IN THE COURT OF APPEALS OF IOWA

No. 2-168 / 11-0513
Filed June 27, 2012

JONATHAN MEMMER,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Johnson County, Nancy A. Baumgartner, Judge.

Jonathan Memmer appeals from the denial of his application for postconviction relief. **AFFIRMED.**

Mark C. Meyer, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Janet M. Lyness, County Attorney, and Andrew B. Chappell, Assistant County Attorney, for appellee State.

Heard by Vaitheswaran, P.J., and Doyle and Danilson, JJ.

DOYLE, J.

In 2001, a jury found Jonathan Memmer guilty of two counts of first-degree murder. Memmer appealed. In our decision we summarized the facts as follows:

> Two women were brutally murdered, their bodies later found in a burning apartment building in Iowa City. Numerous people observed Memmer in the vicinity of the apartment complex and earlier with the women at drinking establishments. At trial, several witnesses testified to observing Memmer in the days before and after the murders.

State v. Memmer, No. 01-1869, 2003 WL 21542489, at *1 (Iowa Ct. App. July 10, 2003). Rejecting Memmer's claims of district court error, we affirmed Memmer's convictions and preserved his ineffective-assistance-of-counsel claims for postconviction proceedings. *Id*. at *2.

In April 2004, Memmer filed his application, later amended, for postconviction relief (PCR) asserting thirteen claims of ineffective assistance of counsel. Following a trial on his application, the PCR court entered its order denying and dismissing Memmer's application. This appeal followed.

Memmer reasserts two claims raised before and decided by the PCR court: Trial counsel was ineffective for failing to object to the felony-murder related jury instructions and to evidence and statements Memmer deemed prejudicial, inadmissible, or unreliable. Upon our de novo review of these issues, *see Castro v. State*, 795 N.W.2d 789, 792 (Iowa 2011), we conclude the PCR court thoroughly discussed Memmer's claims and correctly applied the law.[1]

[1] Regarding the PCR court's resolution of Memmer's felony-murder-instruction claims, as indicated above, we agree with the court's reasoning, application of law, and conclusions, and so affirm. But even if we had not agreed, we would have affirmed on another basis. *See, e.g*., *Sims v. NCI Holding Corp*., 759 N.W.2d 333, 341 (Iowa 2009) ("[A]lthough our rationale differs from that of the district court, we reach the same result,

Further discussion of those issues would be of no value. *See* Iowa Ct. R. 21.29(1)(d), (e).

Additionally, Memmer asserts on appeal one new claim not raised before the PCR court: That his sentences of life in prison without parole are illegal because the jury did not make a finding that the acts that caused the death of each victim were committed separate from the acts constituting the underlying forcible felony. Specifically, he argues:

> The jury was not elsewhere instructed that they must find that the infliction of bodily injury during the burglary must be independent of the homicide. Because the jury did not make a separate-acts finding in connection with the felony-murder offense, [he] has been illegally sentenced to consecutive terms of life in prison for the enhanced offense of murder in the first degree. In other words, the jury was not instructed that there must be separate acts underlying the murder and the associated felony, and thus, the jury did not find, beyond a reasonable doubt, the facts necessary to enhance the offense to murder in the first degree and thereby increase the statutory maximum sentence from fifty years [Iowa Code §§ 707.1 & 707.3] to life without parole. [Iowa Code §§ 707.2(2) & 902.1].

"A claim that a sentence is illegal goes to the underlying power of the court to *impose* a sentence, not simply to its *legal validity*." *Veal v. State*, 779 N.W.2d 63, 65 (Iowa 2010) (emphasis added). The purpose of allowing review of an

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and therefore affirm."). The felony-murder alternative for each of the marshalling instructions provided essentially as follows: That on March 18, 1999, Memmer struck the victim; the victim died as a result of being struck; Memmer was acting with malice aforethought; and at the same time, Memmer was participating in the offense of burglary in the first degree. As an element of first-degree burglary, the jury was instructed: "On or about the 16th day of March, 1999, [Memmer] broke into [the apartment]." The use of the phrase "on or about the 16th day of March" was not fatal and could well include a break-in occurring on March 18, 1999, the date of the murders. *See e.g.*, *In re J.A.L.*, 694 N.W.2d 748, 755 (Iowa 2005) (finding there was no fatal variance between delinquency petition and the proof offered); *State v. Young*, 172 N.W.2d 128, 129 (Iowa 1969) (holding information charging defendant with statutory rape on June 15, 1968, did not prevent defendant from being convicted for rape on June 22, 1968, when the evidence admitted showed the statutory rape occurred on June 22, 1968).

"illegal sentence" is "not to re-examine errors occurring at the trial or other proceedings prior to the imposition of the sentence." *State v. Bruegger*, 773 N.W.2d 862, 871-72 (Iowa 2009). Rather, its purpose is only to correct a truly illegal sentence. *Id*. Thus, where "the claim is that the *sentence itself is inherently illegal*, whether based on constitution or statute, . . . the claim may be brought at any time." *Id*. at 872 (emphasis added); *see also* Iowa R. Crim. P. 2.24(5)(a).

Memmer was convicted of two counts of first-degree murder, a class "A" felony. *See* Iowa Code § 707.2 (1999). Pursuant to Iowa Code section 902.1, he received two mandatory life sentences. Memmer does not contend his sentences were outside the statutory range for first-degree murder or that impermissible factors were considered in sentencing. Instead, he argues that pursuant to the holdings in *State v. Heemstra*, 721 N.W.2d 549, 558 (Iowa 2006), and *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), the failure to include separate instructions requiring the jury to find him guilty of the predicate felony offense, first-degree burglary, beyond a reasonable doubt resulted in an illegal sentence of "consecutive terms of life in prison for the enhanced offense of murder in the first degree." We find his newly asserted claim is simply his prior ineffective-assistance-of-counsel claim recast. We have already affirmed the PCR's ruling on that issue. Nevertheless, even if his claim was truly an illegal sentence claim, his arguments regarding *Heemstra* and *Apprendi* fail.

Our supreme court in *Heemstra* held that "if the act causing willful injury is the same act that causes the victim's death, the former is merged into the murder and therefore cannot serve as the predicate felony for felony-murder purposes."

721 N.W.2d at 558. The supreme court has expressly ruled that *Heemstra*, decided after Memmer's convictions, is not retroactive. *State v. Ragland*, 812 N.W.2d 654, ___ (Iowa 2012); *Goosman v. State*, 764 N.W.2d 539, 545 (Iowa 2009) ("[T]he limitation of retroactivity announced in *Heemstra* to cases on direct appeal where the issue has been preserved did not violate federal due process.").

In *Apprendi*,

> the Supreme Court effectively eliminated the distinction between "elements" and "sentencing factors," calling the distinction "novel and elusive." The Court held "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."

State v. Helmers, 753 N.W.2d 565, 568 (Iowa 2008) (internal citations omitted). If Memmer argues the jury was not properly instructed on an element of the crime, this would appear to be a challenge to the conviction, and we do not re-examine alleged trial errors. *See*, *e.g.*, *People v. Davis*, 909 N.E.2d 766, 782 (Ill. 2009) ("Accordingly, we hold that the instant felony-murder instruction, even if erroneous, was a typical trial error that did not amount to a structural defect that required automatic reversal."). Regardless, the jury was so instructed here: "The burden is on the State to prove [Memmer] guilty beyond a reasonable doubt," and "[t]he presumption of innocence remains on the defendant throughout the trial unless the evidence establishes [Memmer's] guilty beyond a reasonable doubt." The jury was instructed to "consider all of the instructions together." The first-degree murder instructions, although setting forth two alternative theories, stated:

> If the State has proved all of the numbered elements of Paragraph A [setting forth the four elements of first-degree-premeditated murder], or if the State has proved all of the numbered elements of Paragraph B [setting forth the four elements of first-degree-felony murder], [Memmer] is guilty of Murder in the First Degree . . . .

One of the elements of felony murder was that Memmer "was participating in the offense of Burglary in the First Degree." That crime's elements were laid out in another instruction. We presume the jury followed the instructions given. *See State v. Simpson*, 438 N.W.2d 20, 21 (Iowa 1989). Moreover, once the jury found Memmer guilty of two counts of first-degree murder, Iowa Code section 902.1 mandated the court to impose two mandatory life sentences; the court did not enhance Memmer's sentence. Consequently, the requirements of *Apprendi* were satisfied in this case.

For all of these reasons, we affirm the judgment of the PCR denying and dismissing Memmer's PCR application.

AFFIRMED.