

IN THE SUPREME COURT OF IOWA

STATE OF IOWA,)	
Plaintiff-Appellee)	
)	CASE NO. 19-2112
)	
v.)	(Polk County Nos. SRCR326685,
)	SRCR327909, AGCR329728)
)	
JAMES VANDERMARK)	Appeal from Orders by Honorable District
Defendant-Appellant)	Judge William Kelly in
)	Polk County District Court
)	
)	FINAL BRIEF OF APPELLANT
)	
)	

Comes now James Vandermark, Appellant, by and through counsel, and submits his final brief.

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

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ROUTING STATEMENT

This case may be transferred to the Iowa Court of Appeals as it presents the application of existing legal principles.

STATEMENT OF THE CASE

This is an appeal of SRCR326685, SRCR327909, and AGCR329728, that were included in a sentencing order on November 22, 2019. See sentencing Order dated November 22, 2019, App. p. 115. In SRCR326685, the Court allowed an amended trial information filed one week prior to trial. See Order allowing amended trial information dated October 2, 2019, App. p. 65. The amended trial information included a habitual offender enhancement so that the total maximum possible time of incarceration increased from 1 year to 15 years. The See amended trial information, App. p. 55. Despite the amended trial information filed so close to trial, the Court denied the Defendant's motion to continue. See trial transcript in SRCR326685 for October 2, 2019, p. 44, lines 17, 18. The Defendant asked for a continuance due to the amended trial information one week prior to trial, but the judge did not grant the continuance. See Id. The total sentence for SRCR327909 was run consecutive to SRCR326685, for a total of 16 years. See sentencing order for SRCR326685, SRCR327909, and AGCR329728, App. p. 115. The jury in SRCR326685 found Vandermark guilty of willful injury and found that Vandermark "specifically intended to cause a serious injury" despite the victim testifying that after the incident he thought he was ok and didn't seek medical attention. SRCR326685 Trial Transcript October 2, 2019, p. 153 lines 21-25, p. 154 line 1. See also SRCR326685 jury instruction 21, App. p. 80. Notice of

Appeal was filed by Appellant on December 20, 2019. (See Notice of Appeal, App. p. 121)

STATEMENT OF THE FACTS

1. Trial information for SRCR326685 was filed May 29, 2019. See trial information, App. p. 45. Seven days prior to trial, the State amended the trial information SRCR326685 from a serious misdemeanor with a maximum penalty of 1 year in jail to Willful Injury, a class D Felony, including a habitual offender enhancement, with a maximum penalty of 15 years in prison. See amended trial information, App. p.55.

2. The new charge of willful injury had a different intent element. Willful injury requires the “specific intent to cause serious injury” that was not included in the original charge. See uniform jury instruction 800.11. The original charge was Assault Causing Bodily Injury. See original trial information, App. p.45.

3. Despite having an additional intent element, and a huge increase in maximum possible penalty from one year to 15 years, and despite the amended trial information being filed only 7 days prior to trial, the trial court denied the Defendant’s request for a continuance. See trial transcript in SRCR326685 for October 2, 2019, p. 44, lines 17, 18.

4. The Defendant was found guilty of the amended charge of Willful Injury, a Class D Felony, with the habitual offender enhancement. See trial

transcript in SRCR326685 for November 22, 2019 p. 36, lines 19-24. The jury in SRCR326685 found Vandermark guilty of willful injury and found that Vandermark "specifically intended to cause a serious injury" despite the victim testifying that after the incident he thought he was ok and didn't seek medical attention. SRCR326685 Trial Transcript October 2, 2019, p. 153 lines 21-25, p. 154 line 1. See also SRCR326685 jury instruction 21, App. p.80.

5. An order sentencing the Defendant was filed November 22, 2019. (See sentencing order App. p. 115) The defendant was sentenced to a total of 16 years in prison, including other cases. See Id. p. 43 lines 7-9

6. Notice of Appeal was filed by Appellant on December 20, 2019. (See App. p. 121)

ARGUMENT

I. THE APPELLANT SHOULD HAVE BEEN GRANTED A NEW TRIAL IN SRCR326685 AS THE TRIAL COURT IMPROPERLY ALLOWED AN AMENDED TRIAL INFORMATION AS THE AMENDED TRIAL INFORMATION WAS A WHOLLY NEW CHARGE AND PREJUDICIAL TO THE APPELLANT

Preservation of issue for review

The Appellant argued for a new trial based on the improperly allowed amended trial information. See Appellant's Motion for new trial and Motion in arrest of judgment filed November 18, 2019. App. p.102.

Standard of review

The normal standard of review is for "an abuse of discretion". State v. Valin, 724 N.W.2d 440, 444 (2016).

Argument

Amendments to trial informations may only be done for error or omissions. See Iowa Court Rule 2.4(8). Iowa Court Rule 2.4(8) states "The court may, on motion of the state, either before or during the trial, order the indictment amended

so as to correct errors or omissions in matters of form or substance. Amendment is not allowed if substantial rights of the defendant are prejudiced by the amendment, or if a wholly new and different offense is charged.” Iowa Court Rule 2.4(a).

Correction

The state in its motion to amend trial information does not state that anything needed to be corrected. See State’s motion to amend trial information. App. p.95. The state in its motion to amend trial information does not allege any error in the original trial information, or that anything was omitted in the original trial information. Id. On the contrary, the state decided it wanted to enhance the charge by a factor of 15 in maximum prison time and change the charge from Assault Causing Bodily Injury to Willful Injury with a habitual offender enhancement. There is no provision in the plain meaning of Iowa Court Rule 2.4(a) that allows amendment of the trial information just because the State wants to enhance a charge. See Iowa Court Rule 2.4(a). There must be correction needed. See Id. The State never even alleges any error in the original trial information. See State’s Motion to amend trial information. App. p. 95. There was no error here. The state meant what it stated in the original charge. It fully meant to charge a serious misdemeanor. There was never any claim by the State that it did not mean to originally charge the case as a serious misdemeanor with a

maximum incarceration of one year. See *Id.* Then, 7 days prior to trial, it decided to enhance the charge in maximum incarceration by a factor of 15.

Prejudice to Defendant

“Amendment is not allowed if substantial rights of the defendant are prejudiced by the amendment.....” Iowa Court Rule 2.4(a).

Clearly, substantial rights of the defendant were prejudiced. It is highly prejudicial to the Defendant that rather than facing one year of incarceration, the Defendant faced 15 years of incarceration.

Wholly New and Different Offense

In determining whether a charge is a “wholly new and different offense”, the Court in *State v. Sharpe*, 304 N.W.2d 220, 223 (Iowa 1981) considered factors including whether there is a “great disparity in punishment”, and whether there is an additional intent element. *Id.* at 222, 223.

In this case there are both of those factors. There is an extreme disparity of punishment. The trial information initially was filed May 29, 2019, charging the Appellant with Assault Causing Bodily Injury or Mental Illness, a serious misdemeanor. As a serious misdemeanor, this charge carries a maximum sentence of one year in jail. See Iowa Code 903.1(1)(b).

Trial was held October 2, and October 2, 2019. See Court Reporter certificate dated October 3, 2019. To the Appellant’s surprise, on September 25,

2019 just 7 days prior to trial, the State filed an amended trial information, charging the Appellant with Willful Injury, a class D Felony. See Amended Trial Information dated September 25, 2019, App. p. 55. The State also on September 25, 2019 gave notice of its intent to see the habitual offender enhancement, putting the requested sentence to 15 years in prison. See Notice of Habitual Offender Enhancement, Notice of Additional and Supplemental Minutes and Witnesses, filed September 25, 2019, App. p. 53. Therefore, the huge disparity in punishment went from 1 years maximum jail to 15 years maximum prison.

An additional element cited by the Sharpe court was an additional intent element. See *State v. Sharpe*, 304 N.W.2d, 220, 222 (Iowa 1981). The Appellant's original charge Assault Causing Bodily Injury or mental illness carried the following elements pursuant to uniform jury instruction 800.2:

800.2 Assault Causing Bodily Injury or Mental Illness - Elements.

The State must prove all of the following elements of assault causing a [bodily injury] [mental illness]:

1. On or about the _____ day of _____, 20____, the defendant did an act which was intended to [cause pain or injury] [result in physical contact which was insulting or offensive] [place (name of victim) in fear of an immediate physical contact which would have been painful, injurious, insulting or offensive] to [him] [her].
2. The defendant had the apparent ability to do the act.
3. The defendant's act caused a [bodily injury] [mental illness] to (name of victim) as defined in Instruction No. _____.

If the State has proved all of the elements, the defendant is guilty of Assault Causing [Bodily Injury] [Mental Illness]. If the State has proved only elements 1 and 2, the defendant is guilty of Assault. If the State has failed to prove either element 1 or 2, the defendant is not guilty.

Iowa Uniform Jury Instructions 800.2.

The amended charge of Willful Injury required the following elements pursuant to uniform jury instruction ____:

800.11 Willful Injury - Elements. The State must prove all of the following elements of Willful Injury.

1. On or about the ____ day of _____, 20__, the defendant (set forth facts of assault).
2. The defendant specifically intended to cause a serious injury to [the victim].
3. The defendant's acts caused a (bodily) (serious) injury to [the victim] as defined in Instruction No. _____.

If you find the State has proved all of the elements, the defendant is guilty of Willful Injury. If the State has proved only elements 1 and 3, the defendant is guilty of Assault Causing [Serious] [Bodily] Injury. If the State has proved only elements 1 and 2, the defendant is guilty of Assault With Intent to Inflict Serious Injury. If the State has failed to prove elements 2 and 3, the defendant is guilty of Assault. If the State has failed to prove element 1, the defendant is not guilty.

Iowa Uniform Jury Instructions 800.11.

Willful injury requires the “specific intent to cause serious injury”. See uniform jury instruction 800.11. This is an additional intent element missing from the original charge.

Therefore, Willful Injury along with the habitual offender enhancement was a wholly new and different charge from the original charge of Assault Causing Bodily Injury or Mental Illness.

Therefore, the conviction and sentence for SRCR326685 should be overturned as the trial information should not have been allowed to be amended as it was a wholly new and different charge, and because no errors or omissions were listed that needed to be “corrected”. The State fully meant the trial information as originally charged. There was no “correction”, only that the State decided it wanted to drastically enhance the charge just before trial.

II. THE APPELLANT WAS ENTITLED TO A NEW TRIAL IN SRCR326685 BECAUSE THE COURT DENIED THE DEFENSE’S MOTION TO CONTINUE AFTER THE STATE AMENDED THE TRIAL INFORMATION ONE WEEK PRIOR TO TRIAL

Preservation of issue for review

The Appellant asked for a continuance at the time of the hearing on the motion to amend the trial information. See transcript of hearing on motion to amend trial information for SRCR326685 on October 2, 2019, p. 26 lines 1-3.

Standard of review

The normal standard of review is for “an abuse of discretion”. State v. Valin, 724 N.W.2d 440, 444 (2016).

Argument

The Defendant asked for a continuance due to the amended trial information one week prior to trial, but the judge did not grant the continuance. See trial transcript October 2, 2019, p. 44, lines 17, 18. The “traditionally appropriate remedy for a defendant’s claim of surprise: a continuance”. State v. Brothern, 832 N.W. 2d 187, 194 (2013).

Surprise, Change of trial strategy

Iowa Court Rule 2.4(8)(d) states that “[w]hen an application for amendment is sustained, no continuance or delay in trial shall be granted because of such amendment unless it appears that defendant should have additional time to prepare because of such amendment”.

“[A]n amendment prejudices the substantial rights of the defendant if it creates such surprise that the defendant would have to change trial strategy to meet the charge in the amended information”. State v. Brothern, 832 N.W.2d 187, 193 (Iowa 2013).

The amended trial information was a surprise to the Defense. Defense counsel stated “Defense counsel stated “it does provide a surprise to the defense,

that this is going to be tried as a habitual offender enhancement”. Trial Transcript in SRCR326685 for October 2, 2019, p. 11, lines 1-4.

In this case, the Defendant’s trial counsel asked for a continuance as Defendant’s trial counsel said that he would have prepared differently. See trial transcript in SRCR326685 for October 2, 2019, p. 30 lines 7-14. Defendant’s counsel stated that their trial strategy might have included deposing the victim and getting an expert to testify regarding the nature of the injuries. See trial transcript in SRCR326685 for October 2, 2019, p. 30 lines 7-14.

Defendant’s counsel stated that “it is prejudicial to Mr. Vandermark to have to defend these new – wholly new charges a week from trial and not be able to either get an expert to testify to the serious injury nature or possibly depose the defendant regarding his – the actual injury sustained, if they are different from what was reported in the police report”. Transcript in SRCR326685 for October 2, 2019, p. 25, lines 18-24.

Willful injury requires the “specific intent to cause serious injury”. See uniform jury instruction 800.11. Therefore, the strategy would need to look more carefully at defending against this intent element.

Lack of submitting witnesses 10 days prior to trial

Another reason that the Defense brought up as a reason resisting the amended trial information and asking for a continuance was that the prosecution

violated the Iowa Criminal Rules of procedure in listing witnesses less than 10 days prior to trial.

Defense counsel stated:

“The notice for the Trial Information, Amended Trial Information, and the Minutes of Testimony were untimely. We have ten days before trial that those need to be submitted so we can adequately prepare for trial and understand what evidence we believe the State will call and what the witnesses will testify to that the State calls. Your Honor, this Amended Trial Information and Additional Minutes of Testimony were filed seven days prior to trial. So by statute, by code, they are untimely. Now if they are untimely, you look at Iowa Rule of Criminal Procedure 2.19(3), and it says that, essentially, we can ask for a continuance.”

Trial Transcript in SRCR326685 for October 2, 2019, p. 10, lines 8-21.

Therefore, although the Defense counsel said it might not be necessary to depose the additional witness, nevertheless the State violated the notice requirement of the Iowa Rule of Criminal Procedure 2.19(3), and a continuance should have been given. See *Id.* The change in the underlying charge that included the additional witness provided a need for the Defense to have additional time to prepare. Defense counsel stated “it does provide a surprise to the defense, that this is going to be tried as a habitual offender enhancement”. Trial Transcript

for SRCR326685 on October 2, 2019, p. 11, lines 1-4. However, the judge did not grant the continuance. See *Id.*, p. 44, lines 17, 18.

III. THE SENTENCE WAS OVERLY HARSH UNDER THE CIRCUMSTANCES IN THE COMBINED SENTENCES FOR SRCR326685, SRCR327909, AND AGCR329728

A. Preservation of issue for review

The Appellant argued for a lenient sentence. See Sentencing transcript for SRCR326685, SRCR327909, and AGCR329728, p. 26. lines 10-16.

Standard of review

“We review sentencing decisions for an abuse of discretion when the “sentence is within the statutory limits”” *State v. Gordon*, 921 N.W.2d 19, 24 (Iowa 2018) (internal citations omitted).

Argument

The defendant received a 15 year sentence for Willful Injury, a class D Felony in SRCR326685 that was enhanced under the habitual offender statute. See sentencing order, App. p. 115. The Defendant received an additional 1 year under SRCR327909 for Assault causing bodily injury, a serious misdemeanor. *Id.* The defendant received a 2 year concurrent sentence in AGCR329728 for Harassment

in the First Degree, and Aggravated Misdemeanor. *Id.* The Defendant received the 15 year habitual enhancement for a total of 16 years. See *Id.*

Comparing the severity of punishment to the gravity of the crime can help in determining if the sentence was unduly harsh under the circumstances. See *State v. Oliver*, 812 N.W.2d 636, 636, 639 (Iowa 2012). In SRCR326685, Rodriguez told others that he was “ok” and didn’t require medical attention. Trial Transcript for SRCR326685 on October 2, 2019, p. 153 lines 21-25, p. 154 line 1.

Under Iowa Code 901.5, the Court should consider what will provide “maximum opportunity for the rehabilitation of the defendant” in addition to “the protection of the community”. Iowa Code 901.5. See also *State v. Pearson*, 836 N.W.2d 88, 97 (Iowa 2014). Although the sentencing court stated it considered some factors such as the defendant’s age and mental health issues, it did not indicate how consecutive sentences in SRCR326685 and SRCR327909 would rehabilitate the defendant. Considering the defendant had already received a 15 year habitual offender enhancement, the Court did not explain how consecutive sentences in SRCR326685 and SRCR327909 was rehabilitative to the Defendant.

IV. THE APPELLANT SHOULD HAVE BEEN GRANTED A NEW TRIAL IN SRCR326685 BECAUSE THE JURY FOUND THE DEFENDANT GUILTY DESPITE HAVING INSUFFICIENT EVIDENCE

Preservation of issue for review

The Appellant asked for a judgment of acquittal based on insufficient evidence in SRCR326685. See transcript for SRCR326685 on October 3, 2019, p. 3 line 19 to p. 4 lines 1-23.

Standard of review

The normal standard of review is for “an abuse of discretion”. State v. Valin, 724 N.W.2d 440, 444 (2016).

Argument

The evidence did not provide sufficient evidence to convict Mr. Vandermark of the charge against him in SRCR326685.

“In a sufficiency-of-the-evidence challenge we review all the evidence to determine whether a rational trier of fact could have found the defendant guilty beyond a reasonable doubt. We view the evidence in the light most favorable to the State and draw all fair and reasonable inferences from all the evidence. We do not uphold a verdict on evidence that merely raises suspicion, speculation, or conjecture regarding guilt”. State v. Williams, 574 N.W.2d 293, 296 (Iowa 1998). “Speculation and conjecture cannot be used to support a verdict”. State v. Schitter, 881 N.W.2d 380, 391 (Iowa 2016).

In a sufficiency of evidence challenge, “[t]he evidence must be sufficient to convince a rational fact finder that the defendant is guilty beyond a reasonable

doubt”. Id. “Speculation and conjecture cannot be used to support a verdict”.
State v. Schitter, 881 N.W.2d 380, 391 (Iowa 2016).

The jury instruction 21 required the following:

“The State must prove all of the following elements of Willful Injury
Causing Bodily Injury:

1. On or about April 10, 2019, the Defendant assaulted Edgar Rodriguez.
2. The Defendant specifically intended to cause a serious injury to Edgar Rodriguez.
3. The Defendant’s act caused Edgar Rodriguez to sustain a bodily injury.

If the State has proved all of these elements, the Defendant is guilty of Willful Injury Causing Bodily Injury. If the State has failed to prove any one of the elements, the Defendant is not guilty of Willful Injury Causing Bodily Injury, and you must then consider the charge of Assault with Intent to Inflict Serious Injury in Instruction No. 22.”

See Jury Instruction 21, App. p. 80.

Willful injury requires the “specific intent to cause serious injury”. See above jury instruction, uniform jury instruction 800.11.

Under Iowa Code 702.18, a serious injury is “any of the following:

- a. Disabling mental illness.
 - b. Bodily injury which does any of the following:
 - (1) Creates substantial risk of death.
 - (2) Causes serious permanent disfigurement.
 - (3) Causes protracted loss or impairment of the function of any bodily member or organ.”
- Iowa Code 702.18.

The evidence at trial failed to show beyond a reasonable doubt that the Defendant specifically intended to cause serious injury.

The witness Edgar Rodriguez testified:

Q. And since you were in the hospital, did you seek any medical treatment for that injury?

A. (By the Interpreter) No. When this happened, I was asked -- my son got called into the room, and I was asked if I wanted to get checked out. And I said no, that I just wanted my son to be seen and then to leave. I said that I was okay and that I just wanted to leave.

Trial Transcript for SRCR326685 on October 2, 2019, p. 153 lines 21-25, p. 154 line 1.

Clearly, there was no reasonable evidence of serious injury as Rodriguez told others that he was “Ok” and didn’t require medical attention. See *Id.* Nevertheless, even though there was no reasonable evidence of serious injury, the jury was required to prove beyond a reasonable doubt that Vandermark nevertheless intended to inflict serious injury. See Jury instruction 21, App. p. 80.

Since the witness did not even decide he needed medical attention, there was no medical evidence of a serious injury. Trial Transcript for SRCR326685 on

October 2, 2019, p. 153 lines 21-25, p. 154 line 1. There was no medical expert that testified that a serious injury occurred. There was no testimony from a medical professional that he received from the Defendant an injury that 1) “Creates substantial risk of death”, (2) “Causes serious permanent disfigurement” or (3) “Causes protracted loss or impairment of the function of any bodily member or organ”. See Iowa Code 702.18.

Therefore, from the witness’ own testimony he thought he was “OK” at the time and didn’t need medical attention, and the lack of any medical opinion otherwise that indicated a serious injury, there was no reasonable evidence of serious injury.

The evidence at trial failed to show beyond a reasonable doubt that the Defendant specifically intended to cause serious injury. It was reasonable to infer from the evidence that Vandermark did not intend to inflict serious injury, because Rodriguez testified that he was “ok” and did not need medical attention. In order to find Vandermark guilty beyond a reasonable doubt, the jury had to speculate that although there was no evidence of a serious injury, Vandermark nevertheless “missed the mark” in his punches and nevertheless, beyond a reasonable doubt intended to inflict serious injury. Such speculation is not sufficient. “Speculation and conjecture cannot be used to support a verdict”. State v. Schitter, 881 N.W.2d 380, 391 (Iowa 2016).

Because it requires speculation for a jury to determine that Vandermark intended to inflict serious injury on Rodriguez, there is reasonable doubt, and Vandermark should have been found not guilty of willful injury.

V. CONCLUSION

For all the reasons above, the Appellant respectfully requests that the judgment and sentence of the district court in SRCR326685 be overturned and the combined sentence in SRCR326685, SRCR327909, and AGCR329728 be overturned.

WHEREFORE, the Appellant James Paul Vandermark respectfully requests judgment and sentence of the district court in SRCR326685 be overturned and the combined sentence in SRCR326685, SRCR327909, and AGCR329728 be overturned. The Appellant requests that he be granted a dismissal in SRCR326685. In the alternative if the Appellant is not granted a dismissal, the Appellant asks that he be granted a new trial in SRCR326685.

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REQUEST FOR NON-ORAL SUBMISSION

The appellant requests non-oral submission in this case.

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The undersigned certifies a copy of this brief was served on the following persons and upon the clerk of the Iowa Supreme Court regarding the above cause at their respective addresses by e-filing on October 14, 2020, and to the Defendant-Appellant by mail on October 14, 2020.

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