IN THE COURT OF APPEALS OF IOWA

No. 0-243 / 09-1018
Filed May 12, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MICKEY LEE HARMON,
Defendant-Appellant.

Appeal from the Iowa District Court for Pottawattamie County, Gordon C. Abel, Judge.

Defendant appeals his convictions and sentencing. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Patricia Reynolds, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Matthew D. Wilber, County Attorney, and Jon Jacobmeier and Eric Nelson, Assistant County Attorneys, for appellee.

Considered by Sackett, C.J., Eisenhauer and Mansfield, JJ.

EISENHAUER, J.

In October 2005, Council Bluffs police officers Galus and Schott responded to a 911 call for help made from Mickey Harmon's apartment. After the officers entered Harmon's apartment, a fight broke out.

In May 2009, a jury convicted Harmon[1] of assault with intent to inflict serious injury (Galus), disarming a peace officer (Schott), two counts of interference with official acts causing bodily injury (Galus and Schott), and the two counts at issue here regarding merger of offenses: (1) assault on a peace officer with intent to cause serious injury (Schott); and (2) assault on a peace officer causing bodily injury (Schott). Harmon appeals his convictions and sentencing. We affirm.

I. Merger of Lesser-Included Offense.

Harmon argues he could not have committed assault on a peace officer with intent to cause serious injury (felony assault) without also committing assault on a peace officer causing bodily injury (misdemeanor assault). *See* Iowa Code §§ 708.3A(1), 708.3A(3) (2005). Harmon asserts the two offenses should have been merged at sentencing and seeks resentencing. Our review is for correction of errors at law. Iowa R. App. P. 6.907.

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[1] In May 2006, Harmon entered *Alford* pleas to five counts. He later moved to withdraw his pleas. The trial court permitted withdrawal for one count, but sentenced Harmon on the remaining counts. On appeal, we reversed and allowed Harmon to withdraw his pleas on all counts and proceed to trial. *See State v. Harmon*, No. 06-1990 (Iowa Ct. App. Feb. 13, 2008).

Iowa Code section 701.9 requires the merger of lesser-included offenses: "No person shall be convicted of a public offense which is necessarily included in another public offense. . . ." Iowa Code § 701.9.

"To determine whether one crime is a lesser-included offense of another, we apply the impossibility test and look to the elements of the offenses in question." *State v. Ondayog*, 722 N.W.2d 778, 783 (Iowa 2006). We look to the elements of the greater offense (felony assault/intent to cause serious injury) to see if it can be committed without also committing the lesser offense (misdemeanor assault/causing bodily injury). *See State v. Hickman*, 623 N.W.2d 847, 850 (Iowa 2001). "If the greater offense cannot be committed without also committing the lesser offense, the lesser is included in the greater. We call this the 'impossibility' test." *Id.*

The "elements test" is "an aid in using the impossibility test and is fully subsumed in it." *Id.* In comparing the elements of the two offenses, we look to "the statutory definition of the greater offense rather than the evidence by which the offense may be proved in a particular case." *State v. Webb*, 313 N.W.2d 550, 552 (Iowa 1981). "We place the applicable statutes side by side and examine their elements in the abstract." *State v. Mulvany*, 600 N.W.2d 291, 293 (Iowa 1999) (quoting *State v. Jeffries*, 430 N.W.2d 728, 739 (Iowa 1988)).

When we compare the elements of felony and misdemeanor assault on a peace officer, we recognize misdemeanor assault requires the State to prove the police officer suffered a bodily injury while bodily injury is not an element of felony

assault. Specifically, the first, second, and fourth elements of Instruction 25 for felony assault and Instruction 31 for misdemeanor assault are identical:

> (1) On or about the 1st day of October 2005, the Defendant did an act which was intended to cause pain or injury or result in physical contact which was insulting or offensive *or* place Dana Schott in fear of an immediate physical contact which would have been painful, injurious, insulting or offensive to Dana Schott.
> (2) The Defendant had the apparent ability to do the act.
> . . . .
> (4) The Defendant knew or should have known that Dana Schott was a Peace Officer.

See Iowa Code § 708.1 (stating assault is a general intent crime) (emphasis added). Under the alternative language of element one ("*or*"), physical contact is not a requirement.

While three of the elements for misdemeanor and felony assault on a peace officer are identical, the offenses differ in the third element required. The jury instruction for misdemeanor assault states: "(3) The Defendant['s] act caused a bodily injury to Dana Schott as defined in Instruction No. 20."[2] *See id.* § 708.3A(3).

In contrast, the instruction for felony assault states: "(3) The act was done with the specific intent to cause a serious injury." *See id.* § 708.3A(1). This instruction does not state, "specific intent to cause a serious injury *and caused a serious injury*." Nor does it state, "specific intent to cause a serious injury *and caused a bodily injury.*" Therefore, unlike misdemeanor assault, felony assault does not require the defendant's act *cause* a resulting injury to Schott, either serious or bodily. *See Ondayog*, 722 N.W.2d at 783 (stating "the two greater

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[2] Instruction 20 states: "The term 'bodily injury' means physical pain, illness or any impairment of physical condition."

offenses do not necessarily include bodily injury, which is an element of the assault for which [defendant] was convicted").

Accordingly, assault on a peace officer causing bodily injury is not a lesser-included offense of assault on a peace officer with intent to cause serious injury due to the distinguishing element of "causing a bodily injury." Because the two crimes have separate and distinct elements, the two offenses do not meet the impossibility test and we reject Harmon's contention two of his convictions should be merged.[3]

II. Sentencing.

Harmon argues the court erred in not giving adequate reasons for imposing consecutive sentences and seeks a new sentencing hearing.[4] We review the trial court's discretionary action in sentencing for an abuse of discretion. *State v. Delaney*, 526 N.W.2d 170, 178 (Iowa Ct. App. 1994).

Iowa Rule of Criminal Procedure 2.23(3)(*d*) requires a trial court to state on the record its reasons for selecting a particular sentence. "[T]he duty of [providing] an explanation for a sentence includes the reasons for imposing consecutive sentences." *Delaney*, 526 N.W.2d at 178. This explanation must provide enough detail to permit review of the court's discretionary action. *State v. Johnson*, 445 N.W.2d 337, 343 (Iowa 1989). However, the reasons need not

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[3] Because we reach this conclusion, we need not address the State's argument that merger is inappropriate because the charges were based on separate acts (tackling Schott against the wall and later, wrenching Schott's thumb).

[4] Our review of the record shows no merit to Harmon's claim the court's written and oral sentencing pronouncements are inconsistent.

be specifically tied to the imposition of consecutive sentences, but may be found from the reasons expressed for the overall sentencing plan. *Id.*

At the outset of the hearing, the parties acknowledged Harmon was subject to mandatory incarceration and focused their comments on whether he should serve concurrent sentences, consecutive sentences, or some combination thereof for his six convictions. Harmon emphasized his current employment, requested concurrent sentences, and noted: "[A]ll of these convictions arise out of the same sequence of events on the same date . . . ."

Officer Galus testified to the impact the offenses had upon his life: "[I]t's probably the worst thing I've ever had to go through." Further, he explained his life is much different, he is more fearful, and he doesn't go anywhere without his gun. Officer Galus urged the court to order all the sentences run consecutively.

The State emphasized the violent nature of the crimes, Harmon's lack of remorse, Harmon's lengthy criminal history, and Harmon's hatred of authority figures. The State did not request all charges be consecutive, but asked "the court to treat each officer as a separate victim in which the defendant needs to serve consecutive time for."

Thereafter, the court stated:

> [T]he Court has considered the various charges and has given careful consideration to the Presentence Investigation Report. It does reflect that you have had a significant number of contacts with law enforcement.
>
> . . . .
>
> You have a history of assaultive behavior. You have a history of abuse of alcohol. The presentence report reflects, at least, in the statements attributed to you, that you project blame for the entire incident upon the law enforcement officers.
>
> . . . .

> Even now, you're continuing to project blame. The circumstances that presented themselves on the night that the officers entered your home, uniformed officers, readily identifiable as Council Bluffs Police Officers who declared their purpose of being there, was for the purpose of a welfare check. . . . They were there to serve and protect people inside. . . .
>
> The sequence of events leading to these charges began with your conduct. You committed assaults upon uniformed officers. And even once you were temporarily subdued, you reinitiated the attacks, quite determined attacks.

The court considered the fact the events "all occurred within a relatively short period of time," and ordered Harmon to serve two years for Count I (assault with intent to commit serious injury (Galus)) consecutively to five years for Count II (assault on a peace officer with intent to cause serious injury (Schott)). The remaining four counts were ordered to be served concurrently (Count V for five years, Count VI for two years, Count VII for two years, Count VIII for two years).

We conclude the district court provided sufficient reasoning to enable judicial review of its sentencing decision and find no abuse of discretion. *See id.* (upholding consecutive sentencing where separate victims were affected by defendant's separate crimes).

AFFIRMED.