

IN THE COURT OF APPEALS OF IOWA

No. 8-654 / 07-1059
Filed October 1, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

FELIPE NEGRETE-RAMIREZ,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Joel D. Novak, Judge.

Defendant appeals his judgment and sentences for robbery in the first degree, burglary in the first degree, and assault causing serious injury.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Mark C. Smith, State Appellate Defender, and Shellie L. Knipfer, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, John P. Sarcone, County Attorney, and Jaki Livingston, Assistant County Attorney, for appellee.

Considered by Mahan, P.J., and Vaitheswaran and Doyle, JJ.

MAHAN, P.J.

Brandon Tripp discovered the defendant, Felipe Negrete-Ramirez, breaking into his car. Negrete-Ramirez was leaning through the passenger door trying to remove the radio with a screwdriver. Tripp grabbed Negrete-Ramirez from behind and tried to wrestle away the screwdriver. Negrete-Ramirez grabbed a knife with his left hand and stabbed Tripp in the arm, face, and thumb. Tripp ran to his house, and Negrete-Ramirez left the scene.

Negrete-Ramirez was charged in count I with first-degree robbery, in count II with first-degree burglary, and in count III with willful injury causing serious injury. At trial, Tripp testified:

As soon as I – as soon as I knew he had a knife out, which he pulled out. He must have pulled it out of his left pocket because it was in his left hand. And as soon as I knew, my arm was cut, my face was cut, and my thumb was cut. The only time I saw the knife is when it was coming at my, you know, at me.

Tripp testified that as a result of his encounter with Negrete-Ramirez, he received fifteen stitches on his face. Tripp further testified that the tendon on his thumb was cut and required surgery to repair and his thumb continues to have movement limitations and numbness. Tripp also has a scar on his left forearm.

The jury was instructed on the three counts of the indictment and their lesser-included offenses.

The jury returned guilty verdicts on counts I and II as charged. However, on count III, willful injury causing serious injury, the jury found Negrete-Ramirez guilty of the lesser-included offense of assault causing serious injury.

The district court entered judgment on the convictions. Negrete-Ramirez now appeals, contending the offenses of first-degree robbery and assault

causing serious injury merged under Iowa Code section 701.9 (2005). He makes no challenge to his first-degree burglary conviction.

Discussion.

Merger implicates the legality of the sentence. *State v. Anderson*, 565 N.W.2d 340, 343-44 (Iowa 1997). An illegal sentence can be challenged at any time, *State v. Kress*, 636 N.W.2d 12, 17 (Iowa 2001), and we can address the issue even if it was not expressly raised below. *State v. Carney*, 584 N.W.2d 907, 910 (Iowa 1998).

Under our merger statute,

[n]o 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.

Iowa Code § 701.9. 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.*

In *Hickman* our supreme court noted that it was impossible to commit first-degree robbery under the purposely-inflicts-serious-injury alternative without also committing willful injury and thus the two offenses merge under section 701.9. *Id.* at 852. At trial, the State agreed that “with respect to the way robbery one is charged in this case,” if the defendant was convicted of robbery in the first degree and willful injury, then the willful injury would merge into the first-degree robbery.

Here, defendant's conviction of assault causing serious injury arose as a lesser-included offense of willful injury. If the willful injury conviction necessarily merges into first-degree robbery—as the State here concedes—so too does the lesser-included offense of assault causing serious injury. *Hickman*, 623 N.W.2d at 850.

The State argues that, despite the congruity of elements of these two crimes, the district court was not obligated to merge the two convictions because defendant committed multiple assaults when he cut Tripp's face, thumb, and arm. We disagree. The case was presented to the jury as one continuous course of conduct. We conclude the record does not support a factual basis for two separate crimes. See, e.g., *State v. Walker*, 610 N.W.2d 524, 527 (Iowa 2000) (concluding defendant knowingly plead to, and record minimally supported, factual basis for two separate crimes).

Disposition.

We affirm the judgment and sentence for first-degree burglary and first-degree robbery, 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.