IN THE SUPREME COURT OF IOWA

Supreme Court No. 21-1040

STATE OF IOWA,

Plaintiff-Appellee,

v.

JOSEPH ALLEN BLOOM,

Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR WAPELLO COUNTY
Honorable Greg Milani
(District Court No. FECR012755)

DIRECT APPEAL ON BEHALF OF APPELLANT JOSEPH ALLEN BLOOM

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FINAL BRIEF

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STATEMENT OF THE CASE

Procedural History

On September 24, 2020, Joseph Allen Bloom was charged by the State of Iowa with five counts, to-wit: Count I, Burglary in the First Degree, while being a Habitual Offender; Count II, Robbery in the First Degree, while being a Habitual Offender; Count III, Theft in the First Degree, while being a Habitual Offender; Count IV, Assault while Participating in a Felony Causing Serious Injury, while being a Habitual Offender; and, Count V, Willful Injury Causing Serious Injury, while being a Habitual Offender. (Trial Information p. 1-3; App. 25). Bloom entered a plea of not guilty to all charges on October 8, 2020. (Written Arraignment; Appx. 29). The matter proceeded to a four-day jury trial on April 6, 7, 8, and 9 of 2021. (Order Setting Trial p. 1; App. 31).

On day three of the trial, the State rested. (Trial Tr. Vol. 3, p. 101, ln. 1). Thereafter, counsel for the defendant made a Motion for Directed Verdict for a Verdict of Acquittal pursuant to Iowa Rule of Criminal Procedure 2.19(8). (Trial Tr. Vol. 3, p. 101, ln. 5-7). The defense counsel presented detailed arguments to support the dismissal of each count. (Trial Tr. Vol. 3, p. 101-103 *generally*). Counsel specifically raised the issue that no independent evidence was presented to corroborate the accomplice testimony as required by Iowa Rule of Criminal

Procedure 2.21(3). Trial Tr. Vol. 3, p. 101, ln. 10-12. "There's insufficient corroborating evidence in this case." *Id*. at ln. 18-19.

After counsel's respective arguments, the court reserved ruling on the motion for directed verdict. (Trial Tr. Vol. 3, p. 111, ln. 14-16). After the defense rested, the court ruled on the motion for directed verdict and dismissed Count III. (Trial Tr. Vol. 3, p. 123, ln. 10-13). Thereafter, the jury deliberated and returned a guilty verdict on all counts presented to them, namely, Counts I, II, IV, V. (Criminal Verdict p. 2-5; Appx. 43-46; Trial Tr. Vol. 4, p. 121).

On June 28, 2021, the matter proceeded to sentencing. (Judgment and Sentence p. 1; Appx. 82; Sentencing Tr. p. 2, ln. 2-3); The Court considered several procedural issues at sentencing. (Sentencing Tr. *generally*). These issues included the application of the sentencing enhancements. *Id*. at p. 6, ln. 10-13. Specifically, the defendant argued that, for the Iowa Code §902.11 sentencing enhancement to apply, the defendant must be serving a sentence for a prior forcible felony or a crime of similar gravity. *Id*. at p. 7, ln. 2-6. Bloom argued that the offense of vehicular homicide is not a forcible felony or a crime of similar gravity and, therefore, §902.11 does not apply. *Id*. at p. 7, ln. 7-16. The State presented argument that the sentencing enhancement does apply. *Id*. at p. 10, ln. 21-25.

In addition, the defense raised the issue of merger among the crimes of Assault while Participating in a Felony, Willful Injury Causing Serious Injury, and Robbery

in the First Degree. *Id*. at p. 13-14. The defendant argued that all three of those counts should merge. *Id*. at p. 15, ln. 2-3. The defendant further requested that all counts run concurrently. *Id*. at p. 16, ln. 23-25.

After considering the arguments of counsel, the court entered judgment and sentence against Mr. Bloom. (Judgment and Sentence p. 1-2; Appx. 82-83; Sentencing Tr. p. 19-20). Mr. Bloom was sentenced on Count I, Burglary in the First Degree, to a term not to exceed 25 years of imprisonment; Count II, Robbery in the First Degree, to a term not to exceed 25 years of imprisonment; Count IV, Assault while Participating in a Public Offense Causing Serious Injury, a term of imprisonment not to exceed 15 years; and Count V, Willful Injury Causing Serious Injury, a term of imprisonment not to exceed 15 years. (Judgment and Sentence p. 1-2; Appx. 82-83). Counts I and II are to run consecutive to one another. *Id*. Counts IV and V are to run concurrently to Counts I and II. (Judgment and Sentence p. 1; Appx. 82; Sentencing Tr. p. 19-21). Bloom shall not be paroled or work released until he has served one half of the maximum term of the sentence. (Sentencing Tr. at p. 21, ln. 16-18).

Mr. Bloom filed a timely Notice of Appeal on July 23, 2021 and now asks the reviewing court to find that the district court violated his constitutional rights by denying his motion for acquittal based on lack of corroborating evidence to the accomplice testimony, failing to merge several of the counts, and by erroneously

applying a sentencing enhancement. (Notice of Appeal; Appx. 91). Mr. Bloom asks that the Iowa Court of Appeals vacate the judgment and sentence in this matter and remand to the district court for further proceedings.

Facts

On April 5, 2020, two masked men entered Michael Nulph's home in Ottumwa, Wapello County. (Trial Tr. Vol. 2, p. 30, ln. 6; Vol. 3, p. 31-32, ln. 22-25, ln. 1-3. Mr. Nulph was physically attacked ("He started throwing punches there shortly thereafter, and then another guy come running in. One guy got me down, and the other guy started hitting me with a chair.") *Id*. at p. 33, ln. 4-7. Nulph lost consciousness. *Id*. at p. 33, ln. 11-12. When he regained consciousness, he discovered that his cell phones, keys, and cash were missing. *Id*. at p. 33, ln. 19-21.

Nulph ultimately saw a plastic surgeon and underwent reconstructive surgery for his injuries. *Id*. at p. 33, ln. 22-23. Dr. Simon Wright treated Nulph and testified that Nulph had sustained a fractured skull, specifically a facial injury that involves the separation of the upper jaw from the rest of the skull. (Trial Tr. Vol. 2, p. 75, ln. 10-11). In this so called LaFort facture, there is "a fracture line that goes across the eye sockets, across the nose, across the cheek bones on both sides, that upper jaw would just be kind of loose and unstable." (Trial Tr. Vol. 2, p. 76, ln. 10-14). Dr. Wright was able to perform a successful surgery on Nulph. *Id*. at p. 80, ln. 2-3. However, Nulph testified that he has ongoing physical symptoms from the attack

including difficulty breathing and cognitive impairment. (Trial Tr. Vol. 2, p. 65, ln. 20-22).

Further testimony revealed that a woman by the name of Alexies Meier had befriended Nulph and was informally living at his home, or at least storing her personal belongings there. (Trial Tr. Vol. 2, p. 108, ln. 8-20). Alexies Meier had previously dated Anthony Lankford. Id. at p. 112, ln. 9-19. Alexies testified that she was with Anthony Lankford and Joseph Bloom at Bloom's house just prior to the incident at Nulph's house. Id. at p. 117, ln. 7-10.

Alexis testified that she drove the two perpetrators, Anthony Lankford and Joseph Bloom, to Nulph's house that day under duress. (Trial Tr. Vol. 2, p. 121, ln. 1-5). Meier testified that Lankford threatened her and instructed her to enter Nulph's house and turn off the security monitoring system. *Id*. at p. 121, ln. 5-9. She entered the house, switched off a power strip, apologized to Nulph, and ran out of the house. (Trial Tr. Vol. 2, p. 123-124, ln. 24-25; ln. 2-4). At the time she ran out of the house, according to her testimony, Lankford and Bloom entered Nulph's house wearing masks. *Id*. at p. 125, ln. 14-20. Thereafter, Lankford and Bloom came back out of the house and got back into the truck. (Trial Tr. Vol. 2, p. 127, ln. 2-6). Lankford and Bloom discussed assaulting Nulph. *Id*. at p. 127, ln. 7-23. Lankford and Bloom also had in their possession black cases and a key lanyard. *Id*. at p. 128, ln. 7-8, 18-

20. Meier further testified that Lankford gave her close to $3,000 after the incident at Nulph's home. *Id*. at p.135, ln. 8-9.

Additional State witness, Joesph Bloom's paramour, Connie West, also provided testimony, including that she allowed Bloom to borrow her truck and drove him to the AmericInn hotel and paid for a room for him the night of the incident. (Trial Tr. Vol. 3, p. 38, 5-8).

Bloom waived the right to testify in his own defense. (Trial Tr. Vol. 3, p. 113, ln. 2-10). Bloom's witness, a trailer park manager, testified that Bloom and his co-defendants performed contract work cleaning up debris for him around the time of the incident. (Trial Tr. Vol. 3, p. 116, ln. 4-5).

Routing Statement

This Appeal should be heard by the Court of Appeals because it presents the application of existing legal principles. Iowa R. App. P. 6.1101(3).

SUMMARY OF THE ARGUMENT

Mr. Bloom argues that the district court erred by failing to grant a directed verdict of acquittal based on the lack of independent corroborating evidence to the accomplice testimony. No physical evidence or other identification testimony was presented by the State to place the defendant at the scene of the crime. A conviction cannot be had on accomplice testimony alone. Further, the district court failed to merge several of the convictions and sentences, resulting in an illegal sentence. The convictions of Robbery in the First Degree and Willful Injury Causing Serious Injury should be merged. In addition, the charge of Assault While Participating in a Felony should merge with Burglary in the First Degree and Robbery in the First Degree. Finally, the sentencing enhancements under Iowa Code §902.11 do not apply in this case. The predicate conviction for the application of §902.11 was vehicular homicide. Vehicular homicide is neither a forcible felony nor a crime of similar gravity. Accordingly, the judgment and sentence should be vacated, and the matter remanded to the district court for further proceedings.

ARGUMENT

I. The District Court Erred by Failing to Grant the Motion for Verdict of Acquittal Based on The Lack of Independent Evidence to Corroborate the Accomplice Testimony.

A. Error Preservation

Counsel for the defendant made a motion for directed verdict for a verdict of acquittal pursuant to Iowa Rule of Criminal Procedure 2.19(8) on the record at trial. (Trial Tr. Vol. 3, p. 101, ln. 5-8). The defendant specifically raised the issue of accomplice testimony being insufficient evidence to convict. *Id*. at ln. 10-12. "There's insufficient corroborating evidence in this case." *Id*. at ln. 18-19.

B. Standard of Review

The standard of review of a trial court's determination on the legal adequacy of corroborating evidence to accomplice testimony is for correction of errors at law. *State v. Bugely*, 562 N.W.2d 173, 176 (Iowa 1997).

C. A Directed Verdict of Acquittal was in order where the only evidence against the defendant was accomplice testimony that was not independently corroborated.

Alexies Meier, the only witness to identify Bloom as a perpetrator of the crime, was charged with the same crimes as Bloom for the same incident giving rise to Bloom's charges.[1] Meier was therefore an accomplice to the crimes. An

[1] Co-defendant Alexis Meier was charged with the same offenses as Bloom in FECR012598, except that Meier was not charged with Theft in the First Degree.

accomplice is "a person who willfully unites in or is in some way concerned in the commission of a crime." *State v. Berney*, 378 N.W.2d 915, 917 (Iowa 1985) (quoting *State v. Johnson*, 318 N.W.2d 417, 440 (Iowa 1982). "In general, a person is an accomplice if he or she could be charged and convicted of the same offense for which the defendant is on trial." *State v. Douglas*, 675 N.W.2d 567, 571 (Iowa 2004).

Iowa Rule of Criminal Procedure 2.21(3) states:

> A conviction cannot be had upon the testimony of an accomplice or a solicited person, unless corroborated by other evidence which shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

In the present case, the victim could not and did not identify the defendant as a perpetrator of the crime against him. (Trial Tr. Vol.2, p. 32, ln. 1-3; p. 47, ln. 11-14). In fact, during an investigative photo line-up, Mr. Nulph told Officer Story that Bloom was not one of the two people who robbed him. (Trial Tr. Vol. 2, p. 46, ln. 15-25). At trial, Alexies Meier was the only witness to identify Bloom as a co-perpetrator of the crime against Mr. Nulph. (Trial Tr. Vol. 2, p. 125).

The law in Iowa has required corroboration of accomplice testimony for many decades.

> This rule has been a part of the body of Iowa law since 1851. Iowa Code section 2998 (1851) states: A conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

State v. Connors, 822 N.W. 2d 744 (Iowa Ct. App. 2012). "It has long been the law in Iowa that one may not be convicted on the testimony of an accomplice alone." *State v. Brandt*, 44 N.W. 2d 690, 693 (Iowa 1950).

"Two purposes are served by the requirement of accomplice corroboration: first, it connects the accused to the crime charged; and second, it 'serves as a counterweight against the dubious credibility of an accomplice, whose motivation to testify is suspect because the person would have a natural self interest in focusing the blame on the defendants.' *State v. Barnes*,791 N.W.2d 817, 823–24 (Iowa 2010) (quoting *State v. Berney*, 378 N.W.2d 915, 918 (Iowa 1985), overruled on other grounds by *State v. Bruce*,795 N.W.2d 1, 3 (Iowa 2011))." *State v. Williams*, 820 N.W.2d 769 (Iowa Ct. App. 2012).

"Corroborative evidence need not be strong as long as it can fairly be said that it tends to connect the accused with the commission of the crime and supports the credibility of the accomplice." *Berney*, 378 N.W.2d at 918. An overview of cases on the issue of corroboration of accomplice testimony reveals several ways that accomplice testimony can be corroborated:

1. A non-accomplice witness heard gunshots and identified the shooter's voice in *State v. Benavidez*. 710 N.W. 2d 545 at 545 (Iowa Ct. App. 2005).

2. Burglary victims saw the defendant driving a vehicle and the defendant fled from them, the vehicle was later found to contain items stolen in the burglary in *State v. Banes*. 910 N.W. 2d 634 (Iowa Ct. App. 2018).
3. The defendant was found in possession of multiple items stolen in different thefts in *State v. Roose*. 728 N.W. 2d 851 (Iowa 2007).
4. A confidential informant participated in three controlled buys of crack cocaine, drugs and drug paraphernalia were recovered in a search warrant of the defendant's residence, and the CI identified the defendant in *State v. Williams*. 820 N.W. 2d 769 (Iowa Ct. App. 2012).
5. Defendant's acts of child abuse were witnessed by others, physician testified that injuries to child consistent with accomplice description of defendant's acts in *State v. Yeo*. 659 N.W. 2d 544, 548 (Iowa 2003).
6. The defendant possessed and used credit cards stolen in the burglary in *State v. Robinson*. No. 19-1300, 3 (Iowa Ct. App. Apr. 15, 2020).
7. Surveillance video showed the defendant surveilling the area and entering the store at the time of the robbery in *State v. Bridges*. No. 16-1366, at 7 (Iowa Ct. App. Dec 6, 2017).
8. Surveillance video showed defendant purchasing pseudoephedrine two accomplices testified was used to manufacture methamphetamine in *State v. Hommer*. 873 N.W. 2d 551, 3 (Iowa Ct. App. 2015).

Other cases demonstrate when corroborative evidence is not sufficient:

1. Defendant residing near the crime scene, conversations with others after the crime, and the fact that no stolen items were found in defendant's possession proved only the defendant's knowledge of the area, knowledge a crime was being investigated, and suspicion that accomplice was involved in a crime. "The evidence does not corroborate a material aspect of the accomplice's testimony connecting the defendant with the commission of the crime charged." *State v. Ingram* 690 N.W. 2d 697 (Iowa Ct. App. 2004) (citing *State v. Gillespie*, 503 N.W.2d 612, 617 (Iowa Ct. App. 1993).
2. Accomplice testimony was not corroborated after statements by the defendant were found to be inadmissible. Accomplice testimony lacked credibility and there was no physical evidence to connect the defendant to the crime in *State v. Peterson*, 663 N.W. 2d 417, 434 (Iowa 2003).
3. Accomplice testimony was not corroborated by finding a satchel and two hammers at the residence of the defendant when those items were not shown to have been used in the commission of the crime and the tool used in connection with the crime was found in the possession of an accomplice in *State v. Fletcher*, 68 N.W. 2d 99 (Iowa 1955).

4. In *State v. Hommer*, cited above, the testimony of two accomplices was corroborated. However, the testimony of two other accomplices was not corroborated where their testimony was not supported by independent evidence or where the testimony did not connect the defendant to the offense. *Hommer* at 4.

In this case, there is no independent evidence connecting Bloom to the charged offenses that would corroborate Meier's accomplice testimony. Nulph specifically denied that Bloom was one of his assailants. The State presented no independent witnesses to the crime. There was no video evidence of the crime. There was no evidence that Bloom was ever in possession of any items stolen in the robbery. Simply put, there is no physical evidence. In addition, as an accomplice, Meier had a motivation to shift blame away from herself and onto Bloom and Lankford. Due to lack of independent corroborating evidence, the district court should have granted the motion for verdict of acquittal.

II. The District Court Erred by Failing to Merge Bloom's Convictions and Sentences as required by the Double Jeopardy clause of the U.S constitution and Iowa Code §701.9, resulting in an illegal sentence.

A. Error Preservation

Bloom raised the issue of merger at sentencing. (Sentencing Tr. p. 13-15). Further, a "district court's failure to merge convictions as required by statute results

in an illegal sentence" and "such claims may be raised at any time." *State v. Love*, 858 N.W.2d 721, 723 (Iowa 2015). Thus, the rules of error preservation do not apply to challenges to sentences that are illegal. *State v. Woody*, 613 N.W.2d 215, 218 (Iowa 2000). To the extent that Bloom's objection at the trial level was inadequate, error preservation is not required to correct an illegal sentence.

B. Standard of Review

Review of an illegal sentence for lack of merger is for correction of errors at law. *Love*, 858 N.W.2d at 724; *State v. Rodriquez*, 636 N.W.2d 234, 246 (Iowa 2001). Review of a Double Jeopardy claim is de novo. *State v. Stewart*, 858 N.W.2d 17, 19 (Iowa 2015).

C. The offenses of Burglary in the First Degree, Robbery in the First Degree, Assault while Participating in a Public Offense Causing Serious Injury, and Willful Injury Causing Serious Injury are necessarily included in one another and must therefore be merged.

The Double Jeopardy provision of the 5th Amendment to the United States Constitution states: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. Am. 5. The Double Jeopardy provision of the United States Constitution applies to the State through the 14th Amendment due process clause. *Benton v. Maryland*, 395 N.W.2d 784, 794 (1969).

Iowa Code §701.9 provides:

> 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.

This section codifies the double jeopardy protection that the United States Constitution provides. *State v. Sharkey*, no. 09-0068, 2010 WL 200355 at *2 (Iowa Ct. App. 2010) (unpublished opinion).

When one crime is necessarily included in a greater offense, the court is required to merge the convictions. Iowa courts apply a legal elements test when determining whether one crime is a lesser include offense of another. *State v. Mulvany*, 600 N.W. 291, 293 (Iowa 1999). Under this test, the applicable statutes are placed side by side and their elements are examined in the abstract. "The comparison must produce a nearly perfect match. If the lesser offense contains an element that is not part of the greater offense, the lesser cannot be include in the greater." *Id*. (quoting *State v. Jefferies*, 430 N.W.2d 728, 730 (Iowa 1988)).

1. Willful Injury Causing Serious Injury merges into Robbery in the First Degree because they both necessarily include an intent to cause serious injury.

Willful injury Causing Serious Injury and Robbery in the First Degree must property be merged because Willful Injury Causing Serious Injury is necessarily included in Robbery in the First Degree. Both crimes include the intent or purpose to inflict or cause serious injury. These elements are synonymous.

Instruction No. 35, Robbery in the First Degree, provides:

> The State must prove all of the following elements of Robbery in the First Degree:
>
> 1. On or about the 5th day of April, 2020, the defendant had the specific intent to commit a theft.
> 2. To carry out his intention or to assist him in escaping from the scene, with or without the stolen property, the defendant committed an assault on Michael Nulph as defined in Instruction No. 27.
> 3. The **defendant purposely inflicted or attempted to inflict a serious injury** on Michael Nulph.
>
> If the State has proved all of the elements, the defendant is guilty of Robbery in the Fist Degree. If the State has failed to prove any one of the elements, the defendant is not guilty of Robber in the First Degree and you will the n consider the charge of Robbery in the Second Degree explained in Instruction No. 36.

(emphasis added). (Jury Instruction No. 35.; Appx. 67).

Whereas Instruction No. 41, Willful Injury Causing Serious Injury, states:

> The State must prove all of the following elements of Willful Injury Causing Serious Injury.
>
> 1. On or about the 5th day of April 2020, the defendant assault Michael Nulph.
> 2. The **defendant specifically intended to cause a serious injury** to Michael Nulph.
> 3. The defendant's acts caused a serious injury to Michael Nulph as defined in Instruction No. 34.
>
> If you find the State has proved all of the elements, the defendant is guilty of Willful Injury Causing Serious Injury. If the State has proved only elements 1 and 3, the defendant is guilty of Assault Causing Serious Injury. If the State has proved only elements 1 and 2, then you will consider the charge of Willful Injury Causing Bodily Injury as explained in Instruction 42.

(emphasis added). (Jury Instruction No. 41; Appx. 71).

As stated, the Robbery in the First-Degree instruction provides that "the defendant purposely inflicted or attempted to inflict a serious injury on Michael Nulph." Similarly, the Willful Injury instruction provides, "the defendant specifically intended to cause serious injury to Michael Nulph." The words "purposely inflicted a serious injury" and "intended to cause serious injury" are synonymous. *State v. Hickman*, 623 N.W.2d 847 (Iowa 2001).

In *Hickman*, the Court encountered the same issue and found that the two offenses, robbery in the first degree and willful injury, are merged under Iowa Code Section 701.9. *Id*. at 852. The *Hickman* court looked to the elements of each offense and determined that the greater offense could not be committed without also committing the lesser offense. *Id*. at 850. This is known as the "impossibility test." Id. (citing *State v. Coffin*, 504 N.W.2d 893, 894 (Iowa 1993).

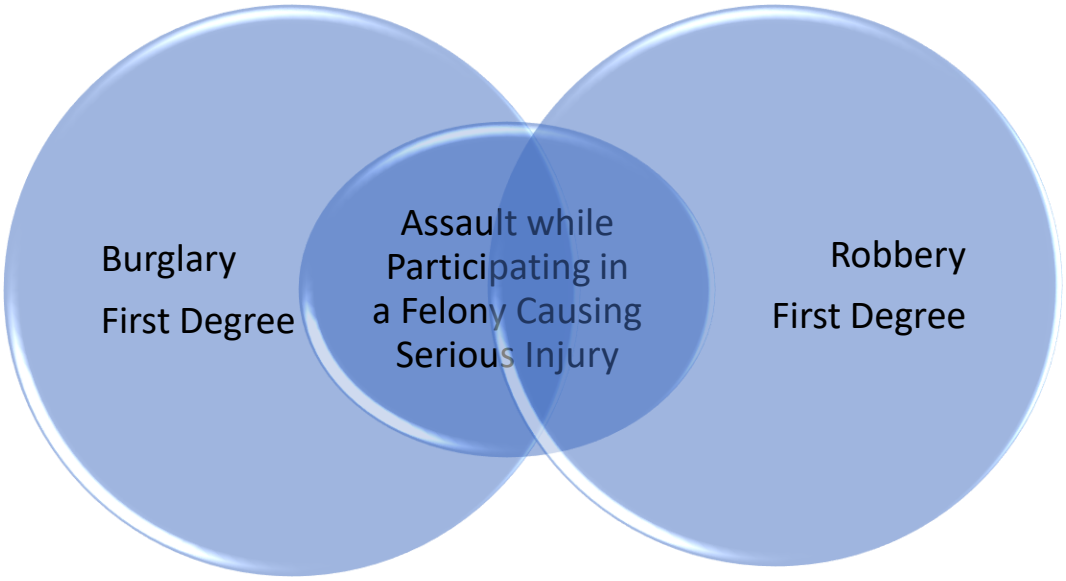
> [W]e conclude the words 'purposely inflicts… a serious injury' under the first-degree robbery statute and 'intended to cause serious injury' under the willful injury statute, convey the same thought: the defendant intended to cause serious injury to the victim (specific intent), not just to do the act that resulted in serious injury (general intent). Under this analysis, it is impossible to commit first degree robbery under the purposely inflicts serious injury alternative without also committing willful injury.

The court ruled that the offenses of Robbery in the First Degree and Willful Injury are merged under Iowa Code §701.9 and the separate judgment and sentence for willful injury must be vacated. *Id*. at 852. The same result is also required in Bloom's case.

2. Assault While Participating in a Public Offense merges into Robbery in the First Degree and Burglary in the First Degree because they necessarily include the same elements.

At the outset of this analysis, it is established that Robbery in the First Degree and Burglary in the First Degree do not merge into one another. See *State v. Reames*, No. 05–1084, 2006 WL 2873320, at *2 (Iowa Ct.App. Oct. 11, 2006) (determining that the legal elements test does not require the merger of robbery and burglary convictions); *Bryson v. State*, 886 N.W.2d 860, 865 (Iowa App. 2016) (Second Degree Robbery and First-Degree Burglary do not merge because robbery includes the requisite of an assault occurring to assist in escaping or to further the commission of the intended theft whereas burglary only required the assault to occur at some point during the burglary); *Herron v. State*, 888 N.W.2d 681 (Iowa App. 2016) ("A review of these elements shows that first-degree robbery does not merge into first-degree burglary because the robbery count required an element that is not present in the burglary count.")

However, Assault While Participating in a Public Offense merges into Robbery in the First Degree and Burglary in the First Degree. Assault while Participating in a Felony Causing Serious Injury does not contain an element independent of Burglary in the First Degree and Robbery in the First Degree. All elements of Assault while Participating in a Felony are subsumed by Burglary in the First Degree and Robbery in the First Degree as the Venn diagram below illustrates.



Jury Instruction No. 38, Assault While Participating in a Public Offense Causing Serious Injury, states:

> The State must prove all of the following elements of an Assault While Participating in a Public Offense Causing Serious Injury:
>
> 1. On or about the 5th day of April, the defendant committed an assault on Michael Nulph as defined in Instruction No. 27.
> **2.** At the time of the assault, **the defendant was participating in the crime of Burglary.**
> 3. **The assault caused a serious injury**.
>
> If the State has proved all of the elements, the defendant is guilty of Assault While Participating in a Public Offense Causing Serious Injury. If the State has failed to prove any of the elements the defendant is not guilty of Assault While Participating in a Public Offense Causing Serious Injury and you will consider the charge of Assault While Participating in a Public Offense explained in Instruction No. 39.

(emphasis added). Jury Instruction No. 38; Appx. 69.

The common element between Burglary and Assault While Participating in a Public Offense is "burglary." (*See* Element 2, Jury Instruction 38 above). Burglary in the First Degree includes the element of committing the felony crime of burglary.

The common element between Robbery and Assault While Participating in a Public Offense is "causing a serious injury." (See Element 3, Jury Instruction No. 38 above). Robbery in the First Degree includes the element of inflicting a serious injury.

Again, Iowa Code §701.9 provides:

> 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.

All elements of the crime of Assault While Participating in a Public Offense Causing Serious Injury are covered by Robbery in the First Degree and Burglary in the First Degree. Thus, Bloom is being doubly punished for the same crime twice, to-wit: causing a serious injury while participating in a felony. The convictions of robbery and burglary are already specifically punishing him for causing serious injury while participating in a felony.

Because the elements of Assault While Participating in a Public Offense Causing Serious Injury are subsumed by the counts of Robbery in the First Degree and Burglary in the First degree, the Assault conviction must be vacated.

III. The District Court Erred by Applying Sentencing Enhancements Under Iowa Code §902.11 to the Convictions of Robbery in the First Degree and Burglary in the First Degree.

A. Error Preservation

Trial counsel for Bloom objected to the prior felonies being "forcible felonies." (Trial Tr. Vol. 3, p. 91, ln. 5-8; Sentencing Tr. p. 7, ln. 2-16, p. 9, ln. 21-22). The defendant specifically objected to the characterization of Vehicular Homicide as a forcible felony or a crime of similar gravity for the purposes of the sentencing enhancement under Iowa Code §902.11. (Sentencing Tr. p. 8, ln. 4-19). Further, because an illegal sentence can be corrected at any time, this issue is not subject to error preservation rules. *State v. Ross*, 729 N.W.2d 806, 809 (Iowa 2007). ("An illegal sentence is void and 'not subject to the usual concepts of waiver, whether from a failure to seek review or other omissions of error preservation.' Because an illegal sentence is void, it can be corrected at any time.")

B. Standard of Review

A sentence not permitted by a statute is illegal. *State v. Kress*, 636 N.W.2d 12, 17 (Iowa 2001). The court reviews illegal sentences for correction of errors at law. *State v. Ross*, 729 N.W.2d 806, 809 (Iowa 2007).

C. Vehicular Manslaughter is not a predicate offense for the application of a sentencing enhancement under Iowa Code §902.11.

The record in this case establishes that Bloom's criminal history includes two prior felony convictions. (Trial Tr. Vol. 3, p. 90, ln. 11-13, ln. 15-17). Bloom was

convicted of Burglary in the Second Degree in 1998. *Id*. at p. 90, ln. 22-23. Bloom was also convicted of Vehicular Homicide in 2004. *Id*. at p. 90, ln. 19-20. In depth discussion was had at sentencing as to whether the enhancements under Iowa Code §902.11 applied to the defendant. (Sentencing Tr. p. 5-12). The court found that the enhancements of §902.11 do apply and sentenced Bloom to serve at least one half of the maximum sentence before he may be paroled or work released. (Sentencing Tr. p. 21, ln. 14-20; Judgment and Sentence p. 2; Appx. 83).

Iowa Code Section 902.11 provides:

> 902.11 Minimum sentence — eligibility of prior forcible felon for parole or work release. A person serving a sentence for conviction of a felony, who has a criminal record of one or more prior convictions for a forcible felony or a crime of a similar gravity in this or any other state, shall be denied parole or work release unless the person has served at least one-half of the maximum term of the defendant's sentence. However, the mandatory sentence provided for by this section does not apply if either of the following apply:
>
> 1. The sentences for the prior forcible felonies expired at least five years before the date of conviction for the present felony.
>
> 2. The sentence being served is on a conviction for operating a motor vehicle while under the influence of alcohol or a drug under chapter 321J.

Thus, a person subject to this sentencing enhancement must serve 50% of his sentence prior to qualifying for parole or work release.

Bloom argues that his prior felony conviction of vehicular homicide[2] does not meet the requirement of a "forcible felony" or "crime of similar gravity." First, a list of forcible felonies appears at Iowa Code §702.11. ("A forcible felony is any felonious child endangerment, assault, murder, sexual abuse, kidnapping, robbery, arson in the first degree, or burglary in the first degree.") Vehicular homicide is not listed as a forcible felony. Thus, the analysis turns to whether vehicular homicide is a crime of similar gravity. "A crime of similar gravity" is not defined in the Iowa Code. *State v. Grimes*, 569 N.W.2d 378, 380 (Iowa 1997).

Bloom was convicted of vehicular homicide under Iowa Code §706.6A(2) (2004). This code section provides that "A person commits a class C felony when the person unintentionally causes the death of another." The key word in this statute is "unintentionally." In *State v. Grimes*, the court points out that each of the crimes that are listed as forcible felonies have an element of specific intent to do harm to another person. *Id*. at 380. Conversely, the crime of vehicular homicide while operating while intoxicated is not a specific intent crime; rather it is a crime involving negligence or recklessness. Thus, vehicular homicide is neither an enumerated forcible felony nor is it a crime of similar gravity. For this reason, the sentencing enhancement under Iowa Code §902.11 does not apply to Bloom.

[2] The sentence for Bloom's prior conviction of Burglary Second Degree expired more than five years before the date of conviction for the instant offense and therefore does not count toward the sentencing enhancement under §902.11.

CONCLUSION

For the foregoing reasons, Appellant asks that the Iowa Court of Appeals vacate the verdict and sentence in this matter, remand to the district court for further proceedings, and for any other relief that the court deems just under the circumstances of this case.

ORAL ARGUMENT

The decisional process in this case would not be significantly aided by oral argument; therefore, oral argument is not requested. Iowa R. App. Pro. 903.2(i).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Denise M. Gonyea, hereby certify that on April 25, 2022, I served a copy of the attached brief on the counsel of record for all other parties to this appeal via EDMS. A paper copy of the appeal was provided to the Defendant by U.S. Mail.

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CERTIFICATE OF FILING

I, Denise M. Gonyea, hereby certify that I filed this brief with the Clerk of the Supreme Court of Iowa via EDMS on April 25, 2022.

/s/ Denise M. Gonyea

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ATTORNEY'S COST CERTIFICATE

I certify that the true cost of producing the necessary copies of the foregoing Final Brief was $0.00, and that amount has been paid in full by the attorney for Defendant-Appellant, McKelvie Law Office.

/s/ Denise M. Gonyea

Denise M. Gonyea

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:

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/s/ Denise M. Gonyea

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