IN THE COURT OF APPEALS OF IOWA

No. 0-489 / 99-1576
Filed October 25, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DEE DANIEL HICKMAN,
Defendant-Appellant.

FILED
OCT 2 5 2000
CLERK SUPREME COURT

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

Dee Hickman appeals from the judgment and sentence entered upon his convictions for first-degree robbery and willful injury. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and James G. Tomka, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kristin Mueller, Assistant Attorney General, William E. Davis, County Attorney, and Robert Weinberg, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Mahan and Zimmer, JJ.

ZIMMER, J.

Dee Hickman appeals the judgment and sentence entered following his convictions for first-degree robbery and willful injury. He argues the trial court erred by denying his motions for judgment of acquittal and by failing to merge the convictions on the charges of willful injury and first-degree robbery. We affirm.

Hickman's convictions occurred as a result of his participation in a robbery and shooting in Davenport, Iowa, in the early evening hours of April 6, 1999. Hickman, Marcus Gay, and Greg Irving stopped by the home of codefendant Marvin Hughes. Hickman made several phone calls and pages to John Thorpe in order to arrange the purchase of marijuana. The parties ultimately planned to meet Thorpe at 6:30 p.m. near a stadium to buy one pound of marijuana for $950. During the conversation, Hickman asked Thorpe whether he would be alone. Hickman reported this fact to his cohorts and told them they did not have money to buy the marijuana—they would just take it. Gay agreed to sit in the front seat of Thorpe's car during the transaction and hit him in the head while Hickman took the marijuana.

Hughes drove the other three to meet Thorpe. Hickman entered Thorpe's car and sat in the back seat. Gay sat in the front passenger's seat next to Thorpe. Thorpe took out the marijuana and placed it on a scale on the passenger's side floor. As he sat up, Thorpe felt what he believed was a gun in his right ear. Someone told Thorpe "You're jacked" and Gay hit Thorpe in the face. At that point, Thorpe tried to grab his gun from underneath his left thigh. However, he decided to let go of it because one of the attackers yelled that Thorpe was reaching for something and Thorpe did not want to get shot.

Hickman then shot Thorpe in the back of the head. The bullet entered near the junction of the right ear, jaw, and neck and exited through the roof of the mouth. Thorpe was able to drive himself to his aunt's home where an ambulance was called. Thorpe survived the wound after treatment.

Hickman, Irving, and Gay fled the scene with the marijuana in Hughes's vehicle and returned to Hughes's residence. Hughes's girlfriend, Faith Beasley, observed their nervous behavior. She noted Hickman and Gay both had guns and Irving had a ziploc bag of marijuana. Gay was excited, stating how he had hit Thorpe very hard. Hickman stated that he could not believe what had happened. The four men then divided the marijuana.

On May 20, 1999, the State charged Hickman with first-degree robbery in violation of Iowa Code section 711.2 (count I), attempted murder in violation of section 707.11 (count II), willful injury in violation of section 708.4 (count III), and assault while participating in a felony in violation of section 708.3 (count IV). Hickman's jury trial began on August 16, 1999. The jury subsequently found him guilty of first-degree robbery as charged in count I, the lesser offense of assault with intent to inflict serious injury under count II, and willful injury as charged in count III. Count IV was not submitted to the jury. On the first-degree robbery charge, the district court sentenced Hickman to an indeterminate twenty-five-year term of imprisonment. The court merged the assault into the willful injury conviction and sentenced Hickman to serve an indeterminate ten-year term of imprisonment for the willful injury conviction.

Hickman appeals. He argues the district court erred by denying his motion for judgment of acquittal based on insufficiency of the evidence. He also

maintains the district court failed to merge the willful injury conviction into the first-degree robbery conviction, in violation of Iowa Code section 701.9 and double jeopardy principles.

I. Sufficiency of the Evidence. We review sufficiency of the evidence challenges for correction of errors at law. *State v. Chang,* 587 N.W.2d 459, 461-62 (Iowa 1998). In our review of a ruling on a motion for judgment of acquittal, we view the evidence in the light most favorable to the State. *State v. Boleyn,* 547 N.W.2d 202, 204 (Iowa 1996). We accept any legitimate inferences that may reasonably be deduced from the evidence. *Id.*

Hickman contends the trial court should have granted his motion on all charges because the defense theory of justification required acquittal. The State responds by arguing Hickman failed to preserve this particular sufficiency-of-the-evidence argument. The State also argues the prosecution presented sufficient evidence to rebut Hickman's justification defense at trial.

Whether or not this particular argument was preserved, we find it lacks merit. Hickman and the victim, Thorpe, told different versions of the incident. Thorpe testified that as he reached for the scale on the front passenger's side, a gun was stuck in his ear, making the individual with the gun the first aggressor. Then, Gay struck Thorpe in the face. Thorpe stated that only at that point did he try to grab his gun from underneath his left leg with his left hand, but released it when either Hickman or Gay shouted that Thorpe was reaching for something. Thorpe then heard a whistling sound as he was shot in the right side of the head. On the other hand, Hickman claimed he first decided to steal the marijuana after Thorpe handed it to him in the car. According to Hickman, he began to open the

back door to flee but Thorpe pulled out his gun, making Thorpe the first aggressor. Gay grabbed Thorpe's left hand and a struggle ensued. According to Hickman, he shot Thorpe to protect himself and Gay.

Deciding whose version to believe is left to the jury. The jury was entitled to believe Thorpe and other witnesses and reject Hickman's self-serving version of events. *See State v. Garr,* 461 N.W.2d 171, 174 (Iowa 1990) (noting jury is not required to believe defendant's account of the events). Our standard of review does not permit us to reassess the witnesses' credibility. We examine only the legal *sufficiency* of the evidence. There is sufficient evidence in the record from which the jury could conclude beyond a reasonable doubt Hickman committed robbery in the first degree and willful injury. We affirm the district court's denial of Hickman's motion for judgment of acquittal.

II. Merger. Hickman contends willful injury is a lesser-included offense of first-degree robbery.[1] He argues the district court failed to merge his sentences for these crimes, in violation of constitutional double jeopardy principles and Iowa Code section 701.9 (1997).

We agree with the State that Hickman has failed to preserve error on his double jeopardy challenge because he did not raise the issue in district court. *See State v. Mulvany,* 600 N.W.2d 291, 293 (Iowa 1999). We require error preservation even on constitutional issues. *Id.* (citation omitted). However, the State concedes the error preservation rule does not apply to a defendant's statutory claim of an illegal sentence under section 701.9. *See* Iowa R. Crim. P.

---

[1] In jury instruction 19, the trial court listed willful injury as a lesser-included offense of count I, first-degree robbery. We find no authority for this instruction. However, no party objected to the instruction and Hickman does not make any arguments on appeal based on the instruction.

23(5)(a); *see also Mulvany,* 600 N.W.2d at 293. Because Hickman alleges a violation of section 701.9, our review is for correction of errors at law. *Mulvany,* 600 N.W.2d at 293 (citation omitted).

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.

The premise of Hickman's argument is that willful injury is a lesser-included offense of first-degree robbery.

Under section 701.9, we apply the legal elements test to determine lesser-included offenses. *Mulvany,* 600 N.W.2d at 293 (addressing only legal elements test on merger issue arising only under section 701.9; double jeopardy issue not preserved). We place the statutes

> side by side and examine their elements in the abstract. The comparison must produce a nearly perfect match. If the lesser offense contains an element that is not part of the greater offense, the lesser cannot be included in the greater.

Id. (quoting *State v. Jeffries,* 430 N.W.2d 728, 736 (Iowa 1988)). The test is whether, if the elements of the greater offense are established in the manner in which the State sought to establish them, the elements of the lesser offense have also been established. *State v. Mapp,* 585 N.W.2d 746, 748-49 (Iowa 1998) (finding first-degree murder cannot be established without also establishing lesser offense of willful injury).

The elements of first-degree robbery are:

1. . . . [T]he defendant had the specific intent to commit a theft.

2. To carry out [his] . . . intention or to assist [him] . . . in escaping from the scene, with or without the stolen property, the defendant:

a. Committed an assault on [the victim].
b. Threatened [the victim] with, or purposely put [the victim] in fear of immediate serious injury.
c. Threatened to immediately commit [a forcible felony].

3. The defendant:

a. Purposely inflicted or attempted to inflict a serious injury on [the victim] [or]
b. Was armed with a dangerous weapon.

II Iowa Crim. Jury Instructions 1100.1 (1989); *see also* Iowa Code § 711.2.

The elements of willful injury are:

1. . . . [T]he defendant (set forth acts of assault).

2. The defendant specifically intended to cause a serious injury to [the victim].

3. [The victim] sustained a serious injury.

I Iowa Crim. Jury Instructions 800.10 (1988); *see also* Iowa Code § 708.4.

Willful injury is not a lesser-included offense of first-degree robbery because the offenses contain different intent elements. The robbery intent element at issue is "purposely inflicted or attempted to inflict a serious injury." The term "purposely" requires only a general intent to inflict serious injury because with the term 'purposely,' the focus is on the result the defendant's purposeful acts cause, not on the defendant's mental state. *See State v. Neuzil,* 589 N.W.2d 708, 711 (Iowa 1999) (construing stalking statute which uses the word 'purposefully' to be general intent crime). Put another way, the act causing serious injury must be intentional, but the resulting serious injury need not be intended by the defendant. *See State v. Heacock,* 521 N.W.2d 707, 711 (Iowa

1994). This is different from willful injury, which requires an act accompanied by the intent to cause serious injury. The first-degree robbery statute simply requires the defendant to purposefully engage in conduct which causes serious injury—there is no mention of proof that the robber actually intended to cause serious injury. On the other hand, for the charge of willful injury, there must be proof of the specific intent to cause serious injury. *See* Iowa Code § 708.4. Willful injury is not a lesser-included offense. The district court was not required to merge these convictions. We affirm Hickman's sentence.

AFFIRMED.