IN THE SUPREME COURT OF IOWA

Supreme Court No. 21-0522

STATE OF IOWA,

Plaintiff-Appellee,

v.

DALTON WAYNE COOK,

Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR WAPELLO COUNTY
Honorable Joel D. Yates
(District Court No. FECR011673)

DIRECT APPEAL
ON BEHALF OF DALTON WAYNE COOK

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FINAL BRIEF

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STATEMENT OF THE CASE

Procedural History

On September 14, 2018, Dalton Wayne Cook, and co-defendants Michael Paul Bibby and Tiffany Kay McNeal, were charged by trial information with thirteen (13) felony counts including ten (10) counts of Attempted Murder, and one count each of Robbery in the First Degree, Burglary in the First Degree, and Willful Injury Causing Serious Injury. (Trial Information; Appx. 33). McNeal entered a plea of guilty to the lesser included offenses of Burglary in the Second Degree and two (2) counts of Willful Injury Causing Bodily Injury. (McNeal Judgment; Appx. 39). McNeal was sentenced in a global plea agreement to two (2) 10-year consecutive sentences, all incarceration time suspended, on September 23, 2019. *Id*. Cook and Bibby proceeded to trial. Their cases were consolidated by order of the court on May 18, 2020. (Ruling on Motion to Consolidate; Appx. 46).

Dalton Wayne Cook pleaded not guilty on all charges and, represented by counsel, presented his case by trial to a jury beginning on March 23, 2021. (Trial Tr. Vol. 1, p. 1). At the close of the State's case, Cook made a motion for a judgment of acquittal on Counts 1-10 and 13. (Trial Tr. Vo. 5, p. 168-199). These counts included all the attempted murder counts, and the one count of willful injury causing serious injury. *Id*. Cook did not submit the motion for judgment of acquittal on the robbery or burglary charge. (Trial Tr. Vol. 5, p. 197, ln. 9-13). Upon consideration, the Court

granted the motion for acquittal on Counts 3-10, all of which are charges of attempted murder. (Trial Tr. Vol 5, p. 202, ln. 8-10). The Court found that there was a lack of specific intent necessary for the attempted murder charges in Counts 3-10 to go forward to the jury. *Id*. at p. 202, ln. 11-14. Thus, Counts 1, 2, and 11-13 were submitted to the jury. *Id*. at p. 202, ln. 16-17.

On April 1, 2021, the jury returned a verdict of guilty against Cook for the crimes of Assault with Intent to Cause Serious Injury (lesser included offense of Count 1), Robbery in the First Degree (Count 11/Count 3 as submitted to the jury), Burglary in the First Degree (Count 12/Count 4 as submitted to the jury), and Willful Injury Causing Serious Injury (Count 13/Count 5 as submitted to the jury). (Trial Tr. Vol. 7, p. 6-7). The jury acquitted Cook on Count 2, which was the attempted murder of police chief Tom McAndrew. *Id*. at p. 6, ln. 21-22.

The matter proceeded to sentencing on the four counts of conviction on April 19, 2021. (Sent. Tr. p. 3, ln. 3). At sentencing, the Court made the following record on the charges of conviction:

> With that record then, Mr. Cook, the record in this case shows that a jury of your peers found you Guilty of four crimes on or about April 1st of 2021. Again, Count I, aggravated misdemeanor, Assault with Intent to Cause Serious Injury; Count XI, Robbery in the First Degree, and that was an aider and abettor. I should for the record indicate that Count I, the Assault, was under the theory of joint criminal conduct; Count XII, Burglary in the First Degree, Class B Felony, as an aider and abettor; and then four – the fourth crime was under Count XIII,

> Willful Injury Causing Serious Injury, aider and abettor, Class C Felony.

(Sent. Tr. p. 3-4).

Cook raised the issue that Count 1, Assault with Intent to Cause Serious Injury, is a lesser included offense of Count 13, Willful Injury Causing Serious Injury. (Sent. Tr. p. 5, ln. 21-25). Cook requested that no sentence be entered on Count 1 due to merger. *Id*. at p. 6, ln. 1-4. The State did not object to the merger. *Id*. at p. 6, ln. 5-8.

The district court proceeded to sentence Cook as follows: Count 11, Robbery in the First Degree, incarceration not to exceed 25 years with a requirement to serve 58% of the 25-year sentence prior to being eligible for parole; Count 12, Burglary in the First Degree, an indeterminate sentence of 25 years; and, on Count 13, Willful Injury Causing Serious Injury, an indeterminate sentence of 10 years. (Sent. Tr. p. 15; Judgment and Sentence p. 1; Appx. 106). The Court ordered that Counts 11 and 12 shall be served concurrently, and that Count 13, shall be served consecutively to Counts 11 and 12. *Id*. Thus, Cook has an aggregate sentence of an indeterminate term in prison, not to exceed 35 years, with the possibility of parole after 14.5 years. (Judgment and Sentence; Appx. 106).

Cook filed a timely notice of appeal on April 21, 2021, and now sets forth his arguments to the Court of Appeals requesting relief on two primary issues. (Notice of Appeal; Appx. 115).

Facts

On August 3, 2018, Colt Stewart was at Joseph and Amy Garrett's house on Lillian Street in Ottumwa. (Trial Tr. Vol. 2 p. 38, ln. 21; p. 39, ln. 13). Colt was standing outside of the front door of the house talking on his cell phone when three men approached him. (Trial Tr. Vol. 2, p. 39, l. 22; p. 40, ln. 21). One of the men, described as "the tall guy," was carrying an AR-15 style rifle, and "the shorter guy" was carrying a knife. (Trial Tr. Vol. 2, p. 40, ln. 22; p. 41, ln. 8). The tall man was wearing a paintball mask. (Trial. Tr. Vol. 2, p. 41, ln. 12-14).

When the men approached, one of them stated to Colt, "we are here to rob you." (Trial Tr. Vol. 2, p. 42, l. 6-7). The short man then knocked Colt's cell phone out of his hand, and Colt pushed that man and punched the tall man. (Trial Tr. Vol. 2, p. 43, ln. 7-16). The tall man fell, and someone said, "shoot him." (Trial Tr. Vol. 2, p. 46, l. 7-15). Colt then fell to the ground with an injury to his leg. *Id*. Colt realized that his leg was bleeding and he moved toward the street. (Trial Tr. Vol. 2, p. 47, ln. 1-9). He later learned that he had been shot in the thigh. (Trial Tr. Vol. 2, p. 57, ln. 6-18).

Amy Garrett was at home on the afternoon of August 3, 2018, along with Colt Stewart's friend, Randi Kay. (Trial Tr. Vol. 2, p. 93, ln. 10; p. 95, ln. 1). Amy was in the kitchen when she "heard something that sounded like a paint can in a fire" coming from outside the house. (Trial Tr. Vol. 2, p. 95, ln. 2-13). Then, a man

wearing a mask and carrying a rifle entered the house and walked into the bedroom with two other men following. (Trial Tr. Vol. 2, p. 96, ln. 12-19). Amy heard someone say, "where's the drugs" and "where's the money?" (Trial Tr. Vol. 2, p. 99, ln. 21-23). Amy rushed out her back door and called the police with a neighbor's phone. (Trial Tr. Vol. 2, p. 96, ln. 19-22; p. 100; ln. 15).

Joseph Garrett was asleep in his bedroom when he was awakened by a man with a rifle demanding money and drugs. (Trial Tr. Vol. 2, p. 72, ln. 10-23). The man was wearing a black mask. (Trial Tr. Vol. 2, p. 73, ln. 3-11). Joseph thought the man was joking and laughed; the man grabbed Kay by the hair, put the gun to her head, and said, "this ain't a joke." (Trial Tr. Vol. 2, p. 73-74). Kay offered her purse to the man, stating that there was money inside. (Trial Tr. Vol. 2, p. 75, ln. 9-14). The man with the gun grabbed Amy's purse, which was hanging on the bed frame, then backed out of the room and left the house through the back door and started running. (Trial Tr. Vol. 2, p. 76, ln. 24; p. 77, ln. 20). Joseph testified that he never saw the other men inside his house. (Trial Tr. Vol. 2, p. 83, ln. 15-24). Joseph then went outside to his front yard and helped Colt with his leg injury until an ambulance arrived. (Trial Tr. Vol. 2, p. 77, ln. 24; p. 80, ln. 7).

Tom McAndrew was the Chief of Police for the City of Ottumwa at the time of the incident. (Trial Tr. Vol. 2, p. 121, l. 20). Chief McAndrew was outside the police station when he heard over the radio that there had been a shooting "around

Lillian Street." (Trial Tr. Vol. 2, p. 123, ln. 1-6). Chief McAndrew also heard that there were three suspects fleeing on foot, and the chief drove to the stated location. (Trial Tr. Vol. 2, p. 122, ln. 23; p. 124, ln. 5). He then drove into a field behind Liberty Elementary School. (Trial Tr. Vol. 2, p. 124, ln. 6; p. 127, ln. 22).

Once he was parked in the field, Chief McAndrew "saw three subjects come out of the timber and start running." (Trial Tr. Vol. 2, p. 127, ln. 24-25). He saw one of the men, later identified as Bibby, level a rifle toward his vehicle, so he turned the car to the south to get behind a berm. (Trial Tr. Vol. 2, p. 129, ln. 20; p. 130, ln. 6). During this time, Chief McAndrew's front passenger side window shattered. (Trial Tr. Vol. 2, p. 130, ln. 6-11). McAndrew drove further away from the men and attempted to obtain cover behind the terrain. (Trial Tr. Vol. 2, p. 137, ln. 11; p. 138, ln. 6). He stopped "two or three times" and exited his vehicle but saw the person aiming the rifle at him again and so drove further away until he felt he was in a safe position. (Trial Tr. Vol. 2, p.138 ln. 7–24).

McAndrew observed the three men and testified that the man with a rifle was alternating between running and aiming the rifle toward officers who had gathered in the school parking lot. (Trial Tr. Vol. 2, p. 147 ln. 18; p. 148 ln. 22). He testified that "the athlete" (identified as Dalton Cook) broke away from "the guy with the rifle" (identified as Bibby) and "the dough boy guy" (identified as David White). (Trial Tr. Vol. 2, p. 142 ln. 21–24). McAndrew testified that at times the man with a

rifle was "laying on the ground on his back" and would sit up and aim at the officers in the parking lot, and "at least once he came up and he tried to turn like he was pointing towards [McAndrew] …." (Trial Tr. Vol. 2, p. 150 ln. 6–13). When that happened McAndrew heard a "snap" and believed he was taking fire. (Trial Tr. Vol. 2, p. 150 ln. 13–14). Eventually McAndrew saw the man with a rifle "take off running," then heard gunfire and saw the man fall down; the man got up again, more shots were fired, and the man "went down hard." (Trial Tr. Vol. 2, p. 152 ln. 3–9). McAndrew advised the other officers by radio that he believed the man had been shot. (Trial Tr. Vol. 2, p. 152 ln. 10–12).

Chad Farrington was a Lieutenant with the Ottumwa Police Department on August 3, 2018. (Trial Tr Vol. 3, p. 46, ln. 6–10). He responded to Liberty School and observed matters from near the school parking lot. (Trial Tr Vol. 3, p. 50, ln. 9–15; p. 51, ln. 3–8). He testified that the person he saw who was armed was carrying "an AR-15 style rifle." (Trial Tr Vol. 3, p. 56, ln. 2–7). Farrington testified that the person with the rifle would run, then drop down and aim at officers, then get up and run again. (Trial Tr Vol. 3, p. 61, ln. 4–11; p. 64, ln. 6–13). Farrington acknowledged that this could have been a tactic to keep police away to escape. (Trial Tr Vol. 3, p. 75, ln. 23; p. 76, ln. 10). Farrington heard "maybe two or three" rifle reports at around the time McAndrew's vehicle was taking fire but could not see the shooter. (Trial Tr Vol. 3, p. 76, ln. 18; p. 77, ln. 1).

After the shooting stopped, Farrington and other officers drove into the field and located Bibby, who was "wearing a dark-colored top, had a type of paint-ball style mask that was not over his face, but it was up on his head, and he had been shot." (Trial Tr. Vol. 3, p. 64, ln. 18; p. 66, ln. 8). An AR-15 style rifle was located "10 or 12 feet" from Bibby. (Trial Tr. Vol. 3, p. 68, ln. 1–3). Sergeant Noah Aljets went into the field with other officers after Bibby was located; they moved to a location where Aljets saw someone's feet. (Trial Tr. Vol. 3, p. 105, ln. 5–24). He found a person, later identified as David White, lying face down. (Trial Tr. Vol. 3, p. 108, ln. 12–13). The officers rolled White over, and it was apparent to Aljets that he was deceased. (Trial Tr. Vol. 3, p. 108, ln. 17–18). Aljets testified that he and other officers had shot at the men "when they were running away." (Trial Tr. Vol. 3, p. 115, ln. 16–20; p. 116, ln. 4–5).

Ottumwa police officer Darren Batterson arrived at the scene after the shooting had stopped. (Trial Tr. Vol. 3, p. 111, ln. 15–16). One suspect was still at large and was believed to be in a wooded area near the field. (Trial Tr. Vol. 3, p. 111, ln. 19–24). Cook was established as running away from the scene as described by Chief McAndrew and additional police witnesses. (Trial Tr. Vol. 3, p. 140, ln. 19-21; p. 156, ln. 6-13). Officer Batterson testified to locating Cook in a geographical area separate from Bibby and White. Batterson, realizing that Cook had separated from the other suspects, headed to the timberline to search for Cook.

(Trial Tr. Vol. 3, p. 113, ln. 6-14). Batterson located footprints in the creek bed where "somebody tore it up and was running." (Trial Tr. Vol. 3, p. 113, ln. 18-20).

As Batterson was tracking Cook, he received a call on the radio that other law enforcement officers were bringing K-9 assistance up the creek, so he stopped and waited for the dog. (Trial Tr. Vol. 3, p. 114, ln. 14-18). When the K-9 group failed to locate Cook in the area, Batterson continued his own path. (Trial Tr. Vol. 3, p. 116, ln. 19-20). Shortly thereafter, Batterson located Cook in the creek, submerged in the water. (Trial Tr. Vol. 3, p. 116, ln. 6-8). At trial, Officer Batterson identified Cook as the person he located in the water on that day. (Trial Tr. Vol. 3, p. 117, ln. 14-24). When Batterson apprehended Cook, Cook did not resist and did not have any weapons on him. (Trial Tr. Vol. 3, p. 119, ln. 1-5).

DCI Criminalist Stephanie Yocca and her partner were instructed to search the Liberty Elementary area for "any kind of ammunition components." (Trial Tr. Vol. 5, p. 61, ln. 3–6). They searched the parking lot, as well as the field to the south and southwest. (Trial Tr. Vol. 5, p. 61, ln. 14– 17). They used flashlights and metal detectors to assist with the search. (Trial Tr. Vol. 5, p. 62, ln. 6–8, p. 18–24). Two other members of the "crime scene team" also searched using metal detectors. (Trial Tr. Vol. 5, p. 70, ln. 9–11). Yocca testified that "10 or more people" participated in searching that day, for around six and a half hours. (Trial Tr. Vol. 5, p. 69, ln. 13–

24). In the field, they recovered one unfired .223 caliber cartridge, and one fired .223 casing. (Trial Tr. Vol. 5, p. 65, ln. 7–10).

DCI Criminalist Michael Tate testified that the casing found in the field, as well as one casing found at the Lillian Street scene, were later matched by tool mark analysis to the rifle which was found near Bibby. (Trial Tr. Vol. 5, p. 95, ln. 6–16). DCI Agent Michael Rowe testified that the Liberty School area was also searched on August 4th and 7th. (Trial Tr. Vol. 5, p. 116, ln. 20–22). He testified that dogs were used to search on those dates, but no additional casings were located. (Trial Tr. Vol. 5, p. 118, ln. 17; p. 119, ln. 13; p. 128; ln. 15; p. 130, ln. 5; p. 131, ln. 18–25). Items found during those searches were: a pink purse, a black BB gun, a buck knife, a marriage license belonging to Joe and Amy Garrett, blue latex gloves, a black cloth face mask, and a pink bandana. (Trial Tr. Vol. 5, p. 121, ln. 4; p. 122, ln. 22). Rowe also assessed McAndrew's vehicle and testified that the window had fallen into the vehicle when he saw it, that no bullet fragments were in the vehicle, and that "a little section of the window frame on the outside of the vehicle appeared to be dented or scratched." (Trial Tr. Vol. 5, p. 135, ln. 23; p. 136, ln. 19).

Additional details will be discussed below as necessary.

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)(a).

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).

SUMMARY OF THE ARGUMENT

Dalton Wayne Cook appeals on two grounds. First, Cook argues that there was insufficient evidence for a conviction as to him on Counts 1 and 13 regarding Bibby's assault on Colton Stewart. Co-Defendant Bibby's actions were not attributable to Cook on either an aiding and abetting or a joint criminal conduct theory. A judgment of acquittal should have been granted on those counts. Second, Cook asserts that his sentence is illegal and unconstitutional because Willful Injury Causing Serious Injury merges with Robbery in the First Degree and he should not have been separately sentenced on those counts.

I. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT COOK'S CONVICTION FOR WILLFUL INJURY CAUSING SERIOUS INJURY.

A. Standard of Review

The Court reviews sufficiency-of-the-evidence claims for correction of errors at law. *State v. Brubaker,* 805 N.W.2d 164, 171 (Iowa 2011). The jury's verdict is binding if supported by substantial evidence. *State v. Folkers*, 941 N.W. 2d 337, 338 (Iowa 2020).

B. Preservation of Error

At the close of the State's evidence, Cook moved for a judgment of acquittal on Counts 1 (Attempt to Commit Murder) and 13 (Willful Injury Causing Serious Injury). (Trial Tr. Vo. 5, p. 168-199). Cook argued that neither the theory of aiding and abetting nor the theory of joint criminal conduct are applicable to Mr. Cook on these counts. (Trial Tr. Vol. 5, p. 168-169). Mr. Cook further filed a timely notice of appeal. These steps preserved error on this issue.

C. Argument

The Court will uphold a verdict if substantial evidence supports it. *See State v. Brubaker,* 805 N.W.2d 164, 171 (Iowa 2011). Evidence is substantial if it would convince a reasonable fact finder the defendant is guilty beyond a reasonable doubt. *Id.* The Court considers all evidence in the record—not just the evidence supporting guilt—when making sufficiency-of-the-evidence determinations. *Id.* The evidence

is viewed in the light most favorable to the State, drawing all reasonable inferences to uphold the verdict. *State v. Williams,* 695 N.W.2d 23, 28 (Iowa 2005).

Faced with a weight-of-the-evidence challenge under rule 2.24(2)(b)(6), the district court must determine whether "a greater amount of credible evidence supports one side of an issue ... than the other." *State v. Reeves,* 670 N.W.2d 199, 202 (Iowa 2003). While the district court has wide discretion in deciding motions for a new trial, it must exercise such discretion "carefully and sparingly" as not to "lessen the role of the jury as the principal trier of the facts." *State v. Ellis,* 578 N.W.2d 655, 659 (Iowa 1998).

A new trial should only be granted in the "exceptional case" where the evidence "preponderates heavily against the verdict." *Reeves*, 670 N.W.2d at 202. "A verdict is contrary to the weight of the evidence only when a greater amount of credible evidence supports one side of an issue or cause than the other." *State v. Ary*, 877 N.W.2d 686, 706 (Iowa 2016) (quoting *State v. Shanahan*, 712 N.W.2d 121, 135 (Iowa 2006)). The weight-of-the-evidence standard is "more stringent than the sufficiency-of-the-evidence standard in that it allows the court to grant a motion for new trial only if more evidence supports the alternative verdict as opposed to the verdict rendered." *Id*.

In Cook's case, Counts 1 and 13 were among the counts submitted to the jury. Count 1 being Attempt to Commit Murder while acting as a principal, while aiding

and abetting another, or by joint criminal conduct, as to Colt Stewart. And, Count 13, being Willful Injury Causing Serious Injury while acting as principal, while aiding and abetting another, or by joint criminal conduct as to Colt Stewart. The jury returned a verdict of guilty on Count 1 to the lesser included offense of Assault with Intent to Cause Serious Injury and a verdict of guilty on Count 13, as charged, Willful Injury Causing Serious Injury. These two charges merged at sentencing and Cook was sentenced only on Count 13 as Count 1 was merged.

Because both of these counts concern physical harm to Colt Stewart under a joint criminal conduct or aider and abettor theory, they can legally be viewed as the same act for purposes of weighing the evidence. The evidence showed that Bibby, while holding a rifle, approached the Garrett's house with Cook and White. It is established that Cook was at the Garrett house when Bibby shot Colt Stewart. However, the analysis does not end there.

When specific intent is an element of the crime charged, a person may be convicted on a theory of aiding and abetting only if that person participated while possessing the required intent or with knowledge the principal had the required intent. *State v. Tangie,* 616 N.W.2d 564, 574 (Iowa 2000). In this case, there was no proof that Cook knowingly approved and agreed to the commission of the crime, either by actively participating in it or by knowingly advising or encouraging the act in some way before or when it was committed. Cook did not participate in the

discharge of the weapon or encourage the act. There is a reference to someone saying, "shoot him," but no one testified as to who said those words. Even for the theory of joint criminal conduct, one must reasonably expect a new crime to have been committed in the furtherance of the crime of robbery. In this case, there was an unexpected event that triggered the shooting of Colt Stewart, which was Mr. Stewart striking down one individual and going after Bibby with the gun. This is an unexpected event and not one that is likely under this scenario, having taken place even prior to the robbery/burglary actions.

In Cook's case, there is a lack of reasonable foreseeability that Bibby would commit a crime prior to the burglary act. It was further not reasonably foreseeable that Colt Stewart would react in the way that he did, striking out at Bibby and another individual. Thus, the joint conduct is absent and the specific intent element is absent with regard to Bibby actions in shooting Mr. Stewart.

II. THE DISTRICT COURT IMPOSED AN ILLEGAL AND UNCONSTITUTIONAL SENTENCE BY FAILING TO MERGE COOK'S CONVICTION FOR WILLFUL INJURY CAUSING SERIOUS INJURY WITH HIS CONVICTION FOR ROBBERY IN THE FIRST DEGREE.

A. Preservation of Error

Cook raised the issue of merger on Counts 1 and 13 at trial in his motion for judgment of acquittal. (Trial Tr. Vol. 5, p. 169-170). It does not appear that he specifically argued for the merger of Robbery and Willful Injury Causing Serious

Injury. However, 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 Cook'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. Argument

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)).

Thus, in Cook's case, Willful injury Causing Serious Injury and Robbery in the First Degree must properly 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 3rd day of August, 2018, 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:
   a. Committed an assault on another as defined in Instruction No. 31 and in committing the assault the **defendant intended to inflict serious injury upon another**, caused bodily injury or mental illness to another, used or displayed a dangerous weapon in connection with the assault, caused serious injury to another or
   b. Threatened another with, or purposely put another in fear of immediate serious injury.
3. The defendant:
   a. **Purposely inflicted or attempted to inflict a serious injury on another** or
   b. Was armed with a dangerous weapon.

If the State has proved all of the elements, the defendant is guilty of Robbery in the First Degree. If the State has failed to prove any one of the elements, the defendant is not guilty of Robbery in the First Degree, and you will then consider the charge of Robbery in the Second Degree explained in Instruction No. 33.

(emphasis added). (Jury Instruction No. 32.; Appx. 83).

Whereas Instruction No. 40, 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 3rd day of August, 2018, the defendant committed an assault against Colt Stewart.
2. The **defendant specifically intended to cause serious injury** to Colt Stewart.
3. The defendant's acts caused a serious injury to Colt Stewart as defined in Instruction No. 29.

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 2, then you will consider the charge of Willful Injury Causing Bodily Injury as explained in Instruction 41.

(emphasis added). (Jury Instruction No. 41; Appx. 93).

As stated, the Robbery in the First-Degree instruction provides that "the defendant purposely inflicted or attempted to inflict a serious injury on another." Similarly, the Willful Injury instruction provides, "the defendant specifically intended to cause serious injury to Colt Stewart." 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 Cook's case.

CONCLUSION

Defendant Dalton Wayne Cook argues that the evidence was insufficient to support a conviction on the count of willful injury causing serious injury. In addition, the conviction of willful injury should have merged with robbery in the first degree at sentencing. For these and all of the above reasons, the Mr. Cook respectfully requests that the Honorable Court of Appeals reverse the findings of the district court in this case, remand for further proceedings, and for any other relief as this Court deems just and appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Denise M. Gonyea, hereby certify that on August 18, 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 August 18, 2022.

/s/ Denise M. Gonyea

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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

Denise M. Gonyea