

IN THE COURT OF APPEALS OF IOWA

No. 2-049 / 10-1160
Filed February 29, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

SCOTTIE L. SCOTT,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Todd A. Geer,
Judge.

A defendant contends that the district court erred in failing to merge two of his convictions, that the record contains insufficient evidence to support his convictions, and that the court erred in sentencing him to consecutive terms of imprisonment. **AFFIRMED.**

Victoria D. Noel of Noel Law Firm, P.C., Maquoketa, for appellant.

Scottie L. Scott, Anamosa, appellant pro se.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Thomas J. Ferguson, County Attorney, Kimberly A. Griffith, Assistant County Attorney, and Ernie Rose, Student Legal Intern, for appellee.

Considered by Vaitheswaran, P.J., and Tabor and Mullins, JJ.

VAITHESWARAN, P.J.

The State charged Scottie Scott with (1) willful injury, (2) domestic abuse assault with the intent to inflict a serious injury, (3) going armed with intent, and (4) assault while participating in a felony. The district court found him guilty of all four crimes but merged the sentences for the last two.

On appeal, Scott's attorney asserts "[t]he trial court erred in not merging the sentences for Count I and Count II at the time of sentencing." She also contends that the evidence was insufficient to support the district court's findings of guilt. In a pro se brief, Scott raises the following issues: (1) "the State erred by alleging counts that are the lesser included offense of and for the same offense as other counts"; (2) "the State erred by alleging counts that do not apply"; (3) "the court erred by approving a trial information consisting of counts that are the lesser-included offense of and/or the same offense as other counts"; (4) "the court erred by returning a verdict of guilty on either or both counts one and two and by entering consecutive sentences thereof"; and (5) "the court erred by returning a verdict of guilty on either or both counts three and four and by entering sentence thereof."

I. Merger

The primary question on appeal is whether Count II, domestic abuse assault with the intent to inflict a serious injury, merged with Count I, willful injury. This encompasses the first issue raised by counsel and the first, third, and possibly fourth issues raised by Scott in his pro se brief.

Iowa Code section 701.9 (2007) 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.

“In determining whether a lesser offense is included in a greater one, we look to the elements of each and determine if the greater offense can be committed without also committing the lesser offense.” *State v. Hickman*, 623 N.W.2d 847, 850 (Iowa 2001).

The district court stated that, to prove willful injury, the State would have to establish that (1) Scott assaulted his girlfriend, (2) Scott specifically intended to cause his girlfriend serious injury, and (3) Scott’s girlfriend sustained serious injury. See Iowa Code § 708.4. The court stated that, to prove domestic abuse assault with the intent to inflict a serious injury, the State would have to prove that (1) Scott assaulted his girlfriend, (2) Scott had the apparent ability to do the act, (3) Scott intended to cause serious injury to his girlfriend, and (4) “[t]he act occurred between family or household members who resided together at the time of the incident or persons who have been family or household members residing together within the past year.” See *id.* § 708.2A.

It is clear that willful injury may be committed without committing domestic abuse assault with the intent to inflict a serious injury, as willful injury does not require a family or household relationship. See *State v. Rodriguez*, 636 N.W.2d 234, 247 (Iowa 2001). For this reason, domestic abuse assault with the intent to inflict a serious injury is not “necessarily included” in the willful injury conviction,

and the district court did not err in entering separate judgments and sentences for each crime. See *id.*

II. Sufficiency of the Evidence

The next question raised is whether the record contains sufficient evidence to support the district court's findings of guilt. This encompasses the second issue in the brief of Scott's attorney and the second, possibly the fourth, and the fifth issues contained in Scott's pro se brief. Our review is for errors of law. *State v. Hennings*, 791 N.W.2d 828, 832 (Iowa 2010). We will affirm findings of guilt that are supported by substantial evidence. *Id.*

The district court made detailed findings of fact supporting the elements of each of the charged crimes. In pertinent part, the court stated:

The defendant had resided with [his girlfriend] "off and on" for approximately one year. . . .

[Scott's girlfriend] heard the defendant coming up the stairs making a "growling" noise. Defendant appeared at the bedroom doorway with a "crazy" look on his face, still growling. Defendant had a large knife in his hand, and began walking toward [her] hacking or chopping toward her with a knife. [Scott's girlfriend] was scared and asked defendant to stop as he continued to approach her. Defendant continued to approach, and [Scott's girlfriend] leaned against her window near her bed. She curled up into a semi-fetal position and tried to break the window, but was unable to get out of the bedroom. She saw blood, but did not know at first that she had been cut by the knife. She collapsed on the bed, lost sensation, and defendant persisted in cutting her and growling at her. . . .

During the course of the altercation, and before defendant came back into the room with a knife, defendant struck [his girlfriend] several times with the nightstick he generally keeps on his person. . . . [His girlfriend] suffered multiple lacerations, including a severe laceration to her knee area. Her patellar tendon was severed, and the laceration extended into the knee joint itself. [Her] injuries were consistent with the slicing motion described by

[her], and the knife described by [her], which was found at the scene. [Her] wounds were described by medical personnel as wounds appearing to be defensive. . . . [She] continues to suffer pain and some physical limitation from the injuries inflicted by Defendant.

These findings are supported by the testimony of Scott's girlfriend, who the district court found "extremely credible and reliable." We give weight to that credibility finding. See *State v. Dalton*, 674 N.W.2d 111, 118 (Iowa 2004). In addition, other witnesses corroborated key aspects of her testimony. We conclude this evidence amounts to substantial evidence in support of the district court's findings of guilt.

III. Consecutive Sentences

The district court ordered Count II (domestic abuse assault with the intent to inflict a serious injury) to be served consecutively to the concurrent sentences imposed on Counts I and III. Scott makes passing reference to the court's imposition of consecutive sentences but does not assert the nature of the claimed error or cite authority. Accordingly, we find the issue waived. Iowa R. App. P. 6.904(2)(g)(3).

AFFIRMED.

Tabor, J., concurs; Mullins, J., specially concurs.

MULLINS, J. (concurring specially)

I respectfully concur specially.

Count II of the trial information was captioned “Assault Domestic Abuse Causing Serious Injury.” It alleged that the defendant “did: assault [S.T.], a person with whom he resides and inflicted serious injury or used or displayed a dangerous weapon; Contrary to and in violation of Section § 708.2A(2)(c) of the Iowa Criminal Code.” Iowa Code section 708.2A(2)(c) defines the crime of “domestic abuse assault . . . with the intent to inflict a serious injury upon another, or if the person uses or displays a dangerous weapon in connection with the assault.” There is no crime in Iowa defined as “domestic abuse assault causing serious injury.”

Although the trial court identified the proper elements of the offense in its findings of fact, conclusions of law and ruling, and found the defendant guilty of Count II based on those elements, throughout the ruling the court identified the crime as “causing serious injury” not “with intent to cause serious injury.” This misidentification was not challenged by the defendant at the trial court nor has it been raised on appeal. Presumably, the State intended to charge the defendant as the crime is defined in section 708.2A(2)(c), and apparently the defendant understood the crime for which he was charged and tried. See *State v. Davison*, 245 N.W.2d 321, 322–23 (Iowa 1975). He should have been found guilty of domestic abuse assault with intent to inflict serious injury.

I would affirm the convictions and sentence, but remand for correction of the judgment for Count II.