IN THE COURT OF APPEALS OF IOWA

No. 1-495 / 10-1535
Filed July 27, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ZACHARY KOLBERG,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Thomas N. Bower, Judge.

Kolberg appeals his convictions and sentences for burglary in the first degree and assault with the intent to commit sexual abuse. **REVERSED AND REMANDED FOR RESENTENCING.**

Mark C. Smith, State Appellate Defender, and Vidhya K. Reddy, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Brook Jacobsen, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Doyle and Danilson, JJ.

SACKETT, C.J.

Zachary Kolberg appeals his convictions and sentences for burglary in the first degree, in violation of Iowa Code sections 713.1 and 713.3 (2009) and assault with the intent to commit sexual abuse causing bodily injury, in violation of Iowa Code section 709.11. Kolberg asserts his conviction of assault with the intent to commit sexual abuse merges into his conviction of burglary in the first degree pursuant to Iowa Code section 701.9, and thus the district court imposed an illegal sentence by sentencing him on the assault conviction. In the alternative, Kolberg asserts he was denied effective assistance of counsel when his trial counsel failed to object to the sexual abuse jury instruction which he contends provided an incomplete definition. We find Kolberg's convictions do merge and reverse and remand for resentencing. Because we find in favor of Kolberg on the merger claim, Kolberg cannot establish prejudice under his ineffective-assistance-of-counsel claim.

I. BACKGROUND AND PROCEEDINGS. In the early morning hours of May 6, 2009, Paige Patten awoke to the sound of her bedroom door opening. She saw a male figure standing next to her bed with one hand in his pants, breathing heavily. He placed his other hand underneath the blanket and touched Paige's thigh. She attempted to scream, but the man covered her face with his hand and a pillow. He also reached down her shirt and touched her breast. The two struggled and landed on the floor of her bedroom. The man got on top of her, put his hands around her neck and started choking her. She also recalled hearing the man say, "Let me rape you." Paige believes she may have lost

consciousness during the struggle and the next thing she remembers is the light in the hallway turning on and her bedroom door opening.

Meanwhile, downstairs, Paige's parents were awakened by their dog barking aggressively. They left their downstairs bedroom and were attempting to calm the dog, when they both heard a thud upstairs. Fearing her daughter Paige maybe having a diabetic attack, Becky Patten headed up stairs and turned on the hallway light. She entered her daughter's bedroom to find a man on top of her daughter on the floor. She attempted to take hold of the man and started screaming for her husband. The intruder got free from Mrs. Patten, headed down the stairs, and attempted to open the front door which was locked.

Chuck Patten, hearing his wife's screams, grabbed the intruder and tackled him to the floor. While Mr. Patten was struggling with the man, Mrs. Patten came from behind and struck the man on the head with a crock causing a head wound. At this point the intruder's hat had been removed and both Mr. and Mrs. Patten recognized the intruder as Kolberg, a former boyfriend of Paige. Paige regained consciousness, came down the stairs, and recognized Kolberg as well.

The police were called and Kolberg was taken to the hospital for treatment of his head wound. It was discovered Kolberg had gained entry into the house by using a hidden key in the attached garage.

Paige was also taken to the hospital for an evaluation as she could not recall whether she had been sexually assaulted. It was later determined she had not been penetrated, but she did have red marks on her neck and she was

bleeding from her mouth. It was also discovered her blood sugar level was very high, which could explain the loss of consciousness during the struggle.

The State filed a trial information on June 8, 2009, charging Kolberg with first-degree burglary and assault with the intent to commit sexual abuse. The jury trial commenced on June 9, 2010, and the jury found Kolberg guilty as charged the following day. Kolberg did file a motion for a new trial and a motion in arrest of judgment asserting there was insufficient evidence to support his conviction and the State failed to preserve evidence that may have been exculpatory. These motions were denied at hearing and Kolberg does not claim on appeal this ruling was in error. Kolberg was sentenced September 13, 2010, to twenty-five years incarceration for the burglary conviction and five years for the assault with the intent to commit sexual abuse conviction. The sentences were to run consecutively.

Kolberg appeals claiming his conviction violates the double jeopardy clause of the federal and state constitutions as it punishes him twice for the same offense. He asserts assault with the intent to commit sexual abuse is a lesser-included offense of burglary in the first degree, and thus, pursuant to Iowa Code section 701.9, the conviction for the lesser offense is void. In the alternative, Kolberg asserts his counsel rendered ineffective assistance by failing to object to the jury instruction defining sexual abuse without referencing a "sex act."

II. SCOPE OF REVIEW. Our review of a claim of an illegal sentence due to a failure to merge convictions is for correction of errors at law. *State v. Anderson*, 565 N.W.2d 340, 342 (Iowa 1997). To the extent Kolberg claims his

constitutional rights were violated, our review is de novo. *State v. Daniels*, 588 N.W.2d 682, 683 (Iowa 1998). While Kolberg did not raise the issue of merger below, this is not fatal to his claim as a challenge to an illegal sentence can be raised at any time. *State v. Mulvany*, 600 N.W.2d 291, 293 (Iowa 1999).

III. MERGER. Iowa Code section 701.9 states,

> 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.

Kolberg claims the offense of assault with the intent to commit sexual abuse is "necessarily included" in the offense of burglary in the first degree as charged. The Iowa Supreme Court in *Anderson*, 565 N.W.2d at 344 agreed, and so do we.

We apply the legal elements tests for lesser-included offenses to determine whether merger is required under section 701.9. *State v. Bullock*, 638 N.W.2d 728, 729–34 (Iowa 2002). Under this test, we compare "the elements of both crimes to see whether it is possible to commit the greater offense without also committing the lesser." *State v. Lambert*, 612 N.W.2d 810, 815 (Iowa 2000). "If a crime may be committed in alternate ways, the alternative submitted to the jury controls the comparison." *Daniels*, 588 N.W.2d at 684.

Burglary in the first degree was submitted to the jury using the alternatives of having the specific intent to commit an assault or a felony and intentionally or recklessly inflicting bodily injury. *See* Iowa Code §§ 713.1, 713.3(c). Thus the marshalling instruction on burglary in the first degree established the following elements: (1) Kolberg entered the home, (2) the home was an occupied

structure, (3) one or more persons were present in the occupied structure, (4) the occupied structure was not open to the public, (5) Kolberg did not have permission or authority to enter the home, (6) Kolberg did so with the specific intent to commit an assault or the offense of sexual abuse, (7) during the incident Kolberg intentionally or recklessly inflicted bodily injury on Paige Patten. Sexual abuse was defined in part in the instructions to mean, "The act is done by force or against the will of the other."

The marshalling instruction on assault with the intent to commit sexual abuse causing bodily injury had the following elements: (1) Kolberg assaulted Paige Patten, (2) Kolberg did so with the specific intent to commit a sex act by force against the will of Paige Patten, and (3) Kolberg's assault caused a bodily injury to Paige Patten.

With the exception of charging both alternatives of having a specific intent to commit an assault and a specific intent to commit a felony[1], the instructions are identical to the instructions analyzed in *Anderson*, 565 N.W.2d at 344. The court in *Anderson* found the specific intent to commit sexual abuse under the burglary instruction, and the specific intent to commit a sex act under the assault instruction identical. 565 N.W.2d at 344. In addition, the court in *Lambert* reiterated "it would be impossible to commit first degree burglary by intentionally or recklessly injuring another without also committing assault." 612 N.W.2d at

---

[1] We see no reason to depart from the holding in *Anderson* based on this slight difference in jury instructions. Because the jury was not submitted a special interrogatory, we have no way to know whether they decided the case under the assault alterative or the felony alternative. Where it is impossible to determine which alternative the jury used and one alternative requires merger, merger is required. *Lambert*, 612 N.W.2d at 816.

816 (citing *State v. Peck*, 539 N.W.2d 170, 175 (Iowa 1995)). Thus, based on *Anderson*, we find the conviction for assault with the intent to commit sexual abuse is a lesser-included offense of burglary in the first degree. 565 N.W.2d at 344. Based on the way the State sought to prove the elements of these crimes, the elements of the lesser charge were established in the greater charge. As such, assault with the intent to commit sexual abuse merges into the burglary charge and the conviction and sentence on the assault charge is void. *Id*.

The State seeks for us to find the *Anderson* decision is an anomaly that "drifted away, without explanation, from the *Webb* analysis." The *Webb analysis* is derived from the case of *State v. Webb*, 313 N.W.2d 550, 552 (Iowa 1981), where the supreme court established a distinction between "alternative ways of committing an offense" and "alternative enumerated definitions of an offense." The State urges us to analyze the "alternative enumerated definitions of an offense" when applying the lesser-included offense test and not the "alternative ways" as the court in *Anderson* did. The alternative definitions of the offense of burglary in the first degree include having the intent to commit an assault, intent to commit a felony, or intent to commit a theft. The State asserts under *Webb* there are many "alternative ways" to commit burglary under the "intent to commit a felony" alternative definition. Because it is possible to commit burglary under the alternative definition of "intent to commit a felony" without also committing sexual abuse, the State asserts the two offenses do not merge and we should overrule *Anderson*.

We first note the court in *Webb* was not attempting to apply the merger doctrine when it developed the "alternative ways" and "alternative definitions" distinction. 313 N.W.2d at 552. Instead, the court was attempting to determine whether the crime of involuntary manslaughter was a forcible felony. *Id*. at 551–52. In addition, we find *Anderson* controlling in this case and we leave the task of overruling precedent to the Iowa Supreme Court. *See State v. Eichler*, 248 Iowa 1267, 1270, 83 N.W.2d 576, 578 (1957) ("If our previous holdings are to be overruled, we should ordinarily prefer to do it ourselves."); *State v. Hastings*, 466 N.W.2d 697, 700 (Iowa Ct. App. 1990) ("We are not at liberty to overturn Iowa Supreme Court precedent."). Based on *Anderson*, we find the conviction for assault with the intent to commit sexual abuse must be reversed as it merged with the conviction for burglary in the first degree and the case remanded for resentencing.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL. Kolberg also asserts his trial counsel rendered ineffective assistance when he failed to object to the jury instruction defining sexual abuse. The instruction omitted the reference to a "sex act" instead defining sexual abuse in part as, "The act is done by force or against the will of the other." The term "sex act" was properly defined in another instruction, but without a reference to "sex act" in the sexual abuse definition, Kolberg asserts the jury would not have known that he had to have the specific intent to perform one of the enumerated sex acts when they determined he had the specific intent to commit sexual abuse under the burglary charge.

To sustain a claim for ineffective assistance of counsel, Kolberg must establish counsel failed to perform an essential duty and prejudice resulted. *Anfinson v. State*, 758 N.W.2d 496, 499 (Iowa 2008). If either element is not met, the claim will fail. *Id.* To demonstrate prejudice, the defendant must show that "but for the counsel's unprofessional errors, the result of the proceeding would have been different." *Id*.

Kolberg concedes and we agree that our decision above, finding the intent elements in the burglary and the assault instructions identical, cures any defect caused by the omission of the term sex act in the sexual abuse definition. Sex act was properly referenced and defined in the specific intent element in the assault with the intent to commit sexual abuse marshalling instruction. Based on *Anderson*, the two specific intent elements under burglary and assault are identical. 565 N.W.2d at 344. The jury had to find Kolberg had the specific intent to commit a sex act under the assault charge when it found him guilty of that offense, and thus, Kolberg cannot establish there would have been a different outcome had the instruction properly contained the term "sex act" in the definition of sexual abuse. Because Kolberg cannot establish prejudice as a result of the error, his claim for ineffective assistance must be denied.

REVERSED AND REMANDED FOR RESENTENCING.