

IN THE COURT OF APPEALS OF IOWA

FILED

MAY 31 1988

CLERK SUPREME COURT

STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed May 31, 1988

vs.

)

299

JEFFREY L. TAGGART,

)

8-13
87-456

Defendant-Appellant.

)

Appeal from the Iowa District Court for Polk County (32505), Theodore H. Miller, Judge.

Defendant was charged with two counts of attempted murder but was convicted of two counts of the lesser offense of willful injury; he appeals, contending the convictions cannot stand because willful injury is not a lesser included offense of attempt to commit murder. **REVERSED.**

Charles Harrington, Chief Appellate Defender, for defendnat-appellant.

Thomas J. Miller, Attorney General of Iowa, and Richard J. Bennett, Assistant Attorney General, for the plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson and Schlegel, JJ.

SCHLEGEL, J.

The defendant, Jeffrey Taggart, was charged with two counts of attempted murder. The court submitted the charges of attempted murder to the jury, along with other lesser offenses, including willful injury. The jury found him guilty of two counts of willful injury. The defendant appeals, claiming the court erred in submitting the charge of willful injury since it is not a lesser-included offense of attempted murder. We reverse.

The State does not concede that willful injury is not a lesser-included offense of attempted murder, but argues that the court need not decide that question. The State claims that the defendant waived any error that may have been committed in connection with that issue, by failing to object to its submission to the jury, and thereby failing to preserve the error. The defendant contends that the error may be raised at any time, since the court lacked subject-matter jurisdiction of the charge of willful injury because it was neither charged specifically, nor was an included offense to the crime charged in the information.

Attempted murder is defined by Iowa Code section 707.11 as follows:

A person commits a class "B" felony when, with the intent to cause the death of another person and not under circumstances which would justify the persons actions, the person does any act by which the person expects to set in motion a force or chain of events which will cause or result in the death of the other person.

It is not a defense to an indictment for attempt to commit murder that the acts proved could not have caused the death of any person, provided that the actor intended to cause the death of some person by so acting, and the actor's expectations were not unreasonable in the light of the facts known to the actor.

Iowa Code § 707.11 (1985).

Willful injury is defined as follows:

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.

Iowa Code § 708.4 (1985).

The Iowa Supreme Court has stated:

In determining what offenses are lesser and included, we have developed a factual and legal test for the trial courts to apply. State v. Sangster, 299 N.W.2d 661, 663 (Iowa 1980). For an affirmative finding of an included offense, both tests must be satisfied. Id.

The legal or element test requires the lesser offense to be composed solely of some but not all of the elements of the greater offenses. Id. Thus, the lesser offense is necessarily included in the greater offense if the greater offense cannot be committed without also committing the lesser. State v. Redmon, 244 N.W.2d 792, 801 (Iowa 1976). Conversely, if the lesser offense contains an element that is not part of the greater offense, the lesser cannot be included in the greater. Sangster, 299 N.W.2d at 663.

The factual test requires the court to determine whether there is a sufficient factual basis in the record for submitting the included offense. Id.

State v. Lampman, 345 N.W.2d 142, 143 (Iowa 1984).

It is clear that in the case before us, willful injury does not satisfy the legal or element test for a lesser-included offense. The lesser offense is not necessarily included in the greater offense, because the greater offense (attempted murder) can be committed without also committing the lesser offense (willful injury). Attempted murder does not necessarily include serious injury, which is essential to willful injury. See Iowa Code § 708.4 (1985).

The issue we must decide is whether the failure of the defendant to object to the submission of the offense of willful injury to the jury as a lesser-included offense waived his right to raise that error at this time.

A formal accusation is essential for every trial of a crime. State v. Meyers, 256 Iowa 801, 805, 129 N.W.2d 88, 91 (1964). An information charges not only the major offense, but any lesser offenses necessarily included therein. State v. English, 242 Iowa 248, 252, 46 N.W.2d 13, 15 (1951). In the case of State v. Bartlett, 181 Iowa 436, 438-40, 164 N.W. 757, 758 (1917), the court

held that a conviction without a formal accusation is a nullity. In that case, in an effort to avoid prosecution for a more serious charge, the defendant appeared before the justice of the peace and entered a plea and was found guilty of assault. The court held that the State had not become a party to the action, because there was no formal charge. Because no formal charge had been filed, the supreme court held that there had been no jurisdiction over the case and the trial court's judgment was void.

In the recent case of State v. Trucke, 410 N.W.2d 242, 243 (Iowa 1987), the Iowa Supreme Court continued its adherence to these principles, and noted that a conviction upon a charge not made in the information must be reversed. In Trucke, the court stated that "[f]ederal courts interpreting the federal counterpart to rule 10(2)(b) [Iowa Rules of Criminal Procedure] have held that, like lack of subject matter jurisdiction, failure to charge an offense may be raised sua sponte by the court at any time." Id. at 243 n.1.

We hold that the failure to object to the submission of an offense not charged, or that is not an included offense to one which is charged, does not constitute a waiver of the error of improper submission of that offense, and may be raised at any time, whether preserved or not.

Having so held, and having held that willful injury is not an included offense of attempted murder, we hold that the conviction of the defendant on the two counts of willful injury must be reversed.

REVERSED.