IN THE SUPREME COURT OF IOWA

STATE OF IOWA Plaintiff-Appellee, v. WAYLON JAMES BROWN, Defendant-Appellant.	Supreme Court No. 22-0324

APPEAL FROM THE IOWA DISTRICT COURT
FOR WOODBURY COUNTY
HONORABLE JAMES N. DAANE
HONORABLE TOD J. DECK

APPELLANT'S BRIEF AND ARGUMENT

MARTHA J. LUCEY
State Appellate Defender

ASHLEY STEWART
Assistant Appellate Defender
astewart@spd.state.ia.us
appellatedefender@spd.state.ia.us

STATE APPELLATE DEFENDER'S OFFICE
Fourth Floor Lucas Building
Des Moines, Iowa 50319
(515) 281-8841 / (515) 281-7281 FAX

ATTORNEYS FOR DEFENDANT-APPELLANT FINAL

CERTIFICATE OF SERVICE

On the 13th day of October, 2022, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Waylon Brown, No. 6288391 Anamosa State Penitentiary. 406 North High Street, Anamosa, Iowa 52205.

APPELLATE DEFENDER'S OFFICE

ASHLEY STEWART
Assistant Appellate Defender
Appellate Defender Office
Lucas Bldg., 4th Floor
321 E. 12th Street
Des Moines, IA 50319
(515) 281-8841
astewart@spd.state.ia.us
appellatedefender@spd.state.ia.us

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AS/ls/10/22

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether there was insufficient evidence to prove that Brown was the principle or aided and abetted in the commission of either First or Second-Degree Robbery?

Authorities

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State v. Kelso-Christy, 911 N.W.2d 663, 666 (Iowa 2018)

State v. Meyers, 799 N.W.2d 132, 138 (Iowa 2011)

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State v. Casady, 491 N.W.2d 782, 787 (Iowa 1992)

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a. *Robbery in the First-Degree*

Iowa Code § 703.1 (2021)

State v. Hearn, 797 N.W.2d 577, 580 (Iowa 2011)

State v. Ramirez, 616 N.W.2d 587, 591-92 (Iowa 2000) (en banc), overruled on other grounds by State v. Reeves, 636 N.W.2d 22, 25-25 (Iowa 2001)

State v. Barnes, 204 N.W.2d 827, 828 (Iowa 1972)

Rosemond v. United States, 572 U.S. 65, 75-76, 134 S. Ct. 1240 (2014)

State v. Huser, 849 N.W.2d 472, 491 (Iowa 2017)

State v. Henderson, 908 N.W.2d 868, 876 (Iowa 2018)

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b. *Robbery in the Second Degree*

State v. Olson, 373 N.W.2d 135, 136 (Iowa 1985)

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II. Whether the district court imposed an illegal and unconstitutional sentence by failing to merge Brown's conviction for Robbery in the First-Degree and Willful Injury Causing Serious Injury?

Authorities

State v. Hickman, 623 N.W.2d 847, 849 (Iowa 2001)

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State v. Jeffries, 430 N.W.2d 728 (Iowa 1988)

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a. *The impossibility test dictates that the offenses should merge.*

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b. *The legislature did not intend for multiple punishments.*

State v. Lewis, 514 N.W2d 63, 69 (Iowa 1994)

State v. Hickman, 623 N.W.2d 847, 849 (Iowa 2001)

State v. Rufin-Fones, 834 N.W.2d 873 (Iowa Ct. App. 2013)

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III. Whether the district court erred by failing to grant Brown's motion for a mistrial and forcing Brown to choose between a week and a half delay or waiving his right to a 12-person jury panel?

Authorities

State v. Choudry, 569 N.W.2d 618, 620 (Iowa Ct. App. 1997)

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ROUTING STATEMENT

This case should be transferred to the Court of Appeals because the issues raised involve applying existing legal principles. Iowa R. App. P. 6.903(2)(d) and 6.1101(3)(a).

STATEMENT OF THE CASE

Defendant-Appellant Waylon Brown appeals his conviction, sentence and judgment following a jury trial and conviction for Robbery, first degree, in violation of Iowa Code §§ 711.1 and 711.2 and Willful Injury Causing Serious Injury, in violation of Iowa Code § 708.4(1).

Course of Proceeding

On November 10, 2021, a trial information was filed charging Brown with Robbery, in the first degree, and Willful Injury Causing Serious Injury. (Trial Information) (App. pp. 5-8). Brown entered a written plea of not guilty. (11/17/2022 Written Plea of Not Guilty) (App. p. 9).

After a jury trial, Brown was convicted as charged on January 28, 2022. (Criminal Verdict) (App. p. 18). On

February 18, 2022, Brown was sentenced to 25 years in custody for the robbery in the first degree, and 10 years for willful injury causing serious bodily injury. The sentences were ordered to run consecutively. (Order of Disposition) (App. pp. 19-35). Brown filed a timely notice of appeal on February 21, 2022. (Notice) (App. p. 36).

Facts

This case involves an incident that took place on the morning of October 20, 2021. There are conflicting versions of events between the alleged victim Jeremiah Jenson and the defendant Waylon Brown.

Jensen's version of events:

On October 20, 2021, at 5:30 am, Jeremiah Jensen was walking across the street from his apartment complex, The Castle on the Hill (hereafter known as the Castle), to a Kum & Go. (Trial Vol. I, p. 20, L21-p. 21, L1, p. 21, L13-15). As Jensen was walking, he had his backpack with drawing supplies and his blood thinner medication inside. (Trial Vol.

I, p. 24, L1-11). According to Jensen, after returning from Kum & Go, he saw Waylon Brown. Brown started talking to him, but Jensen kept walking. (Trial Vol. I, p. 22, L3-9). Next, Jensen heard Brown say "get him Tommy". (Trial Vol. I, p. 22, L24-25). Jensen did not see Tommy White, until White began running from the direction of the cars. (Trial Vol. I, p. 22, L24-p. 23, L4). Jensen began to run from Brown and White toward the front door of the Castle, because he was aware that cameras were located at the entrance. (Trial Vol. I, p. 23, L5-13). Jensen was being chased by Brown and White. (Trial Vol. I, p. 23, L4-15). Next, Jensen felt something hit him in the back of the head, twice, and he fell into the glass door of the Castle. (Trial Vol. I, p.25, L22-p. 26, L1-7). Jensen then heard Brown telling White to take his backpack. White began pulling the backpack off and dragging Jensen. (Trial Vol. I, p. 25, L3-10). The two took Jensen's backpack and White went into Jensen's pocket and took his cellphone. White also yelled to take Jensen's ring from his finger. (Trial

Vol. I, p. 25, L15-1). Jensen stated that the two eventually ran away. (Trial Vol. I, p. 256, L19-20). Jensen then tried to get up three times, but kept falling because he was dizzy and his vision was blurred. (Trial Vol. I, p. 25, L22-p. 26, L2). Jensen noticed that his head was bleeding a lot because he was on blood thinners. (Trial Vol. I, p. 26, L3-7). Jensen made it into the outer door of the Castle, got onto the elevator and called for help. No one answered. Jensen then made it to his apartment door and knocked until his girlfriend opened the door. (Trial Vol. I, p. 26, l12-20). Jensen's cousin called 9-1-1. (Trial Vol. I, p. 26, L23-25).

Brown's version of events:

On October 20, 2021, at 4:30 am, Brown was sitting outside of the Castle. (Trial Vol. I, p. 85, L23-p. 86, L5). Brown saw one man, wearing all black running and another in a white t-shirt. (Trial Vol. I, p. 86, L9-11). Brown heard White yell: "Hey, he took my bag." (Trial Vol. I, p. 6-8; p. 87, L6-12). Brown just reacted and started running. (Trial Vol.

I, p. 86, L9). He was not sure if either person had a weapon, but he ran after Jeremiah and pushed him at the door. (Trial Vol. I, p. 86, L13-15; p. 87, L13-17). Brown pushed Jeremiah because he thought he was helping White get his belongings back. (Trial Vol. I, p. 87, L19-21). At the time, Brown did not notice that White had a baseball bat. (Trial Vol. I, p. 88, L6-10). Brown did not make any statements about taking Jensen's backpack or jewelry. (Trial Vol. I, p. 88, L15-17).

Also relevant is that White signed an affidavit in which he stated that Brown was not a party or participant to the robbery or assault of Jeremiah Jensen. (Def. Ex. 104)(App. p. 13).

Undisputed facts:

Jensen was transported to the hospital and it took seven staples to close his head wound. (Trial Vol. I, p. 26, L23- 25, p. 27, L1-4).

Any additional relevant facts are presented in the argument below.

ARGUMENT

I. THERE WAS INSUFFICIENT EVIDENCE TO PROVE THAT BROWN WAS THE PRINCIPLE OR AIDED AND ABETTED IN THE COMMISSION OF EITHER FIRST OR SECOND-DEGREE ROBBERY.

Error Preservation: During the trial, at the close of the State's evidence, Brown moved for an acquittal of robbery in the first degree. (Trial Vol. I, p. 75, L14-p. 76, L2). The defendant argued that the State did not prove all elements of robbery in the first degree. The defendant further argued that the State failed to establish that there was any agreement between Brown and Mr. White. (Trial Vol. I, p. 75, L22-p. 76, L2). The Court denied the motion. (Trial Vol. I, p. 76, L5-19). Error, therefore was preserved.

If the Court finds that Brown did not adequately preserve his sufficiency argument and that error was not properly preserved by the motion for acquittal the court may still review Brown's challenge. Recently, the Iowa Supreme Court, in State v. Crawford, held that "a defendant's trial and imposition of sentence following a guilty verdict are sufficient to preserve

error with respect to any challenge to the sufficiency of evidence raised on direct appeal. 972 N.W.2d 189, 195-202 (Iowa 2022).

Standard of Review: The Court reviews sufficiency of the evidence claims for correction of errors of law. State v. Kelso-Christy, 911 N.W.2d 663, 666 (Iowa 2018). When evaluating the sufficiency of the evidence, the court considers "whether, taken in the light most favorable to the State, the finding of guilt is supported by substantial evidence in the record." Id (quoting State v. Meyers, 799 N.W.2d 132, 138 (Iowa 2011). There is substantial evidence , if the evidence "would convince a rational fact finder the defendant is guilty beyond a reasonable doubt." Id. The Court will draw all legitimate legal references in support of the verdict. State v. Taylor, 689 N.W.2d 116, 1314 (Iowa 2004). However, "[e]vidence which merely raises suspicion, speculation, or conjecture is insufficient." State v. Casady, 491 N.W.2d 782, 787 (Iowa 1992) (en banc). The evidence must at least raise a

fair inference of guilt as to each essential elements of the crime. State v. LaPointe, 418 N.W.2d 49, 51 (Iowa 1988).

Discussion: Brown argues that the State failed to provide sufficient evidence that he committed robbery in the first or second degree either as the principle or as an aider or abettor.

During the trial, Brown did not contest the fact that White committed first-degree robbery. Brown did argue that he did aid and abet White in the commission of first-degree robbery.

a. *Robbery in the First-Degree*

The Iowa Code defines aiding and abetting as:

> All persons concerned in the commission of a public offense, whether they directly commit the act constituting the offense or aid and abet its commission, shall be charged, tried, and punished as principals. The guilt of a person who aids and abets the commission of a crime must be determined upon the facts which show the part the person had in it, and does not depend upon the degree of the person's guilt.

Iowa Code § 703.1 (2021).

In order to establish a conviction under the aiding and

abetting theory, "the evidence to support a conviction under a theory of aiding and abetting exists if there is "substantial evidence that the accused assented to or lent countenance and approval to the criminal act by either actively participating or encouraging it prior to or at the time of its commission." State v. Hearn, 797 N.W.2d 577, 580 (Iowa 2011) (quoting State v. Ramirez, 616 N.W.2d 587, 591-92 (Iowa 2000) (en banc), *overruled on other grounds* by State v. Reeves, 636 N.W.2d 22, 25-25 (Iowa 2001). Knowledge of the crime is essential; "however neither knowledge nor presence at the scene of the crime is sufficient to prove aiding and abetting." State v. Barnes, 204 N.W.2d 827, 828 (Iowa 1972). "[A]n Aiding and abetting conviction requires more than just facilitating one or another element, but also a state of mind extending to the entire crime." Rosemond v. United States, 572 U.S. 65, 75-76, 134 S. Ct. 1240 (2014). "Aiding and abetting may be proven by direct or circumstantial evidence. Direct and circumstantial evidence are equally probative."

State v. Huser, 849 N.W.2d 472, 491 (Iowa 2017) (citation omitted).

"[I]n the context of a first-degree robbery prosecution under the dangerous weapon alternative, the State must prove the alleged aider and abettor had knowledge that a dangerous weapon would be or was being used. State v. Henderson, 908 N.W.2d 868, 876 (Iowa 2018). "Otherwise, the aider and abettor may have knowledge of the intent to commit a robbery, but not first-degree robbery. Id.

> A person who "purposefully inflicts or attempts to inflict serious injury or is armed with a dangerous weapon" during a robbery commits first-degree robbery; all other robberies are second-degree robbery.

Iowa Code §§ 711.2 and 711.3.

In this case, the State failed to prove that Brown had the intent to rob Jensen or that Brown knew White would be armed with a dangerous weapon, to wit, a baseball bat. The jury in Brown's case was instructed on both robbery in the first-degree as follows:.

1. On or about October 21, 2021, in Woodbury County,

Iowa, the defendant:

> a. had the specific intent to commit a theft and/or b. aided and abetted Thomas White, who had the specific intent to commit a theft, and the defendant aided and abetted Thomas White, with the knowledge that Thomas White had such specific intent.
>
> 2. To carry out his intention or to assist him in escaping from the scene, with or without the stolen property, the defendant aided and abetted Thomas White who committed an assault upon Jeremiah Jensen as defined in instruction 31.
>
> 3. The defendant aided and abetted Thomas White who was armed with a dangerous weapon.
>
> If the State has proved all elements, the defendant is guilty of Robbery in the First Degree. If the State has failed to prove any one of elements, the defendant is not guilty of Robbery in the First Degree…

(Jury Instruction No. 17)(App. p. 14).

In order to establish aiding and abetting robbery in the first degree, the State relied upon video evidence, which displayed a small portion of the incident. (State's Ex 30 Video). However, the video does provide any proof that Brown had prior knowledge that White would have the bat or intend to use the bat. The video is a relatively short clip that

displays White coming on the scene after Brown with a bat close to his side. As Brown testified, because White was behind him her never saw the bat and was unaware of its existence. The video does not ever show Brown holding the baseball bat. There is no testimony that Brown used the bat on Jenson. Further, the State did not present any proof that Brown supplied White with the baseball bat with the specific intent to rob Jensen. Additionally, White submitted an affidavit in which he stated that Brown was not involved in the robbery in any capacity. (Def. Ex. 104) (App. p. 13; Trial Vol. II, p. 7, L7). The video does not show that Brown had knowledge or the intent to use a dangerous weapon and there was no other evidence presented that Brown was aware of the intent by White to use baseball bat.

The State failed to prove that Brown aided and abetted robbery in the first-degree. Knowledge of the crime is not enough and therefore the conviction should be vacated and remanded for dismissal.

b. *Robbery in the Second Degree*

The State also failed to present sufficient evidence that Brown possessed the specific intent for robbery in the second degree or that aided or abetted White in the commission of the crime.

The jury in Brown's case was instructed on both robbery in the second-degree as follows:

> 1. On or about October 21, 2021, in Woodbury County, Iowa, the defendant:
>
> > a. had the specific intent to commit a theft and/or b. aided and abetted Thomas White, who had the specific intent to commit a theft, and the defendant aided and abetted Thomas White, with the knowledge that Thomas White had such specific intent.
>
> 2. To carry out his intention or to assist him in escaping from the scene, with or without the stolen property, the defendant aided and abetted Thomas White who committed an assault upon Jeremiah Jensen as defined in instruction 31.
>
> If the State has proved all elements, the defendant is guilty of Robbery in the First Degree. If the State has failed to prove any one of elements, the defendant is not guilty of Robbery in the First Degree…

(Jury Instruction No. 21)(App. p. 16).

Specific intent can seldom be proved by direct evidence. See State v. Olson, 373 N.W.2d 135, 136 (Iowa 1985). Proof of intent usually arises from circumstantial evidence. Id. Evidence of the defendant's " 'presence, companionship, and conduct before or after the offense is committed' may be enough from which to infer a defendant's participation in the crime." State v. Lewis, 514 N.W.2d 63, 66 (Iowa 1994) (quoting State v. Miles, 346 N.W.2d 517, 520 (1984)).

The State did not introduce any evidence any interaction or communication between White and Brown prior to the incident with Jensen. There was no evidence that the two planned or even discussed a robbery of Jenson. In contrast, the defense introduced evidence, from White, in the form of a signed affidavit. In the affidavit, White stated that Brown was not involved in the robbery, in any capacity. (Def. Ex. 104) (App. p. 13).

The State also failed to introduce evidence of White and Brown interacting immediately after the incident.

Without any evidence that White and Brown planned the robbery or that Brown was supposed to participate in the robbery, the State failed to prove that Brown aided and abetted Thomas.

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

Error Preservation: A sentence that is contrary to Iowa Code § 701.9 is void and therefore the court's error in imposing the sentence is not subject to normal rules of error preservation and waiver. State v. Hickman, 623 N.W.2d 847, 849 (Iowa 2001).

Standard of Review: Review of an illegal sentence due to merger is for correction of errors at law. State v. Anderson, 565 N.W.2d 340, 342 (Iowa 1997). However,…"insofar as an unconstitutional sentence is alleged…review is de novo." State v. Zarate, 908 N.W.2d 831, 840 (Iowa 2018).

Discussion: The district court submitted a robbery in

the first-degree, second-degree, and willful injury causing serious injury to the jury, as three standalone jury instructions. (Jury Instruction Nos. 17, 21, 26) (App. pp. 14-, 16-17). The jury found Brown guilty of both robbery in the first-degree and willful injury causing serious injury. Brown contends that robbery in the first-degree and willful injury causing serious injury should merge. He also contends that because robbery in the second degree was included as a lesser-offense, it would also merge with willful injury causing serious injury.

Both the United States and Iowa Constitution prohibit multiple punishments for the same offense. U.S. Const. amend. V; Iowa Const. art. I, § 12; see also State v. Taft, 506 N.W.2d 757, 760 (Iowa 1993).

Iowa Code § 701.9 (2021), instructs courts to enter judgment only for the greater offense, when the defendant is "convicted of a public offense which is necessarily included in another public offense of which the defendant is convicted."

State v. Caquelin, 702 N.W.2d 510, 511 (Iowa Ct. App. 2005). Similarly, Iowa Rule of Criminal Procedure 2.6(2) states: "upon prosecution for a public offense, the defendant may be convicted of either the public offense charged, or included, but not both." Iowa R. Crim. P. 2.6 (2)(2021).

In order to determine what constitutes a "necessarily included offense", the courts must apply a two-step approach." See State v. Johnson, 950 N.W.2d 21, 24-25 (Iowa 2020).

First, the court employees a legal elements test "to determine whether it is possible to commit the greater offense without also committing the lesser offense." Id. at 24 (quoting State v. Halliburton, 539 N.W.2d 339, 340 (Iowa 1995); See also State v. Coffin, 504 N.W.2d 893, 894 (Iowa 1993). The court dubbed this test the "impossibility test and is [t]he paramount consideration in determining the submissibility of the lesser included offenses." State v. Turecek, 456 N.W.2d 219, 223 (Iowa 1990).

"The typical method to ascertain whether it is possible to

commit the greater offense without committing the lesser is to strictly compare the elements of the two crimes – something we [Iowa Courts] have called the 'strict statutory elements approach.' " State v. Jeffries, 430 N.W.2d 728 (Iowa 1988).

Under this approach, if the elements of the proffered lesser included offense are found in the putative greater offense (and the greater offense contains at least one additional element), then it will be legally impossible to commit the greater offense without simultaneously committing the lesser offense." Id. at 730-31. See also State v. Halliburton, 539 N.W.2d 339, 3440 (Iowa 1995).

Since Jeffries, the Court has cautioned against applying the elements approach *overly restrictively* and to the exclusion of the broader impossibility inquiry. State v. McNitt, 451 N.W.2d 824, 824-825 (Iowa 1990) (emphasis added). "[T]he comparison of the elements of the greater and lesser crimes, sometimes referred to as the 'elements test' is only resorted to as an aid in applying the impossibility test and is fully

subsumed therein." State v. Turecek, 456 N.W.2d 219, 223 (Iowa 1990).

The court pointed out that "[i]t is not essential that elements of the lesser offense be described in the statutes in the same manner as the elements of the greater offense." Id. at 223. Therefore, a particular element of the lesser offense does not need to be identical in meaning with a particular element of the greater offenses so long as the meanings of the two elements overlap so that the element of the greater offense cannot be satisfied without also satisfying the element of the lesser offense. Id.

The second step to the necessarily-included offense analysis is "[w]hether the legislature intended multiple punishments for both offenses. See State v. Johnson, 950 N.W.2d 21, 24-25 (Iowa 2020) (quoting State v. Halliburton, 539 N.W.2d 339, 340 (Iowa 1995)).

a. *The impossibility test dictates that the offenses should merge.*

In this case, in order to establish Robbery in the First-

Degree, the State had to prove three elements:

> 1. On or about October 21, 2021, in Woodbury County, Iowa, the defendant:
>
> > a. had the specific intent to commit a theft and/or
> >
> > b. aided and abetted Thomas White, who had the specific intent to commit a theft, and the defendant aided and abetted Thomas White, with the knowledge that Thomas White had such specific intent.
>
> 2. To carry out his intention or to assist him in escaping from the scene, with or without the stolen property, the defendant aided and abetted Thomas White who committed an assault upon Jeremiah Jensen as defined in instruction 31.
>
> 3. The defendant aided and abetted Thomas White who was armed with a dangerous weapon.
>
> If the State has proved all elements, the defendant is guilty of Robbery in the First Degree. If the State has failed to prove any one of elements, the defendant is not guilty of Robbery in the First Degree.

(Jury Instruction No. 17)(App. p. 14).

In order to establish that Brown committed Willful Injury Causing Serious Injury the State had to prove:

> 1. On or about the 10th day of October 2021, the defendant aided and abetted Thomas White who hit Jeremiah Jensen in the head with a baseball bat.

> 2. The defendant aided and abetted Thomas White, who specifically intended to cause serious injury to Jeremiah Jenson.
>
> 3. The defendant aided and abetted Thomas White whose acts caused a serious injury to Jeremiah Jensen as defined in Instruction No. 36.
>
> If the State has proved all elements, the defendant is guilty of Willful Injury Causing Serious Injury…

(Jury Instruction No. 26) (App. p. 17).

In comparing the jury instructions and elements for Robbery in the First-Degree and Willful Injury Causing Serious Injury , Brown reasons that the two charges should merge, even if the elements are, on the surface, not identical. Brown argues that the Court should look beyond the "statutory elements test" and determine that "impossibility test" makes it impossible for the elements of the robbery in the first-degree to be satisfied without the elements of willful injury. State v. Turecek, 456 N.W.2d 219, 223 (Iowa 1990).

Here, Brown maintains that the assault language used in the robbery in the first-degree instruction refers to the same

act that created the willful injury causing serious injury.

In order for the court to determine if the two elements share the identity, the court should look at the "manner in which the State sought to prove those elements." State v. Coffin, 504 N.W.2d 893 (Iowa 1993) (quoting State v. Turecek, 456 N.W.2d 219, 223 (Iowa 1990)). "[I]f the robbery and assault charges are predicated on a single assault, the two crimes should merge. State v. Nyomah 292 N.W.2d 106 (Iowa Ct. App. 2018) (citing State v. Wilson, 523 N.W.2d 440, 441 (Iowa 1994).

In the State's closing arguments, it argued that the robbery in the first-degree was proven when "Thomas comes up from behind and swings the bat several times, hitting Jeremiah Jensen in the head." (Trial Vol. III, p. 7, L13-15).

In relation to the Willful Injury Causing Serious Injury, the State argued, "…photographs clearly show the wound to the top of his [Jensen's] head." (Trial Vol. III, p. 9, L25, p. 10, L2). The head wound to which the State was referring was

the wound caused by Thomas White striking Jensen with a bat on his head.

Here, the impossibility test is satisfied because only one act occurred which could constitute the assault for the robbery in the first-degree and the underlying assault for the willful injury: the singular incident striking Jensen with the baseball bat. The State did not argue that there were multiple assaults that constituted separate acts by the Brown or White. Additionally, in this case, the instructions developed by the parties and approved by the district court did not ask the jury to engage in the fact-finding necessary to support separate acts of assault. See State v. Velez, 829 N.W.2d 572, 576-77 (Iowa 2013). There was no instruction asking the jury to determine whether there was a sufficient "break in the action" necessary to support a finding of multiple assaults under Velez. Id. at 582-583. Therefore, the findings for the robbery in the first-degree, robbery in the second-degree, and the willful injury were all predicated on the single assault.

b. *The legislature did not intend for multiple punishments*

Under some circumstances, the legislature may expressly permit multiple punishments for the same offense, negating the requirement to merge a lesser included offense into a greater. State v. Lewis, 514 N.W2d 63, 69 (Iowa 1994).

Iowa Courts have found no legislative intent to impose multiple punishments upon defendants convicted of both robbery and the lesser included assault charges. State v. Hickman, 623 N.W.2d 847, 849 (Iowa 2001) (holding that willful injury merges with first-degree robbery); State v. Rufin-Fones, 834 N.W.2d 873 (Iowa Ct. App. 2013) (holding assault while participating in a felony merges with first-degree robbery); State v. Suljevic, 821 N.W.2d 286 (Iowa Ct. App 2012) (holding: "we find no evidence from the language that of the statutes to demonstrate such legislative intent" to preclude merger of assault while participating in a felony and first-degree robbery); State v. Negrete-Ramirez 759 N.W.2d 3 (Iowa Ct. App. 2008)(holding that assault causing serious injury

merges with first-degree robbery).

In this case, willful injury is a lesser include offense of robbery in the first degree and second degree, there was no evidence to support that multiple assaults occurred, and the legislature did not intend for multiple punishments for defendants who are convicted of both robbery in the first-degree and its lesser included offenses. The district court improperly failed to merge the convictions.

III. THE DISTRICT COURT ERRED BY FAILING TO GRANT BROWN'S MOTION FOR A MISTRIAL AND FORCING BROWN TO CHOOSE BETWEEN A WEEK AND A HALF DELAY OR WAIVING HIS RIGHT TO A 12-PERSON JURY PANEL.

Error Preservation: Error was preserved when Brown moved for a mistrial on four different occasions due to several juror absences. (Trial Vol. III, p. 3, L16-p.4, L14; p. 21, L9-p. 22, L2; Vol. IV, p. 3, L25-p. 4, L13; Vol. IV, p. 15, L18-19). The court denied Brown's motion at each instance. (Trial Vol. III, p. 5, L23- p. 6, L22; p. 22, L23-p. 24, L5; Vol. IV, p. 7, L2-9; p. 15, L20-p. 16, L7).

Standard of Review: The appellate court reviews motion for a mistrial for abuse of discretion. However, if it involves a constitutional right, the review is de novo. State v. Choudry, 569 N.W.2d 618, 620 (Iowa Ct. App. 1997).

Discussion: On Wednesday, January 20, 2022, at 9:24 a.m., during the second day of trial, at the conclusion of all evidence, a juror did not report for jury duty. (Trial. Vol. III, p. 2, L23-p. 3, L2). The district court attempted to contact the juror and was unsuccessful. The district court then decided to recess the trial until either 1 p.m. that afternoon or 9 a.m. the following morning.

With the absence of the juror, Brown moved for a mistrial arguing that the integrity of the juror might be compromised. (Trial Vol. III, p. 3, L16-p.4, L14).

The State resisted the motion for a mistrial and requested the court allow more time to locate the juror. (Trial Vol. III, p. 4, L18-p.5, L3). The Court agreed and allowed more time to locate the missing juror. Court was recessed until 1:30 p.m.

(Trial Vol. III, p. 5, L23- p. 6, L22).

Later, at 9:54 a.m., the district court , the defense attorney, and State reopened the record and discussed whether Brown was willing to waive his right to a 12-person jury panel. (Trial Vol. III, p. 8, L7-17). Brown's attorney contended that more time was needed to discuss the options with her client. The defense requested an additional recess to discuss Brown's decision before informing the court. (Trial Vol. III, p. 8, L18-21). The district court indicated that an answer should be provided immediately. (Trial Vol. III, p. 8, L22 – 25). The courtroom was cleared until 9:55 a.m. (Trial Vol. III, p. 9, L1-11). Brown decided not to waive his right to a 12-person jury panel. (Trial Vol. III, p. 9, L13-22). The court took another recess, while attempting to find the missing juror. (Trial Vol. III, p. 9, L23- p. 10, L4).

At 10:04 a.m., the court reconvened with the jury present, minus the missing juror. (Trial Vol. III, p. 10, L10-11). The court informed the jury that a juror was missing and

that they would be "let go" as the court attempted to locate the missing juror. (Trial Vol. III, p, 10, L16-18). The district court then inquired to determine if any of the remaining jurors had conflicts in their availability for the following day (Friday, January 21, 2022). Two jurors (Metzger and Schenkelberg) answered affirmatively. (Trial Vol. III, p. 10, L19-p. 11, L3). The district court decided to recess the trial for the afternoon and Friday (January 21, 2022). The jurors were ordered to return on the following Monday morning (Trial Vol. III, p. 11, L12-20; p. 12, L18-23).

Brown's defense attorney reiterated her motion and the reasons why the delay of the trial would be detrimental to Brown, including a speedy trial violation and the integrity of the jurors. (Trial Vol. III, p. 13, L19-20).

At 11 a.m., the district court reopened the record. The missing juror, Murphy, had been located and was present in the courtroom. (Trial Vol. III, p. 13, L22- p. 14, L6). The juror informed the court that he had overslept. (Trial Vol. III,

p. 14, L11-14; p.15, L1-4).

After voir dire with the juror, Brown moved for a mistrial again. The defense argued that Murphy's absence, even if unintentional, was prejudicial to Brown. (Trial Vol. III, p. 21, L9-p. 22, L2). The State resisted the motion. (Trial Vol. III, p. 22, L8-22). The district court denied the motion. (Trial Vol. III, p. 22, L23-p. 24, L5).

Court reconvened on the morning of Monday, January 24, 2022. (Trial Vol. IV, p. 2, L1-2). At that time, the court was informed that another juror was absent. Juror Byers had contracted "the flu on Friday afternoon." The court spoke with Byers and asked the juror to take a COVID-19 test, out of caution, and provide the court with the results before 4:30 p.m., if possible. (Trial Vol. IV, p. 2, L9-21; L22-24). Court continued to be in recess.

At this time, Brown, again moved for a mistrial. (Trial Vol. IV, p. 3, L25-p. 4, L13). The district court once again denied the motion. (Trial Vol. IV, p. 7, L2-9).

The district court informed the jury about Juror Byers and the possibility of COVID. The district court dismissed the jury for the day and recessed court until the following morning, Tuesday, January 25, 2022. (Trial Vol. IV, p. 7, L15-p. 10, L22).

The court reconvened at 10:47 am, and informed Brown and the State that Juror Byers tested positive for COVID-19. The Court informed the attorneys Brown and both attorneys, that court would be in recess for five days, following CDC guidelines. Juror Byers would be allowed to quarantine for five days before returning to continue the trial. (Trial Vol. IV, p. 11, L14-23). Brown again renewed his motion for a mistrial. (Trial Vol. IV, p. 15, L18-19). The court denied the motion. (Trial Vol. p. 15, L20-p. 16, L7). After a 9-day delay, after the close of evidence, court reconvened on January 28, 2022. (Trial Vol. V. p. 1, L1-2).

In this case, Brown was entitled to a mistrial, at every instance in which he moved for one, but most especially before

the five-day COVID-19 quarantine of Juror Byers. Brown should not have had to choose between waiting 9 days for a full 12-jury panel or waiving his right to a 12-jury panel, instead the best and only option was a mistrial. The denial of the mistrial harmed Brown and violated his right to fair trial.

While there is no case that aligns directly with the case at bar, there are cases that can be compared and distinguished.

In State v. Miller, 825 N.W.2d 372 (2012), which can be compared to this case, the defendant appealed his conviction arguing that the district's court allowance of a juror's absence during deliberations placed the defendant in an "untenable" position of deciding to wait a week for the juror to return or replacing that juror with an alternate.

The Court ruled that the district's court's reliance on the availability of the alternate juror to offer Miller an alternative to waiting until the released juror returned from his week-long hiatus was error. Id. at 6.

Following Miller, the Iowa Court of Appeals took the issue

up in State v. Dietrich and arrived at a different outcome. In that case, the court ruled that the jury's mere entrance into the jury room did not mean substantial deliberations had begun before the Court substituted a juror with an alternate juror and without deliberations, the juror could have been replaced. 825 N.W.2d, 327 (Iowa Ct. App. 2012).

Even though similar to Dietrich, the jury was not in deliberation, the better compassion is to Miller is still valid. The fundamental fact in this case, and the one that makes Miller the most equivalent, here is that Brown did not have alternates, either before or during deliberations. The court forced Brown to choose between an over week-long hiatus or waiving his right to a full jury panel. The choice held even higher stakes for Brown than that imposed in Miller because here there were no alternate jurors to choose from, even outside of deliberations, to replace the absent jurors. Instead of forcing Brown to choose from two bad options, the court should have granted the mistrial. Without granting the

mistrial, Brown was forced to conclude his case with a jury that was likely prejudiced against him.

The denial of the motion for mistrial was prejudicial to Brown. Unfair prejudice arises when the evidence would cause the jury to base its decision on something other than proven facts and applicable law, such as sympathy for one party or desire to punish a party. State v. Rodriguez, 636 N.W.2d 234, 240 (Iowa 2001).

First, the jury had a 9-day delay between the conclusion of evidence and the submission of the case to the jury. During the delay, the jurors were exposed to outside influences, life circumstances, work, family, and other obligations. The extended jury absence could have easily affected the memory of the jurors. It is plausible, that pieces of pertinent evidence could have been forgotten during the 9-day lapse and any forgetfulness likely adversely impacted Brown and resulted in a biased result.

Second, the jury was told that the trial was likely going to

be a two-day trial. (Trial Vol. IV p. 12, L20-23). With this information, the jury probably began making plans for the conclusion of the two-day trial, including work plans, family plans, and school plans. In this case, suddenly, after two days of evidence, the case transformed into a nearly two-week trial. It is very conceivable that the jury returned and rushed through deliberations in an effort to conclude the trial and move on with their life plans. This circumstance would have undesirably impacted Brown and made his trial unfair.

Third, the jury was also subjected to deliberate with a juror who could expose them to a serious virus, COVID-19. The fear of being exposed to COVID-19 by being forced to share deliberation space with someone who could still be contagious would have affected the jury, and quite possibly made them rush through deliberations without thoroughly examining the evidence. This circumstance would also have damaged Brown and rendered his trial unfair.

The district court committed reversible error and abused

its discretion when it did not grant Brown's motion for a mistrial. Therefore, a new trial should be granted.

CONCLUSION

For all the above reasons, the defendant requests this court reverse and remand his conviction and sentence.

ORAL SUBMISSION

Oral submission is not requested.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $5.53, and that amount has been paid in full by the Office of the Appellate Defender.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR BRIEFS

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) because:

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/s/ Ashley Stewart Dated: 10/13/22

ASHLEY STEWART
Assistant Appellate Defender
Appellate Defender Office
Lucas Bldg., 4th Floor
321 E. 12th Street
Des Moines, IA 50319
(515) 281-8841
astewart@spd.state.ia.us
appellatedefender@spd.state.ia.us