IN THE COURT OF APPEALS OF IOWA

No. 1-519 / 09-1815
Filed July 27, 2011

JOHN SHIMKO,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

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

A postconviction relief applicant alleges his trial attorney was ineffective in failing to adequately explain a plea offer and his appellate counsel was ineffective in failing to argue a constitutional basis for his juror claim. In his pro se brief, the applicant also contends he should have been allowed to argue an intoxication defense, the district court erred in not merging his convictions, and the convictions were not supported by sufficient evidence. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Philip B. Mears of Mears Law Office, Iowa City, and Eric Tindal, Williamsburg, for appellant.

John Shimko, Anamosa, pro se.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, Adam D. Parsons, County Attorney, and David L. Matthews, Assistant County Attorney, for appellee.

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

DANILSON, J.

Shimko appeals an adverse ruling after a trial upon his application for postconviction relief. He raises various claims and we affirm on all, except one. We agree the offense of assault causing serious injury is a lesser-included offense of willful injury as instructed and his conviction for assault causing serious injury must be vacated.

The facts reflect that John Shimko had an altercation with a would-be rival for a woman's affections. Prior to the altercation, Shimko told the woman he was going to "stick" his rival. During the altercation, a witness heard Shimko say to the other man, "I will shank you." The other man was beaten and suffered large cuts to his neck and chest and a fractured skull; his injuries were life threatening. Shimko claimed the other man came at him with a knife and he was defending himself. The victim underwent two surgeries and has permanent scars.

As a result of the altercation, Shimko was charged with attempted murder, willful injury, going armed with intent, assault causing serious injury, and carrying weapons. Prior to trial, the State offered a proposed plea agreement. The proposal noted the defendant faced a possible sentence of forty-seven years in prison if the sentences were run consecutively, and if he was convicted of attempted murder, he would not be eligible for parole until serving seventeen and one-half years. The State offered to dismiss the attempted murder charge if Shimko would plead guilty to willful injury and any one of the remaining class D felonies. Shimko's attorney believed the plea was extremely advantageous and was surprised when Shimko decided not to take the deal. Counsel took the unusual action adding the following language to the bottom of the proposed plea

agreement, which then was signed by Shimko: "The proposed plea agreement—explained by my counsel with special notation is rejected by the individual defendant."

Following a jury trial, John Shimko was found guilty of attempted murder, willful injury, going armed with intent, assault causing serious injury, and carrying weapons. In its ruling on the motion for new trial, the district court addressed Shimko's challenge to juror David Moore, finding the juror did not have an ongoing or current business relationship with the prosecutor and had specifically stated there was nothing that would prevent him from being fair and impartial. The district court also ruled "[t]here was absolutely no evidence of intoxication" and consequently there was no basis for the defendant's request for an instruction on an intoxication defense. Finally, the district court rejected the defendant's claim that the evidence did not support the verdicts. The court wrote:

> In particular, the defendant points out that there was limited evidence concerning a weapon in this case. The defendant was found guilty of two crimes involving a weapon, (1) going armed with intent, and (2) carrying a weapon. The circumstantial evidence produced at trial clearly establishes that there had to be a knife involved in the altercation. The evidence is that the victim suffered serious stab wounds. Those injuries had to be inflicted by a weapon. As a result, there had to be a weapon involved. The jury found that the defendant inflicted injuries upon the victim and, as a result he would have been armed with and carrying the weapon used to inflict the injuries. *There was overwhelming evidence of the defendant's guilt on the offenses based on the eyewitness testimony, as well as the recorded telephone statements of the defendant made prior to the event occurring.* As a result, the court concludes that the verdict was not contrary to the evidence produced at trial.

(Emphasis added.)

On appeal this court affirmed. We found the trial court did not abuse its discretion in denying a motion to strike a juror for cause and substantial evidence supported the convictions. *See State v. Shimko*, No. 05-1758 (Iowa Ct. App. Oct. 25, 2006).

Shimko applied for postconviction relief raising claims of ineffective assistance of trial and appellate counsel. He alleged his trial attorney was ineffective in failing to: (1) effectively explain the intricacies of the law governing the justification defense and, as a result, Shimko could not adequately evaluate the plea offer; (2) develop the victim's motive for assaulting Shimko; (3) use a peremptory strike to remove a client of the prosecutor from the jury; and (4) introduce the victim's criminal record to impeach him. Shimko also asserted appellate counsel was ineffective in failing to develop a constitutional basis for striking the juror. In a separate pro se filing Shimko contended appellate counsel should have urged he was entitled to an intoxication defense; trial and appellate counsel should have argued his convictions merged "as they are in violation of double jeopardy principles"; trial counsel was ineffective in not filing a motion in limine to determine what prior convictions were admissible for impeachment purposes, which may have affected his decision not to testify; defendant had been deprived of making an informed decision as to whether to testify; and trial counsel was ineffective in not challenging the sufficiency of the evidence in several specifics. The State sought summary disposition. The district court noted the victim had no prior convictions, so trial counsel could not be ineffective in failing to introduce such evidence. The motion for summary disposition was otherwise denied.

Following a hearing, the district court found that three of Shimko's ineffectiveness claims were raised and adjudicated on direct appeal[1] and could not be relitigated in postconviction proceedings. *See Washington v. Scurr*, 304 N.W.2d 231, 234 (Iowa 1981) ("Postconviction relief is not a means for relitigating claims that were or should have been properly presented at trial or on direct appeal."). The court addressed each of Shimko's remaining pro se claims and those raised by counsel and denied relief. This appeal followed.

With the exception of all but one issue, we conclude the district court thoroughly discussed Shimko's claims and correctly applied the law. Further discussion of those issues would be of no value. *See* Iowa Ct. R. 21.29(1)(*d*), (*e*).

However, "Iowa Code section 701.9 requires the merger of lesser included offenses."[2] *State v. Halliburton,* 539 N.W.2d 339, 343 (Iowa 1995). "This statute codifies the double jeopardy protection against cumulative punishments. If the Double Jeopardy Clause is not violated because the legislature intended double punishment, section 701.9 is not applicable and merger is not required." *Id.* at 344 (citations omitted). "[I]n deciding whether a punishment is constitutionally permissible under the Double Jeopardy Clause, we look to what punishment the

---

[1] Those claims were that trial counsel was ineffective because he (1) failed to use a preemptory strike to remove the juror, and (2) failed to argue the insufficiency of the evidence in the motion for judgment of acquittal, and (3) failed to argue the insufficiency of the evidence in the motion for new trial.

[2] 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.

legislature intended to impose." *Id.*; *see also State v. Lambert*, 612 N.W.2d 810, 815 (Iowa 2000).

Shimko argues his convictions for assault causing serious injury and willful injury are lesser-included offenses of attempt to commit murder and thus must merge with the greater offense.

Review of an alleged violation of the merger statute is for the correction of errors at law. *Lambert,* 612 N.W.2d at 815. To the extent Shimko's claim has a constitutional dimension, review is de novo. *State v. Nail,* 743 N.W.2d 535, 538 (Iowa 2007).

We first note that our supreme court has concluded that willful injury is not a lesser-included offense of attempted murder, and conviction for both arising from the same course of conduct does not violate a defendant's rights under the Double Jeopardy Clause. *State v. Clarke*, 475 N.W.2d 193, 195-96 (Iowa 1991) ("Application of the legal elements test plainly demonstrates that willful injury is not a lesser-included offense of attempted murder [because proof of serious injury is required for willful injury but not attempted murder]. No reason appears to depart from the legal elements test in the present case just because both offenses arise out of the same course of conduct by the defendant. . . . No violation of the defendant's claimed rights under the double jeopardy clause occurred."). Consequently, we conclude Shimko's willful injury conviction does not merge with his attempted murder conviction.

We turn to his claim that assault causing a serious injury is a lesser-included offense of attempted murder and/or willful injury.[3] 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 *State v. Anderson,* 565 N.W.2d 340, 343 (Iowa 1997), 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*, however, 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. *See State v. Braggs*, 784 N.W.2d 31, 36-37 (Iowa 2010) (finding it "impossible to commit attempted murder without also performing an act which meets the statutory definition of an assault under section 707.1"). Consequently,

> [t]he trial court must determine whether if the 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

[3] The State seeks to uphold the assault causing serious injury conviction by arguing the jury could have found Shimko committed numerous assaults, but offers no supporting authority for the argument. It is therefore deemed waived. Iowa R. App. P. 6.903(2)(*g*)(3). Further, the case was presented as one continuous course of conduct rather than claiming each blow or knife cut constituted separate crimes. *See, e.g., State v. Walker*, 610 N.W.2d 524, 527 (Iowa 2000) (requiring an independent factual basis for each plea and conviction).

ways to commit an offense, the alternative submitted to the jury controls. *See Anderson,* 565 N.W.2d at 344 ("[W]hen a statute provides alternative ways of committing the offense, the alternative submitted to the jury controls.").

Here, the court listed the following elements of attempt to commit murder, willful injury, and assault causing a serious injury (listed from left to right):

1. On or about the 3rd day of September, 2004, the defendant assaulted Robert Gray with a knife. 2. By his acts, the defendant expected to set in motion a force or chain of events which would have caused or resulted in the death of Robert Gray. 3. When the defendant acted, he specifically intended to cause the death of Robert Gray. 4. The Defendant was not acting with justification.	1. On or about September 4 [sic], 2004, the defendant stabbed Robert Gray with a knife or struck him. 2. The defendant specifically intended to cause serious injury to Robert Gray. 3. Robert Gray a sustained serious injury. 4. The defendant was not acting with justification.	1. On or about the 3rd day of September, 2004, the defendant did an act which was intended to cause pain or injury to Robert Gray. 2. The defendant had the apparent ability to do the act. 3. The defendant's act caused a serious injury to Robert Gray. 4. The defendant was not acting with justification.

Here, assault causing a serious injury is not a lesser-included offense of attempt to commit murder because there is no requirement that the defendant suffer a serious injury for the commission of attempt to commit murder. *See Clarke*, 475 N.W.2d at 195-96. However, assault causing serious injury is a lesser included offense of willful injury as instructed. It is impossible to commit willful injury as instructed without committing the offense of assault causing serious injury. We agree with Shimko his conviction for assault causing serious injury merged and entry of judgment on the conviction was error. *See Lambert*, 612 N.W.2d at 816. We reject his claims with respect to his convictions for

carrying a concealed weapon and going armed with intent as they contain elements not included in the other offenses.[4]

We therefore reverse the district court's ruling to the extent it found no error in the failure to merge the applicant's conviction for assault causing serious injury. We reject the district court's ruling that because concurrent sentences were imposed, Shimko suffered no prejudice. *See Rutledge v. United States*, 517 U.S. 292, 302, 116 S. Ct. 1241, 1248, 134 L. Ed. 2d 419, 429 (1996) ("'The second conviction, whose concomitant sentence is served concurrently, does not evaporate simply because of the concurrence of the sentence. The separate *conviction*, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored.'" (citation omitted)). Here one clear adverse consequence incurred by Shimko was the obligation to pay a $750 fine plus applicable surcharges for the offense of assault causing serious injury. Because of the adverse consequences, Shimko's trial counsel and appellate counsel were ineffective in their failure to raise this issue in prior proceedings.

We remand with directions to reverse Shimko's conviction for assault causing serious injury, vacate the sentence imposed, and issue an order dismissing Count IV—the charge of assault causing serious injury.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

[4] Going armed with intent required a finding that the knife was a dangerous weapon (not all knives are necessarily dangerous weapons, *see* Iowa Code section 702.7). The carrying weapons charge required the jury to find the knife was concealed, which was not a required element of going armed with intent.