**IN THE COURT OF APPEALS OF IOWA**

No. 6-670 / 05-1283
Filed October 11, 2006

**STATE OF IOWA,**
Plaintiff-Appellee,

**vs.**

**GERALD RAY GAINES,**
Defendant-Appellant.

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Appeal from the Iowa District Court for Woodbury County, Jeffrey A. Neary, Judge.

Gerald Gaines appeals his judgment and sentence for willful injury and assault causing bodily injury. **JUDGMENT FOR WILLFUL INJURY AFFIRMED. JUDGMENT AND SENTENCE FOR ASSAULT CAUSING BODILY INJURY VACATED, AND CASE REMANDED.**

Linda Del Gallo, State Appellate Defender, and Dennis D. Hendrickson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Thomas S. Mullin, County Attorney, and Mark Campbell, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Vaitheswaran, J., and Hendrickson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2005).

**VAITHESWARAN, J.**

Gerald Gaines broke into the home of his former girlfriend, struck her in the head, and took her purse. Shortly thereafter, when both were outside, Gaines reached out of the window of a running car, grabbed her hair, and sped off down the street between thirty-five and forty miles an hour, dragging her alongside the car. The former girlfriend sustained injuries that required three surgeries and a three-week hospital stay.

The State charged Gaines with (1) first-degree burglary, (2) assault while participating in a felony, and (3) willful injury. Iowa Code §§ 713.1, 713.3(1)(c); 708.3; 708.4(1) (2003). The jury was instructed that assault causing bodily injury was a lesser included offense of each charge.

A jury found Gaines guilty as charged on the first and third counts and guilty of the lesser included offense of assault causing bodily injury on the second count. The court entered judgment and imposed indeterminate prison sentences, ordering that "[c]ount two shall run concurrently with [c]ount one" and "[c]ount three shall run consecutively with [c]ount one."

***I. Sufficiency of the Evidence***

On appeal, Gaines seeks reversal and dismissal of the willful injury count. He argues that the evidence is insufficient to establish a "serious injury." Because trial counsel did not specifically challenge this element of the willful injury count, Gaines concedes his argument must be examined under an ineffective-assistance-of-counsel rubric. *See State v. Truesdell*, 679 N.W.2d 611, 615 (Iowa 2004). Under this circumstance, the Iowa Supreme Court has articulated the test as follows: "[I]f the

record . . . fails to reveal substantial evidence to support the convictions, counsel was ineffective for failing to properly raise the issue and prejudice resulted." *Id*.

The jury was instructed that "[a] serious injury is a bodily injury which causes serious permanent disfigurement or extended loss or impairment of the function of any bodily parts or organ." Gaines's former girlfriend testified she had three surgeries to graft skin that was "burned off" when Gaines dragged her next to the car. She also testified she sustained physical and mental scarring from the incident and that the scarring was permanent. This testimony amounts to substantial evidence supporting a jury finding that the former girlfriend sustained a serious injury. Therefore, trial counsel was not ineffective in failing to challenge the "serious injury" element of the willful injury count in Gaines's motion for judgment of acquittal.

***II. Merger***

Although Gaines only challenges his willful injury judgment, he alludes to a problem with his entire sentence. Specifically, he mentions that even though the second count, assault causing bodily injury, was an included offense of each count, he was convicted on all three counts. Therefore, he intimates that the assault causing bodily injury conviction in count two could have merged with one of the other convictions.

Merger implicates the legality of the sentence. *State v. Anderson*, 565 N.W.2d 340, 343-44 (Iowa 1997). It is axiomatic that an illegal sentence can be challenged at any time. *State v. Kress*, 636 N.W.2d 12, 17 (Iowa 2001). Additionally, because such a sentence would be void, we can address the illegality even if the issue was not expressly raised by the parties. *State v. Carney*, 584 N.W.2d 907, 910 (Iowa 1998).

The merger statute, 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.

After the jury returned findings of guilt on the first and third counts and on the lesser included offense of the second count, Iowa Code section 701.9 obligated the district court to determine whether any of those findings were "necessarily included in another public offense." As noted, assault causing bodily injury was defined for the jury as a lesser included offense of all the charged crimes. In addition, case precedent supports a conclusion that assault causing bodily injury is a lesser included offense of the bodily injury alternative of first-degree burglary that was charged here, as well as the willful injury count. *See State v. Lambert*, 612 N.W.2d 810, 816 (Iowa 2000) (holding convictions for first-degree burglary and simple assault should have merged); S*tate v. Peck*, 539 N.W. 2d 170, 175 (Iowa 1995) (holding assault and assault causing bodily injury merged with "reckless" alternative of first-degree burglary); *State v. Mikesell*, 479 N.W.2d 591, 591 (Iowa 1991) (stating assault causing bodily injury should have been submitted as a lesser included offense of willful injury).

Because assault causing bodily injury was necessarily included in the other offenses of which Gaines was convicted, the district court could not find Gaines guilty of assault causing bodily injury in addition to either of the other two crimes. *Anderson*, 565 N.W.2d at 343. For this reason, we vacate the conviction, judgment, and sentence on the assault causing bodily injury count and remand to the district court for entry of an order in accordance with this opinion. *Anderson*, 565 N.W.2d at 344. In light of this

disposition, we need not address Gaines's contention that the finding of guilt for assault causing bodily injury is factually inconsistent with the remaining findings of guilt.

**JUDGMENT FOR WILLFUL INJURY AFFIRMED. JUDGMENT AND SENTENCE FOR ASSAULT CAUSING BODILY INJURY VACATED, AND CASE REMANDED.**