IN THE COURT OF APPEALS OF IOWA

No. 2-507 / 11-1480
Filed August 8, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LAWRENCE SONI,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Robert A. Hutchison, Judge.

Defendant appeals from his conviction and sentencing for assault and willful injury causing bodily injury. **AFFIRMED AS MODIFIED.**

Susan R. Stockdale, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, John P. Sarcone, County Attorney, and Jeff Noble and Frank Severino, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Tabor and Bower, JJ.

VOGEL, P.J.

The defendant, Lawrence Soni, appeals his convictions for assault, in violation of Iowa Code sections 708.1 and 708.2(5) (2009), and willful injury causing bodily injury, in violation of Iowa Code section 708.4(2). Soni was sentenced to imprisonment for a period not to exceed five years on the willful injury conviction and thirty days for the assault conviction; the sentences were to run concurrently. Soni asserts a faulty jury instruction on reasonable doubt caused prejudice, there was insufficient evidence to support the verdict on the willful injury charge, the two convictions should have merged, and his prison sentence should have been suspended. For the reasons stated below, we affirm Soni's conviction for willful injury causing bodily injury. However, as we find the assault conviction should have merged with the willful injury conviction, we merge the assault conviction and vacate the thirty-day sentence.

I. BACKGROUND AND PROCEEDINGS

On October 17, 2010, Soni loaned two dollars to a group of students at Lincoln High School, including Hernan Alvarez, to purchase marijuana. Soni loaned the money under the condition that he would have the opportunity to share the spoils from his financial contribution. The group, however, failed to share the marijuana with Soni. The following day, Soni, along with his cohort, Andre Lyle Jr., confronted Alvarez and his companions in a parking lot adjacent to the school. This encounter was recorded on a cell phone—part video, part only audio—which was later posted on Facebook. Alvarez returned Soni's two dollars and then started talking to another companion to purchase more marijuana. He placed the newly purchased marijuana in his pocket. Next,

without warning, Soni took a few steps and punched Alvarez on his right cheek, knocking him to the ground. Alvarez blacked out for approximately five seconds. Alvarez testified at trial that this punch "dislocated" his jaw, causing it to swell, preventing closure for a few weeks and causing it to lock when eating.

Once Alvarez was on the ground, the cell phone recording the encounter was put into a pocket and the remainder of the recording is audio only. When Alvarez regained consciousness, Lyle was standing on top of him, patting down his pockets, and inquiring where the recently purchased marijuana was. Alvarez resisted the search, and Lyle reacted by punching him in the left cheekbone. From the audio recording, what was identified as Lyle's voice is heard joyfully saying, "And I've got the rillo. We about to go blow."

The evidence of the level of Soni's continued involvement after his initial punch is conflicted. One witness testified that once Alvarez was on the ground Soni was just "standing there." Alvarez himself testified that after Soni hit him, Soni walked away. There is no evidence of Soni throwing any additional punches after the initial punch that knocked Alvarez to the ground. Soni's voice is not identified on the cell phone as having said anything after the initial punch was thrown.

Both Lyle and Soni were charged with robbery in the second degree. A second trial information was later filed charging Soni with willful injury causing bodily injury. After a joint trial on June 27, 2011, the jury found Lyle guilty as charged. As for Soni, on the robbery charge, the jury found him guilty of the lesser-included offense of assault, and guilty as charged on willful injury causing bodily injury. While the presentence investigation report recommended

supervised probation coupled with mental health and substance abuse treatment, the court found that Soni was a danger to the community with a limited ability to rehabilitate himself. Soni was sentenced to five years in prison on the willful injury conviction and thirty days on the assault conviction. Soni appeals these convictions and sentencing on multiple grounds.

II. JURY INSTRUCTION

Soni asserts the court erred in failing to give the reasonable doubt instruction he requested. We review challenges to jury instructions for correction of errors at law. *State v. Hanes*, 790 N.W.2d 545, 548 (Iowa 2010). "We review the related claim that the trial court should have given the defendant's requested instruction for an abuse of discretion." *State v. Marin*, 788 N.W.2d 833, 836 (Iowa 2010) (quoting *Summy v. City of Des Moines*, 708 N.W.2d 333, 340 (Iowa 2006)). Error in giving or refusing to give a particular instruction warrants reversal unless the record shows the absence of prejudice. *State v. Spates*, 779 N.W.2d 770, 775 (Iowa 2010).

The district court proposed and ultimately gave the 1973 model jury instruction:

> The burden is on the State to prove the defendant guilty beyond a reasonable doubt.
> A reasonable doubt is one that fairly and naturally arises from the evidence or lack of evidence produced by the State.
> If, after a full and fair consideration of all the evidence, you are firmly convinced of the defendant's guilt, then you have no reasonable doubt and you should find the defendant guilty.
> But if, after a full and fair consideration of all the evidence in the case, or from the lack of evidence produced by the State, you are not firmly convinced of the defendant's guilt, then you have a reasonable doubt and you should find the defendant not guilty.

This instruction has been expressly approved by the supreme court as being an adequate explanation of the law. *State v. McFarland*, 287 N.W.2d 162, 163 (Iowa 1980). Soni requested the district court use the model instruction adopted in March 2009. The only difference between the two instructions is the second paragraph, which was amended to read:

> A reasonable doubt is a doubt based upon reason and common sense, and not the mere possibility of innocence. A reasonable doubt is the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be proof of such convincing character that a reasonable person would not hesitate to rely and act upon it. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

The district court rejected Soni's proposed instruction, not because it was a misstatement of the law, but rather because it was contradictory to another instruction causing unnecessary confusion. Soni does not now contend that the old model instruction is an incorrect statement of law, but rather that the new model instruction is better because it provides more guidance than the old one.

Trial courts have rather broad discretion in the language that may be chosen to convey a particular idea to the jury. *State v. Grady*, 183 N.W.2d 707, 719 (Iowa 1971). "If an instruction correctly states the applicable law it will be deemed proper even though an alternative wording is possible." *State v. Morrison*, 368 N.W.2d 137, 175 (Iowa 1985). There is no error so long as the choice of words does not result in an incorrect statement of law or omit a matter essential for the jury's consideration. *Stringer v. State*, 522 N.W.2d 797, 800 (Iowa 1994). Because the instruction used by the district court has been held to be a correct statement of law, the jury was instructed according to the law and Soni cannot establish prejudice. *Cf. State v. Holtz*, 548 N.W.2d 162, 164 (Iowa

1996) (concluding that "no prejudice resulted from any error in failing to give the uniform instruction" when the given instruction was a correct statement of law). The district court did not abuse its discretion and reversal therefore is not warranted on this ground.

III. SUFFICIENCY OF THE EVIDENCE

Soni next contends there is insufficient evidence to support the verdict of willful injury causing bodily injury. He specifically challenges the second element: whether he "specifically intended to cause a serious injury."

We review challenges to the sufficiency of the evidence for errors at law. *State v. Spies*, 672 N.W.2d 792, 796 (Iowa 2003). The district court's findings of guilt are binding on appeal if supported by substantial evidence. *State v. Hansen*, 750 N.W.2d 111, 112 (Iowa 2008). Evidence is substantial if it would convince a rational trier of fact the defendant is guilty beyond a reasonable doubt. *Id.* The evidence is viewed in the light most favorable to the State, considering the entire record not merely the evidence supporting guilt. *State v. Sutton*, 636 N.W.2d 107, 110 (Iowa 2001).

The crime of willful injury causing bodily injury is defined in the Code as, "Any person who does an act which is not justified and which is intended to cause serious injury to another commits the following: . . . A class 'D' felony, if the person causes bodily injury to another." Iowa Code § 708.4(2). Soni argues he did not intend to cause serious injury and a person of common sense would not expect serious bodily injury from one blow to the jaw. "Serious injury" was defined for the jury as "a bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement or extended loss or impairment of

the function of any bodily part or organ." The law does not require proof a victim actually suffered serious injury to show the requisite intent to inflict serious injury. Iowa Code § 708.4(2).

Without determining whether a single punch is per se evidence of intent to inflict serious injury, we find that a rational trier of fact could find Soni had the requisite intent. Alvarez is significantly smaller and somewhat younger than both Soni and Lyle. Immediately before the punch, Alvarez was standing with his hands in his pockets, looking away from Soni. Taking a few steps in a "wind up" motion, Soni then punched Alvarez with enough force to knock Alvarez to the ground and render him briefly unconscious.

Intent, while seldom capable of direct proof, is ordinarily disclosed by all the circumstances attending the assault, together with all relevant facts and circumstances disclosed by the evidence. *State v. Bell*, 223 N.W.2d 181, 184 (Iowa 1974). The extent of injury may be taken into consideration in determining a defendant's intent. *Id.* (citing *State v. Petsche*, 219 N.W.2d 716, 717 (Iowa 1974)). While never diagnosed by a medical professional, Alvarez testified the blow dislocated his jaw, causing it to be swollen and displaced. He also testified that he was knocked unconscious for approximately five seconds. This is sufficient evidence for a reasonable juror to find Soni had the sufficient intent to cause serious injury, and we accordingly find no error.

IV. MERGER

Soni next contends the assault charge, as a lesser included of robbery, should have merged into the willful injury conviction pursuant to Iowa Code

section 701.9.[1] While he discussed the merger with the court at sentencing, no objection was lodged. However, we find Soni has not waived the argument. *See State v. Halliburton*, 539 N.W.2d 339, 343 (Iowa 1995) (holding a sentence that is contrary to Iowa Code section 701.9 is void, and therefore, the court's error in imposing sentence is not subject to normal rules of error preservation and waiver). When a defendant alleges he has been illegally sentenced under the merger statute, our review is for the correction of errors at law. *State v. Lambert*, 612 N.W.2d 810, 815 (Iowa 2000).

Iowa Code section 701.9 "codified the double jeopardy protection against cumulative punishment." *State v. Gallup*, 500 N.W.2d 437, 445 (Iowa 1993). Iowa courts use the "impossibility test" that 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. Anderson*, 565 N.W.2d 340, 343 (Iowa 1997). Under the facts of this case, for a conviction on the willful injury charge, Soni must have assaulted Alvarez. The question before us is whether the two convictions should have merged.

Although the same act can be the factual predicate of two different crimes, the record in this case does not support that more than one crime was committed. *State v. Jeffries*, 430 N.W.2d 728, 736 (Iowa 1988). The jury was

[1] The State claims this argument is not preserved for appellate review because the conviction for assault is a simple misdemeanor, in which discretionary review must be requested. Iowa Code § 814.6. Here, a notice of appeal was filed rather than an application for discretionary review. Appellate courts may provide discretionary review when a notice of appeal is filed instead of an application for discretionary review. Iowa R. App. P. 6.108; *State v. Watts*, 801 N.W.2d 845, 850 n.2 (Iowa 2011). In this case, the supreme court entered an order dated May 15, 2012, granting discretionary review.

instructed under alternate theories as to Soni for the robbery charge, either: (1) as a principle or aiding and abetting another or (2) joint criminal conduct.

Under the aiding and abetting alternative the jury was instructed:

> Lawrence Soni, or someone he aided and abetted, had the specific intent to commit a theft and
>
> To carry out this intention or to assist him in escaping from the scene, with or without the stolen property, the defendant, Lawrence Soni, or someone he aided and abetted, assaulted Alvarez.

Under the joint criminal conduct theory the jury was instructed:

> The defendant, Lawrence Soni, acted together with Andre Lyle Jr.
>
> The defendant, Lawrence Soni, and Andre Lyle, Jr. knowingly participated in the crime of Assault.
>
> While furthering the crime of Assault, Andre Lyle, Jr. committed the different crime of Robbery.
>
> The defendant, Lawrence Soni, could have reasonably expected that the different crime of Robbery would be committed in furtherance of the crime of assault.

The State argued in its closing:

> If it was not for Lawrence Soni, the State submits to you that this crime may not have ever occurred. The reason for that is if Hernan's [Alvarez's] on his feet and sees the—these guys coming to take his property, he has some options; doesn't he? He can maybe put his hands up to block the blow. He can maybe use his legs to run away, but this man right here (indicating to Soni) aided this man right here (indicating to Lyle) by knocking him to the ground, knocking him unconscious and so dazed that he didn't have a chance to defend himself.

In essence, the State argued that Soni should be convicted of robbery as he knocked Alvarez unconscious to the ground, thus allowing Lyle to land one more punch and take the marijuana from Alvarez. The jury rejected both theories of robbery, aiding and abetting and joint criminal conduct, and found on the verdict form that Soni was guilty of the lesser-included offense of assault. The verdict

form continued with the next count, willful injury causing bodily injury, to which they found him guilty.

In this case, the offense of willful injury causing bodily injury could not be committed without also committing an assault. Because the jury rejected both of the State's theories under the robbery charge—that he aided and abetted Lyle or participated in joint criminal conduct—the simple assault conviction should have merged into the willful injury conviction.

We, however, do not find it necessary to remand for resentencing as the assault charge is to be merged and judgment entered only on the greater offense. *See* Iowa Code § 701.9 ("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."); *see also State v. Belken*, 633 N.W.2d 786, 802 (Iowa 2001) (finding the sexual abuse conviction merged into the kidnapping conviction and vacating the judgment and sentence entered on the sexual abuse conviction). We therefore merge the conviction for simple assault and vacate the judgment and sentence imposed thereon.

V. SENTENCING

Finally, Soni argues the district court abused its discretion when it failed to suspend Soni's prison sentence and place him on probation. We review sentencing for either abuse of discretion or defects in the sentencing procedure. *State v. Floyd*, 466 N.W.2d 919, 925 (Iowa Ct. App. 1990).

As the State sets forth in its brief, the criteria for sentencing are well-established:

> The trial court and we on review should weigh and consider all pertinent matters in determining proper sentence, including the nature of the offense, the attending circumstances, defendant's age, character and propensities and chances of his reform. The courts owe a duty to the public as much as to defendant in determining a proper sentence. The punishment should fit both the crime and the individual.

State v. Bragg, 388 N.W.2d 187, 191 (Iowa Ct. App. 1986). A sentencing court has the duty to consider all the circumstances of a particular case, but it is not required to specifically acknowledge each claim of mitigation; rather, upon review we see if the reasons articulated by the lower court are sufficient to enable us to determine if an abuse of discretion occurred. *State v. Boltz*, 542 N.W.2d 9, 11 (Iowa Ct. App. 1995).

We find that the district court did not abuse its discretion in imposing an indeterminate five-year prison sentence. The court reviewed the presentence investigation report, as well as the defendant's age, prior convictions, deferments, employment circumstances, mental health, and substance abuse. It also considered his family circumstances, the nature of the offense, and the harm to the victim. The district court did not consider any improper incidents that were mentioned by the State. These grounds are not "clearly untenable or to an extent clearly unreasonable," and we therefore affirm the imposition of a prison sentence instead of probation. *See State v. Thomas*, 547 N.W.2d 223, 225 (Iowa Ct. App. 1996).

VI. CONCLUSION

Because we find the jury was properly instructed as to reasonable doubt, there was sufficient evidence to support the verdict on the willful injury charge, and the district court did not abuse its discretion by not suspending the prison

sentence, we affirm the trial court on these grounds. However, because the district court entered an illegal sentence when it failed to merge the two convictions, we merge the conviction of simple assault and vacate the sentence imposed on that conviction.

AFFIRMED AS MODIFIED.