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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-628 / 90-84

STATE OF IOWA,

Appellee,

vs.

CHARLES SAMUEL RICHARDS,

Appellant.

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Appeal from the Iowa District Court for Scott County, David J. Sohr, Judge.

Defendant challenges the sufficiency of the evidence for one conviction and the entry of judgment on both a greater and lesser-included offense under the Double Jeopardy clause. **AFFIRMED AND REMANDED.**

Linda Del Gallo, State Appellate Defender, and Brian K. Sissel, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Ann E. Brenden, Assistant Attorney General, William E. Davis, County Attorney, and J.E. Tobey III, Assistant County Attorney, for appellee.

Considered by Oxberger, C.J., and Hayden and Sackett, JJ.

HAYDEN, J.

Charles Richards was involved in a barroom confrontation. The confrontation ended when Richards shot and wounded the other combatant. Richards claimed he pulled the gun only to scare his opponent. He claimed the gun discharged accidentally when the opponent struck Richards.

As a result of this incident, Richards was charged with several crimes. A jury found him guilty of assault with intent to cause serious injury, willful injury, and going armed with intent. However, the district court stated at sentencing the crime of assault with intent to cause serious injury was a lesser-included offense of the crime of willful injury. Therefore, the court merged those two offenses and entered judgment only on the greater offense. The court imposed sentence only on the greater of these two offenses, willful injury. The court also imposed sentence on the third offense, going armed with intent.

Richards has appealed his convictions and sentences.

Richards challenges the sufficiency of the evidence to support his conviction for the charge of going armed with intent. Richards also contends the district court erred by: (1) entering judgments on both the crime of willful injury and the crime of assault with intent to cause serious injury, (2) by merging the two judgments, (3) and by imposing sentence on the greater of the two crimes. He argues his conviction on the lesser-included charge barred his conviction and sentence on the greater charge.

Our scope of review is on assigned error only. Iowa R. App. P. 4.

I. Sufficiency of the Evidence

The standard of review in challenging the sufficiency of the evidence is well established. State v. Lampman, 342 N.W.2d 77, 81 (Iowa App. 1982). We will uphold a verdict where there is substantial evidence in the record tending to support the charge. State v. Aldape, 307 N.W.2d 32, 39 (Iowa 1981).

When reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State, including legitimate inferences and presumptions that fairly and reasonably may be deduced from the evidence in the record. State v. Hall, 371 N.W.2d 187, 188 (Iowa App. 1985); State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984). Direct and circumstantial evidence are equally probative so long as the evidence raises "a fair inference of guilt and [does] more than create speculation, suspicion, or conjecture." State v. Hamilton, 309 N.W.2d 471, 479 (Iowa 1981). It is necessary to consider all the evidence in the record, and not just the evidence supporting the verdict, to determine whether there is substantial evidence to support the charge. Hall, 371 N.W.2d at 188; Bass, 349 N.W.2d at 500. Substantial evidence means evidence which would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. Hall, 371 N.W.2d at 188; State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984).

Under the circumstances of this case, we determine sufficient evidence exists to support Richards' conviction of going armed with intent. We affirm the trial court on this issue.

II. Double Jeopardy

Richards next contends the trial court erred in entering judgment on both willful injury and assault with intent to cause serious injury. He argues assault with intent is a lesser-included offense of willful injury. Richards contends the judgment and sentence on the lesser offense precludes judgment and sentence on the greater.

As Richards' argument raises constitutional issues under the double jeopardy clause of the United States Constitution, our review is de novo. See State v. Niehaus, 452 N.W.2d 184, 187 (Iowa 1990).

At sentencing the trial court found assault with intent to cause serious injury to be a lesser-included offense of willful injury. It entered judgment and it sentenced only on the greater offense of willful injury.

We dismiss Richards' complaint of error on the trial court's entry of judgment for both willful injury and assault with intent. Our de novo review of the record reveals the trial court entered judgment at the time of sentencing only on the greater offense of willful injury, Iowa Code section 708.4:

> Any person who does an act which is not justified and which is intended to cause and does cause serious injury to another commits a class "C" felony.

The trial court proceeded to sentence Richards under Iowa Code section 902.9, which states in pertinent part:

> The maximum sentence for any person convicted of a felony shall be that prescribed by statute or, if not prescribed by statute, if other than a class "A" felony shall be determined as follows:
> * * *
> 3. A class "C" felon, not an habitual offender, shall be confined for no more than ten years, and in addition may be sentenced to a fine of not more than ten thousand dollars.

We turn now to Richards' final argument. He claims because the jury convicted him of both the greater and lesser-included offense, judgment and sentence may only be imposed on the lesser. His premise is the double jeopardy prohibition bars a subsequent conviction on an offense already convicted upon.

Prosecution and verdict on one charge bars a subsequent prosecution on a greater or lesser-included offense for the same charge arising out of the same incident. U.S. Const. amend. 5; see generally Corbin v. Grady, ___ U.S. ___, 110 S. Ct. 2084, 109 L. Ed.2d 548 (1990); see also State v. Jeffries, 430 N.W.2d 728 (Iowa 1988) (reaffirmed in State v. McNitt, 451 N.W.2d 824, 824-25 (Iowa 1990)).

In this case, Richards' convictions on both counts arose out of the same proceeding, not out of a subsequent one. The trial court properly entered judgment and sentence only on willful injury. Thus, double jeopardy never arose in this proceeding. We determine the trial court did not err in entering judgment and in sentencing only on the greater offense of willful injury.

We affirm the trial court on this issue.

III. Criminal Record

Both the State and the appellate defender appear to accept as fact the trial court entered judgment for both willful injury and assault with intent to cause serious injury. Our review of the record and transcript reveals entry of judgment and sentence only on willful injury. We order Richards' criminal record expunged of any conviction for assault with intent to cause serious injury arising out of this case, and we remand for this purpose.

AFFIRMED AND REMANDED.