

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
)
) APPLICATION FOR FURTHER REVIEW
)
)
)

Comes now James Vandermark, Appellant, by and through counsel, and submits his application for further review.

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QUESTIONS PRESENTED FOR REVIEW

- I. WHETHER 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**
- II. WHETHER 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**
- III. WHETHER THE APPELLANT SHOULD HAVE BEEN GRANTED A NEW TRIAL SRCR326685 BECAUSE THE JURY FOUND THE DEFENDANT GUILTY DESPITE HAVING INSUFFICIENT EVIDENCE**

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STATEMENT SUPPORTING FURTHER REVIEW

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 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.

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 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.

IV. 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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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 February 10, 2021, and to the Defendant-Appellant by mail on February 10, 2021.

/s/ /Daniel M. Northfield/
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James Vandermark
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IN THE COURT OF APPEALS OF IOWA

No. 19-2112
Filed January 21, 2021

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JAMES PAUL VANDERMARK,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, William P. Kelly, Judge.

James Vandermark appeals his conviction for willful injury causing bodily injury and his combined sentence. **AFFIRMED.**

Daniel M. Northfield, Urbandale, for appellant.

Thomas J. Miller, Attorney General, and Thomas E. Bakke, Assistant Attorney General, for appellee.

Considered by Bower, C.J., and Vaitheswaran and Greer, JJ.

BOWER, Chief Judge.

James Vandermark appeals the denial of his motion for a new trial and motion for judgment of acquittal relating to case number SRCR326685 and the combined sentences for SRCR326685, SRCR327909, and AGCR329728. We conclude the district court did not err in allowing an amendment to the trial information or abuse its discretion in denying a motion to continue. The jury's verdict is supported by substantial evidence, and the court was within its discretion in imposing consecutive sentences. We affirm.

I. Background Facts & Proceedings

On April 10, 2019, Vandermark had a near-accident in a parking lot with E.R. E.R. has a child with one of Vandermark's acquaintances. Sometime later that evening, the acquaintance was waiting for an appointment in a hospital lobby with her children, E.R., and another person. Vandermark called the acquaintance and asked where she was. Vandermark then drove to the hospital where the group was waiting, entered the lobby, walked directly to his acquaintance's group, punched E.R. in the head multiple times, and then left. The strikes caused a black eye and other sore spots on the E.R.'s head. Vandermark was in the lobby for less than thirty seconds.

On April 18, Vandermark was arrested for assault causing bodily injury, a serious misdemeanor, in violation of Iowa Code section 708.2(2) (2019), resulting in a trial information being filed in late May (SRCR326685). Following additional incidents in May and July with other persons, Vandermark was charged with a second assault causing bodily injury (SRCR327909) and two counts of harassment in the first degree (AGCR329728).

On September 25, the State filed a motion to amend the trial information related to the first assault to change the charged offense to willful injury causing bodily injury, in violation of Iowa Code section 708.4(2), a class “D” felony. The State also filed a notice it would seek a habitual-offender enhancement in the case. Vandermark resisted.

On October 2, just before trial, the court granted the motion to amend the charge, finding, “The Defendant’s original charge and amended charge both fall under the 708 assault chapter in the Iowa Code, the elements are substantially similar, and the time, date, and place surrounding the allegations have not changed.” The court also denied Vandermark’s oral motion to continue the trial.

The jury trial occurred on October 2 and 3. At the close of the State’s evidence, Vandermark moved for judgment of acquittal, asserting the State failed to present sufficient evidence to support a guilty verdict. The motion was denied. The jury found Vandermark guilty of willful injury causing bodily injury. After the jury returned its verdict, Vandermark waived a second trial on the habitual-offender enhancement and admitted his prior convictions in a colloquy with the court.

Vandermark filed a motion for new trial and a motion in arrest of judgment based on the amended trial information and denial of his motion to continue. The court reiterated its reasoning from the pretrial colloquy and denied the motions at sentencing.

On October 29, a jury found Vandermark guilty of assault causing bodily injury in the later-filed assault charge. On November 20, Vandermark pleaded guilty to one count of first-degree harassment.¹

On November 22, the court sentenced Vandermark in all three cases. The statutory sentence was imposed in each case—an indeterminate prison sentence of fifteen years with a three-year mandatory minimum for willful injury causing bodily injury with the habitual-offender enhancement, one year for assault causing bodily injury, and two years for harassment. The court ordered the assault sentence to run consecutive to the willful-injury sentence and the harassment sentence to run concurrent with the willful-injury sentence, for a total of sixteen years.

Vandermark appeals his conviction for willful injury causing bodily injury and his sentences.

II. Analysis

Vandermark asserts three challenges against his willful-injury conviction. First, he claims he is entitled to a new trial because the court abused its discretion in allowing the late amendment to the trial information with a more serious charge, asserting prejudice. Second, he claims entitlement to a new trial because the court abused its discretion in denying his motion to continue after the trial information was amended. Third, he claims there was insufficient evidence of his intent to inflict serious injury, which is a required finding for the offense. Vandermark also challenges the sentences imposed.

¹ The remaining harassment charge was dismissed.

A. Motion for new trial. “Our review of a district court ruling on a motion for a new trial depends on the grounds raised in the motion.” *State v. Lopez*, 633 N.W.2d 774, 781 (Iowa 2001). “To the extent the motion is based on discretionary grounds, we review it for an abuse of discretion. But if the motion is based on a legal question, our review is on error.” *Id.* at 781–82 (citation omitted).

Vandermark makes two challenges to the court’s denial of his motion for new trial: (1) the district court should have denied the amendment to the trial information and (2) the court should have granted his request for continuance.

1. *Amendment to trial information.* Iowa Rule of Criminal Procedure 2.4(8) governs the amendment of a trial information or indictment.

a. *Generally.* 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.

...
d. *Continuance.* When 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.

Iowa R. Crim. P. 2.4(8). Before the trial information can be amended, the court must determine if (1) “the amendment prejudices substantial rights of the defendant or [(2)] the amendment charges a wholly new or different offense.” *State v. Maghee*, 573 N.W.2d 1, 5 (Iowa 1997). If it does either, the court must not allow the amendment. *Id.* For this analysis, our review is for correction of errors at law. *Id.*

Vandermark argues willful injury is “a wholly new and different offense” from assault because of the difference in punishment and the additional intent element.

He claims the additional incarceration faced due to the habitual-offender enhancement prejudiced his substantial rights.

In determining if a charge is a “wholly new or different offense,” the court considers if the violation is the same “base prohibition,” involving the same elements, refers to “the same times, dates, and places of the alleged offenses,” and whether “[t]he State’s theory of the offenses and the defenses would be identical under each.” *State v. Brisco*, 816 N.W.2d 415, 418–19 (Iowa Ct. App. 2012); see also *State v. Ruiz*, No. 18-1260, 2019 WL 3729562, at *1 (Iowa Ct. App. Aug. 7, 2019) (finding no abuse of discretion if the court had allowed the amendment of one count where “[t]he statute charged remained the same; the witnesses remained the same; [and] the originally filed minutes of testimony supported the amended charges”).

Iowa case law is clear that assault under section 708.1 is a specific intent crime “[b]ecause the elements . . . include an act that is done to achieve the additional consequence of causing the victim pain, injury or offensive physical contact.” *State v. Fountain*, 786 N.W.2d 260, 265 (Iowa 2010). The question presented here is whether “specific intent to cause serious injury” is different enough from the specific intent to cause an assault to qualify willful injury as a wholly new and different offense than assault causing bodily injury. We conclude in this case it is not.

The amended charge referenced the same time, date, place, and alleged actions, was within the same assault classification, did not involve additional witnesses, and was supported by the original minutes of testimony. The amended trial information did not charge a wholly new and different offense.

The only prejudice Vandermark alleges on appeal is the longer term of incarceration faced with the habitual-offender enhancement.

“An 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.” *Maghee*, 573 N.W.2d at 6. An amendment to add a habitual-offender enhancement can prejudice the defendant’s substantial rights “if the defendant had no prior notice of the State’s plan to amend and would have pled guilty had he or she known of that plan before trial.” *State v. Brothorn*, 832 N.W.2d 187, 196 (Iowa 2013) (examining a case where an amendment added the habitual-offender enhancement during trial).

The amendment here occurred a week before trial, and Vandermark was offered an opportunity to plead guilty without the enhancement before trial started. Vandermark was offered and also waived the opportunity to have a separate trial on the habitual-offender enhancement. On appeal, Vandermark does not assert any change in his trial strategy caused by the amendment. We discern no prejudice. The district court did not err in allowing the amendment.

2. Motion to continue. Next, Vandermark claims the district court’s denial of his motion to continue after the trial information was amended entitles him to a new trial. Vandermark asked for a continuance to depose the victim about the injury sustained and possibly obtain expert witness testimony. He asserted “trial strategy is wholly different” when preparing for a felony charge with a habitual-offender enhancement as opposed to a serious misdemeanor.² Vandermark

² The reference to an expert witness was to explore whether the injuries actually inflicted qualified as “serious injury.” The State agreed it would not seek to amend

further claims the State violated Iowa Rule of Criminal Procedure 2.19(3) by failing to provide notice of prosecution witnesses at least ten days before trial.

“We review the denial by the district court of a motion for continuance for an abuse of discretion.” *State v. Artzer*, 609 N.W.2d 526, 529 (Iowa 2000).

In ruling on Vandermark’s resistance to the amended trial information, the court specifically considered trial strategy, noting that Vandermark had pled “not guilty” to the assault and had not offered any affirmative defenses. The court also found the amended charge was not a wholly new and different offense. We agree, as explained above. We further note the additional evidence Vandermark sought as reason for the continuance had to do with the seriousness of the injury *actually sustained*, which is not necessary when the challenged portion of the charge only involves his own intent.

As to Vandermark’s witness challenge, the new witness proposed by the State was a county clerk of court (or designee) whose testimony would relate to records supporting the habitual-offender enhancement. The enhancement would have been tried at a later date after the underlying trial, if at all, so it was not necessarily true Vandermark had less than ten days’ notice. Vandermark conceded discovery of the clerk of court was not needed, and he ultimately waived trial on the enhancement

Under these circumstances, the court did not abuse its discretion in denying Vandermark’s motion to continue.

the trial information after the evidence came in to request a “willful injury causing serious injury” charge.

B. Sufficiency of the evidence. Vandermark’s challenge to the court’s denial of his motion for acquittal alleges there was insufficient evidence to support a guilty verdict. Vandermark cites a lack of evidence of *actually inflicting* serious injury and states any finding by the jury that he intended to inflict serious injury is mere speculation or conjecture.

“We review sufficiency-of-evidence challenges for correction of errors at law.” *State v. Lane*, 743 N.W.2d 178, 181 (Iowa 2007). We consider the evidence in the light most favorable to the State. *Id.*

Vandermark’s first theory about the severity of the injury actually sustained is irrelevant. The evidence only needed to support a finding that a *bodily* injury occurred, not that a *serious* injury was inflicted. See Iowa Code § 708.4. Moreover, Vandermark did not contest the existence of a bodily injury and urged the jury to convict him of the original charge of assault causing bodily injury. Sufficient evidence supports the bodily injury element of the offense.

Vandermark next asserts only speculation or conjecture could result in a jury finding he intended to cause serious injury. He argues, “It was reasonable to infer from the evidence that Vandermark did not intend to inflict serious injury, because [the victim] testified that he was ‘ok’ and did not need medical attention.” We disagree.

“Because it is difficult to prove intent by direct evidence, proof of intent usually consists of circumstantial evidence and the inferences that can be drawn from that evidence.” *State v. Adams*, 554 N.W.2d 686, 692 (Iowa 1996). Viewing the evidence in the light most favorable to the State, including reasonable

inferences, we conclude there is substantial evidence from which the jury could find Vandermark intended to inflict serious injury upon the victim.

Vandermark called his acquaintance to get her location. He then drove to the hospital where the acquaintance and victim were waiting. He walked directly to the group and began punching the victim. Vandermark struck the victim multiple times with enough force to raise bruises within a short period of time. He then left, showing his purpose there was solely to strike the victim. Additionally, the victim testified that several months after the assault his nose still felt crooked. The jury could have reasonably inferred from these actions Vandermark intended to inflict a serious injury. Substantial evidence supports the jury's verdict, and the court did not abuse its discretion in denying Vandermark's motion for judgment of acquittal.

C. Sentence challenge. Vandermark also claims his combined sentences are "overly harsh," and that the court did not explain how consecutive sentences were rehabilitative when the fifteen-year habitual-offender enhancement had already been imposed. Here, the sentencing court ordered the second charged assault sentence to run consecutive to the first charge of willful injury with habitual-offender enhancement sentence and ordered the harassment sentence to run concurrently with the willful-injury sentence—for a total indeterminate term of sixteen years with a three-year mandatory minimum.

"We review the district court's sentence for an abuse of discretion." *State v. Barnes*, 791 N.W.2d 817, 827 (Iowa 2010). "An abuse of discretion is found when the court exercises its discretion on grounds clearly untenable or to an extent clearly unreasonable." *Id.* The court is required to state reasons for imposing a particular sentence on the record, including consecutive sentences. *Id.* "Although

the reasons need not be detailed, at least a cursory explanation must be provided to allow appellate review of the trial court's discretionary action." *Id.* (citation omitted).

Here, the court considered Vandermark's long history of assaultive behavior and his violent and abusive upbringing. The three separate offenses he was being sentenced for were distinct from each other in time, victims, and location, and occurred within a four-month period. Vandermark had been arrested for the first willful-injury offense and was out on bond when he inflicted the second assault in May, and he had been officially charged in both assault cases before the first-degree harassment behavior occurred.

The court noted: "He's at that age where a grown man knows what he's doing, knows what his actions can cause, knows the implications of his actions, and understands the ramifications of his actions." The court decided to run the two-year sentence for harassment concurrently based on Vandermark's mental-health issues leading to violent reactions to people. When imposing the consecutive sentence for the assault conviction, the court stated its reasons as "the separate and serious nature of the violent offense" and the "protection of the community." The court described Vandermark's actions as "brutal, barbaric, and . . . not tolerated in a civilized society."

Under the facts of this case, the court was within its discretion in imposing the sentences. Vandermark's challenge is without merit.

AFFIRMED.



IOWA APPELLATE COURTS

State of Iowa Courts

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