IN THE COURT OF APPEALS OF IOWA

No. 6-075 / 05-0557
Filed April 26, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RILEY BURNETT GOINS,
Defendant-Appellant.

Appeal from the Iowa District Court for Dubuque County, Alan L. Pearson, Judge.

Riley Goins appeals his judgment and sentences for first-degree burglary, willful injury causing serious injury, going armed with intent, and assault causing serious injury. **AFFIRMED IN PART, VACATED IN PART; AND REMANDED.**

Linda Del Gallo, State Appellate Defender, and Robert P. Ranschau, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Linda Hines, Assistant Attorney General, Fred H. McCaw, County Attorney, and Ralph Potter, Assistant County Attorney, for appellee-State.

Considered by Huitink, P.J., and Vaitheswaran and Eisenhauer, JJ.

VAITHESWARAN, J.

Riley Goins appeals his judgment and sentences for first-degree burglary, willful injury causing serious injury, going armed with intent, and assault causing serious injury. Iowa Code §§ 713.3, 708.4(1), 708.8, 708.2(4) (2003). He contends: (1) trial counsel was ineffective in failing to explore a diminished responsibility defense, (2) the district court erred in failing to appoint substitute counsel, and (3) the district court should have merged his convictions for assault causing serious injury and willful injury causing serious injury.

I. Ineffective Assistance of Counsel – Diminished Responsibility

Goins contends that, "[g]iven defendant's history of mental health problems, it would have been reasonable for trial counsel to investigate the possibility of pursuing a diminished responsibility defense." We preserve this claim for postconviction relief to "allow full development of the facts surrounding counsel's conduct." *State v. Stewart*, 691 N.W.2d 747, 750 (Iowa Ct. App. 2004).

II. Substitute Counsel

Following a jury verdict,[1] Goins filed a pro se motion for new trial, arguing his trial attorney provided ineffective assistance. At a hearing on this motion, the district court told Goins, rather than his trial counsel, to argue the motion. The court stated, "since you have self-filed this motion and the motion itself essentially is your complaint concerning [defense counsel's] performance, I won't ask him to argue in support of the motion. I will ask if you have any argument

[1] The written judgment and sentence states that Goins pled guilty. In fact, the case proceeded to trial and jury verdict.

that you want to make." After Goins and the State stated their respective positions, the district court denied the new trial motion.

On appeal, Goins argues "the district court erred in failing to appoint substitute counsel to argue defendant's motion for a new trial, thereby denying defendant effective assistance of counsel."

Goins concedes he did not ask the district court to appoint substitute counsel to argue the new trial motion. Therefore, to the extent he challenges the district court's failure to appoint substitute counsel, he has not preserved error. *See State v. Tejeda*, 677 N.W.2d 744, 749-50 (Iowa 2004) (holding that, "*once a defendant requests substitute counsel on account of an alleged breakdown in communication*," a court has a duty to sua sponte inquire in to the nature of the breakdown and the need for a replacement) (emphasis added); *State v. Mulvany*, 600 N.W.2d 291, 293 (Iowa 1999) ("[W]e require error preservation even on constitutional issues.").

Goins also raises a related ineffective-assistance-of-counsel claim. He argues that trial counsel did not "recognize the dilemma that defendant's allegations placed him in and request that he be allowed to withdraw from the case and that new counsel be appointed." We preserve this claim for postconviction relief.

III. Merger

Goins finally contends that "the trial court should have merged the conviction for assault causing serious injury (count IV) with a conviction for willful injury causing serious injury (count II)." Our review of this issue is for errors of law. *State v. Finnel*, 515 N.W.2d 41, 43 (Iowa 1994).

Iowa Code section 701.9 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.

To determine whether one public offense is "necessarily included" in another public offense, we apply an "impossibility" test. *State v. Hickman*, 623 N.W.2d 847, 850 (Iowa 2001). Under this test, "[i]f the greater offense cannot be committed without also committing the lesser offense, the lesser is included in the greater." *Id.*

The jury was instructed that, to convict Goins of assault causing serious injury, the State would have to prove the following elements:

> 1. On or about the second day of August, 2004, the defendant did an act which was intended to cause pain or injury.
> 2. The defendant had the apparent ability to do the act.
> 3. The defendant caused serious injury to Andrew Quinn.

The jury was instructed that, to convict Goins of willful injury causing serious injury, the State would have to prove the following elements:

> 1. On or about the second day of August, 2004, the defendant assaulted Andrew Quinn.
> 2. The defendant specifically intended to cause a serious injury to Andrew Quinn.
> 3. Andrew Quinn was seriously injured.

The instructions provided several definitions of "assault" including "an act which is intended to cause pain or injury to another person coupled with the apparent ability to execute the act." Examining the elements of assault causing serious injury and willful injury causing serious injury, it is clear that Goins could not have committed willful injury causing serious injury without also committing assault

causing serious injury. *See State v. Winstead*, 552 N.W.2d 651, 654 (Iowa Ct. App. 1996); *State v. Blanks*, 479 N.W.2d 601, 606 (Iowa Ct. App. 1991).

The State argues that, despite the congruity of elements of these two crimes, the district court was not obligated to merge the two convictions. In its view, there was "a factual basis for two separate crimes of willful injury and assault causing serious injury." We disagree.

The record reflects that Goins lived in a boarding house. Andrew Quinn also lived in the house. Goins entered Quinn's room and stabbed him several times on the left side of his body. Goins also separated Quinn's right shoulder. Quinn testified, "he just kept coming, kept coming, and I didn't see him, I just seen his hand, the knife."

We conclude the record does not support a factual basis for two separate crimes. *Cf. State v. Walker,* 610 N.W.2d 524, 527 (Iowa 2000) (concluding record minimally supported factual basis for two separate assaults). Therefore, the two offenses merged.

IV. Disposition

We affirm the judgment and sentence for first-degree burglary, going armed with intent, and willful injury causing serious injury, vacate the judgment and sentence for assault causing serious injury, and remand the case for entry of an order dismissing the assault causing serious injury charge.

AFFIRMED IN PART, VACATED IN PART; AND REMANDED.