

**IN THE COURT OF APPEALS OF IOWA**

No. 1-741 / 10-1767  
Filed December 7, 2011

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**PHILLIP RAYMOND CLARK,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Black Hawk County, Stephen C. Clark, Judge.

Phillip Clark appeals from his convictions for first-degree burglary, carrying weapons, and two counts of assault while participating in a felony. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, David Arthur Adams, Assistant State Appellate Defender, and Keith Duffy, Student Intern.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Joel Dalrymple, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Vaitheswaran and Tabor, JJ.

**TABOR, J.**

Phillip Clark was armed with a .40 caliber handgun when he broke into the Cedar Falls apartment of his former girlfriend. In this appeal, he asks us to find that his conviction for carrying weapons under Iowa Code section 724.4(1) (2009) merges into his conviction for first-degree burglary under section 713.3(1)(b). When we look to the statutory elements, we conclude that an offender could possess a “dangerous weapon” that would satisfy the element of first-degree burglary without that weapon being a “pistol or loaded firearm” as specified for the carrying-weapons offense. Accordingly, it is possible to commit the greater offense without committing the lesser. Further, because the lesser offense requires proof Clark carried his weapon within city limits and burglary lacks that element, the lesser offense is not wholly contained in the greater offense. We therefore conclude merger is not required under Iowa Code section 701.9.

**I. Background Facts and Procedures**

Phillip Clark lived in an apartment in Cedar Falls with his girlfriend, Jaclynne Chizewsky. Although he was not listed on the lease, Clark stayed at the apartment most nights before the pair ended their relationship. The break-up occurred between June 7 and early June 8, 2010, at which point Clark moved out. During the late hours of June 8 and early morning of June 9, Chizewsky was “hanging out” in her apartment with two friends, Natasha Butler and Lucas Vandenberg. While the three were in the bedroom, Chizewsky heard Clark’s truck pull into the parking lot and saw him running toward the apartment. She

rushed to lock, chain, and deadbolt the apartment door before Clark could enter. Then Chizewsky and Clark engaged in a “yelling match” through the door.

Despite Chizewsky’s pleas for Clark to “go away,” he kicked in the door. Clark started to strangle Chizewsky, and held a gun to her head. Butler entered the living room when she heard the door kicked in, but Vandenberg remained in the bedroom. During his attack on Chizewsky, Clark noticed Vandenberg’s sandals in the entryway, and asked, “Whose are those?” Clark then moved to the bedroom, “racked” his gun, and pointed it at Vandenberg. Chizewsky jumped onto Clark’s back, as Vandenberg joined in the fray. The ensuing three-way wrestling match spilled out into the hallway and living room. Eventually Clark was able to return to his feet and leave the apartment.

A police investigation revealed Clark’s father owned a .40 caliber handgun, which was missing that night.

On June 21, 2010, the county attorney charged Clark with first-degree burglary, in violation of Iowa Code section 713.3; two counts of assault while participating in a felony, in violation of section 708.3; and carrying weapons, in violation of section 724.4(1). After a three-day trial beginning on August 31, 2010, a jury found Clark guilty on all counts. On October 25, 2010, the district court sentenced Clark to indeterminate prison terms of twenty-five years—with a five-year mandatory minimum—for first-degree burglary, two years for carrying weapons, and five years for each count of assault while participating in a felony. The court ordered that the sentences be served concurrently.

Clark filed a notice of appeal on October 26, 2010. He contends that because the elements submitted to the jury for the carrying-weapons offense coincided with the elements of first-degree burglary, the offenses should merge. Further, he asserts the legislature did not intend for first-degree burglary and carrying weapons to be punished cumulatively.

## II. Scope and Standard of Review

We review merger challenges under section 701.9 for correction of legal error.<sup>1</sup> *State v. Belken*, 633 N.W.2d 786, 794 (Iowa 2001); see Iowa R. App. P. 6.907.

## III. Analysis

At issue is the following statute:

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. The purpose of the merger statute is to prevent a court from imposing a greater punishment than that contemplated by the legislature. *State v. Lambert*, 612 N.W.2d 810, 815 (Iowa 2000).

To ascertain legislative intent, the court utilizes the legal elements test for lesser included offenses. *State v. Halliburton*, 539 N.W.2d 339, 344 (Iowa 1995). In comparing the elements of both offenses, we must “determine if the greater can be committed without also committing the lesser.” *State v. Caquelin*, 702

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<sup>1</sup> Because Clark bases his appeal on section 701.9 and not the double jeopardy clause, proper review is for errors at law, and not de novo. See *State v. Finnel*, 515 N.W.2d 41, 43 (Iowa 1994) (reviewing constitutional claim de novo, while reviewing section 701.9 claim for errors at law).

N.W.2d 510, 511 (Iowa Ct. App. 2005). If not, the lesser offense will merge with the greater, absent legislative intent to impose multiple punishments for a sole transgression. *Halliburton*, 539 N.W.2d at 344.

To determine what elements comprise a particular offense, courts look to the statute defining the offense. *State v. Wales*, 325 N.W.2d 87, 88 (Iowa 1982) (“The elements of an offense are determined by the statute defining it rather than by the charge or the evidence.”). But when the statute defines an offense alternatively, the alternative submitted as a jury instruction controls. *State v. Aguiar-Corona*, 508 N.W.2d 698, 702 (Iowa 1993).

Iowa’s first-degree burglary statute reads as follows:

1. A person commits burglary in the first degree if, while perpetrating a burglary in or upon an occupied structure in which one or more persons are present, any of the following circumstances apply:
  - a. The person has possession of an explosive or incendiary device or material.
  - b. The person has possession of a dangerous weapon.
  - c. The person intentionally or recklessly inflicts bodily injury on any person.
  - d. The person performs or participates in a sex act with any person which would constitute sexual abuse under section 709.1.
2. Burglary in the first degree is a class “B” felony.

Iowa Code § 713.3.

In the case at hand, the first degree burglary instruction submitted to the jury read:

1. On or about the 9th day of June, 2010, the defendant broke into 2328 Melrose Dr., Apartment #1, Cedar Falls, IA.
2. The apartment was an occupied structure as defined in Instruction 19.
3. One or more persons was present in the occupied structure.

4. The defendant did not have permission or authority to break into the apartment.
5. The defendant did so with the specific intent to commit an assault.
6. During the incident the defendant:
  - a. Possessed a dangerous weapon or
  - b. Intentionally or recklessly inflicted bodily injury on Jaclynne Chizewsky and/or Lucas Vandenberg.

Because the court instructed the jury on fewer alternatives than are listed in the statute, we compare those two alternatives for the lesser elements test: did Clark (1) possess a dangerous weapon, or (2) intentionally or recklessly inflict bodily injury on Chizewsky and/or Vandenberg.

The jury also convicted Clark of carrying weapons in violation of section 724.4(1), which states:

Except as otherwise provided in this section, a person goes armed with a dangerous weapon concealed on or about the person, or who, within the limits of any city, goes armed with a pistol or revolver, or any loaded firearm of any kind, whether concealed or not, or who knowingly carries or transports in a vehicle a pistol or revolver, commits an aggravated misdemeanor.

The marshalling instruction for carrying weapons submitted to the jury provided, in pertinent part:

1. On or about the 9th day of June, 2010, the defendant was armed with a pistol or loaded firearm.
2. The defendant was within the city limits of Cedar Falls, Iowa.

Under the lesser elements test, we may consider only the alternative concerning carrying a pistol or loaded firearm within the city limits of Cedar Falls.

Beginning with the first element of carrying weapons, Clark cites the jury's affirmative response to an interrogatory asking "do you find the defendant was armed with a dangerous weapon, displayed a dangerous weapon in a

threatening manner, or represented that he had a dangerous weapon?" He argues its "yes" answer shows the jury found Clark guilty based on element 6(a) of first-degree burglary. He contends that because the court instructed the jury that a .40 caliber pistol is, as a matter of law, a dangerous weapon, then the jury must have found the pistol to be a dangerous weapon, causing the first element of carrying weapons to overlap element 6(a) submitted for first-degree burglary.

Regarding the second element of carrying weapons, Clark argues that to break into an apartment in Cedar Falls, as required in first-degree burglary, he must be within the city limits of Cedar Falls, an element contained in the carrying weapons charge. Therefore, according to his argument, element two of carrying weapons is contained in element one of first-degree burglary.

The State counters that first-degree burglary may be committed without also committing the offense of carrying weapons. Because the former requires possession of a dangerous weapon, whereas the latter requires a narrower category of possessing a pistol or loaded firearm, one could commit first-degree burglary without carrying a pistol or loaded revolver. Moreover, because carrying a firearm contains an element not found within the greater offense of first-degree burglary, the lesser offense cannot be included within the greater.

This court previously has addressed differing definitions of weapons between greater and lesser offenses. In *State v. Hill*, 363 N.W.2d 599, 600 (Iowa Ct. App. 1984), the defendant appealed his convictions of going armed with intent and unauthorized possession of an offensive weapon, violations of Iowa Code sections 708.8 and 724.3 respectively. The defendant argued possession

of an offensive weapon is a lesser-included offense of going armed with intent. *Hill*, 363 N.W.2d at 600. This court distinguished the two offenses on the basis of the type of weapon required in each offense:

It is evident that the statutory definition of the greater offense does not include “offensive weapons” as a necessary element. Rather it requires a “dangerous weapon” which by definition includes *but is not limited to* an “offensive weapon.” See Iowa Code § 702.7 (1983). For example, a dagger, razor, stiletto, or knife having a blade of three inches or longer would be considered a dangerous weapon. Yet none of these weapons are offensive weapons. See Iowa Code §§ 702.7, 724.1 (1983). Thus, a person armed with a knife and intending to use the weapon against another person would violate section 708.8 (going with armed intent), but would not violate section 724.3 (unauthorized possession of an offensive weapon).

*Id.* at 601 (emphasis in original). Analogous reasoning applies to Clark’s offenses. The greater offense of first-degree burglary requires possession of a “dangerous weapon,” which includes, but is not limited to, a pistol or loaded firearm. See Iowa Code § 702.7 (2009) (defining dangerous weapon as “any instrument or device designed primarily for use in inflicting death or injury upon a human being or animal, and which is capable of inflicting death upon a human being when used in the manner for which it was designed . . . .”); see also *State v. Franklin*, 368 N.W.2d 716, 719 (Iowa 1985) (relying on definition of dangerous weapon in section 702.7 when holding a machete to be a dangerous weapon for the purpose of first-degree burglary).

Clark does not offer any support for his proposition that the jury instruction defining a .40 caliber pistol to be a dangerous weapon as a matter of law would promote parity between the two elements. His argument appears to be based on the facts of the case, looking to the additional interrogatory sent to the jury to



surmise Clark's conviction rested upon the "dangerous weapon" element of the first-degree burglary instruction. But *Hill* rejects such conjecture when applying the merger doctrine because the test compares the statutory definitions of each offense rather than the facts presented in a particular case. 363 N.W.2d at 601. Therefore, the fact Clark used a .40 caliber pistol, which falls into the category of dangerous weapon for first-degree burglary, does not answer the ultimate question whether carrying a weapon is a lesser-included offense of first-degree burglary. See *id.* (holding the fact that defendant's sawed-off shotgun was considered both a dangerous weapon and an offensive weapon to be irrelevant for purposes of section 701.9). Because the "dangerous weapon" element of first-degree burglary is broader than the "pistol or loaded firearm" element of carrying weapons, it is possible to commit the greater offense without committing the lesser. Merger is not appropriate.

In addition, Clark's conviction for carrying weapons contains a separate element not found in the greater offense of first-degree burglary. The carrying weapons instruction requires the jury to find Clark acted within the city limits of Cedar Falls. No geographical restriction appears in the offense of first-degree burglary. Clark contends that to break into an apartment in Cedar Falls, he would have to be within the city limits. But as earlier noted, section 701.9 operates as a comparison of statutory elements, not the facts of a specific case. *Hill*, 363 N.W.2d at 601. Although the first-degree burglary instruction specifically listed the address of the apartment, the purpose of the address was to identify the "occupied structure," a distinct element of section 713.3. Therefore, similar to

the date listed in the first-degree burglary marshalling instruction, the address of the occupied structure is not an essential element. Our supreme court has held, “if the lesser offense contains an element that is not part of the greater offense, the lesser cannot be included in the greater.” *Aguiar-Corona*, 508 N.W.2d at 702. Because the instruction for carrying weapons submitted to the jury required Clark to be within city limits, a mandate which is not part of first-degree burglary, the two offenses will not merge.

Had the elements test shown the offense of carrying weapons merged into first-degree burglary, we would then turn to whether the legislature intended multiple punishments. See *Halliburton*, 539 N.W.2d at 344. But because it is possible to commit the greater offense without also committing the lesser, examination of legislative intent is not necessary in this case. The district court did not error by entering judgment on Clark’s convictions for first-degree burglary and carrying weapons as separate offenses.

**AFFIRMED.**