IN THE COURT OF APPEALS OF IOWA

No. 0-271 / 09-0490
Filed May 12, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

THOMAS EDWARD JENNINGS JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Henry County, Cynthia H. Danielson, Judge.

Thomas Jennings appeals from judgments and sentences imposed upon convictions for willful injury resulting in serious injury, assault on persons engaged in certain occupations, and interference with official acts. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Bradley M. Bender, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, Edward Harvey, County Attorney, and Darin Stater, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Potterfield and Danilson, JJ.

POTTERFIELD, J.

Thomas Jennings appeals from judgments and sentences imposed following his convictions for willful injury resulting in serious injury, assault on persons engaged in certain occupations, and interference with official acts.

I. Background Facts & Proceedings

A jury could find the following facts. Thomas Jennings moved into a house in Winfield next door to the home of Debora Wilkerson and her daughters. On June 21, 2008, Wilkerson's daughters and niece, Jennings's stepson, and another boy rode together on Wilkerson's golf cart. They were involved in an accident that damaged the cart and injured some of the children. There was some question about which of the children was driving the cart. They pushed it to Jennings's garage.

Wilkerson called her friend, Barbara Chaney, a registered nurse, to come look at the children's injuries. Barbara Chaney arrived at Wilkerson's house with her husband, John Chaney, Winfield's chief of police.

Wilkerson and her sister, Diane Breon, went next door to Jennings's house to discuss the repair of the golf cart. Jennings initially wanted to try to repair the cart himself, but after learning that Breon's daughter had been driving the cart, he told Breon that she was responsible for the repairs. When Wilkerson continued to press the matter, Jennings told her to "get the fuck out of my garage, off my property" and to "[g]et the golf cart out of here." As Wilkerson and Breon attempted to push the damaged cart away, Jennings continued to yell at them.

Breon went back to Wilkerson's house to ask John Chaney for help. John Chaney arrived at Jennings's property, told Wilkerson and Breon to return to Wilkerson's house, and tried to calm Jennings. John Chaney, who was off duty and dressed in a t-shirt and

shorts, showed his badge or handcuffs to Jennings, but Jennings said he "did not care who the fuck he was." Jennings pushed Chaney, who tripped over a downspout and fell to the grass. Jennings began to hit Chaney in the chest and back. Chaney told the women that he needed help, "call 911."

Wilkerson went to her house to make the call. Barbara Chaney also telephoned 911. When Wilkerson and Barbara Chaney returned to Jennings's property, Chaney was back on his feet and telling Jennings he was going to be arrested. Jennings became "more excited, more mad." During the ensuing scuffle, Chaney again fell down, hitting the concrete floor of Jennings's garage. Jennings began punching Chaney, who appeared to be unconscious. After hitting Chaney several times, Jennings got up and walked away.

Chaney suffered multiple facial fractures, contusions, bruising of his lip and around his left eye, and two types of head bleeding—a subdural hematoma and a subarachnoid hemorrhage.

Jennings later told Henry County deputy sheriff Matthew Simpson that he had consumed a large quantity of alcohol that day. Jennings's version of the encounter was that Chaney initially talked to Jennings in a nice manner about the golf cart accident, but then started bumping Jennings's chest. Jennings told Simpson that Chaney pulled out his wallet, but Jennings explained that "he's had two tours in Iraq, and he would not look down at the wallet, because he knew that's how he would get sucker punched." Jennings stated that Chaney took several swings at him.

Jennings was charged with willful injury resulting in serious injury, in violation of Iowa Code section 708.4(1) (2007), assault on persons engaged in certain occupations, in violation of sections 708.1 and 708.3A(1), and interference with official acts, in violation

of section 719.1(1). Both Jennings and the State filed motions in limine, for which no ruling is on record.

Jennings was convicted as charged. His motions for new trial and for merger of the convictions were overruled.

At sentencing, the district court noted, "[Defense counsel] is correct in stating that the convictions on these three counts, although they do not end in a merger, do arise from the same facts and circumstances and many similar elements." The court also noted that though Jennings did not raise it in defense, he suffers from posttraumatic stress syndrome, which may have impacted the presentation of his case, and "perhaps this incident arose from an unwillingness to seek help and get help for the PTSD." The court imposed one ten-year and two five-year terms of imprisonment, to be served concurrently.

Jennings now appeals, contending the district court erred in overruling his objections to jury instructions, and in failing to merge the convictions of willful injury and assault on persons engaged in certain occupations. Jennings also contends trial counsel was ineffective in failing to obtain a ruling on the motions in limine.

II. Standard of Review & Discussion

A. Jury Instructions. Review of challenges to jury instructions is for the correction of errors at law. *State v. Carey*, 709 N.W.2d 547, 551 (Iowa 2006).

> We review jury instructions to decide if they are correct statements of the law and are supported by substantial evidence. The district court has a duty to instruct fully and fairly on the law regarding all issues raised by the evidence. The court may phrase the instructions in its own words as long as the instructions given fully and fairly advise the jury of the issues it is to decide and the law which is applicable.

State v. Liggins, 557 N.W.2d 263, 267 (Iowa 1996) (citations omitted). "Error in giving an instruction does not merit reversal unless it results in prejudice to the defendant." *State v. Fintel*, 689 N.W.2d 95, 99 (Iowa 2004).

The district court's marshalling instructions on assault on persons engaged in certain occupations and interference with official acts both required that the State prove that Jennings knew Chaney was a peace officer.[1] Jennings does not challenge those instructions, but he argues that additional instructions given by the court[2] informed the

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[1] Jury Instruction No. 21 provided:

> Under Count II of the Trial Information, the State of Iowa must prove all of the following elements of Assault on a Peace Officer with the Intent to Inflict Serious Injury:
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> 1. On or about the 21st day of June, 2008, the Defendant did an act meant to cause pain or injury to John D. Chaney.
> 2. The Defendant had the apparent ability to do the act.
> 3. The act was done with the specific intent to inflict a serious injury.
> 4. The Defendant knew that John D. Chaney was a peace officer.
> 5. The Defendant was not acting with justification.

And with respect to interference with official acts, Jury Instruction No. 25 reads:

> Under Count III of the Trial Information, the State of Iowa must prove all of the following elements of Interference With Official Acts Causing Serious Injury:
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> 1. On or about the 21st day of June, 2008, the Defendant knew John D. Chaney was a peace officer who was performing his lawful duty.
> 2. The Defendant knowingly resisted or obstructed John D. Chaney in the performance of his lawful duty.
> 3. The Defendant caused a serious injury to John D. Chaney.
> 4. The Defendant was not acting with justification.

[2] Jury Instruction No. 34 stated:

> A peace officer, while making a lawful arrest, is justified in the use of any force which the peace officer reasonably believes to be necessary to effect the arrest or to defend any person from bodily harm while making the arrest. However, the use of deadly force is only justified when a person cannot be captured any other way and either
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> 1. The person has used or threatened to use deadly force in committing a felony or
> 2. The peace officer reasonably believes the person would use deadly force against any person unless immediately apprehended.
>
> A peace officer making an arrest pursuant to an invalid warrant is justified in the use of any force which the peace officer would be justified in using if the warrant were valid, unless the peace officer knows that the warrant is invalid.

jury Chaney was a peace officer and was carrying out a lawful arrest. Jennings argues that "although derived from an accurate statement of the law," the given instructions nullified his defense; that is, that Chaney was acting as a friend of Debora Wilkerson and her sister, rather than in his capacity as a peace officer, and that Chaney was trespassing on defendant's property.[3]

The district court has a duty to instruct fully and fairly on the law regarding all issues raised by the evidence. *Liggins*, 557 N.W.2d at 267. The court must give an instruction if it "correctly states the law, has application to the case, and is not stated elsewhere in the instructions." *State v. Kellogg*, 542 N.W.2d 514, 516 (Iowa 1996).

Jennings was allowed to present evidence and argument in support of his justification defense and his claim that Chaney was not acting in his official capacity as a police officer. He concedes the instructions were accurate statements of the law, but argues that the instructions assume the official nature of Chaney's actions and so nullified his defense. The record reveals that counsel argued forcefully that Chaney was acting in an unofficial capacity. We find no error in the court's overruling Jennings's objections to the instructions.

B. Merger. Review of an alleged violation of the merger statute, Iowa Code section 701.9, is for the correction of errors at law. *State v. Lambert*, 612 N.W.2d 810, 815 (Iowa

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Jury Instruction No. 36 stated:

> A person is not authorized to use force to resist an arrest, either of the person's self, or another which the person knows is being made either by a peace officer or by a private person summoned and directed by a peace officer to make the arrest, even if the person believes that the arrest is unlawful or the arrest is in fact unlawful.

Jennings objected to the inclusion of these instructions. He did not propose a modification of either instruction.

[3] The district court rejected Jennings's proposed instruction on trespass. On appeal, Jennings does not contend the omission of the trespass instruction was error.

2000). To the extent defendant's claim has a constitutional dimension, review is de novo. *State v. Nail*, 743 N.W.2d 535, 538 (Iowa 2007).

The Iowa merger doctrine is expressed in Iowa Code section 701.9 and Iowa Rule of Criminal Procedure 2.6(2).[4] *See State v. Anderson*, 565 N.W.2d 340, 343 (Iowa 1997). Iowa Code section 701.9 codifies the double jeopardy protection against cumulative punishment. *State v. Halliburton*, 539 N.W.2d 339, 344 (Iowa 1995).

Iowa Code section 701.9 provides:

> No person shall be convicted of a public offense which is necessarily included in another public offense of which the person is convicted. If the jury returns a verdict of guilty of more than one offense and such verdict conflicts with this section, the court shall enter judgment of guilty of the greater of the offenses only.

Iowa Rule of Criminal Procedure 2.6(2) provides: "Upon prosecution for a public offense, the defendant may be convicted of either the public offense charged or an included offense, but not both."

To be considered a lesser-included offense, the lesser offense must be composed solely of some but not all elements of the greater offense. *State v. Jackson*, 422 N.W.2d 475, 478 (Iowa 1988). The supreme court in *Anderson,* 565 N.W.2d at 343, chronicles the evolution of the test for lesser-included offenses. In *State v. Jeffries*, 430 N.W.2d 728, 736 (1988), the supreme court decided to retain the strict statutory-elements approach ("the elements test") to lesser-included offenses. *Jeffries* was not a rejection of the "impossibility test," which provides one offense is a lesser-included offense of the greater when the greater offense cannot be committed without also committing the lesser. *State v. McNitt*, 451 N.W.2d 824, 825 (Iowa 1990). The trial court must determine if the

[4] Formerly Iowa Rule of Criminal Procedure 6(2).

elements of the greater offense are established, in the manner in which the State has sought to prove those elements, then the elements of any lesser offense have also necessarily been established. *State v. Turecek*, 456 N.W.2d 219, 223 (1990). It is not essential that the elements of the lesser offense be described in the statutes in the same manner as the elements of the greater offense. *Id.* In *State v. Steens*, 464 N.W.2d 874, 875 (Iowa 1991), the supreme court recognized that when there are alternative ways to commit an offense, the alternative submitted to the jury controls. Six years later, in *Anderson*, 565 N.W.2d at 344, the supreme court reaffirmed that "when a statute provides alternative ways of committing the offense, the alternative submitted to the jury controls."

Here, the elements of willful injury resulting in serious injury were stated in Instruction No. 16:

> 1. On or about the 21st day of June, 2008, the Defendant struck John D. Chaney.
> 2. The Defendant specifically intended to cause a serious injury to John D. Chaney.
> 3. John D. Chaney sustained a serious injury.
> 4. The Defendant was not acting with justification.

See Iowa Code § 708.4. Willful injury causing serious injury is a class "C" felony. *Id.* § 708.4(1).

The elements of assault on persons engaged in certain occupations were stated in Instruction No. 21:

> 1. On or about the 21st day of June, 2008, the Defendant did an act meant to cause pain or injury to John D. Chaney.
> 2. The Defendant had the apparent ability to do the act.
> 3. The act was done with the specific intent to inflict serious injury.
> 4. The Defendant knew that John D. Chaney was a peace officer.
> 5. The Defendant was not acting with justification.

See Iowa Code §§ 708.1, 708.3A. Assault on persons engaged in certain occupations with the intent to cause serious injury is a class "D" felony. *Id.* § ___.

Because the lesser offense includes an element not included in the former, that is, the defendant knew that John Chaney was a peace officer, it fails the impossibility test and, consequently, assault on persons engaged in certain occupations cannot be a lesser-included offense of willful injury resulting in serious injury. *See Jeffries*, 430 N.W.2d at 736 ("[I]f the lesser offense contains an element that is not part of the greater offense, the lesser cannot be included in the greater.")

Jennings argues this analysis is called into question by *State v. Hickman*, 623 N.W.2d 847, 851–52 (Iowa 2001). In *Hickman*, 623 N.W.2d at 852, the court concluded

> the words "purposely inflicts . . . a serious injury" under the first-degree robbery statute [section 711.2] and "intended to cause . . . serious injury" under the willful-injury statute [708.4], convey the same thought: the defendant intended to cause serious injury to the victim (specific intent), not just to do the act that resulted in serious injury (general intent). Under this analysis, it is impossible to commit first-degree robbery under the purposely-inflicts-serious-injury alternative without also committing willful injury.

Even when we "look beyond the strict elements test" as suggested by Jennings, we find nothing in *Hickman* that suggests the offenses at issue here merge. There is nothing in the willful injury elements that conveys any reference to police officers as a separate class of victim.

We conclude the district court did not err in failing to merge Jennings's convictions of willful injury resulting in serious injury and assault on persons engaged in certain occupations.

C. Ineffective Assistance of Counsel. Ineffective-assistance-of-counsel claims involve a constitutional challenge and therefore are reviewed de novo. *State v. Bentley*, 757 N.W.2d 257, 262 (Iowa 2008).

Jennings and the State filed motions in limine, but no ruling on the parties' motions appears in the record. The State's motion concerned two prior incidents in which Chaney was involved. Jennings's trial counsel did not question Chaney regarding those incidents. Jennings contends trial counsel was ineffective in failing to obtain a ruling on the motion in limine. We conclude the record is inadequate to evaluate this claim, and preserve the issue for possible postconviction proceedings. *See State v. Tate*, 710 N.W.2d 237, 240 (Iowa 2006).

III. Conclusion.

The district court did not err in its instructions to the jury and in failing to merge the convictions for willful injury and assault on persons engaged in certain occupations. The record is inadequate to address the defendant's ineffective-assistance-of-counsel claim.

AFFIRMED.