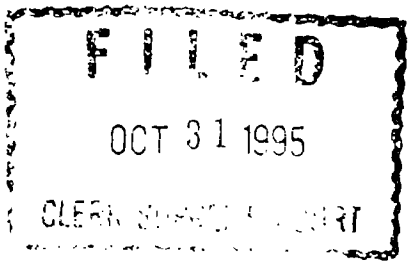
IN THE COURT OF APPEALS OF IOWA



No 5-483 / 94-1664

STATE OF IOWA,

Appellee,

vs.

TIMMY JOE TUCKER,

Appellant.

Appeal from the Iowa District Court for Scott County, James E. Kelley, Judge.

Tucker appeals his conviction, following a jury trial, for first-degree burglary, second-degree robbery, and assault with intent to inflict serious injury. **AFFIRMED.**

James Bryson Clements, Davenport, for appellant.

Thomas J Miller, Attorney General, Julie H. Brown, Assistant Attorney General, William E. Davis, County Attorney, and Kelly Raines, Assistant County Attorney, for appellee.

Considered by Hayden, P.J., and Habhab and Huitink, JJ.

HAYDEN, P.J.

Defendant Timmy Joe Tucker appeals his convictions for the crimes of burglary in the first degree, in violation of Iowa Code sections 713.1 and 713.3; assault with intent to inflict serious injury, in violation of section 708.2; and robbery in the second degree, in violation of sections 711.1 and 711.3. We affirm defendant's convictions.

This case arises from the same set of facts discussed in *State v. Waller*, No. 5-482/94-1617 (Iowa App. Oct. 31, 1995) (Unpublished). On May 10, 1994, Tucker's girlfriend, Brenda Waller, who worked as a prostitute, entered into an agreement to have sexual intercourse with Kenneth Tye for thirty dollars. Tucker drove Waller and Tye to the Riverview Inn in Davenport for this rendezvous.

Later in the evening, after Waller had returned from the rendezvous, Tucker and Waller returned to the Riverview Inn. Tucker broke into Tye's room and took his pants. When Waller had been in the room, Tye had placed his wallet in his pants pocket. Before leaving the room, Tucker attacked Tye with a tire iron. Tucker and Waller then fled the motel. When they were apprehended they were in possession of Tye's pants, belt, and knife.

On May 10, 1994, Tucker was charged with burglary in the first degree and assault with intent to inflict serious injury. On August 26, 1994, the State filed a motion to amend the trial information to add a third count, robbery in the second

degree. The district court granted the motion. The court denied defendant's motion to strike the amended trial information.

A jury found defendant guilty of the three crimes charged. Defendant was sentenced to a term of imprisonment not to exceed twenty-five years on the burglary charge, a term of imprisonment not to exceed ten years on the robbery charge, and a term of imprisonment not to exceed two years on the assault charge. The robbery and assault sentences are to run concurrently, but the burglary sentence is consecutive to the other two charges. Defendant has appealed.

I. Defendant contends the district court erred by denying his motion to strike the robbery count of the amended trial information. Iowa Rule of Criminal Procedure 4(8)(a), in pertinent part, provides:

> Amendment is not allowed if substantial rights of the defendant are prejudiced by the amendment, or if a wholly new and different offense is charged.

The State concedes robbery in the second degree is a wholly new and different offense than burglary in the first degree. The State points out it would have been able to file a second, separate trial information charging defendant with robbery. It is permissible to charge burglary and robbery in tandem, even when the two charges stem from a single set of facts. *State v. Eichorn,* 325 N.W.2d 95, 96 (Iowa 1982) Under the circumstances presented here, no statute of limitations or speedy indictment problems would have arisen from the trial information filed on August 26, 1994. The State could

then have asked the court to consolidate the separate offenses. *See State v. Ogan*, 497 N W 2d 902, 904 (Iowa 1993).

Because the State would have been able to charge defendant with all three crimes under a different procedure, defendant cannot show prejudice due to the State's amendment of the trial information to add a new charge. We deny defendant's request for relief on this ground.

II. Defendant claims there was insufficient evidence in the record to support his conviction for robbery. Section 711.1 provides:

> A person commits a robbery when, having the intent to commit a theft, the person does any of the following acts to assist or further the commission of the intended theft or the person's escape from the scene thereof with or without the stolen property:
>
> 1. Commits an assault upon another.

Defendant states there is insufficient evidence his assault of Tye assisted or furthered the commission of the theft or his escape. He states the victim was sleeping and he could have committed the theft and escaped without assaulting the victim.

The evidence in the case shows defendant had not yet escaped when Tye woke up. Tye testified when he woke up Tucker was holding his pants in one hand. He stated Tucker struck him with a tire iron with the other hand. We conclude the evidence shows the assault assisted or furthered defendant's escape from the scene. Section 711.1 explicitly includes within the definition of robbery an assault committed after a theft has been completed, but which furthered the offender's escape. *State v.*

Jordan, 409 N.W.2d 184, 186 (Iowa 1987). We determine there was sufficient evidence in the record to support defendant's conviction for robbery.

III. Defendant contends the district court erred by overruling his objection to jury instruction No 27, on the robbery charge. Instruction No 27 provided:

> Under Count IV, as against defendant Timmy Joe Tucker, the State must prove all of the following elements of Robbery in the Second Degree:
>
> 1. On or about the 10th day of May, 1994, defendant Timmy Joe Tucker or someone he aided and abetted had the specific intent to commit a theft.
> 2. In carrying out this intention or to assist them in escaping from the scene, with or without the stolen property, the defendant Timmy Joe Tucker committed an assault on Kenneth Tye.

Defendant believes the instruction was improper because it allowed the jury to find him guilty of robbery in the second degree if he committed an assault "in carrying out" the theft. He asserts the instruction should have followed the language of section 711 1 and required a finding he committed an assault to "assist or further the commission of the intended theft."

We will not disturb a trial court's ruling on instructions absent an abuse of discretion. *State v. Webb*, 516 N.W.2d 824, 831 (Iowa 1994). If the court's jury instructions adequately cover an area of law, the court does not err by refusing a defendant's requested instruction even if defendant's instruction is clearer. *State v. Doss*, 355 N.W.2d 874, 881 (Iowa 1984). We believe jury instruction No 27 adequately covers the law in this area. We also note instruction No. 27 was a uniform

instruction. The Iowa appellate courts have been reluctant to disapprove a uniform instruction. *State v. Monk*, 514 N.W 2d 448, 450 (Iowa 1994). We find no abuse of discretion in the district court's submission of instruction No. 27 to the jury.

IV. Finally, defendant claims his sentences for the crimes of burglary and robbery, arising from the same acts, violates the Double Jeopardy Clause. He asserts robbery is an alternative means of charging the same crime as burglary and he is therefore facing double punishment for the same crime.

In a challenge brought under the Double Jeopardy Clause our review is de novo. *State v. Constable*, 505 N.W.2d 473, 477 (Iowa 1993). The Double Jeopardy Clause protects against three things: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. *State v. Wissing*, 528 N.W.2d 561, 565 (Iowa 1995).

The question of what punishments are constitutionally permissible is no different from the question of what punishments the legislature intended to be imposed. *State v. Aguiar-Corona*, 508 N.W.2d 698, 701 (Iowa 1993). Under the test articulated in *Blockburger v. United States*, 284 U.S 299, 304, 52 S. Ct. 180, 182, 76 L. Ed. 306, 309 (1932), where one offense is a lesser-included offense of another offense, punishment should not be imposed for each offense. *Wissing*, 528 N.W.2d at 566 However, if the *Blockburger* test shows the two offenses are not the same offense, there

is a presumption the legislature intended multiple punishments for both. *Aguiar-Corona*, 508 N.W.2d at 702

The supreme court has determined a comparison of the elements of robbery and burglary in the statutes demonstrates the two crimes are different; they do not consist of the same elements. *Eichorn*, 325 N.W.2d at 96. Burglary and robbery are considered to be separate and distinct offenses. *State v. Burton*, 231 N.W.2d 577, 578 (Iowa 1975). Because burglary and robbery are not the same offense, we presume the legislature intended multiple punishments for both. We determine defendant's sentences for burglary and robbery do not offend the Double Jeopardy Clause.

After considering all issues raised by defendant in this appeal, we affirm his convictions and sentences for burglary in the first degree, assault with intent to inflict serious injury, and robbery in the second degree. Costs of this appeal are assessed to defendant.

AFFIRMED.