**IN THE COURT OF APPEALS OF IOWA**

No. 8-596 / 07-0382
Filed October 15, 2008

**MICHAEL ANTHONY MCDUFFEN,**
Applicant-Appellant,

**vs.**

**STATE OF IOWA,**
Respondent-Appellee.

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Appeal from the Iowa District Court for Dallas County, William H. Joy, Judge.

Applicant appeals the district court's denial of his request for postconviction relief on his conviction for first-degree robbery. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Stephan J. Japuntich, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, and Wayne Reisetter, County Attorney, for appellee.

Considered by Mahan, P.J., and Vaitheswaran, J., and Schechtman, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

**SCHECHTMAN, S.J.**

## I. Background Facts & Proceedings

The five-count trial information accused Michael McDuffen of attempt to commit murder, robbery in the first degree, willful injury, and two other felonies. During a seven-day bench trial, in response to the defendant's motion for judgment of acquittal, the count for willful injury was dismissed. The trial court concluded that willful injury, under Iowa Code section 708.4 (1997), was a lesser-included offense of robbery in the first degree under Iowa Code sections 711.1 and 711.2 (purposely inflicted a serious injury).

Subsequently, the trial court, as the fact finder, found McDuffen had assaulted his landlady in his room, then battered her with the end of the canister portion of a vacuum cleaner, leaving her in a vegetative state, and then exited with her purse containing about $2,000 in cash, checks, and money orders. The trial court found McDuffen guilty of both attempted murder and robbery in the first degree. McDuffen was sentenced to a term of imprisonment not to exceed twenty-five years on each count, to be served consecutively.

His convictions were affirmed on appeal, the contested issue being sufficiency of the evidence. McDuffen's assertions of ineffective assistance of counsel were reserved for postconviction proceedings. *See State v. McDuffen*, No. 98-0716 (Iowa Ct. App. May 26, 1999).

He now appeals the dismissal of his postconviction relief action. McDuffen contends he received ineffective assistance from trial and appellate

counsel due to their respective failures to challenge his conviction for first-degree robbery after its lesser included offense of willful injury had been dismissed.

## II. Standard of Review

We review claims of ineffective assistance of counsel de novo. *State v. Bergmann*, 600 N.W.2d 311, 313 (Iowa 1999). To establish a claim of ineffective assistance of counsel, an applicant must show (1) the attorney failed to perform an essential duty, and (2) prejudice resulted to the extent it denied the applicant a fair trial. *State v. Shanahan*, 712 N.W.2d 121, 136 (Iowa 2006). Absent evidence to the contrary, we assume that the attorney's conduct falls within the wide range of reasonable professional assistance. *State v. Hepperle*, 530 N.W.2d 735, 739 (Iowa 1995).

## III. Merits

McDuffen claims that the district court's dismissal of the charge of willful injury constituted an acquittal of the greater charge. He asserts that because willful injury is a lesser included offense of first-degree robbery, his conviction of the greater offense after acquittal on the lesser offense violates double jeopardy. *See State v. Butler*, 505 N.W.2d 806, 807 (Iowa 1993) (noting the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, applicable to states under the Fourteenth Amendment, protects against a second prosecution for the same offense after acquittal). McDuffen contends he received ineffective assistance because neither counsel sought dismissal of the charge of first-degree robbery under this legal theory.

Willful injury is a lesser included offense of the "purposely inflicts serious injury" alternative of first-degree robbery, as "it is impossible to commit first-degree robbery under the purposely-inflicts-serious injury alternative without also committing willful injury." *See State v. Hickman*, 623 N.W.2d 847, 852 (Iowa 2001). An "acquittal of the lesser-included charge bars a subsequent prosecution of the greater offense." *State v. Burgess*, 639 N.W.2d 564, 568 (Iowa 2001). Under Iowa Code section 701.9, Iowa's merger statute, ("No person shall be convicted of a public offense which is necessarily included in another public offense of which the person is convicted"), a defendant may not be convicted of both willful injury and first-degree robbery, with the subject alternative, based on the same act.

Claims similar to those raised by McDuffen were raised in *State v. Hamrick*, 595 N.W.2d 492, 493 (Iowa 1999), where the defendant raised a double jeopardy claim when the State charged him with third-degree kidnapping after a previous dismissal under rule 2.33(1) of the lesser-included offense of false imprisonment. The Iowa Supreme Court noted the charge of false imprisonment had been dismissed as a part of a plea agreement, which subsequently failed, and under rule 2.33(1) the State was not precluded from re-filing the previously dismissed charges. *Hamrick*, 595 N.W.2d at 494-95. The court also found that the State, on re-examining the evidence, could charge the defendant with a greater offense, in that case third-degree kidnapping. *Id.* at 495. The court found no double jeopardy violation. *Id*.

The central inquiry is what constitutes an acquittal. The trial court stated:

> As the Court noted earlier, willful injury is a lesser included offense of robbery in the first degree. So since it is included as a lesser included offense, there is no need for it to be charged in a separate count. The Court will dismiss count IV, willful injury as a separate offense. But it shall remain as a lesser included offense in robbery in the first degree.

That this dismissal occurred after trial had started and as a ruling in response to a motion for acquittal, at the close of the state's evidence, is not an acquittal in its real sense. The form the judge's ruling takes is not conclusive. *State v. Taft*, 506 N.W. 2d 757, 761 (Iowa 1993). "Rather, a judge's ruling constitutes an acquittal if it actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *Id.* (citing *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571, 97 S. Ct. 1349, 1354, 51 L. Ed 2d 642, 651 (1977)).

The dismissal of the willful injury charge was a compliance with section 701.9 and an effort to avoid multiple counts. The trial court entered no findings addressing the elements of willful injury, nor did the motion for acquittal request it to. The dismissal did not rise to an acquittal for double jeopardy purposes. Counsel had no duty to propound an issue that has no merit. *Millam v. State*, 745 N.W.2d 719, 721-722 (Iowa 2008); *State v. Hildebrand*, 405 N.W.2d 839, 841 (Iowa 1987).

We conclude McDuffen has failed to show he received ineffective assistance due to trial or appellate counsel's failure to raise a double jeopardy challenge to his conviction of first-degree robbery based on the dismissal, during

trial, of the lesser-included offense, of willful injury. We affirm the decision of the district court denying McDuffen's application for postconviction relief.

**AFFIRMED.**