

IN THE COURT OF APPEALS OF IOWA

No. 3-644 / 12-1896
Filed July 24, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RONALD HILTON TUCKER,
Defendant-Appellant.

Appeal from the Iowa District Court for Linn County, Jane F. Spande,
District Associate Judge.

Tucker appeals his sentences for assault while displaying a dangerous
weapon and harassment in the first degree. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and David A. Adams (until
withdrawal) and Patricia Reynolds, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kyle P. Hanson, Assistant Attorney
General, Jerry Vander Sanden, County Attorney, and Elena Wolford, Assistant
County Attorney, for appellee.

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

VOGEL, P.J.

I. Factual and Procedural Background

On July 17, 2012, Ronald Tucker was charged by trial information with assault while displaying a dangerous weapon (domestic abuse), in violation of Iowa Code sections 708.1 and 708.2A(2) (2011), and harassment in the first degree, in violation of Iowa Code sections 708.7(1) and 708.7(2). On September 12, 2012, in exchange for the State's recommendation that Tucker's sentence be suspended, Tucker presented a "consent to waive presence" at his plea and sentencing hearings. In the consent, he agreed his attorney could present his pleas of guilty without a formal record being made and the court could immediately impose a sentence. Tucker simultaneously filed a waiver of rights and plea of guilty, whereby he pleaded guilty to assault while displaying a dangerous weapon (non-domestic abuse), and harassment in the first degree. The court imposed a 360-day sentence on each count, suspended the sentences, and placed Tucker on probation.

In his waiver of rights, Tucker admitted the State "can prove all of the elements" of the offenses. In the consent form, he agreed the minutes of testimony "are substantially correct" and that "there is a factual basis for the charge(s) for which I am now pleading guilty." The minutes established that on June 12, 2012, Tucker went to the home of Marcia Jackson. After pounding on the back door, Jackson allowed Tucker to enter her home. Jackson informed Tucker she did not want to work on the problems in their relationship. Tucker grabbed her face, telling her it would get worse. He also struck her on the head. Jackson started to walk down the hall to retrieve her cell phone to call for

assistance. Tucker grabbed a large kitchen knife, approached Jackson, and threatened to kill her and her children and burn down her home if she picked up her phone. Jackson and Tucker then sat on the couch and had a conversation, during which Tucker kept the knife in his hand. Once they finished talking, Tucker grabbed her by the hair, pushed his knuckles and hand into her face, and said he would “make her pay, if not now, in five years, that he would make her pay, make no mistake.” Once Tucker left, Jackson called the police.

Tucker now appeals his sentence, asserting two bases of error. First, he claims counsel was ineffective for failing to object to the lack of factual basis supporting his guilty plea to the harassment charge. Second, he asserts the district court entered an illegal sentence by not merging the assault and harassment convictions.

II. Ineffective Assistance of Counsel

We review ineffective-assistance-of-counsel claims de novo. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006). To succeed on an ineffective assistance of counsel claim, the defendant must show trial counsel failed to perform an essential duty, and prejudice resulted from counsel’s failure. *Id.* Counsel fails to perform an essential duty when there is no factual basis to support a guilty plea, the defendant nonetheless pleads guilty, and counsel fails to file a motion in arrest of judgment challenging the plea. *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999).

The crime of harassment is committed:

[W]hen the person, purposefully and without legitimate purpose, has personal contact with another person, with the intent to threaten, intimidate, or alarm that other person A person

commits harassment in the first degree when the person commits harassment involving a threat to commit a forcible felony

Iowa Code § 708.7(1)(b), (2)(a). Tucker challenges the “without legitimate purpose” element of the offense. He relies on *State v. Fratzke*, 446 N.W.2d 781, 785 (Iowa 1989), which held the court must consider all of the surrounding circumstances, not the words alone, in determining whether the facts support the defendant’s harassment conviction. Tucker argues he had a legitimate purpose in discussing his relationship with Jackson, and that, despite the words he used, his intent negates the “without legitimate purpose” element necessary to support his harassment charge.

During the incident, Tucker made statements such as, “It’s going to get much worse. You think you can just walk away, but things are just going to get worse,” and, “Go ahead and get the f***ing phone. I will kill these kids and you. I will end everything you have and burn this condo down.” No matter the pretense under which Tucker went to Jackson’s home, words such as these do not have a legitimate purpose. See *State v. Button*, 622 N.W.2d 480, 485–86 (Iowa 2001) (defendant committed harassment by threatening to shoot a police officer, because “[s]tatments about blowing another’s brains out and the desire to shoot the object of the threat certainly have no legitimate purpose”). Therefore, Tucker’s statements in the minutes of testimony, having no legitimate purpose, provide a factual basis to support Tucker’s harassment conviction. As such, counsel was not ineffective for failing to file a motion in arrest of judgment challenging the plea. See generally *State v. Finney*, ___ N.W.2d ___, 2013 WL 3378303, at *15–16 (Iowa 2013) (minutes of testimony established factual basis

for plea, and counsel was not ineffective for failing to challenge plea for lack of factual basis).

III. Merger of Assault and Harassment Convictions

Tucker next asserts the assault and harassment charges should have merged, given they both arose out of one encounter where he threatened Jackson. He further claims that, though different words are used in each statute, they nonetheless describe the same act, and the crime of harassment is simply a lesser included offense of assault.

We review the issue of an illegal sentence for failure to merge for correction of errors at law. *State v. Anderson*, 565 N.W.2d 340, 342 (Iowa 1997). The merger doctrine is found in Iowa Code section 701.9, which states, “[n]o person shall be convicted of a public offense which is necessarily included in another public offense of which the person is convicted.” To establish whether crimes merge, we look to the elements of the offenses, and if one of the crimes may be committed in different ways, “the alternative submitted to the jury controls the comparison.” *State v. Daniels*, 588 N.W.2d 682, 684 (Iowa 1998) (internal citations omitted).

The crime of assault while displaying a dangerous weapon requires the defendant to (1) intentionally display (2) without justification (3) a dangerous weapon (4) in a threatening manner. Iowa Code § 708.1(3). Harassment in the first degree occurs when the defendant (1) communicates with another (2) without a legitimate purpose (3) with the intent to intimidate, annoy, or alarm another (4) a threat to commit a forcible felony. Iowa Code § 708.7(1)(b), (2)(a).

It is clear the elements of these crimes differ. It is possible to commit assault without harassment, given no words need be communicated, and the threat of a forcible felony inherent in first-degree harassment does not necessarily need to be an assault. Here, specifically, the State charged the crimes as separate offenses and established different factual bases for each. Tucker committed harassment when he threatened to kill Jackson and her children, as well as burn the condo down, and he committed assault when he brandished the knife at her, in addition to making the threats. The brandishing of the knife was the additional act needed to make Tucker's actions an assault, though it was not necessary to establish the crime of harassment in the first degree. As such, the two crimes need differing elements to establish a factual basis, and harassment in the first degree is not simply a lesser included offense of assault. Therefore, the district court was correct in not merging Tucker's crimes and sentencing him on two different counts.

AFFIRMED.