

IN THE SUPREME COURT OF IOWA
Supreme Court No. 21-0522

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DALTON WAYNE COOK,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR WAPELLO COUNTY
THE HONORABLE JOEL D. YATES, JUDGE

APPELLEE'S BRIEF

THOMAS J. MILLER
Attorney General of Iowa

THOMAS E. BAKKE
Assistant Attorney General
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
(515) 281-5976
(515) 281-8894 (fax)
Thomas.Bakke@ag.iowa.gov

REUBEN NEFF
Wapello County Attorney

TERRI QUARTUCCI
Assistant Wapello County Attorney

ATTORNEYS FOR PLAINTIFF-APPELLEE

FINAL

TABLE OF CONTENTS

TABLE OF CONTENTS	2
TABLE OF AUTHORITIES.....	3
STATEMENT OF THE ISSUES PRESENTED FOR REVIEW	5
ROUTING STATEMENT.....	7
STATEMENT OF THE CASE.....	7
ARGUMENT.....	12
I. Ample Evidence Established Cook Aided and Abetted the Willful Injury Causing Serious Injury.	12
II. Separate Assaults Supported the Convictions for First- Degree Robbery and Willful Injury Causing Serious Injury. Merger was Unnecessary.....	20
CONCLUSION	26
REQUEST FOR NONORAL SUBMISSION.....	27
CERTIFICATE OF COMPLIANCE	28

TABLE OF AUTHORITIES

Federal Case

Blockburger v. United States, 284 U.S. 299 (1932) 22

State Cases

Baker v. City of Iowa City, 750 N.W.2d 93 (Iowa 2008).....13

Cross v. State, No. 10-0968, 2012 WL 5356167
(Iowa Ct. App. Oct. 31, 2012) 22

Hylar v. Garner, 548 N.W.2d 864 (Iowa 1996)14

State v. Anderson, 517 N.W.2d 208 (Iowa 1994) 15

State v. Anderson, 565 N.W.2d 340 (Iowa 1997)16

State v. Bibby, No. 21-0565, 2022 WL 3068909,
(Iowa Ct. App. Aug. 3, 2022) 25, 26

State v. Canal, 773 N.W.2d 528 (Iowa 2009) 17

State v. Clarke, 475 N.W.2d 193 (Iowa 1991) 20

State v. Crawford, 972 N.W.2d 189 (Iowa 2022)12

State v. Ernst, 954 N.W.2d 50 (Iowa 2021)15

State v. Halliburton, 539 N.W.2d 339 (Iowa 1995) 20, 22

State v. Hayes, Nos. 0-383, 99-0571, 2000 WL 1675592
(Iowa Ct. App. Nov. 8, 2000).....19

State v. Hickman, 623 N.W.2d 847 (Iowa 2001) 22

State v. Huser, 894 N.W.2d 472 (Iowa 2017)..... 17

State v. Hutchison, 721 N.W.2d 776 (Iowa 2006)14

State v. Jandreau, No. 13-0031, 2014 WL 667690
(Iowa Ct. App. Feb. 19, 2014)..... 22

State v. Jefferson, 574 N.W.2d 268 (Iowa 1997).....19

<i>State v. Keopasa euth</i> , 645 N.W.2d 637 (Iowa 2002).....	15
<i>State v. Lewis</i> , 514 N.W.2d 63 (Iowa 1994).....	19
<i>State v. Louwrens</i> , 792 N.W.2d 649 (Iowa 2010).....	13
<i>State v. Martens</i> , 569 N.W.2d 482 (Iowa 1997).....	15
<i>State v. McKettrick</i> , 480 N.W.2d 52 (Iowa 1992)	22, 23
<i>State v. Miles</i> , 346 N.W.2d 517 (Iowa 1984)	20
<i>State v. Miller</i> , 841 N.W.2d 583 (Iowa 2014).....	21
<i>State v. Monk</i> , 514 N.W.2d 448 (Iowa 1994)	15
<i>State v. Olds</i> , No. 14-0825, 2015 WL 6510298 (Iowa Ct. App. Oct. 28, 2015).....	14
<i>State v. Smith</i> , 573 N.W.2d 14 (Iowa 1997)	23
<i>State v. Stewart</i> , 858 N.W.2d 17 (Iowa 2015)	21
<i>State v. Tangie</i> , 616 N.W.2d 564 (Iowa 2000).....	17, 19
<i>State v. Tipton</i> , 897 N.W.2d 653 (Iowa 2017)	15
<i>State v. Williams</i> , 695 N.W.2d 23 (Iowa 2005)	14
State Statutes	
Iowa Code § 701.9.....	21
Iowa Code § 814.28.....	16
State Rules	
Iowa R. App. P. 6.907	20
Iowa R. Crim. P. 2.6(2).....	21

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. **Whether there was sufficient evidence that Cook aided and abetted the willful injury causing serious injury.**

Authorities

Baker v. City of Iowa City, 750 N.W.2d 93 (Iowa 2008)
Hylar v. Garner, 548 N.W.2d 864 (Iowa 1996)
State v. Anderson, 517 N.W.2d 208 (Iowa 1994)
State v. Anderson, 565 N.W.2d 340 (Iowa 1997)
State v. Canal, 773 N.W.2d 528 (Iowa 2009)
State v. Crawford, 972 N.W.2d 189 (Iowa 2022)
State v. Ernst, 954 N.W.2d 50 (Iowa 2021)
State v. Hayes, Nos. 0-383, 99-0571, 2000 WL 1675592
(Iowa Ct. App. Nov. 8, 2000)
State v. Huser, 894 N.W.2d 472 (Iowa 2017)
State v. Hutchison, 721 N.W.2d 776 (Iowa 2006)
State v. Jefferson, 574 N.W.2d 268 (Iowa 1997)
State v. Keopasa euth, 645 N.W.2d 637 (Iowa 2002)
State v. Lewis, 514 N.W.2d 63 (Iowa 1994)
State v. Louwrens, 792 N.W.2d 649 (Iowa 2010)
State v. Martens, 569 N.W.2d 482 (Iowa 1997)
State v. Miles, 346 N.W.2d 517 (Iowa 1984)
State v. Monk, 514 N.W.2d 448 (Iowa 1994)
State v. Olds, No. 14-0825, 2015 WL 6510298
(Iowa Ct. App. Oct. 28, 2015)
State v. Tangie, 616 N.W.2d 564 (Iowa 2000)
State v. Tipton, 897 N.W.2d 653 (Iowa 2017)
State v. Williams, 695 N.W.2d 23 (Iowa 2005)
Iowa Code § 814.28

II. Whether merger was necessary for the convictions for first-degree robbery and willful injury causing serious injury.

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. Bibby, No. 21-0565, 2022 WL 3068909,
(Iowa Ct. App. Aug. 3, 2022)
State v. Clarke, 475 N.W.2d 193 (Iowa 1991)
State v. Halliburton, 539 N.W.2d 339 (Iowa 1995)
State v. Hickman, 623 N.W.2d 847 (Iowa 2001)
State v. Jandreau, No. 13-0031, 2014 WL 667690
(Iowa Ct. App. Feb. 19, 2014)
State v. McKettrick, 480 N.W.2d 52 (Iowa 1992)
State v. Miller, 841 N.W.2d 583 (Iowa 2014)
State v. Smith, 573 N.W.2d 14 (Iowa 1997)
State v. Stewart, 858 N.W.2d 17 (Iowa 2015)
Iowa Code § 701.9
Iowa R. App. P. 6.907
Iowa R. Crim. P. 2.6(2)

ROUTING STATEMENT

The Court should transfer this matter to the Court of Appeals.

Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case

A Wapello County jury found Dalton Wayne Cook guilty of first-degree robbery, first-degree burglary, and willful injury causing serious injury,¹ in violation of Iowa Code sections 708.4(1), 711.2, and 713.3. Sent. Order at pp.1–2; App. 106–07. The court sentenced Cook to incarceration not to exceed 25 years for the robbery and burglary charges, and 10 years for the willful injury charge. Sent. Order at p.2; App. 107. The total term of incarceration (after the burglary and robbery charges were run concurrent but consecutive to the willful injury charges) was not to exceed 35 years. Sent. Order at p.2; App. 107.

On appeal, Cook argues (1) the evidence was insufficient to establish he aided and abetted the willful injury causing serious injury and (2) his sentence for the willful injury charge was illegal because

¹ The jury also found Cook guilty of assault with intent to cause serious injury, but that conviction merged with the willful injury conviction. *See* Sent. Order at p.1; App. 106.

the conviction should have merged with the first-degree robbery conviction. The State disagrees with both claims.

Course of Proceedings

The State accepts the defendant's course of proceedings as adequate and essentially correct. Iowa R. App. P. 6.903(3).

Facts

In the late evening hours on March 2, 2018, Michael Bibby was picked up by his girlfriend, Tami Holderbaum. T.Tr. Vol.IV 129:15–130:8. He had Holderbaum drive to a cornfield where he retrieved a rifle and a rusty pistol. T.Tr. Vol.IV 130:1–131:18. Around noon the next day—March 3rd—Bibby, now accompanied by David White and the defendant, Cook, drove Holderbaum to an office in Ottumwa. T.Tr. Vol.IV 137:6–139:25. The rifle had not been removed from Holderbaum's vehicle. T.Tr. Vol.IV 144:11–:14. Bibby, White, and Cook dropped Holderbaum off, drove away, and they never returned to pick her up. T.Tr. Vol.IV 139:6–140:5.

Meanwhile, at approximately the same time, Colt Stewart had driven his cousin's girlfriend Randi Hanrahan to the home of Joseph and Amy Garrett so she could pick-up a car she had let them borrow. T.Tr. Vol.II 39:6–:21. Stewart decided he would stay in front of the

house to work on a bicycle rim for Joseph Garrett. T.Tr. Vol.II 54:21–55:7.

Stewart was on the phone when three men wearing dark clothing and paintball masks approached him. T.Tr. Vol.II 39:22–42:3. One—later identified as Bibby—was carrying an assault rifle and a shorter, red-haired man—Cook—was carrying a buck knife. T.Tr. Vol.II 39:22–42:3. The group of men announced to Stewart “We’re here to rob you,” and they surrounded him. T.Tr. Vol.II 42:4–7.

Stewart thought the men were relatives that were pranking him, and he at first laughed at them. T.Tr. Vol.II 42:4–43:10. Cook came at Stewart with the knife and smacked the phone out of his hand. T.Tr. Vol.II 43:4–:13, 63:6–:15. Stewart pushed Cook down and punched Bibby. T.Tr. Vol.II 43:14–46:8. Someone yelled, “Shoot him,” and Bibby shot Stewart in the leg causing him to go down. T.Tr. Vol.II 46:7–51:15, 78:2–:9.

Inside the home, Amy Garrett heard the pop from the gunfire. T.Tr. Vol.II 95:7–96:22. She looked outside the front of the house and saw Bibby fire another round and then come inside the house and go directly into the bedroom demanding “Where’s the money?” and “Where’s the drugs?” T.Tr. Vol.II 96:4–99:15. Amy Garrett ran out of

the backdoor of the house as the other two men followed him inside. T.Tr. Vol.II 96:4–100:2. She yelled for help and called 911 from a neighbor’s cell phone. T.Tr. Vol.II 96:4–100:16.

Joseph Garrett woke up to Bibby in the bedroom demanding money and drugs. T.Tr. Vol.II 72:10–:23. He too thought it was a prank and he at first laughed at the man. T.Tr. Vol.II 73:14–:21. Bibby reacted by asking “Do you think this is a joke?” T.Tr. Vol.II 73:14–:22. He grabbed Hanrahan by the hair, pulled her into the room, put her on her knees, and held the rifle to her head. T.Tr. Vol.II 73:21–74:5. He told Joseph Garrett, “This ain’t a joke.” T.Tr. Vol.II 73:21–74:1. Hanrahan gave Bibby her purse while Joseph Garrett insisted he was at the wrong house. T.Tr. Vol.II 75:9–76:20. Bibby seemingly realized they were at the wrong place, and he took Amy Garrett’s purse and left. T.Tr. Vol.II 76:13–77:18.

Many police officers immediately responded to the area. On their way, they learned that the suspects were in a nearby wooded area. T.Tr. Vol.II 123:19–124:15. Ottumwa Chief of Police Tom McAndrew and Sgt. Blake Lefler drove directly to that wooded area. T.Tr. Vol.II 123:19–127:25. McAndrew found the men running out of the wooded area into a field by an elementary school. T.Tr. Vol.II

127:23–129:8. He drove into the field toward the group of men, and Lefler warned him they had something in their hands. T.Tr. Vol.II 127:23–129:8.

As McAndrew got closer, he saw one of the men turn toward Bibby. T.Tr. Vol.II 129:9–:23. McAndrew followed his gaze and looked at Bibby who he saw was aiming a rifle directly at him. T.Tr. Vol.II 129:9–:23. McAndrew immediately reacted and jerked his vehicle to the left about the same time that Bibby fired multiple rounds at him from the assault rifle. T.Tr. Vol.II 129:9–130:9, Vol.III 16:3–:10. The Chief’s front passenger window shattered, and he tried to drive out of Bibby’s range of fire. T.Tr. Vol.II 136:25–138:24.

While this was occurring, multiple officers were arriving in the elementary school’s parking lot. T.Tr. Vol.II 129:15–129:8. A gun battle ensued between the officers and Bibby, as Cook continued to run across the field. *See* T.Tr. Vol.II 147:13–151:22. Bibby took turns between firing at the officers in the parking lot and turning back and aiming and firing at McAndrew while he and the others attempted to escape. T.Tr. Vol.II 149:19–151:6, Vol.III 60:19–62:25.

Eventually, officers shot and incapacitated both Bibby and White, and Cook successfully made it across the field and out of the

area. The officers approached and detained Bibby (who was shot in the abdomen), and they transported him for medical treatment. T.Tr. Vol.III 64:18–66:25. When they located and approached White, however, they discovered he had succumbed to his injuries and was deceased. T.Tr. Vol.III 67:15–:22, 103:17–108:18. Following a manhunt, an officer found Cook hiding underwater in a creek. *See* T.Tr. Vol.IV 113:6–118:1.

ARGUMENT

I. **Ample Evidence Established Cook Aided and Abetted the Willful Injury Causing Serious Injury.**

Preservation of Error

“A defendant’s trial and the imposition of sentence following a guilty verdict are sufficient to preserve error with respect to any challenge to the sufficiency of the evidence raised on direct appeal.” *State v. Crawford*, 972 N.W.2d 189, 201 (Iowa 2022).

Standard of Review

“We review the sufficiency of the evidence for correction of errors at law.” *Id.*

Waiver

Cook’s brief states he challenges the sufficiency of the evidence. *See* Appellant’s Br. at pp.17–20. He includes a heading that

specifically references the sufficiency of the evidence: “The evidence was *insufficient* to support Cook’s conviction for willful injury causing serious injury.” Appellant’s Br. at p.17 (emphasis added). His standard of review and error preservation sections both discuss the sufficiency of the evidence. Appellant’s Br. at p.17. He cites the law on the sufficiency of the evidence. Appellant’s Br. at pp.17–18. And consistent with a sufficiency claim, he argues there was “no proof” establishing certain elements. Appellant’s Br. at pp.19–20.

Still, intertwined in his sufficiency argument, Cook includes unexplained references to the law surrounding the *weight* of the evidence. *See* Appellant’s Br. at p.18 (discussing how weight-of-the-evidence claims are evaluated on appeal), p.19 (“for purposes of weighing the evidence”).

Such passing references are inadequate to raise a challenge to the weight of the evidence, and the challenge is thus waived. “[P]assing reference to an issue, unsupported by authority or argument, is insufficient to raise the issue on appeal.” *State v. Louwrens*, 792 N.W.2d 649, 650 n.1 (Iowa 2010); *see Baker v. City of Iowa City*, 750 N.W.2d 93, 102-03 (Iowa 2008) (recognizing a conclusory statement without argument leaves an issue waived). It

simply is not the duty of this Court to “speculate on the arguments [the appellant] might have made and then search for legal authority and comb the record for facts to support such arguments.” *State v. Olds*, No. 14-0825, 2015 WL 6510298, at *8 (Iowa Ct. App. Oct. 28, 2015) (quoting *Hylar v. Garner*, 548 N.W.2d 864, 876 (Iowa 1996)). This Court should accordingly decline to consider the weight of the evidence.

Merits

Cook challenges his conviction for willful injury causing serious injury. *See* Appellant’s Br. at pp.19–20. He asserts there was insufficient evidence he aided and abetted the commission of the crime. *See* Appellant’s Br. at pp.19–20. The State disagrees. The evidence was sufficient.

A challenge to the sufficiency of the evidence does not allow a reviewing court to weigh evidence or determine that the jury weighed the evidence incorrectly. “In determining the correctness of a ruling on a motion for judgment of acquittal, we do not resolve conflicts in the evidence, pass upon the credibility of witnesses, or weigh the evidence.” *State v. Hutchison*, 721 N.W.2d 776, 780 (Iowa 2006) (citing *State v. Williams*, 695 N.W.2d 23, 28 (Iowa 2005)). Instead,

“review on questions of sufficiency of the evidence is to determine if there is substantial evidence to support the verdict of the jury.” *State v. Martens*, 569 N.W.2d 482, 484 (Iowa 1997) (citing *State v. Monk*, 514 N.W.2d 448, 451 (Iowa 1994)). This occurs when “a rational trier of fact could have found that the elements of the crime were established beyond a reasonable doubt.” *State v. Keopasa euth*, 645 N.W.2d 637, 640 (Iowa 2002) (citing *State v. Anderson*, 517 N.W.2d 208, 211 (Iowa 1994)). In conducting its analysis, this Court should “consider all evidence, not just the evidence supporting the conviction, and view the evidence in the light most favorable to the State, ‘including legitimate inferences and presumptions that may fairly and reasonably be deduced from the record evidence.’” *State v. Ernst*, 954 N.W.2d 50, 54 (Iowa 2021) (quoting *State v. Tipton*, 897 N.W.2d 653, 692 (Iowa 2017)).

Before addressing the merits, the State begins by noting Cook seeks to argue there must be sufficient evidence for both the aiding and abetting and joint criminal conduct theories of culpability. *See* Appellant’s Br. at pp.19–20. But in making this argument, Cook forgets the jury instructions included a special interrogatory precisely on this question. And for the charge willful injury causing serious

injury, the jury specifically found Cook was culpable as an aider and abettor. Verdict Form 10; App. 105. Thus, it is unnecessary to consider joint criminal conduct.

The State recognizes the jury found Cook was culpable under the theory of joint criminal conduct for the lesser offense assault with the intent to cause serious injury. Verdict Form 6; App. 100. But this charge merged into the willful injury conviction, and the conviction for the lesser offense is thus void. *See* Sent. Order at p.1; App. 106; *State v. Anderson*, 565 N.W.2d 340, 344 (Iowa 1997) (“Where a lesser-included offense is merged with the greater offense, a conviction on the lesser-included offense is void.”). Additionally, even if the jury had not specifically chosen one theory of culpability, the State need only establish the sufficiency of the evidence on one alternative. Iowa Code § 814.28.

Ample evidence established Cook aided and abetted the commission of the willful injury causing serious injury. On the question of aiding and abetting, the court instructed the jury, in part, that:

“Aid and abet” means to knowingly approve and agree to the commission of a crime, either by active participation in it or by knowingly advising or encouraging the act in

some way before or when it is committed. Conduct following the crime may be considered only as it may tend to prove the defendant's earlier participation. Mere nearness to, or presence at, the scene of a crime, without more evidence, is not "aiding and abetting." Likewise, mere knowledge of the crime is not enough to prove "aiding and abetting."

Jury Instr. No. 18 (Aid and Abet); App. 69; *accord State v. Tangie*, 616 N.W.2d 564, 574 (Iowa 2000); *see State v. Canal*, 773 N.W.2d 528, 530 (Iowa 2009). "Aiding and abetting may be proven by direct or circumstantial evidence. Direct and circumstantial evidence are equally probative." *State v. Huser*, 894 N.W.2d 472, 491 (Iowa 2017) (citations omitted).

The evidence showed that Cook was among the group that approached and surrounded Stewart and assaulted him before Bibby shot him in the leg. The trio of men wore dark clothing and masks. T.Tr. Vol.II 39:22–42:3. Cook had left his wallet and identification behind in the car they had driven to Ottumwa. T.Tr. Vol.V 31:4–:10. One of the assailants carried a rifle, and another carried a buck knife. T.Tr. Vol.II 39:22–42:3. Stewart specifically noted the man that carried the buck knife was shorter and had red hair. T.Tr. Vol.II 41:3–:24. The shortest man in the trio of assailants was Cook, and he had

red hair. T.Tr. Vol.V 52:22–53:11 (noting the heights of the members of the trio and noting Cook’s hair color as red).

Cook immediately escalated the encounter by stepping toward Stewart in an aggressive manner with a buck knife pointed directly toward him. T.Tr. Vol.II 44:6–:16. And Cook instigated the physical assault on Stewart when he slapped Stewart’s phone out of his hand with a lot of force while still pointing the knife at him. T.Tr. Vol.II 43:4–:13, 63:6–64:4. To prevent Cook from using the knife, Stewart pushed him to the ground and punched rifle-wielding Bibby. T.Tr. Vol.II 43:14–46:8. This was immediately followed by somebody yelling “shoot him,” and Bibby then shot Colt in the leg. T.Tr. Vol.II 46:7–51:15, 78:2–:9. After Bibby shot Stewart, the trio left him lying on the ground bleeding and they entered the Garretts’ residence and committed a burglary and robbery. *See* T.Tr. Vol.II 46:5–47:15. Following the robbery inside the residence, the group then tried to flee together, and an officer eventually found Cook hiding underwater in a creek. *See* T.Tr. Vol.II 127:13–:25, Vol.IV 113:6–118:1.

The evidence established that Cook was an active participant in, and encouraged, the willful injury on Stewart. He was in the trio of armed and masked men that physically surrounded and assaulted

Stewart. Cook was the initial physical aggressor when he slapped Stewart's phone out of his hand, and he aggressively displayed a buck knife toward Stewart before Stewart pushed Cook to the ground and Bibby fired a shot into Stewart's leg after somebody told him to "shoot him." See *Tangie*, 616 N.W.2d at 574 ("The jury could reasonably infer she was, in fact, the instigator of the [crime]."); *State v. Hayes*, Nos. 0-383, 99-0571, 2000 WL 1675592, at *4 (Iowa Ct. App. Nov. 8, 2000) ("Although the evidence does not establish Hayes as the principal in the direct attack on Green, he initiated the first blow to Miklus, summoned his friends to the scene and, participated throughout the entire incident, which encompassed the attack on Green. There is substantial evidence to support Hayes' conviction of willful injury."). And even after all of this, Cook continued to join the group as they entered the Garretts' residence to commit a robbery while Stewart laid outside bleeding from his gunshot wound. See *State v. Jefferson*, 574 N.W.2d 268, 277 (Iowa 1997) ("Carroll admitted he saw the other man pull out a gun, demand money, and force November toward a back room. Having seen this, Carroll neither left, intervened, nor protested. Instead he accompanied the gunman and November to the hallway behind the counter."); *State v.*

Lewis, 514 N.W.2d 63, 66 (Iowa 1994) (quoting *State v. Miles*, 346 N.W.2d 517, 520 (Iowa 1984)) (“[A defendant’s] ‘presence, companionship, and conduct before and after the offense is committed’ may be enough from which to infer a defendant’s participation in the crime.”). The trio then fled from the scene as a group until they became separated during a shootout with the police.

Sufficient evidence established Cook aided and abetted the commission of the willful injury causing serious injury. This Court should affirm.

II. Separate Assaults Supported the Convictions for First-Degree Robbery and Willful Injury Causing Serious Injury. Merger was Unnecessary.

Preservation of Error

The State does not contest error preservation. An argument that convictions should have merged is an allegation of an illegal sentence that can be raised at any time. Iowa R. App. P. 2.24(5)(a); *see State v. Halliburton*, 539 N.W.2d 339, 343 (Iowa 1995).

Standard of Review

Review of statutory merger is for correction of errors at law. Iowa R. App. P. 6.907. Review of double-jeopardy questions is de novo. *State v. Clarke*, 475 N.W.2d 193, 194 (Iowa 1991).

Merits

Next, Cook argues his conviction and sentence for willful injury causing serious injury was unlawful because it should have merged with his conviction for robbery in the first degree. *See* Appellant’s Br. at pp.21–25. The State disagrees because separate assaults support each conviction.

Iowa Code section 701.9 codifies the protection against double jeopardy, providing:

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.

Iowa Code § 701.9; *see* Iowa R. Crim. P. 2.6(2).

“[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.” *State v. Stewart*, 858 N.W.2d 17, 21 (Iowa 2015) (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 are presumed to be what the legislature intended only if each charged

crime “requires proof of an additional fact which the other does not.” *State v. McKettrick*, 480 N.W.2d 52, 57 (Iowa 1992) (quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932)). “If it is not possible to commit the greater offense without also committing the lesser,” then merger is required unless those provisions of the criminal code show that “the legislature intended to impose multiple punishments.” *See State v. Jandreau*, No. 13-0031, 2014 WL 667690, at *4 (Iowa Ct. App. Feb. 19, 2014) (citing *Halliburton*, 539 N.W.2d at 344).

The State does not dispute that the convictions for first-degree robbery and willful injury causing serious injury would merge *if* they had been based solely on the same assault of Colt Stewart. The elements of the willful injury charge are generally all encompassed within the alternatives contained in the elements for the robbery charge. *Compare* Jury Instr. No. 32, *with* Jury Instr. No. 40; App. 24–26; *see State v. Hickman*, 623 N.W.2d 847, 850–52 (Iowa 2001) (concluding willful injury merged with first-degree robbery); *Cross v. State*, No. 10-0968, 2012 WL 5356167, at *4–5 (Iowa Ct. App. Oct. 31, 2012) (concluding willful injury causing serious injury would merge with first-degree robbery).

Even so, the State submits that the convictions do not merge because they are supported by separate assaults. *See State v. Smith*, 573 N.W.2d 14, 19 (Iowa 1997) (holding that multiple punishments could be assessed where two offenses were supported by “two distinct acts”); *McKettrick*, 480 N.W.2d at 56 n.2 (recognizing multiple punishments would be permissible if the evidence had shown—and had been argued by the State as—a series of assaults instead of a single assault).

Following the shooting of Stewart’s leg, the group of assailants, including Cook, entered the Garretts’ residence. T.Tr. Vol.II 96:4–100:2. Joseph Garrett was awakened by what he believed was a rifle barrel touching his face. T.Tr. Vol.II 72:10–:23, 80:11–:19. After he woke up, he testified that a man with a military-style rifle—who was later identified as Bibby—demanded “Where’s the money?” and “Where’s the drugs?” T.Tr. Vol.II 72:10–:23; *see* T.Tr. Vol.II 129:18–:23. When Joseph Garrett reacted by laughing, first thinking it was a prank by a friend, Bibby grabbed nearby Randi Hanrahan by her hair, dragged her into the room, put her on her knees, held the rifle to her head, and exclaimed, “This ain’t no joke.” T.Tr. Vol.II 73:14–75:14. Following this assault, Hanrahan gave Bibby her purse and the group

eventually left after Bibby taking Amy Garrett's purse as well. T.Tr. Vol.II 75:9-:14, 77:1-:3. The conduct within the house, which was distinct and separate from the shooting of Stewart, on its own meets the elements of first-degree robbery. Thus, there is no merger or double jeopardy issue. The charges do not merge because they are separate crimes based on separate acts.

This conclusion is also supported by the fact that during the closing arguments the prosecutor referred to the group's action inside the Garretts' home as meeting the elements of robbery:

Now, Michael Bibby [and Cook are] charged with ... the Willful Injury Causing Serious Injury of Colt Stewart, *Robbery and Burglary of the Garretts' household*, and the Attempted Murder of Chief Tom McAndrew. ...

...

And then we get into the household. Joe Garrett testified and Amy Garrett testified how once the man that they both saw with the rifle got inside the home, they both heard, "Where's the money?" "Where's the drugs?" This, again, highlights these folks were here to steal, to commit a theft. That is clear in the evidence. ... No, it's clear they showed up for drugs. They showed up for money. *This is a burglary and a robbery*. When Joe Garrett wakes up, much like Colt Stewart, he's thinking what on Earth? This can't be real. Well, the person with the rifle... Mike Bibby tells him, "You think this is a game?" "This is not funny." "Do you think this

is funny?” And he grabs Randi Hanrahan and points the gun to her head.

T.Tr. Vol.VI 10:7–:11, 15:16–16:5 (emphasis added); see T.Tr. Vol.VI 30:1–:4 (“[Cook is] still in on this set of criminality. He’s still participating, and so he is still guilty of everything Michael Bibby did.”). This shows there were two distinct assaultive acts and that the assaults inside the house—both waking Joseph Garrett up by touching his face with an assault rifle and violently dragging Hanrahan to her knees and placing the gun to her head—supported the robbery charge and conviction.

The Iowa Court of Appeals recently considered an identical argument in Cook’s co-defendant’s appeal. *State v. Bibby*, No. 21-0565, 2022 WL 3068909, at *3 (Iowa Ct. App. Aug. 3, 2022). There, Bibby raised the same challenge arguing his convictions (following his joint trial with Cook) for willful injury causing serious injury and robbery in the first degree should have merged. *Id.* at *3. But the court agreed merger was unnecessary because there were multiple assaults:

Although Bibby claims “no evidence supports the conclusion that multiple instances of willful injury causing serious injury occurred,” at least two other acts could support the robbery verdict—Bibby’s acts of (1) threatening Garrett

with a rifle and (2) pulling Hanrahan into Garrett's bedroom by her hair and holding the rifle to her head. Because there were multiple assaults or threats to persons other than Stewart from which the jury could base its robbery verdict, we agree that merger is unnecessary.

Id. (footnote omitted). This Court should reach the same result here.

Because there were separate assaultive acts that support the convictions, separate punishments are lawful. Merger of the willful injury and robbery charges was not mandatory or appropriate. This Court should reject Cook's argument and affirm.

CONCLUSION

This Court should affirm Dalton Wayne Cook's conviction and sentence.

REQUEST FOR NONORAL SUBMISSION

Oral submission is unnecessary.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa



THOMAS E. BAKKE
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
Thomas.Bakke@ag.iowa.gov

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **4,027** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: August 19, 2022



THOMAS E. BAKKE

Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
Thomas.Bakke@ag.iowa.gov