IN THE COURT OF APPEALS OF IOWA

No. 9-682 / 08-1490
Filed November 25, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JARED JAMES YORK,
Defendant-Appellant.

Appeal from the Iowa District Court for Washington County, Michael R. Mullins, Judge.

Jared York appeals from his convictions and sentences for child endangerment with bodily injury and involuntary manslaughter by public offense. **REVERSED AND REMANDED FOR RESENTENCING.**

Mark C. Smith, State Appellate Defender, and Theresa R. Wilson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, and Barbara A. Edmondson, County Attorney, for appellee.

Heard by Potterfield, P.J., Doyle, J., and Mahan, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

POTTERFIELD, P.J.

Jared York appeals from his convictions and sentences for child endangerment causing bodily injury, in violation of Iowa Code sections 726.6(1)(a) and 726.6(5) (2003), and involuntary manslaughter by public offense (child endangerment), in violation of section 707.5(1). He contends child endangerment resulting in bodily injury merges into involuntary manslaughter and appeals the trial court's ruling to the contrary. We remand for resentencing.

I. Facts.

The jury could have found that Jared York violently shook his six month old daughter, Rylie, causing fatal brain trauma and accompanying injuries of bleeding on the brain, inside the eyes, and inside the optic nerve sheaths. Rylie also had bruising on her torso, left arm, legs, and back, not typical of infants who are not yet mobile, and earlier had sustained a fracture to her leg. The State did not base any charges on these other injuries.

II. Scope and Standard of Review.

Our review of challenges to the legality of a merger decision by the trial court is for errors at law. *See State v. Anderson*, 565 N.W.2d 340, 342 (Iowa 1997). We review claims of constitutional violations de novo. *State v. Flanders*, 546 N.W.2d 221, 224 (Iowa Ct. App. 1996).

III. Analysis.

The Iowa merger doctrine is expressed in Iowa Code section 701.9 and Iowa Rule of Criminal Procedure 2.6(2).[1] *Anderson*, 565 N.W.2d at 343. Iowa

[1] Formerly Iowa Rule of Criminal Procedure 6(2).

Code section 701.9 codifies the double jeopardy protection against cumulative punishment. *State v. Halliburton*, 539 N.W.2d 339, 344 (Iowa 1995).

Iowa Code section 701.9 provides:

> 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 Rule of Criminal Procedure 2.6(2) provides: "Upon prosecution for a public offense, the defendant may be convicted of either the public offense charged or an included offense, but not both."

To be considered a lesser-included offense, the lesser offense must be composed solely of some but not all elements of the greater offense. *State v. Jackson*, 422 N.W.2d 475, 478 (Iowa 1988).

Involuntary manslaughter by public offense is committed when a person "unintentionally causes the death of another person by the commission of a public offense other than a forcible felony or escape." Iowa Code § 707.5(1). Our supreme court has retained an element of recklessness to the crime, which is in the uniform jury instruction that was given to the jury that convicted Jared York.

> We conclude that the General Assembly intended to preserve the common law requirement of recklessness in its provisions for involuntary manslaughter. Only by construing subsection 707.5(1) to require some degree of fault at least equivalent to that required by subsection 707.5(2) is the legislative scheme of sanctions commensurate to culpability carried forward.

State v. Conner, 292 N.W.2d 682, 686 (Iowa 1980).

The "public offense" element of involuntary manslaughter may be committed in as many alternative ways as there are public offenses defined by the Code, other than a forcible felony or escape. *State v. Webb*, 313 N.W.2d 550, 552 (Iowa 1981). In this case, the public offense alleged in the trial information and on which the jury was instructed is child endangerment resulting in bodily injury in violation of Iowa Code sections 726.6(1) and 726.6(5).

In *Webb*, our supreme court considered whether assault is a lesser-included offense of involuntary manslaughter by public offense where the public offense alleged is assault. *See id*. The court discussed whether the courts look to the charging language in the indictment or information or to the evidence by which a crime may be proved to decide when and if a guilty verdict of more than one offense conflicts with the statute prohibiting multiple convictions. *Id*. With regard to involuntary manslaughter by public offense, the court differentiated between "enumerated statutory definitions" like section 707.5(1), and the public offense alternatives within subsection (1).

> Although we look to the indictment or information to determine the enumerated statutory definition of a particular offense with which the defendant has been charged, alternative ways of committing a crime within an enumerated definition are not similarly treated. This is because the legal test for identifying lesser included offenses depends on the statutory definition of the greater offense rather than the evidence by which the offense may be proved in a particular case.

Id.[2]

[2] In 2004, in an unpublished decision, our court relied on the above language in *Webb* to find that child endangerment did not merge with involuntary manslaughter by public offense, where the alleged public offense was child endangerment. *State v. Petithory*, No. 03-1679 (Iowa Ct. App. Dec. 8, 2004), *aff'd* 702 N.W.2d 854 (Iowa 2005). The

However, the *Webb* language has been undermined by a string of opinions from the Iowa Supreme Court. The supreme court in *State v. Anderson*, 565 N.W.2d 340, 343 (Iowa 1997), chronicles the evolution of the test for lesser-included offenses. In *State v. Jeffries*, 430 N.W.2d 728, 736 (1988), the supreme court decided to retain the strict statutory-elements approach ("the elements test") to lesser-included offenses. *Jeffries* was not a rejection of the "impossibility test," which provides one offense is a lesser-included offense of the greater when the greater offense cannot be committed without also committing the lesser. *State v. McNitt*, 451 N.W.2d 824, 825 (Iowa 1990). In fact, the *Jeffries* "elements test" can help in applying the impossibility test.

> When a case is tried to a jury, the determination of whether a particular lesser crime must be submitted as a lesser-included offense of the crime charged may logically begin with the court's marshaling instruction on the greater offense. The trial court must determine whether if the elements of the greater offense are established, in the manner in which the State has sought to prove those elements, then the elements of any lesser offense have also necessarily been established. It is not essential that the elements of the lesser offense be described in the statutes in the same manner as the elements of the greater offense.

State v. Turecek, 456 N.W.2d 219, 223 (1990).

Finally, in *State v. Steens*, 464 N.W.2d 874, 875 (Iowa 1991), the supreme court recognized that when there are alternative ways to commit an offense, the alternative submitted to the jury controls. Six years later, in *Anderson*, 565 N.W.2d at 344, the supreme court reaffirmed that "when a statute provides alternative ways of committing the offense, the alternative submitted to the jury controls."

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district court here relied on that opinion to rule that the guilty verdicts for child endangerment and involuntary manslaughter did not merge.

Here, the involuntary manslaughter alternative submitted to the jury was the reckless commission of child endangerment. We compare the instructions submitted to the jury to determine whether it is possible to commit the greater offense without also committing the lesser offense.

Instruction No. 24

> The State must prove both of the following of Involuntary Manslaughter:
>
> 1. On or about the 26th day of August, 2003, the defendant recklessly committed the crime of child endangerment.
>
> 2. When the defendant committed the crime, the defendant unintentionally caused the death of Rylie York.
>
> If the State has proved both the elements, the defendant is guilty of involuntary manslaughter. If the State has failed to prove either of the elements, the defendant is not guilty of Involuntary Manslaughter.

Instruction No. 25

> The State must prove all of the following elements of Child Endangerment resulting in bodily injury:
>
> 1. On or about the 26th day of August, 2003, the defendant was the parent of Rylie York.
>
> 2. Rylie York was under the age of fourteen years.
>
> 3. The defendant knowingly acted in a manner creating a substantial risk to Rylie York's physical health or safety.
>
> 4. The defendant's act resulted in bodily injury to Rylie York.
>
> If the State has proved all of the elements, the defendant is guilty of Child Endangerment resulting in bodily injury. If the State has failed to prove any one of the elements, the defendant is not guilty of Child Endangerment resulting in bodily injury (and you will then consider the crime of child endangerment explained in Instruction No. 27.)

The elements of involuntary manslaughter as presented to the jury are identical to the elements of child endangerment with the exception that the State must also prove that the defendant committed child endangerment recklessly, and unintentionally caused the death of the victim. Thus, it is impossible to commit the greater offense—involuntary manslaughter by commission of child

endangerment—without also committing the lesser offense—child endangerment causing bodily injury. Consequently, the two offenses for which York was convicted are greater and lesser-included offenses for purposes of double jeopardy analysis.

We must now consider whether the legislature "clearly indicated" multiple punishments for both crimes. *State v. Lewis*, 514 N.W.2d 63, 69 (1994); *see Halliburton*, 539 N.W.2d at 344 (noting that if the crimes meet the legal elements test for lesser-included offenses, "we then study whether the legislature intended multiple punishments for both offenses") (citing *Lewis*, 514 N.W.2d at 69).

The State relies on three cases decided by the Iowa Supreme Court in the 1990's to support its argument that the Iowa legislature intended that we impose separate punishments for these two offenses charged on the basis of a single act: *Lewis*, *Halliburton*, and *State v. Perez*, 563 N.W.2d 625, 628-29 (Iowa 1997).

In *Lewis*, the supreme court concluded that the legislature intended separate punishments for criminal gang participation as a class D felony and the underlying criminal act used as the predicate, which might carry a longer sentence. *Lewis*, 514 N.W.2d at 69. The court discerned the legislative intent in the State's argument that otherwise the criminal gang participation crime would be "useless" as it merged with the underlying criminal act. *Lewis*, 514 N.W.2d at 69.

In *Halliburton*, the court concluded that even though possession of an offensive weapon was a lesser-included offense of possession of an offensive weapon by a felon, the Legislature intended cumulative punishment. *Halliburton*, 539 N.W.2d at 344-45. To support its conclusion, the court noted that both

offenses were class D felonies and only by imposing cumulative punishments could it give effect to the possession as a felon alternative of Iowa Code section 724.26, *see id*. at 344,[3] and that the two statutes had different purposes. *See id.* at 344-45.

In *Perez*, the court turned to the Supreme Court opinion in *Missouri v. Hunter*, 459 U.S. 359, 366, 103 S. Ct. 673, 678, 74 L. Ed. 2d 535, 542 (1983), for the proposition that the elements test need not be applied at all. "Where a legislature specifically authorizes cumulative punishment under two statutes . . . the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial." *Perez*, 563 N.W.2d at 627 (citing *Hunter*, 459 U.S. at 368-69, 103 S. Ct. at 679, 74 L. Ed. 2d at 544).

The *Perez* court acknowledged that courts must presume that the legislature does not intend cumulative punishments "in the absence of a clear indication of contrary legislative intent." *Id.* at 628 (citing *Hunter*, 459 U.S. at 366, 103 S. Ct. at 678, 74 L. Ed. 2d at 542). The court went on to find an express legislative will in Iowa Code section 708.3, which makes assault while participating in a felony causing serious injury punishable as a C felony. *Id*. The court found that the legislature intended punishment for both the assault and the predicate felony. *Id*.

The State argues here that legislative intent to impose cumulative punishment for a single act that otherwise would require a merger of sentences can be gleaned from the use in the statute of a general reference to a necessary

[3] *Halliburton* dealt with Iowa Code section 724.26 (1993), which was reworded in 2002. 2002 Iowa Acts ch. 1003, § 243.

predicate offense (for example, public offense as a predicate for one alternative way to commit involuntary manslaughter, Iowa Code section 707.5(1), a criminal act as a predicate for criminal gang activity, Iowa Code section 723A.1(1), a felony in assault while participating in a felony, Iowa Code section 708.3, a forcible felony as a predicate for felony murder) as opposed to a specific reference to an identified specific crime (such as sexual abuse as a predicate for first degree burglary, Iowa Code section 713.3(1)). The State's argument correctly catalogues these offenses and predicates as those in which our cases have ruled against merger. However, the argument does not shed any light on why the more generic reference reflects a clear legislative intent against merger, nor why these offenses logically should not merge with their predicates under the elements tests.

In August 2006, the Iowa Supreme Court revisited its position that willful injury as a predicate forcible felony for felony murder does not merge with felony murder. *State v. Heemstra*, 721 N.W.2d 549, 551 (Iowa 2006). The court considered and rejected the argument that the legislature had determined that a willful injury resulting in death would not merge with a conviction for felony murder arising from the same assault. *Id*. at 557. The court went on to say, "Furthermore, we should not defer to the legislature for a signal for us to adopt a legal principle that is the responsibility of the court and within the power of the court to apply, based on legal precedent, common sense, and fairness." *Id.* at 558. The *Heemstra* court overruled its precedent to the extent the previous cases held that willful injury did not merge into felony murder where the felonious assault was the act that caused the death of the victim. *Id*.

The principle of *Heemstra* applies to this case wherein the court imposed consecutive sentences for child endangerment and involuntary manslaughter over defense objection. Since there is no clear indication of legislative intent, and common sense and fairness dictate that the two offenses merge, we will not presume the Legislature intended cumulative punishments.

IV. Conclusion.

We conclude it is impossible to commit the greater offense of involuntary manslaughter by child endangerment without also committing the lesser offense of child endangerment. Consequently, York's conviction for child endangerment merges with his conviction for involuntary manslaughter. Because there is no clear indication that the Legislature intended cumulative punishments, we reverse and remand for resentencing.

REVERSED AND REMANDED FOR RESENTENCING.