IN THE SUPREME COURT OF IOWA
Supreme Court No. 21–1040

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOSEPH ALLEN BLOOM,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR WAPELLO COUNTY
THE HONORABLE GREG MILANI, JUDGE

APPELLEE'S BRIEF

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FINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

State Statutes

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Was the evidence sufficient to corroborate the testimony from Bloom's accomplice, to support Bloom's convictions?

Authorities

State v. Barnes, 791 N.W.2d 817 (Iowa 2010)
State v. Berney, 378 N.W.2d 915 (Iowa 1985)
State v. Brown, 397 N.W.2d 689 (Iowa 1986)
State v. Bugely, 562 N.W.2d 173 (Iowa 1997)
State v. Cox, 500 N.W.2d 23 (Iowa 1993)
State v. Ernst, 954 N.W.2d 50 (Iowa 2021)
State v. Gay, 526 N.W.2d 294 (Iowa 1995)
State v. Hennings, 791 N.W.2d 828 (Iowa 2010)
State v. Johnson, No. 07–0307, 2008 WL 1887303 (Iowa Ct. App. Apr. 30, 2008)
State v. Jorgensen, 758 N.W.2d 830 (Iowa 2008)
State v. Mathews, No. 16–0973, 2017 WL 3283289 (Iowa Ct. Ap. Aug. 2, 2017)
State v. Palmer, 569 N.W.2d 614 (Iowa Ct. App. 1997)
State v. Powell, 400 N.W.2d 562 (Iowa 1987)
State v. Stufflebeam, 260 N.W.2d 409 (Iowa 1977)
State v. Taft, 506 N.W.2d 757 (Iowa 1993)
State v. Taylor, 557 N.W.2d 523 (Iowa 1996)
State v. Vesey, 241 N.W.2d 888 (Iowa 1976)
State v. Wagner, No. 01–1232, 2002 WL 1758180 (Iowa Ct. App. July 31, 2002)
State v. Yeo, 659 N.W.2d 544 (Iowa 2003)

II. Did the sentencing court err in determining that Bloom's convictions were not subject to merger?

Authorities

Blockburger v. United States, 284 U.S. 299 (1932)
Cross v. State, No. 10–0968, 2012 WL 5356167 (Iowa Ct. App. Oct. 31, 2012)
State v. Daniels, 588 N.W.2d 682 (Iowa 1998)
State v. Finnel, 515 N.W.2d 41 (Iowa 1994)
State v. Halliburton, 539 N.W.2d (Iowa 1995)
State v. Hickman, 623 N.W.2d 847 (Iowa 2001)
State v. Mbonyunkiza, No. 14–1283, 2016 WL 7395720 (Iowa Ct. App. Dec. 21, 2016)
State v. McKettrick, 480 N.W.2d 52 (Iowa 1992)
State v. Miller, 841 N.W.2d 583 (Iowa 2014)
State v. Negrete-Ramirez, No. 07–1059, 2008 WL 4531532 (Iowa Ct. App. Oct. 1, 2008)
State v. Perez, 563 N.W. 2d 625 (Iowa 1997)
State v. Stewart, 858 N.W.2d 17 (Iowa 2015)
State v. Stratton, 519 N.W.2d 403 (Iowa 1994)
State v. West, 924 N.W.2d 502 (Iowa 2019)
Iowa Code § 701.9

III. Did the sentencing court err in determining that Bloom's prior conviction for vehicular homicide triggered an enhancement under section 902.11?

Authorities

Lamphere v. State, 348 N.W.2d 212 (Iowa 1984)
People v. Esparza-Treto, 282 P.3d 471 (Colo. App. 2011)
Rivera v. State, No. 16–1253, 2017 WL 2461563 (Iowa Ct. App. June 7, 2017)
State v. Baker, 203 N.W.2d 795 (Iowa 1973)
State v. Bloom, No. 04–0694, 2005 WL 67594 (Iowa Ct. App. Jan. 13, 2005)
State v. Conner, 292 N.W.2d 682 (Iowa 1980)

State v. Conyers, 506 N.W.2d 442 (Iowa 1993)
State v. Freeman, 705 N.W.2d 286 (Iowa 2005)
State v. Grimes, 569 N.W.2d 378 (Iowa 1997)
State v. Izzolena, 609 N.W.2d 541 (Iowa 2000)
State v. Montgomery, 966 N.W.2d 641 (Iowa 2021)
State v. Pearson, 514 N.W.2d 452 (Iowa 1994)
State v. Roby, 951 N.W.2d 459 (Iowa 2020)
State v. Rodriguez, 804 N.W.2d 844 (Iowa 2011)
State v. Rohm, 609 N.W.2d 504 (Iowa 2000)
State v. Sutton, 636 N.W.2d 107 (Iowa 2001)
State v. Woody, 613 N.W.2d 215 (Iowa 2000)
Iowa Code § 702.11
Iowa Code § 707.1
Iowa Code § 707.2(1)(b)
Iowa Code § 707.6A(2)
Iowa Code § 710.1
Iowa Code § 712.1
Iowa Code § 712.2
Iowa Code § 713.3 (1987)
Iowa Code § 713.3(1)(a)–(b)
Iowa Code § 713.3(1)(c)
Iowa Code § 713.5 (1987)
Iowa Code § 726.1(a)
Iowa Code § 726.1(e)–(h)
Iowa Code § 726.6(1)(a)
Iowa Code § 726.6(1)(e)–(h)
Iowa Code § 902.11

ROUTING STATEMENT

There is an issue of first impression in this appeal: whether a conviction for vehicular homicide under section 707.6A(2) is a crime of "similar gravity" to a forcible felony, for purposes of the sentencing enhancement under section 902.11. *See* Iowa R. App. P. 6.1101(2)(c). All of the other issues that have been raised in this appeal involve settled legal principles. *See* Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case

This is Joseph Allen Bloom's direct appeal from his convictions for first-degree burglary, a Class B felony, in violation of Iowa Code section 713.3(1)(b) (2020); first-degree robbery, a Class B felony, in violation of Iowa Code section 711.1(1)(a) and 711.2; assault causing serious injury while participating in a public offense, a Class C felony, in violation of Iowa Code section 708.3(1); and willful injury causing serious injury, a Class C felony, in violation of section 708.4(1).

In this appeal, Bloom challenges the sufficiency of the evidence to corroborate his accomplice's testimony. He also argues that some of his convictions should merge, and that the sentencing court erred in applying a sentencing enhancement under section 902.11.

Course of Proceedings

The State generally accepts Bloom's description of the course of proceedings. *See* Iowa R. App. P. 6.903(3); Def's Br. at 8–11.

Facts

On April 5, 2020, Michael Nulph allowed Alexies Meier to come into his home, to retrieve belongings that she had left there. She told Nulph that she was sorry. Nulph did not know what she was sorry for. It turned out that Meier meant that she was sorry for what was about to happen to Nulph, as soon as she disabled his home security system. *See* TrialTr.V2 30:6–31:20; *accord* TrialTr.V2 122:9–125:12.

Meier "ran out the door," and two men entered Nulph's home, wearing bandanas over their faces. *See* TrialTr.V2 31:16–32:22. The men attacked Nulph, and they beat him until he lost consciousness. *See* TrialTr.V2 32:23–33:12. When Nulph regained consciousness, he was "just laying there in a pool of blood." Nulph discovered that the attackers had taken his cell phones, his keys, and about $1,000 cash from his house. *See* TrialTr.V2 33:13–21. Nulph found a spare key to his car and drove himself to a hospital. Later, he had surgery to repair the damage to his face. *See* TrialTr.V2 33:22–35:21; TrialTr.V2 75:2–82:19; *see also* State's Ex. 1; App. 34 (depicting certain injuries).

Nulph could not definitively identify either masked attacker before trial. But at trial, he said that Bloom "looks familiar as one of the guys that night." *See* TrialTr.V2 46:7–51:8; TrialTr.V2 64:11–21.

Meier testified that, earlier that evening, she was walking to Nulph's when she encountered Bloom and Anthony Lankford. The two of them were in "a Chevy truck." Bloom was driving the truck. *See* TrialTr.V2 115:9–116:19. Meier got into the truck with them, and they went to somebody's house to use drugs. *See* TrialTr.V2 116:6–119:3. After that, Meier asked for a ride to Nulph's house. They agreed to let Meier drive the Chevy truck to Nulph's house. Bloom and Lankford went with Meier, and they sat next to her in the front of the truck. *See* TrialTr.V2 119:17–121:12. Then, when they arrived at Nulph's house, Meier "felt something pressed to [her] side"—it felt like "a weapon."

> I was threatened to either go in and shut the security cameras and everything off or I was going to be hurt.
>
> They started putting masks and gloves on, and I really didn't understand what was going on right then and there, but I went inside.
>
> [. . .]
>
> [T]hat's what I was told to do or [Lankford] was going to hurt me. I assume he had a gun on me. I was very scared. I didn't know what to do. I panicked.

TrialTr.V2 120:24–122:8. Nulph opened up the back door for Meier. Meier was crying, and she told Nulph that she was sorry. But she did

what she was told to do: she turned off his home security system, then took her belongings and left. *See* TrialTr.V2 122:9–125:12. As she left, she saw Bloom and Lankford "coming towards the house," in masks. *See* TrialTr.V2 125:13–21. Meier went to the truck, in the hopes that Bloom and Lankford might have left the keys in it. They did not, so Meier attempted to hot wire the truck. But before she could get the truck to start, Lankford and Bloom came back. One of them picked Meier up and threw her into the back seat of the truck. *See* TrialTr.V2 125:22–127:6. Then, they drove to Bloom's house. Meier heard Bloom and Lankford talking about what had just happened: "They said that Mr. Nulph was left on the ground crying out for help." *See* TrialTr.V2 127:7–24; *accord* TrialTr.V3 16:15–25. Meier saw they were carrying some of Nulph's possessions, including a lanyard that Meier had seen Nulph use as a keychain. *See* TrialTr.V2 127:25–130:1 ("Like, the keys were zipped in the bag, and the lanyard was just, like trailing out.").

Lankford and Bloom had told Meier that she would come to work with them on the following morning, and they wanted to keep an eye on her until then. So they took her to the American Inn. But none of them had any ID, so they were unable to get a room. At that point, "Bloom's wife, girlfriend, significant other, whatever she was,

she came down to the American Inn and rented [them] a room." *See* TrialTr.V2 133:1–134:13. The next morning, Lankford gave Meier some cash—it was "close to $3,000." *See* TrialTr.V2 135:1–23.

That woman who came to the American Inn to get them a room was Connie West; Bloom had been staying at her house, at the time. *See* TrialTr.V3 35:22–36:7; *accord* TrialTr.V2 181:19–182:5. West said that she was at home on that evening, when Bloom "came home and asked [her] to take him to a hotel." *See* TrialTr.V3 36:8–13. She could not recall if anyone else was with Bloom, at that point. But she remembered that she got into her car and "dropped [Bloom] off" at the American Inn. *See* TrialTr.V3 36:16–37:2. Before West left, she went to the front desk and presented her ID to get the hotel room that Bloom had asked her to get. Then, after West left, the hotel called her to "come back and pay for the bill." *See* TrialTr.V3 37:3–38:7; State's Ex. 2; App. 35. At some point during all of that, West saw Lankford; he was there with Bloom, at the hotel. *See* TrialTr.V3 38:8–16.

Before trial, Bloom sent at least one letter to West that included a false description of events that would have provided an alibi.

> **STATE**: Ms. West, have you received any communication from Mr. Bloom since that night?
>
> **WEST**: Um, yes.

STATE: Have you received any communications regarding your testimony today?

[. . .]

WEST: I have received letters — Well, the dog received letters.

[. . .]

STATE: Ms. West, do you know what this is?

WEST: It's the letter that he wrote the dog.

STATE: And what do you mean by "the dog"?

WEST: Well, he used my dog's name for the last name and sent it to me basically because he knew the dog wasn't going to read it.

[State's Exhibit 3 was admitted and handed to West.]

WEST: It says, "I just need you to know that I let some chick use my truck. On the plus side, I was with your mom that night working on the house till I had her take me to the hotel and rent a room."

STATE: And who is "your mom" in that situation?

WEST: I guess I'm the dog's mom.

STATE: And so what does that letter mean to you then?

WEST: It means that he wants me — that he didn't have my truck, which he had my truck. And that he was home with me fixing the house, which he wasn't.

STATE: So he was not home with you?

WEST: No.

STATE: So that's not true?

WEST: No, it's not true. It's not true.

TrialTr.V3 38:17–40:23; *accord* State's Ex. 3; App. 37.

Ottumwa Police Department Officer Carson Story investigated and eventually spoke with Bloom, who said "he didn't have anything

to do with it and he didn't know about it and that he was potentially being set up by Alexies Meier." *See* TrialTr.V3 55:17–56:12. Later on, Bloom wrote him a letter, with some completely new information. *See* State's Ex. 4; App. 38; TrialTr.V3 56:19–57:17. In that letter, Bloom told Officer Story that West "took him to the hotel"—but his narrative did not mention being with West for any other portion of the evening. *See* TrialTr.V3 57:18–24. Bloom also added some new characters, and a way to explain away some evidence that he expected police to find:

> [Bloom] says approximately on the night of the burglary, he was working all day at his job at a trailer park with — I believe he's with [Lankford], and then afterwards they go to the house that [Bloom] was residing at. [Meier] is there, so the three of them are together at the house.
>
> [Meier] asked to borrow [Bloom]'s truck. He said that she takes the truck, and he's watching her leave, and there's these two Mexican looking men that get in the truck with her. They drive away.
>
> [Bloom] says he starts to look for his cell phone because he left it in the truck. I think he talks to [Lankford] about this, what's going on too, and [Lankford] realized his phone is missing.
>
> [. . .]
>
> . . . When I interviewed him, I told him I was going to look into some of the data on Facebook, and a lot of times the Facebook account is tied with the phone.
>
> So to me, I read that as he was trying to explain why his cell phone would be connecting or traveling near the victim's house.

TrialTr.V3 57:25–58:25; State's Ex. 4; App. 38. Bloom also made a number of calls from jail, which were recorded and admitted at trial. In those calls, he described the same false alibi that he had brought up in his letter to West's dog. *See* TrialTr.V3 78:5–23; State's Ex. 32, 38. He also repeatedly mentions that Meier is going to testify against him. He gives out a phone number with instructions to call that number and give Meier's name. *See* State's Ex. 33, 39–40.

Bloom moved for judgment of acquittal after the State rested. One of his grounds for that motion was that Meier was an accomplice, and that the State did not provide sufficient evidence to corroborate Meier's testimony. *See* TrialTr.V3 101:1–102:2. The State pointed out that Nulph had testified that Bloom looked like one of the assailants, at trial. *See* TrialTr.V3 104:21–105:17. And it also noted that Bloom's inconsistent statements and attempts to fabricate an alibi were strong corroborative evidence. *See* TrialTr.V3 105:21–107:12. The trial court reserved its ruling on that motion. *See* TrialTr.V3 111:12–16; TrialTr.V3 122:22–123:13. It never actually ruled on that motion at any point before pronouncing judgment and sentence.

Additional facts will be discussed when relevant.

ARGUMENT

I. The evidence was sufficient to corroborate Meier's testimony and support conviction.

Preservation of Error

The trial court never ruled on Bloom's motion for judgment of acquittal. Bloom does not cite to any such ruling, because there was none. *See* Def's Br. at 15. The court reserved ruling on this motion for judgment of acquittal for lack of corroboration, but never ruled on it. *See* TrialTr.V3 111:12–16; TrialTr.V3 122:22–123:13. There is no ruling to attack. But there is no longer any error-preservation requirement for challenges to sufficiency of the evidence on direct appeal. *See State v. Crawford*, No. 19–1506, slip op. at *8–23 (Iowa Mar. 18, 2022).

Standard of Review

If there were an actual ruling to review, it would be a ruling on "the sufficiency of evidence to corroborate an accomplice's testimony" and it would be "reviewed for errors at law." *See State v. Taylor*, 557 N.W.2d 523, 525 (Iowa 1996).

Merits

A verdict withstands a sufficiency challenge if it is supported by substantial evidence—which is evidence that can "convince a rational trier of fact [that] the defendant is guilty beyond a reasonable doubt."

See State v. Hennings, 791 N.W.2d 828, 823 (Iowa 2010) (quoting *State v. Jorgensen*, 758 N.W.2d 830, 834 (Iowa 2008)). On review of sufficiency challenges, appellate courts "view the evidence in the light most favorable to the verdict and accept as established all reasonable inferences tending to support it." *State v. Gay*, 526 N.W.2d 294, 295 (Iowa 1995) (citing *State v. Taft*, 506 N.W.2d 757, 762 (Iowa 1993)).

Accomplice testimony, standing alone, is insufficient to support a conviction. But sufficiency of corroborative evidence is a relatively low bar. "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." *See State v. Barnes*, 791 N.W.2d 817, 824 (Iowa 2010) (quoting *State v. Berney*, 378 N.W.2d 915, 917 (Iowa 1985)). And corroborative evidence "need not be entirely inconsistent with innocence." *See State v. Yeo*, 659 N.W.2d 544, 548 (Iowa 2003) (quoting *State v. Bugely*, 562 N.W.2d 173, 176 (Iowa 1997)). The general rule is that "[e]vidence asserted as corroborative of an accomplice's testimony will be sufficient to create a jury question [and support conviction] if that evidence corroborates some material aspect of the accomplice's testimony tending to connect defendant to the commission of the crime and thereby supports the

credibility of the accomplice." *See State v. Wagner*, No. 01–1232, 2002 WL 1758180, at *5 (Iowa Ct. App. July 31, 2002) (citing *State v. Brown*, 397 N.W.2d 689, 694–95 (Iowa 1986)). All the State needed to provide was "some material fact tending to connect the defendant to the crime, lending support to the accomplice's credibility." *Taylor*, 557 N.W.2d at 528 (citing *State v. Powell*, 400 N.W.2d 562, 564 (Iowa 1987)).

Here, the most glaring fact that connected Bloom to the crime was the fact that he tried to fabricate a false alibi. "[A] false story told by a defendant to explain or deny a material fact against him is by itself an indication of guilt," because it shows that the defendant knew that he would need to rely on "fabricated evidence to aid his defense." *See State v. Ernst*, 954 N.W.2d 50, 56 (Iowa 2021) (quoting *State v. Cox*, 500 N.W.2d 23, 25 (Iowa 1993)). Bloom's letter to West's dog was an attempt to tell her what her testimony should say—but it wasn't true. *See* TrialTr.V3 38:17–40:23; State's Ex. 3; App. 37. If that were what really happened, then he would not have needed tell West what to say. And because he told her to provide false testimony, that raises a very strong inference that he knew that there was no version of the truth that would establish any defense to these charges, because he knew that he was one of Nulph's assailants. *See Ernst*, 954 N.W.2d at 56.

Bloom's calls also help corroborate Meier's testimony. Bloom was giving ominous instructions: he wanted his people to make a call to a particular number and give Meier's name, because he anticipated that she would testify to his involvement. *See* State's Ex. 33, 39–40. He also sent this text message exchange, apparently about Meier:

> **BLOOM**: bro that dumb rat bitch is here right now suppose to be let out tmw is tmw
>
> **RECIPIENT**: It will be a shiny day in the neighborhood if ya know what I mean
>
> **RECIPIENT**: Business will be handled
>
> **BLOOM**: k
>
> **BLOOM**: nuff said much love brotha
>
> **RECIPIENT**: Much love
>
> **BLOOM**: we keep that shiny day off here so we have no knowledge ok . . . .

State's Ex. 42; App. 40; TrialTr.V3 73:2–75:14. The totality of these messages paints a clear picture: Bloom was attempting to arrange for someone to prevent Meier from testifying against him. *See* TrialTr.V4 55:5–57:22; *accord State v. Stufflebeam*, 260 N.W.2d 409, 412 (Iowa 1977) ("An attempt by a party to improperly, even illegally, influence a witness is thought to be an admission by conduct."). If Meier had not been telling the truth, Bloom could have proven that—but instead, he tried to prevent Meier from testifying. That raises a strong inference that he *knew* that truthful testimony from Meier would prove his guilt.

Finally, note that Bloom's statement to Officer Story indicated that Bloom knew that he needed to "explain why his cell phone would be connecting or traveling near the victim's house." *See* TrialTr.V3 57:25–58:25; State's Ex. 4; App. 38. That version of his story was also completely different from the version that Bloom initially gave. *See* TrialTr.V3 55:17–57:17. That gives rise to a strong inference that Bloom was attempting to devise a false story that explained away the facts that would tend to show his involvement—because he knew that a *true* story would only establish that he *did* commit this crime. *See Ernst*, 954 N.W.2d at 56 (quoting *Cox*, 500 N.W.2d at 25); *accord State v. Johnson*, No. 07–0307, 2008 WL 1887303, at *4 (Iowa Ct. App. Apr. 30, 2008) (citing *Cox*, 500 N.W.2d at 25) (noting that "[a] defendant's false story is in itself an indication of guilt," then finding that accomplice testimony was corroborated by the fact that "Johnson told the detective several different versions" of what had occurred).

Bloom's challenge to the sufficiency of the evidence does not mention any of those facts, at all. *See* Def's Br. at 15–20. He has failed to show that the corroborative evidence in this record is not sufficient to connect him to this crime and to corroborate Meier's testimony. No such argument could succeed on this record. Thus, his challenge fails.

Even without Bloom's letter, calls, and statements, there was still plenty of corroborative evidence. Nulph described being attacked by two men. *See* TrialTr.V2 31:16–33:12. That corroborates Meier's testimony that described two accomplices—Lankford and Bloom. And Nulph said that Bloom "looks familiar as one of the guys that night." *See* TrialTr.V2 46:7–51:8; TrialTr.V2 64:11–21. There was additional corroboration from West, who saw Bloom with Lankford at the hotel. *See* TrialTr.V3 38:8–16. That, in itself, is corroborative. *See State v. Mathews*, No. 16–0973, 2017 WL 3283289, at *4 n.3 (Iowa Ct. Ap. Aug. 2, 2017) (citing *State v. Palmer*, 569 N.W.2d 614, 616 (Iowa Ct. App. 1997)) (noting the corroborative value of "independent evidence that a defendant is in the company of another perpetrator close in time to the crime"). That also helps to corroborate Meier's testimony in that Meier's knowledge of Bloom's whereabouts tends to corroborate her testimony that she was with him during that portion of the evening. *See State v. Vesey*, 241 N.W.2d 888, 891 (Iowa 1976) (explaining that accomplice testimony can be "corroborated by evidence showing the defendant's association with the accomplice"). So even without any of Bloom's messages or statements, the evidence still would have been sufficient to clear the low bar to corroborate Meier's testimony.

II. One of Bloom's claims about merger is correct: his conviction for willful injury causing serious injury should have merged with his first-degree robbery conviction. But his other merger claim is incorrect.

Preservation of Error

If merger had been required, separate sentences would be illegal. A challenge to an illegal sentence evades error preservation and may be raised at any time. *State v. Halliburton*, 539 N.W.2d 343 (Iowa 1995); *State v. Stratton*, 519 N.W.2d 403, 405 (Iowa 1994).

Standard of Review

"Alleged violations of the merger statute are reviewed for corrections of errors at law." *See State v. Stewart*, 858 N.W.2d 17, 19 (Iowa 2015) (citing *State v. Finnel*, 515 N.W.2d 41, 43 (Iowa 1994)).

Merits

"[I]n the merger and double jeopardy context, the threshold question is whether it is legally impossible to commit the greater crime without also committing the lesser." *See id.* at 21 (citing *State v. Miller*, 841 N.W.2d 583, 588 (Iowa 2014)). The threshold question is whether each charged crime passes the *Blockburger* test: multiple punishments do not merge if each crime "requires proof of an additional fact which the other does not." *See State v. McKettrick*, 480 N.W.2d 52, 57 (Iowa 1992) (quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932)).

Bloom's first merger claim is that, as instructed, willful injury causing serious injury was a lesser-included offense and merges with first-degree robbery. *See* Def's Br. at 22–24. His argument hinges on the third element of first-degree robbery, as instructed:

> 3. The defendant purposely inflicted or attempted to inflict a serious injury on Michael Nulph.

Jury Instr. 35; App. 67. Bloom is right that the Iowa Supreme Court has read "purposely" to require specific intent to inflict serious injury, and that a conviction for willful injury causing serious injury merges into a conviction for first-degree robbery under that alternative. *See State v. Hickman*, 623 N.W.2d 847 (Iowa 2001); *accord Cross v. State*, No. 10–0968, 2012 WL 5356167 (Iowa Ct. App. Oct. 31, 2012); *State v. Negrete-Ramirez*, No. 07–1059, 2008 WL 4531532 (Iowa Ct. App. Oct. 1, 2008). The State concedes that merger was required. The right remedy is to remand with instructions to merge Bloom's conviction for willful injury into his first-degree robbery conviction. This does not affect the maximum/minimum term of Boom's sentence because the willful injury conviction was set concurrently with his conviction for first-degree robbery. *See* Sent.Tr. 21:14–24; Sentencing Order (6/28/21) at 2; App. 83. As such, resentencing is not required.

Bloom's second merger claim is that his conviction for assault while participating in a public offense (burglary) causing serious injury merges with his other convictions, because it would be impossible to find him guilty of *both* first-degree robbery and first-degree burglary without findings that established every element of that third charge. *See* Def's Br. at 25–27. But merger requires complete overlap between *two* offenses. The legislature is presumed to intend multiple penalties for *partially* overlapping offenses, which is what Bloom is describing. *See* Def's Br. at 26. The text of section 701.9 specifies that merger is required when an offense "is necessarily included in *another offense*." *See* Iowa Code § 701.9 (emphasis added). It does not apply when an offense is included in *a combination of* other offenses. For example:

> Mbonyunkiza contends sexual abuse in the third degree is a lesser-included offense of neglect of a dependent person and dependent adult abuse. Because it is possible to commit neglect of a dependent person without committing sexual abuse in the third degree and to commit dependent adult abuse without committing sexual abuse in the third degree, Mbonyunkiza's challenge fails.

See State v. Mbonyunkiza, No. 14–1283, 2016 WL 7395720, at *7–8 (Iowa Ct. App. Dec. 21, 2016). Merger is only implicated if an offense is fully encompassed in another single charged offense—not where it is encompassed in the *overlap* between two other offenses.

This conviction does not merge with first-degree burglary because it "contains an element not essential to proof of first-degree burglary, that is, commission of an assault" and thus "it is possible to commit first-degree burglary . . . without actually assaulting someone." *See State v. Daniels*, 588 N.W.2d 682, 684 (Iowa 1998). And it does not merge with first-degree robbery because it requires proof of an element that first-degree robbery, as charged here, does not require: participation in a burglary. *See* Jury Instr. 38; App. 69. This claim fails the threshold test for merger. Bloom does not cite any Iowa case that applies or endorses his multi-overlap theory of merger, nor can the State find any such case—because that is not how merger works.

Even if Bloom's novel legal theory of multi-merger were correct, it would not apply to assault while participating in a public offense and causing serious injury, because this is an instance where the legislature clearly intended to authorize imposition of multiple punishments. "On its face, [section 708.3] contemplates punishment for two offenses—the assault resulting in injury as well as the predicate felony." *See State v. Perez*, 563 N.W. 2d 625, 628–29 (Iowa 1997); *accord State v. West*, 924 N.W.2d 502, 511–12 (Iowa 2019) (confirming that merger is not required if legislature intended to authorize multiple punishment).

Bloom's first merger claim is correct, and remand is required to correct the judgment of sentence. But his second merger claim fails. Assault while participating in a public offense (burglary) and causing serious injury contains an element that first-degree burglary does not (commission of an assault causing serious injury), and it contains an element that first-degree robbery does not (participation in burglary). So it could not be submitted as a lesser-included offense for either of those two offenses, and that claim fails the threshold test for merger. *See Mbonyunkiza*, 2016 WL 7395720, at *7–8. And if that claim could get past that threshold test, it would still fail because section 708.3 is clearly aimed at authorizing multiple punishments for assaults that are committed during participation in other predicate offenses. *See Perez*, 563 N.W. 2d 625, 628–29. As such, this Court should reject Bloom's second merger challenge.

III. The sentencing court did not err in applying the sentencing enhancement under section 902.11. Vehicular homicide is not a forcible felony, but it is a crime of similar gravity because it is a homicide.

Preservation of Error

A claim that an enhancement is unauthorized is a challenge to an illegal sentence, which evades error preservation and may be raised at any time. *See State v. Woody*, 613 N.W.2d 215, 217 (Iowa 2000).

Standard of Review

Review is for correction of errors at law. *See State v. Freeman*, 705 N.W.2d 286, 287 (Iowa 2005).

Merits

Section 902.12(3) required the sentencing court to impose a mandatory minimum before parole eligibility for Bloom's sentence for his conviction for first-degree robbery. It imposed a minimum at the lowest end of the range: 50%. *See* Sent.Tr. 27:17–28:5. Then, for the first-degree burglary conviction, the sentencing court applied a sentencing enhancement under section 902.11, which states:

> 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.

Iowa Code § 902.11; Sent.Tr. 27:17–28:5. So it also imposed a 50% minimum before parole eligibility on the sentence for his conviction for first-degree burglary conviction—which Bloom now challenges.

The triggering conviction for that enhancement was Bloom's conviction for vehicular homicide by reckless driving or by eluding, in violation of Iowa Code section 707.6A(2).[1] So Bloom is challenging the sentencing court's determination that a vehicular homicide is a crime of similar gravity, under section 902.11. *See* Def's Br. at 28–30. Bloom is incorrect. Any conviction for vehicular homicide is a conviction for killing a person who did not deserve to die—and that is "the greatest universal wrong." *See State v. Izzolena*, 609 N.W.2d 541, 550 (Iowa 2000). It may not be an intentional killing, but reckless driving and eluding are both intentional acts that expose others to well-known risks of death or serious injury. That kind of "risk to persons" is the common factor among all forcible felonies. *See Grimes*, 569 N.W.2d at 380. Vehicular homicide is a crime where a defendant creates that risk and causes a grave harm. This conviction for vehicular homicide under section 707.6A(2) was a conviction for "a crime of similar gravity" to a forcible felony, and the court was correct to apply the sentencing enhancement under section 902.11.

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[1] Bloom also had a 1998 conviction for second-degree burglary, but more than five years had passed since he finished that sentence. *See* State's Sentencing Memo. (6/24/21) at ¶5(a)(viii); App. 79. Also, a second-degree burglary conviction does not trigger section 902.11. *See State v. Grimes*, 569 N.W.2d 378, 380 (Iowa 1997).

A. Vehicular homicide always results in the death of an innocent victim—a harm of immense gravity.

Bloom's conviction for vehicular homicide was predicated on the fact that he caused "a fatal traffic accident," either by eluding or by driving recklessly. *See State v. Bloom*, No. 04–0694, 2005 WL 67594, at *1 (Iowa Ct. App. Jan. 13, 2005). The death of a victim has always been an element of this offense. *See* Iowa Code § 707.6A(2) (2022); *accord* Iowa Code § 707.6A(2) (2003). Any conviction under this subsection requires that the defendant, through reckless conduct, "caused the death of another human"—which is a serious harm that is generally "unmatched in the broad spectrum of crimes." *See Izzolena*, 609 N.W.2d at 550 (citing *Lamphere v. State*, 348 N.W.2d 212, 220 (Iowa 1984)). The judge who sentenced Bloom on this conviction for vehicular homicide was correct when he noted that it was "impossible to quantify" the harm that Bloom had "done to the victims of this crime and the extended family." *See Bloom*, 2005 WL 67594, at *5.

A forcible felony is "any felonious child endangerment, assault, murder, sexual abuse, kidnapping, robbery, human trafficking, arson in the first degree, or burglary in the first degree." Iowa Code § 702.11. The common thread that defines this set is "an element of victim risk" of serious physical harm. *See Grimes*, 569 N.W.2d at 380. Here, any

conviction for vehicular homicide arises from offense conduct that created a risk of serious harm to a victim, and then caused a death—which is an ”unparalleled” harm. *See Izzolena*, 609 N.W.2d at 550.

The gravity of harm caused by vehicular homicide is immense, and offenses that are categorized as forcible felonies are offenses that always create similar risks of serious physical harm to victims. Thus, vehicular homicide is a crime of similar gravity to a forcible felony.

B. An offense may be a crime of similar gravity even if it does not require proof of any specific intent to inflict physical harm on a victim.

Bloom's argument is that vehicular homicide is not a crime of similar gravity because the offender "unintentionally" causes a death, whereas "each of the crimes that are listed as forcible felonies have an element of specific intent to do harm to another person." *See* Def's Br. at 30 (citing *Grimes*, 569 N.W.2d at 380). But that is not an accurate statement about forcible felonies, nor is it a fair reading of *Grimes*.

There are many forcible felonies where specific intent to cause physical harm to a victim is not an element. Most sexual abuse does not have any specific intent element. *See State v. Montgomery*, 966 N.W.2d 641, 650–51 (Iowa 2021) (discussing *State v. Pearson*, 514 N.W.2d 452, 455–56 (Iowa 1994)). Four of the five alternatives that

define kidnapping do not require specific intent to harm the victim. *See* Iowa Code § 710.1. Child endangerment that causes serious injury or death is committed *recklessly*—not intentionally—when an offender "[k]nowingly acts in a manner that creates a substantial risk." *See* Iowa Code § 726.6(1)(a); *see also* § 726.6(1)(e)–(h) (listing additional ways of committing child endangerment, without a specific intent to harm). First-degree arson does not even require actual knowledge that anyone will be nearby, much less a specific intent to physically harm a victim. *See* Iowa Code §§ 712.1, 712.2. First-degree burglary can be committed by "recklessly inflict[ing] bodily injury on a person" during a burglary. *See* Iowa Code § 713.3(1)(c). Even felony murder does not require any specific intent to cause harm to any victim—just malice aforethought (which is general intent) and participation in another forcible felony. *See* §§ Iowa Code 707.1, 707.2(1)(b); *Lamphere*, 348 N.W.2d at 220 (noting felony murder is "a crime in which defendant need not even have contemplated a killing when commencing a foray into crime"). While some forcible felonies do require proof of a specific intent to inflict physical harm on a victim, many of them do not—so Bloom is incorrect that specific intent to cause physical harm to a victim is the sole determinative element for "similar gravity" to a forcible felony.

Bloom is also incorrect to say that *Grimes* supports his claim that "each of the crimes that are listed as forcible felonies have an element of specific intent to do harm to another person," and that "a crime involving negligence or recklessness" does not qualify. *See* Def's Br. at 30 (citing *Grimes*, 569 N.W.2d at 380). *Grimes* explained that forcible felonies all had a common element of "victim risk":

> [T]he statutory list of forcible felonies under Iowa Code section 702.11 includes only crimes that involve a risk to persons . . . . The crime of second-degree burglary, as defined in 1987 when the conviction occurred, did not involve an element of victim risk. See Iowa Code §§ 713.3, 713.5 (1987) (first-degree burglary committed if person possesses dangerous device or weapon or inflicts injury on another; second-degree burglary is "[a]ll burglary which is not burglary in the first degree").
>
> We conclude that the 1987 conviction for second-degree burglary did not involve the type of victim risk contemplated by the statutory definition of a forcible felony or a crime of a similar gravity. The court erred in concluding otherwise.

See Grimes, 569 N.W.2d at 380. It did not make the incorrect claim that all offenses that were listed as forcible felonies required proof of specific intent to cause physical harm to a victim. Moreover, because *Grimes* identified that element of "victim risk" as the common factor among forcible felonies, it actually *supports* finding similar gravity for crimes where offenders knowingly disregard risks of grave harm and where grave harm to a victim results from that reckless conduct.

Neither the list of forcible felonies nor *Grimes* offer support for Bloom's claim that "a crime involving . . . recklessness" cannot qualify as a crime of similar gravity to a forcible felony. To the contrary, both suggest that an offense requiring proof of reckless conduct that causes a victim's death is a crime of similar gravity to a forcible felony.

C. Vehicular homicide is less serious than murder, but it still causes death by reckless conduct that poses well-known risks of death or serious injury. That, in itself, is serious.

Generally, "a person recklessly drives when they consciously or intentionally drive and they know or should know that by driving they create an unreasonable risk of harm to others." *See State v. Conyers*, 506 N.W.2d 442, 444 (Iowa 1993) (citing *State v. Baker*, 203 N.W.2d 795, 796 (Iowa 1973)). And eluding under section 321.279 necessarily involves fleeing from police at more than 25 mph over the speed limit, which is inherently reckless. *See, e.g.*, *State v. Roby*, 951 N.W.2d 459, 464–65 (Iowa 2020) (quoting *People v. Esparza-Treto*, 282 P.3d 471, 479 (Colo. App. 2011) ("[O]ne cannot commit the offense of vehicular eluding without also committing the offense of reckless driving")). So this conviction for vehicular homicide under section 707.6A(2) (2003) was a conviction for causing the death of a victim by driving in a way that qualifies as reckless conduct. *See* Iowa Code § 707.6A(2) (2003).

Recklessness is "conduct 'fraught with a high degree of danger,' conduct so obviously dangerous that the defendant knew or should have foreseen that harm would flow from it." *See State v. Rodriguez*, 804 N.W.2d 844, 849–50 (Iowa 2011) (quoting *State v. Sutton*, 636 N.W.2d 107, 111 (Iowa 2001)). While this is not an intentional killing, this is still a serious crime. "Crimes committed with willful or wanton disregard for the rights of other persons are extremely serious." *See Izzolena*, 609 N.W.2d at 550. Vehicular homicide always entails that willful and wanton disregard for others. "[T]he recklessness element serves to exclude the commission of a public offense by those who were not conscious of the grave risks of their conduct." *See State v. Rohm*, 609 N.W.2d 504, 513 (Iowa 2000) (citing *State v. Conner*, 292 N.W.2d 682, 687 (Iowa 1980)). Every conviction for vehicular homicide under section 707.6A(2) is a conviction for a killing through reckless conduct where the offender disregarded known/obvious risks of serious harm, and the most serious conceivable harm resulted.

The gravity of this offense—a reckless killing—is truly immense. Bloom's argument is that he did not intentionally inflict this harm. *See* Def's Br. at 30. But this offense is still serious because Bloom chose to disregard well-known risks to others, and someone died as a result.

> Rivera argues the death here was unintentional and he is thus less culpable than those who purposely inflict intentional harm. . . . [E]ven assuming he was less culpable than those who purposely inflict intentional harm, the consequences of Rivera's conduct were greater than those of other crimes with comparable sentences. The gravity of homicide is unparalleled.

Rivera v. State, No. 16–1253, 2017 WL 2461563, at *4 (Iowa Ct. App. June 7, 2017) (citing *Izzolena*, 609 N.W.2d at 550).

Other forcible felonies involve proof of similar reckless conduct that causes physical harm (or could cause physical harm). Whenever child endangerment results in serious injury or death, it qualifies as a forcible felony—even if it was committed recklessly. *See* Iowa Code §§ 726.1(a) & (e)–(h). First-degree arson is reckless; it is distinguished from second-degree arson if "one or more persons can be reasonably anticipated in or near the property"—which makes it more reckless—or if it causes a firefighter's death—which is a uniquely tragic harm. *See* Iowa Code § 712.2. First-degree burglary can be proven by facts showing conduct that introduces known/obvious risks of harm to a person in the burglarized structure—like possession of explosives, or possession of a dangerous weapon. *See* Iowa Code § 713.3(1)(a)–(b). Or it can be proven if the culprit "intentionally *or recklessly* inflict[ed] bodily harm" during a burglary. *Id.* at § 713.3(1)(c) (emphasis added).

All of these are offenses that involve the element of "victim risk" that defines a forcible felony or a crime of similar gravity. *See Grimes*, 569 N.W.2d at 380. Vehicular homicide is a crime that requires proof of a similar reckless disregard for known/obvious risk of harm to others, and requires proof that a similarly grave harm resulted. As such, the sentencing court was correct to determine that qualified as a crime of similar gravity and that Bloom's conviction for vehicular homicide is a conviction that triggers the enhancement under section 902.11.

CONCLUSION

The State respectfully requests that this Court remand with directions to merge Bloom's conviction for willful injury causing serious injury with his conviction for first-degree robbery, and affirm Bloom's convictions and sentences in all other respects.

REQUEST FOR NONORAL SUBMISSION

This case should be set for nonoral submission. In the event argument is scheduled, the State asks to be heard.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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