IN THE COURT OF APPEALS OF IOWA

No. 8-879 / 08-0241
Filed December 31, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MARK EMERSON WILLEY,
Defendant-Appellant.

Appeal from the Iowa District Court for Jackson County, John A. Nahra, Judge.

Defendant seeks resentencing arguing his two convictions should be merged. **AFFIRMED**.

Mark C. Smith, State Appellate Defender, and David Arthur Adams, Assistant State Appellate Defender, for appellant.

Mark E. Willey, Anamosa, appellant pro se.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, and Phil Tabor, County Attorney, for appellee.

Considered by Sackett, C.J., and Eisenhauer and Doyle, JJ.

EISENHAUER, J.

In 2006, a jury convicted Mark Willey of assault with intent to inflict serious injury, first-degree burglary, and willful injury causing serious injury. At sentencing, the court merged the assault and the willful injury convictions and ordered consecutive sentences for burglary and willful injury. In September 2007, Willey's convictions were affirmed on appeal. In December 2007, Willey filed a motion for resentencing contending his sentence for willful injury causing serious injury should have been merged with his conviction for first-degree burglary.[1] The trial court overruled the motion and a motion to reconsider its ruling. Our review is for correction of errors at law. Iowa R. App. P. 6.4. Because the two crimes have separate and distinct elements and a defendant can commit first-degree burglary without also committing willful injury causing serious injury, we affirm.

We first address the State's contention the doctrine of *res judicata* bars this appeal. *See Spiker v Spiker*, 708 N.W.2d 347, 352 (Iowa 2006). While Willey's request for further review of the September 2007 appellate decision does contain his merger argument, Willey's merger claim was neither listed as an issue nor analyzed by the prior appellate courts. The *res judicata* doctrine does not bar this appeal.

The issue on appeal is whether willful injury causing serious injury is "necessarily included" in first-degree burglary under Iowa's merger statute, Iowa

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[1] We do not address Willey's double jeopardy argument since this claim was not argued below and is raised for the first time on appeal. *See State v. Halliburton*, 539 N.W.2d 339, 343 (Iowa 1995).

Code section 701.9 (2005). This statute requires the merger of lesser-included offenses and provides: "No person shall be convicted of a public offense which is necessarily included in another public offense." Iowa Code § 701.9; *see State v. Halliburton*, 539 N.W.2d 339, 343 (Iowa 1995). We look to the elements of each offense and determine if the greater offense (burglary) can be committed without also committing the lesser offense (willful injury causing serious injury). *See State v. Hickman*, 623 N.W.2d 847, 850 (Iowa 2001). "If the greater offense cannot be committed without also committing the lesser offense, the lesser is included in the greater. We call this the 'impossibility' test." *Id*. The "elements test" is "an aid in using the impossibility test and is fully subsumed in it." *Id*.

The jury was instructed first-degree burglary required, in relevant part, "the defendant intentionally inflicted bodily injury." Bodily injury was defined for the jury as "physical pain, illness or any impairment of physical condition."

In contrast, the jury was instructed willful injury causing serious injury required the jury to find both (1) the defendant specifically intended to cause a serious injury, and (2) the victim sustained a serious injury. An additional instruction defined serious injury: "A serious injury is a bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement or extended loss or impairment of the function of any bodily part or organ." *See* Iowa Code § 702.18(1)(b).

We conclude the *bodily* injury element of first-degree burglary is much broader than the *serious* injury element of willful injury. By definition a *serious* injury is only a type of *bodily* injury – a bodily injury "which creates" a substantial

death risk or a bodily injury "which causes" serious permanent disfigurement/extended loss or impairment. A bodily injury that does not "create" or "cause" the specific, serious physical harms identified does not qualify as a serious injury. Therefore, a defendant can intentionally inflict a bodily injury (physical pain, illness or impairment) in situations where neither the defendant's intent nor the victim's resulting harm rises to the level of a serious injury. Thus, it is possible for a defendant to commit first-degree burglary, which only requires intentional bodily injury, without also committing willful injury causing serious injury.

Further, the legislature has recognized two categories of willful injury. A defendant who intends serious injury and causes serious injury commits a class C felony. *Id.* § 708.4(1). A defendant who intends serious injury and causes bodily injury commits a class D felony. *Id.* § 708.4(2). This shows the legislature recognizes a distinction in whether a serious injury or a bodily injury was caused by a defendant and first-degree burglary only requires proof of an intentionally-inflicted bodily injury.

Under this analysis it is possible to commit first-degree burglary under the "intentionally inflicted bodily injury" alternative without also committing willful injury causing serious injury. The two offenses do not meet the impossibility test and the convictions should not be merged for sentencing.

AFFIRMED.