

IN THE COURT OF APPEALS OF IOWA

No. 0-462 / 09-1552
Filed August 25, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ALAN DEAN PAINTER,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, David H. Sivright Jr.,
Judge.

Alan Painter appeals from his conviction for going armed with intent.

REVERSED AND REMANDED FOR NEW TRIAL.

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

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant
Attorney General, Michael J. Walton, County Attorney, and Jerald Feuerbach,
Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Potterfield and Danilson, JJ. Tabor, J.,
takes no part.

POTTERFIELD, J.**I. Background Facts and Proceedings**

On May 4, 2009, Alan Painter became involved in a physical altercation with his roommate, Brian Ballenger. Painter testified that Ballenger hit him in the forehead and then, as Ballenger hit him in the mouth, he pulled a knife from his pants pocket and stabbed Ballenger twice.

On June 2, 2009, the State filed a trial information charging Painter with going armed with intent in violation of Iowa Code section 708.8 (2009) and assault causing bodily injury in violation of Iowa Code section 708.2(3).¹ A jury found Painter guilty of both charges.² Painter appeals, arguing his trial counsel was ineffective for: (1) failing to challenge the sufficiency of the evidence as to whether his knife was a dangerous weapon; and (2) failing to object to the final jury instruction that defined “dangerous weapon” and instructed the jury that Painter’s knife was “by law” a “dangerous weapon.”

II. Standard of Review

We review ineffective-assistance-of-counsel claims de novo. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). To prevail, Painter must demonstrate: (1) his counsel failed to perform an essential duty and (2) prejudice resulted. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). To establish the first prong, Painter “must overcome the presumption that counsel was competent and show

¹ Painter does not appeal from his conviction for assault causing bodily injury.

² A jury also found Painter guilty of a third charge, assault while displaying a dangerous weapon in violation of Iowa Code section 708.2(3). However, the parties agreed that this charge merged with the charge of going armed with intent, and judgment was not entered on assault while displaying a dangerous weapon. Because the charge of assault while displaying a dangerous weapon contains a “dangerous weapon” element, our reasoning below applies to this charge, and the erroneous jury instruction is fatal to this verdict.

that counsel's performance was not within the range of normal competency." *Id.* To establish the second prong, Painter must show counsel's failure worked to his actual and substantial disadvantage so that a reasonable probability exists that but for counsel's error the result of the proceeding would have differed. *Id.* Painter must prove both elements by a preponderance of the evidence. *Ledezma*, 626 N.W.2d at 142.

III. Ineffective Assistance of Counsel

In order to prove Painter guilty of going armed with intent, the State was required to show that the knife he used was a dangerous weapon. Painter argues his counsel was ineffective for failing to challenge the sufficiency of the evidence as to whether the knife he used was a dangerous weapon.

According to Iowa Code section 702.7, there are three paths under which a weapon may be deemed "dangerous." First, section 702.7 provides a non-exclusive list of items, including switchblades and knives having blades exceeding five inches in length, that are dangerous weapons per se. The knife at issue in this case was not a switchblade, nor did its blade exceed five inches in length; therefore, it was not a dangerous weapon per se. Second, section 702.7 defines "dangerous weapon" to include a design and capability alternative: "any instrument or device designed primarily for use in inflicting death or injury upon a human being . . . and which is capable of inflicting death upon a human being when used in the manner for which it was designed."

Third, section 702.7 provides that a "dangerous weapon" also includes an actual use and capability alternative:

any instrument or device of any sort whatsoever which is actually used in such a manner as to indicate that the defendant intends to inflict death or serious injury upon the other, and which, when so used, is capable of inflicting death upon a human being.

Painter asserts there was no evidence in the record to indicate that the knife he used was capable of inflicting death, as is required to establish the knife was a dangerous weapon under either the second or third alternatives.

To determine whether evidence is sufficient to prove an element of the crime, the question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

State v. Serrato, ___ N.W.2d ___, ___ (Iowa 2010) (internal quotations omitted).

“Our review must be based on all of the evidence in the record, and the evidence presented must at least raise a fair inference of guilt as to each essential element of the crime.” *Id.* (internal quotations omitted).

We find that the State presented minimally sufficient evidence from which a rational fact finder could have found Painter’s knife was a dangerous weapon. The State presented no evidence to establish directly the ability of the knife to inflict death as it was used by Painter. However, the knife was admitted as an exhibit at trial and the jurors could view the serrated blade, just over three and one-half inches in length. We believe that by viewing the knife, considering the testimony regarding the injuries sustained by Ballinger and the medical treatment he received, and drawing inferences from that evidence, a juror could have determined that the knife was capable of inflicting death as it was actually used. “Matters of common knowledge and experience may be used by jurors in arriving at their verdict and in drawing inferences and reaching conclusions from the evidence.” *State v. Manning*, 224 N.W.2d 232, 236 (Iowa 1974). Jurors

reasonably could conclude that such a weapon, when used by an adult in the midst of an altercation to stab another human being, is capable of inflicting death. There was sufficient evidence to support an inference that Painter's knife was a dangerous weapon. Counsel was not constitutionally required to include this element in his motion for directed verdict.

In this case, however, the jury was not given the opportunity to decide whether the knife was a dangerous weapon. The jury was instructed, "[T]he knife involved in this case is, by law, a dangerous weapon." Painter argues that his counsel was ineffective for failing to object to this jury instruction.³ As we determined above, the knife at issue is not a dangerous weapon per se. Therefore, we find, and the State concedes, that the instruction was erroneous. We further conclude that Painter's trial counsel had a duty to object to the instruction. No possible advantage could flow to Painter from trial counsel not pointing out the flawed nature of the instruction, which allowed conviction without proof of an essential element of the crime. A failure to recognize an erroneous instruction and preserve error breaches an essential duty. *State v. Hopkins*, 576 N.W.2d 374, 379-80 (Iowa 1998).

The State argues, however, that Painter cannot show he was prejudiced by the erroneous jury instruction because the instruction did not involve a "fighting issue" in the case and other evidence of guilt was so strong. See *Hopkins*, 576 N.W.2d at 380 (finding that because of the strength of the evidence, defendant could not prove prejudice where there was "no reasonable

³ The record indicates that the court changed this instruction upon agreement of the parties. It is not clear when counsel learned that the final instruction included the language informing the jurors that the knife was a dangerous weapon "by law."

probability the result would have been different even had the district court correctly instructed” the jury); *State v. Miles*, 344 N.W.2d 231, 235 (Iowa 1984) (finding the fact that an erroneous jury instruction involved an issue that was not “a fighting issue” in the case militated against a finding of prejudice).

We disagree that the knife’s characteristics were not fighting issues. Both the prosecutor and defense counsel examined the officer who was the foundation witness for the knife about its operation and uses. Defense counsel’s closing argument included references to the utility of the knife for hunting and fishing and to the legal length of the blade. Counsel did not concede that the State had carried its burden of proof on the element of “dangerous weapon.”

An error in instructing the jury is presumed prejudicial unless the contrary appears beyond a reasonable doubt from a review of the whole case. *State v. Engle*, 590 N.W.2d 549, 551 (Iowa Ct. App. 1998). “Prejudice results when the trial court’s instruction materially misstates the law, confuses or misleads the jury, or is unduly emphasized.” *Anderson v. Webster City Cmty. Sch. Dist.*, 620 N.W.2d 263, 268 (Iowa 2000). Whether an item not listed in the statute is a dangerous weapon is a fact issue for the jury. See *State v. Dallen*, 452 N.W.2d 398, 398 (Iowa 1990). The instruction given to the jury materially misstated the law and removed from the jury’s consideration an issue that it should have decided. We cannot agree with the State that the jury would have inevitably found that the knife in question was capable of inflicting death upon a human being.

However, since Painter’s counsel failed to object to the instruction, we do not presume prejudice. Considering the flawed instruction in light of the State’s

evidence against Painter and the elements of the charges for which he was convicted, we conclude Painter has proven that his counsel's failure to object affected the guilty verdict which was the outcome of the trial. See *Ledezma*, 626 N.W.2d at 142. An objection would have alerted the district court to the problem with the instruction; the jurors would have been given an opportunity to consider whether the state had proved the knife was a dangerous weapon. We conclude Painter was prejudiced by the district court's instruction that removed the "dangerous weapon" issue from the jury's consideration. Based on our determination that Painter suffered prejudice as a result of his counsel's failure to object to the erroneous jury instruction, we reverse his conviction for going armed with intent and remand for a new trial.

REVERSED AND REMANDED FOR NEW TRIAL.