IN THE SUPREME COURT OF IOWA

No. 16–1980

Filed December 15, 2017

Amended February 14, 2018

STATE OF IOWA,

Appellee,

vs.

DUSTIN JAMES ORTIZ,

Appellant.

Appeal from the Iowa District Court for Polk County, Jeanie K. Vaudt, Judge.

The defendant appeals his conviction for second-degree robbery, alleging erroneous jury instructions and insufficiency of evidence. **DISTRICT COURT JUDGMENT REVERSED; CASE REMANDED WITH INSTRUCTIONS.**

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

Thomas J. Miller, Attorney General, Kevin Cmelik and Thomas E. Bakke, Assistant Attorneys General, John P. Sarcone, County Attorney, and Olu A. Salami, Assistant County Attorney, for appellee.

WATERMAN, Justice.

In this appeal, we are asked to decide whether the district court correctly instructed the jury on robbery offenses in light of a 2016 amendment adding the offense of third-degree robbery. 2016 Iowa Acts ch. 1104, § 4 (codified at Iowa Code § 711.3A (2017)). A store owner saw a man steal a skirt and gave chase until the man displayed a knife. The defendant was arrested nearby with a knife and the stolen skirt, identified by the owner, and charged with first-degree robbery. The court instructed the jury on that charge and related offenses. Defense counsel objected that the instructions failed to distinguish between second-degree robbery and third-degree robbery. The court refused to modify the instruction on second-degree robbery as requested, and the jury found the defendant guilty of that offense. The defendant appealed, and we retained the appeal.

The defendant's appellate counsel argues the district court erred in giving jury instructions on second- and third-degree robbery that failed to differentiate between those offenses. He further asserts a claim of ineffective assistance of trial counsel for failing to challenge the robbery statutes as unconstitutionally vague and also raises an anticipatory claim of prosecutorial vindictiveness.

On our review, we conclude the evidence was sufficient to support a finding of simple assault and a conviction for third-degree robbery but insufficient to support the conviction for second-degree robbery. We reject the vagueness challenge to the robbery statutes. We observe that because the legislature defined second-degree robbery to exclude third-degree robbery, the marshaling instructions for the jury must distinguish those offenses by incorporating factually applicable alternative definitions of aggravated or serious assault that support a second-degree

robbery charge. We construe this jury verdict as necessarily finding the defendant guilty of third-degree robbery. We vacate the second-degree robbery conviction and remand for entry of a judgment of conviction for third-degree robbery and resentencing. We do not reach the prosecutorial vindictiveness claim.

I. Background Facts and Proceedings.

We discuss the evidence in the light most favorable to the guilty verdict. Patricia Chavez owns La Estrellita Fashion, a clothing store in Des Moines. On June 15, 2016, Chavez was working alone at the store when she saw a man grab the skirt off a mannequin outside. Chavez ran outside and yelled at the man, who was walking away.[1] He was a tall, thin white male wearing a black shirt and black shorts and carrying a backpack. As Chavez began to pursue him, the man showed Chavez a knife without stopping or turning to face her. Frightened by the display of the knife, Chavez ran back into her store, locked the door, and called the police. Sergeant Brian Vance was dispatched, and while he was en route to the scene, another officer saw a man matching Chavez's description. Sergeant Vance detained that suspect, James Dustin Ortiz. Ortiz claimed he had just stepped off the bus and was going to a friend's house. Sergeant Vance patted him down and found a pocketknife in the front pocket of his shorts.

An officer took Chavez to Ortiz, who was wearing a tank top rather than a black shirt when Chavez was asked if she could identify him. Chavez initially hesitated, then identified Ortiz as the man who stole the skirt. Ortiz was arrested. Police searched his backpack and found the

[1]At trial, Chavez first testified that the man who stole the skirt was running away when she chased him. However, when she was asked if the person "was walking or running," Chavez replied that he was walking.

stolen skirt inside it. Ortiz was taken to the police station to be interviewed, and while there, he removed a second pocketknife from his waistband and handed it over to an officer.

On July 22, Ortiz was charged by trial information with robbery in the first degree in violation of Iowa Code sections 711.1 and 711.2. Ortiz filed a written arraignment in which he demanded his right to speedy trial. The case proceeded to a jury trial. Chavez testified through an interpreter. Sergeant Vance and two other officers also testified. After both sides rested, the court held a hearing on the jury instructions. Ortiz was charged with first-degree robbery, and the jury was also to be instructed on the lesser included offenses of second-degree robbery, third-degree robbery, and assault.

Jury Instruction No. 17 (lesser included offenses) stated,

> The allegations of the Trial Information in Count I includes not only the offense of Robbery in the First Degree but also the lesser included offenses of Robbery in the Second Degree, Robbery in the Third Degree, and Assault.
>
> You will convict the defendant of the highest of said above named offenses of which he is proven guilty beyond a reasonable doubt, if any, and you will acquit him of any and all offenses of which he was not proven guilty.

Jury Instruction 18 (first-degree robbery) stated,

> The State must prove all of the following elements of Robbery in the First Degree:
>
> 1. On or about the 15th day of June, 2016, the defendant had the specific intent to commit a theft.
>
> 2. To carry out that intention or to assist him in escaping from the scene, with or without the stolen property, 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; and
>
> 3. Was armed with a dangerous weapon.

> If the State has proved all of the elements, the defendant is guilty of Robbery in the First Degree. If the State has failed to prove any one of the elements, the defendant is not guilty of Robbery in the First Degree, and you will then consider the charge of Robbery in the Second Degree as explained in Instruction No. 19.

Ortiz's counsel objected to the court's instruction on second-degree robbery, requesting that the assault element be modified by adding: "with the intent to inflict serious injury on Patricia Chavez." Jury Instruction No. 19 (second-degree robbery), with Ortiz's requested change italicized in brackets, stated,

> The State must prove all of the following elements of Robbery in the Second Degree:
>
> 1. On or about the 15th day of June, 2016, the defendant had the specific intent to commit a theft.
>
> 2. To carry out that intention or to assist him in escaping from the scene, with or without the stolen property, the defendant:
>
> a. Committed an assault [*with the intent to inflict serious injury*] on Patricia Chavez or
>
> b. Threatened Patricia Chavez with or purposefully put Patricia Chavez in fear of immediate serious injury.
>
> If the State has proved all of the elements, the defendant is guilty of Robbery in the Second Degree. If the State has failed to prove any one of the elements, the defendant is not guilty of Robbery in the Second Degree, and you will then consider the charge of Robbery in the Third Degree as explained in Instruction No. 20.

Ortiz's counsel asserted that "if the jury were to find Mr. Ortiz guilty based on elements number 1 and 2(a) as written in [the] proposed instruction without any clarification, then that's [third-degree] robbery." Ortiz argued that adding "with the intent to inflict serious injury" was the only way to differentiate second-degree robbery (Jury Instruction No. 19) from third-degree robbery (Jury Instruction No. 20). The State opposed Ortiz's proposed change to the second-degree robbery instruction, arguing the instructions, as modified, would "add an extra element that

the government has to prove." The court agreed with the State and refused to modify the second-degree robbery instruction. Jury Instruction No. 19 was given without the bracketed language requested by Ortiz.

Jury Instruction No. 20 (third-degree robbery) stated,

> The State must prove all of the following elements of Robbery in the Third Degree:
>
> 1. On or about the 15th day of June, 2016, the defendant had the specific intent to commit a theft.
>
> 2. To carry out that intention or to assist him in escaping from the scene, with or without the stolen property, the defendant committed an assault as that term is defined in Instruction No. 22.[2]
>
> If the State has proved all of the elements, the defendant is guilty of Robbery in the Third Degree. If the State has failed to prove any one of the elements, the defendant is not guilty of Robbery in the Third Degree, and you will then consider the charge of Assault as explained in Instruction No. 21.

Jury Instruction No. 21 gave the elements for assault:

> The State must prove both of the following elements of the crime of Assault:
>
> 1. On or about the 15th day of June, 2016, the defendant did an act which was intended to cause pain or injury, or was intended to result in physical contact which was insulting or offensive, or was intended to place Patricia Chavez in fear of an immediate physical contact which would have been painful, injurious, insulting or offensive to her.

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[2]Jury Instruction No. 22 defined "assault":

> Whenever the word assault appears in any instruction, it means the following:
>
> An assault is committed when a person does an act which is intended to cause pain or injury to another person; or any act which is intended to result in physical contact which will be insulting or offensive, or any act which is intended to place another person in fear of immediate physical contact which will be painful, injurious, insulting or offensive to that person, when coupled with the apparent ability to do the act.

> 2. The defendant had the apparent ability to do the act.
>
> If the State has proved both of the elements, the defendant is guilty of Assault. If the State has failed to prove either of the elements, the defendant is not guilty.

The jury found Ortiz guilty of robbery in the second degree. The "armed with a dangerous weapon" element was the only difference between first-degree and second-degree robbery under the court's instructions. In acquitting Ortiz of first-degree robbery, the jury necessarily found the State failed to prove he was "armed with a dangerous weapon."

Ortiz filed a motion for new trial and a motion in arrest of judgment. Ortiz argued that if the jurors found him guilty under the "assault" theory of Jury Instruction No. 19, they would actually be finding him guilty of third-degree robbery. Ortiz withdrew those motions at the sentencing hearing to "avoid the potential of the application of the habitual offender enhancement" at a new trial.

Ortiz was sentenced to prison for a term not to exceed ten years. Ortiz appealed, and we retained his appeal.

II. Standard of Review.

We review sufficiency-of-evidence challenges for correction of errors at law. *State v. Howse*, 875 N.W.2d 684, 688 (Iowa 2016). Our review of claims of ineffective assistance of counsel is de novo. *State v. Liddell*, 672 N.W.2d 805, 809 (Iowa 2003). Our review of constitutional challenges to statutes is de novo. *State v. Musser*, 721 N.W.2d 734, 741 (Iowa 2006).

III. Analysis.

We first address Ortiz's challenge to the sufficiency of the evidence. We compare and contrast the proof required for second-degree robbery

and third-degree robbery and emphasize the need to differentiate those offenses in the jury instructions. We conclude the evidence was insufficient to convict Ortiz of second-degree robbery but sufficient to convict him of third-degree robbery. We construe the jury verdict as finding Ortiz guilty of third-degree robbery. Finally, we address and reject Ortiz's claims of ineffective assistance of counsel for failing to assert a vagueness challenge to the robbery statutes we conclude is meritless.

A. Sufficiency of the Evidence. Ortiz argues the evidence was insufficient to uphold his conviction. We view the evidence "in the light most favorable to the State, including all reasonable inferences that may be fairly drawn from the evidence." *State v. Huser*, 894 N.W.2d 472, 490 (Iowa 2017) (quoting *State v. Sanford*, 814 N.W.2d 611, 615 (Iowa 2012)). We uphold the verdict if substantial evidence in the record supports it. *State v. Neiderbach*, 837 N.W.2d 180, 216 (Iowa 2013). "Evidence is . . . substantial if, when viewed in the light most favorable to the State, it can convince a rational jury that the defendant is guilty beyond a reasonable doubt." *Id.* (quoting *Sanford*, 814 N.W.2d at 615).

The jury found Ortiz guilty of second-degree robbery. To review whether the evidence is sufficient to uphold the verdict, we must determine the elements of the offense. We confront the conundrum created when the legislature in 2016 enacted a new offense of third-degree robbery and narrowed the definition of second-degree robbery to exclude this new offense. Ortiz argues that the district court erred in giving Jury Instruction Nos. 19 (second-degree robbery) and 20 (third-degree robbery) because these instructions failed to distinguish between those offenses. Jury Instruction No. 17 (lesser included offenses) directed the jury to "convict the defendant of the highest . . . offense[] of

which he is proven guilty beyond a reasonable doubt." Thus, under the court's instructions, if the jury found Ortiz guilty of third-degree robbery, it would return a guilty verdict for second-degree robbery. Second-degree robbery carries a ten-year sentence while third-degree robbery carries a two-year sentence.[3] District courts must differentiate between those offenses when instructing the jury.

The State acknowledges that "the bar is having difficulty reconciling precisely how to instruct robbery in light of the legislature's addition of third-degree robbery." As noted, robbery in the third degree was added to the Iowa Code in 2016. 2016 Iowa Acts ch. 1104, § 4 (codified at Iowa Code § 711.3A (2017)). Representative Rizer, who sponsored the bill in the House, explained that the "new crime of robbery three" would fill the "important gap between robbery two and theft." House Video on H.F. 2064, 86th G.A., 2d Sess. (Apr. 27, 2016) (statement of Rep. Rizer), http://www.legis.state.ia.us/dashboard?view=video&chamber=H&clip=H20160427145008734&dt=2016-04-27&offset=696&bill=HF%202064&status=r. Senator Sodders, the sponsor in the Senate, described third-degree robbery as "a lesser included offense of robbery one and two" that would be found when someone "perpetrates a robbery [and] causes a simple assault during the robbery." Senate Video on H.F. 2064, 86th G.A., 2d Sess. (Apr. 27, 2016) (statement of Sen. Sodders), http://www.legis.state.ia.us/

[3]Second-degree robbery is a class "C" felony, which subjects the defendant to a maximum prison term of ten years and a fine of $1000 to $10,000. *See* Iowa Code § 711.3; *id.* § 902.9(1)(*d*). Third-degree robbery is an aggravated misdemeanor subjecting the defendant to a maximum indeterminate sentence of two years and a fine of $625 to $6250. *See id.* § 711.3A(2); *id.* § 903.1(2).

dashboard?view=video&chamber=S&clip=s20160427163230010&offset=1136&bill=HF%202064&dt=2016-04-27.

We may not "change the terms of a statute as the legislature adopted it." *State v. Childs*, 898 N.W.2d 177, 184 (Iowa 2017) (quoting *State v. Iowa Dist. Ct.*, 730 N.W.2d 677, 679 (Iowa 2007)). "In interpreting criminal statutes, . . . we have repeatedly stated that provisions establishing the scope of criminal liability are to be strictly construed with doubts resolved therein in favor of the accused." *State v. Hearn*, 797 N.W.2d 577, 583 (Iowa 2011). We now turn to the text of the applicable statutes.

The Code defines second-degree robbery by exclusion: "All robbery which is not robbery in the first degree is robbery in the second degree, except as provided in section 711.3A [Robbery in the third degree]." Iowa Code § 711.3. Under the newly enacted section 711.3A, "[a] person commits robbery in the third degree when, while perpetrating a robbery, the person commits an assault as described in section 708.2, subsection 6, upon another person."[4] *Id.* § 711.3A; *see also* Legislative Servs. Agency, *2016 Summary of Legislation* 61–62 (2016), https://www.legis.iowa.gov/docs/publications/SOL/797618.pdf ("A

[4]Robbery is defined in Iowa Code section 711.1:

> 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(1). "We look to the definition of assault in section 708.1 to consider whether a robbery occurred under section 711.1(1)." *State v. Keeton*, 710 N.W.2d 531, 533 (Iowa 2006).

person commits robbery in the third degree if while perpetrating the robbery the person commits a simple misdemeanor assault in violation of Iowa Code section 708.2(6).”). Section 708.2(6) states, “Any other assault, except as otherwise provided [in subsections 1 through 5], is a simple misdemeanor.” Iowa Code § 708.2(6). Subsections 1 through 5 all involve assault as defined in section 708.1[5] plus additional elements that increase the penalty from simple assault:

> 1. A person who commits an assault, as defined in section 708.1, with the intent to inflict a serious injury upon another, is guilty of an aggravated misdemeanor.
>
> 2. A person who commits an assault, as defined in section 708.1, and who causes bodily injury or mental illness, is guilty of a serious misdemeanor.
>
> 3. A person who commits an assault, as defined in section 708.1, and uses or displays a dangerous weapon in connection with the assault, is guilty of an aggravated misdemeanor. This subsection does not apply if section 708.6 or 708.8 applies.
>
> 4. A person who commits an assault, as defined in section 708.1, without the intent to inflict serious injury, but who causes serious injury, is guilty of a class “D” felony.
>
> 5. A person who commits an assault, as defined in section 708.1, and who uses any object to penetrate the genitalia or anus of another person, is guilty of a class “C” felony.

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[5]Iowa Code section 708.1(2) states:

> 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).

> 6. Any other assault, except as otherwise provided, is a simple misdemeanor.

Iowa Code § 708.2.

District courts instructing on second-degree robbery should include the applicable alternatives of aggravated, serious, or felonious assault supported by the evidence under subsections 1 through 5 in order to distinguish third-degree robbery. Subsections 2, 4, and 5, however, are inapplicable *in this case* because they require an injury or penetration. Ortiz never touched Chavez, and she suffered no physical or mental injury in their encounter. Nor can we rely on subsection 3 to uphold the guilty verdict for second-degree robbery. The jury found Ortiz guilty of that offense, but acquitted him of first-degree robbery, which included the element that he "was armed with a dangerous weapon." Jury Instruction No. 18 (marshaling instruction—first-degree robbery); *see also* Iowa Code § 711.2 (first-degree robbery defined). This means the jury found that Ortiz was not armed with a "dangerous weapon," which in turn precludes a finding that he "display[ed] a dangerous weapon" in connection with the assault under section 708.2(3). This leaves only subsection 1 (assault "with the intent to inflict a serious injury") for the second-degree robbery charge against Ortiz because subsection 6 (simple assault) is for third-degree robbery.

The instruction on second-degree robbery as given did not accurately state the law because it encompassed third-degree robbery.[6]

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[6]The second-degree robbery jury instruction given mirrors the Iowa State Bar Association's model criminal jury instruction for robbery in the second degree. *See* Iowa State Bar Ass'n, Iowa Criminal Jury Instruction 1100.2 (2016). However, these instructions have not been modified since the 2016 amendment added the offense of third-degree robbery and redefined second-degree robbery to exclude third-degree robbery.

A new trial is not required here,[7] however, because we conclude the evidence is insufficient to convict Ortiz of second-degree robbery under the only applicable alternative that distinguishes third-degree robbery yet was sufficient to prove the simple assault required for third-degree robbery.

Ortiz displayed a knife but never turned to confront Chavez. He did not lunge toward her or approach her with the knife but rather continued walking away. He never made any stabbing or slashing gestures at her. Although the jury could reasonably conclude he displayed the knife to deter her pursuit and effectuate his escape, we conclude the evidence is insufficient to prove beyond a reasonable doubt that Ortiz had "the intent to inflict serious injury on [Chavez]" within the meaning of Iowa Code section 708.2(1). Moreover, by acquitting Ortiz of first-degree robbery, the jury necessarily determined the pocketknife he displayed was not a "dangerous weapon" within the meaning of section 708.2(3). Accordingly, we must vacate Ortiz's conviction of second-degree robbery.

The jury, by finding Ortiz guilty of second-degree robbery under the instructions given, necessarily found him guilty of simple assault to commit a theft—that is, third-degree robbery. The evidence is sufficient

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[7]When a marshaling instruction omits an element of the offense for which a defendant is convicted, we have concluded that the defendant is prejudiced. *See State v. Harris*, 891 N.W.2d 182, 189 (Iowa 2017) (emphasizing "our confidence in the jury verdict [was] undermined because . . . the flawed jury instruction did not require the jury to make a finding on [an] element of the crime" and concluding that the defendant was prejudiced by his lawyer's failure to object to the omission and, therefore, was "entitled to a jury trial with a proper marshaling instruction on [that] element"); *see also State v. Virgil*, 895 N.W.2d 873, 882–83 (Iowa 2017) (holding that omission of instruction defining "household member" required a new trial when the fighting issue was whether the defendant and victim cohabited); *State v. Pearson*, 804 N.W.2d 260, 265 n.1 (Iowa 2011) (explaining that "omission in the jury instruction of the movement element requires a new trial on the going-armed charge").

for third-degree robbery. Chavez testified that when she pursued the man who stole the skirt, the man "show[ed her] a knife." Chavez also explained that the man was approximately ten feet away from her when she saw the knife. Chavez admitted that she never saw the man's face; even when she yelled at him, the man did not turn around but kept walking. But, when asked whether she had any doubts that the man had a knife, Chavez replied, "No." The jury could reasonably infer he showed her the knife to frighten her into abandoning pursuit, which is what happened. *Cf. State v. Keeton*, 710 N.W.2d 531, 534–35 (Iowa 2006) (allowing consideration of victim's perception of the threat in evaluating sufficiency of the evidence of assault required to support robbery conviction). The police who detained and patted down Ortiz found a pocketknife in the front pocket of his shorts, and Ortiz produced a second pocketknife from his waistband at the police station. Viewing the evidence in the light most favorable to the State, we conclude that a rational jury could find beyond a reasonable doubt that when Ortiz displayed the knife, he committed an "act which [was] intended to place [Chavez] in fear of immediate physical contact which will be painful, injurious, insulting, or offensive" and possessed "the apparent ability to execute the act." Iowa Code § 708.1(2)(*b*). This was sufficient to prove Ortiz committed a simple assault as required for third-degree robbery. *See id.* § 708.2(6); *id.* § 711.3A.

The remedy under our precedent is to remand this case for entry of a judgment of conviction for the lesser offense of third-degree robbery and resentencing. *See State v. Pace*, 602 N.W.2d 764, 774 (Iowa 1999) (remanding to the district court to enter judgment on the lesser included offense of second-degree burglary when there was sufficient evidence to support a finding of burglary but insufficient evidence to support a

verdict of first-degree burglary); *see also State v. Morris*, 677 N.W.2d 787, 788–89 (Iowa 2004) ("[W]e have approved entering an amended judgment of conviction with respect to the lesser-included offense" when the evidence is insufficient to support the jury's guilty verdict on the greater offense, but is sufficient for the lesser included offense.).

B. The Constitutional Challenge to Iowa Code Sections 711.3 and 711.3A. Ortiz asserts that his trial counsel was ineffective in failing to challenge Iowa Code sections 711.3 and 711.3A as unconstitutionally vague. Ortiz asserts both as-applied and facial vagueness challenges.

"To establish an ineffective-assistance-of-counsel claim, a defendant must typically show that (1) counsel failed to perform an essential duty and (2) prejudice resulted." *State v. Keller*, 760 N.W.2d 451, 452 (Iowa 2009) (per curiam) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)). A defendant must show "counsel's representation fell below an objective standard of reasonableness." *State v. Madsen*, 813 N.W.2d 714, 724 (Iowa 2012) (quoting *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2064). "In evaluating the objective reasonableness of trial counsel's conduct, we examine 'whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.' " *Id.* (quoting *Strickland*, 466 U.S. at 690, 104 S. Ct. at 2066). "[T]here is a strong presumption trial counsel's conduct fell within the wide range of reasonable professional assistance." *DeVoss v. State*, 648 N.W.2d 56, 64 (Iowa 2002).

Trial counsel has no duty to raise an issue that lacks merit, and if the merit of a particular issue is unclear based on Iowa law, we consider whether a normally competent attorney would have determined the issue was not worth raising. *State v. Graves*, 668 N.W.2d 860, 881 (Iowa

2003). We therefore must assess whether Ortiz's constitutional challenges to Iowa Code sections 711.3 and 711.3A have merit. *See State v. Fountain*, 786 N.W.2d 260, 263 (Iowa 2010).

We have held that a statute is impermissibly vague "if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" or if it allows enforcement that is arbitrary and discriminatory. *Musser*, 721 N.W.2d at 745 (quoting *Hill v. Colorado*, 530 U.S. 703, 732, 120 S. Ct. 2480, 2498 (2000)). Ortiz claims that the statutes in question are impermissibly vague because both statutes prohibit the same conduct and enable discriminatory enforcement as to the level of offense. As explained above, we disagree with Ortiz's claim that sections 711.3 and 711.3A prohibit the same conduct. *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*." (Emphasis added.)). But even if the statutes overlap, this does not render the enactments vague. *See State v. Alvarado*, 875 N.W.2d 713, 718 (Iowa 2016) ("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." (quoting *State v. Perry*, 440 N.W.2d 389, 391–92 (Iowa 1989))).

1. *As-applied challenge.* To determine whether the statutes are vague as applied, "we focus on whether the defendant's 'conduct clearly falls "within the proscription of the statute under any construction." ' " *Musser*, 721 N.W.2d at 745 (quoting *State v. Hunter*, 550 N.W.2d 460, 465 (Iowa 1996), *overruled on other grounds by State v. Robinson*, 618 N.W.2d 306, 312 (Iowa 2000)). Ortiz points out that both statutes require theft and assault. We conclude that these statutes therefore gave

Ortiz fair warning that his theft of the skirt and display of the knife were prohibited by the statutes. That Ortiz's actions could *potentially* be punished as second-degree robbery or third-degree robbery—or first-degree robbery, if the fact finder concluded the knife was a dangerous weapon—does not render the statutes vague as applied to Ortiz. A reasonable person would still know he is committing a crime. We conclude that sections 711.3 and 711.3A are not unconstitutionally vague as applied to Ortiz.

2. *Facial challenge.* Ortiz also asserts a facial challenge to the statutes. "If a statute is constitutional as applied to the defendant, the defendant lacks standing to make a facial challenge unless a recognized exception applies." *Hunter*, 550 N.W.2d at 463. Ortiz relies on the exception for situations in which "persons who are not parties to the suit 'stand to los[e] by its outcome and yet have no effective avenue of preserving their rights themselves.' " *State v. Price*, 237 N.W.2d 813, 816 (Iowa 1976) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 611, 93 S. Ct. 2908, 2915 (1973)). Yet Ortiz fails to explain how this exception applies, and we conclude that it does not. *Cf. Eisenstadt v. Baird*, 405 U.S. 438, 444–46, 92 S. Ct. 1029, 1033–34 (1972) (concluding that even though "Baird was not himself a single person denied access to contraceptives" under a Massachusetts statute, he had standing to challenge the statute and assert the rights of such people "because unmarried persons denied access to contraceptives in Massachusetts . . . are not themselves subject to prosecution and, to that extent, are denied a forum in which to assert their own rights"). For this reason, we reject Ortiz's facial challenge to the statutes.

3. *Ineffective assistance of counsel.* Because we reject Ortiz's constitutional challenges, we also reject his claim of ineffective

assistance of counsel based on trial counsel's failure to raise such a claim. *Cf. Graves*, 668 N.W.2d at 881 ("Trial counsel has no duty to raise an issue that has no merit.").

IV. Disposition.

For these reasons, we vacate the district court's judgment, conviction, and sentence for second-degree robbery and remand the case for entry of a judgment of conviction for third-degree robbery and resentencing.

DISTRICT COURT JUDGMENT REVERSED; CASE REMANDED WITH INSTRUCTIONS.