-degree robbery), and it would only make sense that the

State would continue to pursue the most serious charge in a retrial. *See* Trial Info.; App. 4-5. Because first-degree robbery is foreclosed on retrial, the most serious charge that could be pursued is second-degree robbery with a habitual offender enhancement. As the defense conceded during sentencing, "I understand [the habitual offender enhancement] most likely was not filed in this case because Mr. Ortiz was charged with first degree robbery to start with, and that doesn't apply to first degree robbery." *See* Sent. Tr. 4:7-10.

When Ortiz was charged (and tried) with the offense first-degree robbery, he was facing a maximum of twenty-five years imprisonment with a 70% mandatory minimum. *See* Iowa Code §§ 902.9, .12(1). On retrial, Ortiz would be facing significantly less time, even with the habitual offender enhancement. *See id.*at 902.9. Even if Ortiz received and served the full 15 years of a habitual offender charge, it would still be less than 70% minimum of the maximum punishment for first-degree robbery. Ortiz is not prejudiced by the State's continued effort to charge him with the most serious provable offense.

As the defense conceded, the only reason that State did not pursue the enhancement in the first instance was a result of statutory

restrictions. In a retrial on the lesser-included offense of second-degree robbery, the habitual offender enhancement would now statutorily be available, and the State should be able to pursue that charge if it is deemed appropriate. This Court should decline Ortiz's request to proactively limit the State's prosecutorial discretion.

II. Displaying a Knife While Fleeing from a Pursuing Shopkeeper Constitutes an Assault, Even if the Jury Finds the Knife was Not a Dangerous Weapon or was Influenced by Notions of Leniency.

Preservation of Error

Error was preserved when the defendant challenged the sufficiency of the evidence supporting an assault in his motion for judgment of acquittal, which was denied by the district court. *See* T.Tr. 218:19–226:1.

Standard of Review

"Sufficiency of evidence claims are reviewed for a correction of errors at law." *State v. Sanford*, 814 N.W.2d 611, 615 (Iowa 2012) (citing *State v. Keopasaeuth*, 645 N.W.2d 637, 639–40 (Iowa 2002)).

Merits

A challenge to the sufficiency of the evidence does not allow a reviewing court to weigh evidence or determine that the jury weighed the evidence incorrectly. "In determining the correctness of a ruling

on a motion for judgment of acquittal, we do not resolve conflicts in the evidence, pass upon the credibility of witnesses, or weigh the evidence." *State v. Hutchison*, 721 N.W.2d 776, 780 (Iowa 2006) (citing *State v. Williams*, 695 N.W.2d 23, 28 (Iowa 2005)). "Inherent in our standard of review of jury verdicts in criminal cases is the recognition that the jury [is] free to reject certain evidence, and credit other evidence." *Sanford*, 814 N.W.2d at 615 (quoting *State v. Nitcher*, 720 N.W.2d 547, 556 (Iowa 2006)).

Instead, "review on questions of sufficiency of the evidence is to determine if there is substantial evidence to support the verdict of the jury." *State v. Martens*, 569 N.W.2d 482, 484 (Iowa 1997) (citing *State v. Monk*, 514 N.W.2d 448, 451 (Iowa 1994)). This occurs when "a rational trier of fact" viewing the State's evidence in the most favorable light "could have found that the elements of the crime were established beyond a reasonable doubt." *Keopasaeuth*, 645 N.W.2d at 640 (citing *State v. Anderson*, 517 N.W.2d 208, 211 (Iowa 1994)).

Here, Ortiz argues that there was insufficient evidence to establish an assault for robbery in the second degree because the jury did not find him guilty of robbery in the first degree. Ortiz reasons that because the alleged assault constituted him drawing a

pocketknife as the shopkeeper pursued him, when the jury found him not guilty of first-degree robbery (i.e. that Ortiz was not armed with a dangerous weapon) there could be no assault to support any lesser-included degree of robbery.

The State disagrees that without finding a dangerous weapon there could be no assault under any alternative even if the only assault was Ortiz's displaying of a pocketknife to the pursuing shopkeeper. Ortiz's argument oversimplifies the instructions to an extent that benefits his position and this Court should reject his analysis. While the State agrees the jury necessarily found Ortiz was not "armed with a dangerous weapon," the State submits the jury could still have found Ortiz was armed with a knife for purposes of an assault. *See* Jury Instr. No. 18; App. 11.

The dangerous weapon instruction given to the jury required that they find that the knife Ortiz displayed was "capable of inflicting death." *See* Jury Instr. No. 26; App. 16. It is a reasonable inference to conclude that the jury may have considered that the pocketknife displayed by Ortiz was, in their opinion, not capable of inflicting death. The jury may have considered the two pocketknives Ortiz was carrying too small to be capable of inflicting death. *See* State's Exs. 7-

8; Ex. App. 8-11. The jury then could still find that Ortiz displayed a pocketknife, but it simply did not qualify as a "dangerous weapon" as it was instructed to them. The jury would then move to second-degree robbery and could find an assault as an "act which is intended to place another person in fear of immediate physical contact which will be painful, injurious, insulting or offense to that person, when coupled with the apparent ability to do so." *See* Jury Instr. No. 22; App. 15.

"We look to the definition of assault in section 708.1 to consider whether a robbery occurred under section 711.1(1)." *State v. Keaton*, 710 N.W.2d 531, 533 (Iowa 2006) (citing *State v. Spears*, 312 N.W.2d 79, 80 (Iowa 1981)). Iowa Code section 708.1(2) provides:

> A person commits an assault when, without justification, the person does any of the following:
>
> a. 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.
>
> b. 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.

> c. Intentionally points any firearm toward another, or displays in a threatening manner any dangerous weapon toward another.

Iowa Code § 708.1(2). An assault requires specific intent as well as an overt act. *See State v. Heard*, 636 N.W.2d 227, 230 (Iowa 2001).

The overt act required is different for each subsection of assault. "Subsection ([a]) reflects the common law crime of battery, an act intended to result in painful physical contact. Subsection ([b]) reflects the common law crime of assault, a more preliminary act intended place another in fear of immediate physical contact." *State v. Robinson*, No. 14-1845, 2016 WL 894110, at *3 (Iowa Ct. App. Mar. 9, 2016) (citations omitted) (citing *State v. Yanda*, 146 N.W.2d 255, 255 (Iowa 1966)). The State submits that withdrawing a knife (even if a jury believes the particular knife is not capable of causing death) while being pursued by a shopkeeper is an overt act intended to place the shopkeeper in fear of immediate physical contact if they continue to pursue. This was an assault even if the knife was not a dangerous weapon.

Further, even if the knife was not a "dangerous weapon," as it was instructed to the jury, displaying a knife still shows an "intent to inflict a serious injury upon another." *See* Iowa Code § 708.2(1). This

is especially true because there was testimony that both pocketknives carried by Ortiz were capable of inflicting such injury. *See* T.Tr. 192:7–193:18, 201:16-20. When the shopkeeper pursued Ortiz following the theft of the skirt, and Ortiz responded by displaying a knife, Ortiz was conveying a threat that continued pursuit would result in serious injury. This satisfies the requirements of second-degree robbery. *See* Iowa Code §§ 711.1, .3.

The State further submits that the jury's rejection of first degree robbery was more likely a result of leniency/nullification than insufficient evidence. There was sufficient evidence to establish that Ortiz was armed with a knife during the robbery (in fact two knives), and that both knives he was carrying when police found him were dangerous weapons. *See* T.Tr. 151:11–153:17, 191:7-18, 200:1-21; *see also* State's Exs. 7-8; Ex. App. 8-11. The jury's rejection of that evidence to instead find a lesser-included offense was merely an exercise of leniency. Iowa courts generally refuse to treat the jury's leniency/nullification as though it voids a conviction for a lesser-included offense that is still supported by the evidence:

> [A]lthough inconsistent verdicts reveal the jury did not speak its real conclusions, they do not necessarily show the jury was not convinced of the defendant's guilt. Thus,

> considering the historic reluctance of courts to inquire into the internal workings of the jury, the inability to determine whether the prosecutor or the defendant actually benefited by the inconsistency, and the prosecutor's inability to invoke review of inconsistent verdicts, the most desirable course of action to follow when confronted with inconsistent verdicts is to simply insulate the verdict from review. Instead, appellate review should be limited to whether sufficient evidence exists to support the verdict returned by the jury. This approval is the most sensible under the circumstances and adequately protects defendants from irrational verdicts.

State v. Hernandez, 538 N.W.2d 884, 889 (Iowa Ct. App. 1995); *see also State v. Fintel*, 689 N.W.2d 100–01 (Iowa 2004) (noting "[s]uch inconsistencies may result from the jury's exercise of its power of leniency," which is not grounds for reversal); *cf. State v. Sanchez*, No. 14–1912, 2016 WL 530409, at *3–5 (Iowa Ct. App. Feb. 10, 2016) (declining to extend *Halstead*, which was focused "solely on the legal impossibility of convicting a defendant of a compound crime while at the same time acquitting the defendant of predicate crimes" (quoting *Halstead*, 791 N.W.2d at 815)).

This Court should find that Ortiz's withdrawal of a pocketknife, while being pursued by the shopkeeper, constituted an assault through his demonstrated intention of placing her in fear of serious

injury if the pursuit continues. Ortiz's argument should be rejected and his conviction should be affirmed.

III. Counsel was Not Ineffective for Declining to Argue that the Legislature's Addition of Third-Degree Robbery did Not Make Our Robbery Statute Unconstitutionally Vague or Overbroad.

Preservation of Error

Ineffective assistance of counsel can represent "an exception to the general rules of error preservation" because failure to preserve error can form the basis for a claim. *State v. Stallings*, 658 N.W.2d 106, 108 (Iowa 2003) (citing *State v. Lucas*, 323 N.W.2d 228, 232 (Iowa 1982)), *overruled on other grounds by State v. Feregrino*, 756 N.W.2d 700 (Iowa 2008). Iowa appellate courts are permitted to address these claims on direct appeal "when the record is sufficient to permit a ruling." *State v. Wills*, 696 N.W.2d 20, 22 (Iowa 2005) (citing *State v. Artzer*, 609 N.W.2d 526, 531 (Iowa 2000)).

Standard of Review

Claims of ineffective assistance of counsel are reviewed de novo. *See State v. Liddell*, 672 N.W.2d 805, 809 (Iowa 2003) (citing *Stallings*, 658 N.W.2d at 108).

Merits

To prove ineffective assistance of counsel, a defendant must show that his trial counsel breached an essential duty and that prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Judicial scrutiny of counsel's performance is highly deferential with a strong presumption that counsel's conduct fell within the range of reasonable professional assistance. *Anfinson v. State*, 758 N.W.2d 496, 499 (Iowa 2008) (quoting *Strickland*, 466 U.S. at 689). Trial counsel is not expected to raise an issue that is doomed to failure. *State v. Graves*, 668 N.W.2d 860, 881 (Iowa 2003).

"The crux of the prejudice component rests on whether the defendant has shown 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *Whitsel v. State*, 4a39 N.W.2d 871, 873 (Iowa Ct. App. 1989) (quoting *Strickland*, 466 U.S. at 694). If the Court determines defendant has failed to prove prejudice, it need not consider whether a breach of duty occurred. *Ledezma*, 626 N.W.2d at 142.

A defendant may raise such a claim on direct appeal if they have "reasonable grounds to believe that the record is adequate to address the claim on direct appeal." Iowa Code § 814.7(2). The court prefers to reserve such questions for postconviction proceedings so the defendant's trial counsel can defend against the charge. *State v. Tate*, 710 N.W.2d 237, 240 (Iowa 2006). Claims of ineffective assistance of counsel are resolved on direct appeal only when the record is adequate. *State v. Clay*, 824 N.W.2d 488, 494 (Iowa 2012).

Here, Ortiz argues that his counsel was ineffective for failing to argue that the robbery statutes were unconstitutionally vague and overbroad. The State disagrees.

The State first submits that it is not ineffective assistance to fail to argue that criminal statutes are unconstitutional merely because the court *might* agree with such an argument. "Statutes are presumed to be constitutional . . . ." *State v. Mann*, 602 N.W.2d 785, 791 (Iowa 1999). "[A]n attorney need not be a 'crystal gazer' who can predict future changes in established rules of law in order to provide effective assistance to a criminal defendant." *State v. Schoelerman*, 315 N.W.2d 67, 72 (Iowa 1982). This Court should

reject the notion that failing to raise every possible constitutional claim is ineffective assistance of counsel.

However, even if Ortiz's counsel had raised his claim that second and third degree robbery are unconstitutional vague or overbroad, such a claim would be doomed to failure. Ortiz's counsel thus breached no duty and Ortiz was not prejudiced by the decision to not pursue such a claim.

Ortiz essentially argues (1) second and third degree robbery require the same acts and are thus vague and (2) because the statutes both criminalize the same behavior the statute is facially unconstitutional. Both sentiments are without merit and should be rejected.

First, the plain language of the statute reveals that second and third degree robbery are not intended to be the same crimes. *See* Iowa Code § 711.3 ("All robbery which is not robbery in the first degree is robbery in the second degree, *except as provided in section 711.3A* [(third-degree robbery)]." (emphasis added)). The statutes do *not* require the same acts and thus Ortiz's argument should be rejected. Even if the statutes did criminalize the same behavior, however, this would not be impermissible.

As noted above:

> [E]ven if the statutes did overlap, common group would not be problematic. Overlap only prevents double convictions or double punishments, not a single conviction on one charge based on the prosecutor's charging discretion. As we have explained:
>
> > When a single act violates more than one criminal statute, the prosecutor may exercise discretion in selecting which charge to file. This is permissible even though the two offenses call for different punishments. It is common for the same conduct to be subject to different criminal statutes.

Alvarado, 875 N.W.2d at 718 (quoting *Perry*, 440 N.W.2d at 391-92). "When there is sufficient evidence to charge a suspect with a particular crime, it does not matter that his conduct may also constitute a violation of a lesser offense with a lighter penalty. . . . [T]he prosecutor has discretion to choose what charges to file." *Anspach*, 627 N.W.2d at 233 (citing *Caskey*, 539 N.W.2d at 177-78). "It often happens that a defendant, by the same criminal act, violates more than one criminal statute. And it is not true as a legal proposition that, if his criminal act is covered by one statute, it cannot be covered by another." *Johns*, 118 N.W. at 298.

Ortiz's vagueness argument makes little sense. Ortiz argues that because his conduct falls within both criminal statutes, both statutes are vague. This is the opposite of vagueness in the constitutional sense. As Ortiz notes, "[b]oth statutes require theft and assault." *See* Appellant's Br. at p.46. Ortiz's contention that a person would not know when they are committing a crime because they are violating *two* criminal offenses, instead of merely one, is absurd and should be rejected. In either event, any person with ordinary intelligence would know they are committing a crime. The fact they are committing two crimes should only increase their confidence that their actions are improper, not confuse or diminish it. The statute simply is not vague.

Ortiz further contends that because the charging decision "is left to police . . . and later to prosecutors" the statute is unconstitutional because it "allow[s] discriminatory enforcement." *See* Appellant's Br. at p.44-47. Prosecutorial discretion is an ordinary and accepted practice. *See Alvarado*, 875 N.W.2d at 718; *Anspach*, 627 N.W.2d at 233; *Johns*, 118 N.W. at 298. There is no merit to the argument that applying such discretion inexplicably renders criminal statutes unconstitutional as applied because the defendant could have

been charged with another crime. There is nothing arbitrary or discriminatory about the application of our robbery statutes, especially when all three degrees of it clearly criminalize various circumstances involving an assault coupled with the intent to commit a theft. *See* Iowa Code §§ 711.1-.3A. Ortiz points to no arbitrary or discriminatory practice in the State's charging decision, which the State would argue is not even possible because Ortiz was actually charged with the more serious first-degree robbery, not second.

Ortiz goes on to similarly argue that the statute is facially unconstitutional because a person will not know when they are committing a crime. *See* Appellant's Br. at p.48. Again, merely because a person's conduct violates two criminal statutes, and not just one, does not mean the person would be unable to discern if their actions are illegal. To respond to Ortiz's question, "which crime is the perpetrator committing?" the answer can constitutionally be "both." *See* Appellant's Br. at p.48. Merely because he is violating both statutes does not mean he is being punished for both violations.

As has been our law for over a hundred years, "it is not true as a legal proposition that, if his criminal act is covered by one statute, it cannot be covered by another." *Johns*, 118 N.W. at 298. Ortiz is not

entitled to a new trial on third-degree robbery merely because the prosecutor was lawfully given discretion to make charging decisions. The prosecutor, and not Ortiz, decides how to try their cases.

Because there is no merit to Ortiz's constitutional claims, this Court should find that his counsel was not ineffective for failing to argue them. This Court should reject Ortiz's argument and affirm his conviction of second-degree robbery.

CONCLUSION

The State respectfully requests that this Court affirm Dustin James Ortiz's conviction.

REQUEST FOR NONORAL SUBMISSION

Although this case presents issues of first impression, the State submits that oral argument is unnecessary to dispose of the claims addressed. The facts and legal issues addressed are not overly complex and oral argument would do little to aid the court. In the interest of judicial economy, this Court should assign this matter for nonoral submission.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(*d*) and 6.903(1)(*g*)(1) or (2) because:

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