IN THE COURT OF APPEALS OF IOWA

No. 0-740 / 10-0129
Filed December 22, 2010

ALVIN LEE GAINES, JR.,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Linn County, Ian K. Thornhill, Judge.

A postconviction relief applicant alleges that his original trial counsel was ineffective (1) in failing to object to the first two findings of guilt as inconsistent and (2) in failing to challenge the jury instruction on the crime of going armed with intent. **AFFIRMED.**

Erek P. Sittig, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Harold Denton, County Attorney, and Susan Nehring, Assistant County Attorney, for appellee State.

Heard by Sackett, C.J., and Vogel and Vaitheswaran, JJ. Tabor, J., takes no part.

VAITHESWARAN, J.

Following a shooting in Cedar Rapids, a jury found Alvin Gaines guilty of attempted murder, willful injury, and going armed with intent. This court affirmed his judgment and sentence. *State v. Gaines*, No. 07-0987 (Iowa Ct. App. June 25, 2008).

Gaines applied for postconviction relief. He alleged his trial attorney was ineffective (1) in failing to object to the first two findings of guilt as inconsistent and (2) in failing to challenge the jury instruction on the crime of going armed with intent. The district court denied the application and this appeal followed.

To prevail, Gaines must show that counsel breached an essential duty and prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). Our review is de novo. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001).

I. Inconsistent Verdicts

Gaines contends the jury's findings of guilt on the attempted murder and willful injury counts were inconsistent. *See State v. Pearson*, 547 N.W.2d 236, 240 (Iowa Ct. App. 1996) ("Multiple verdicts as to separate counts are inconsistent if the factual and legal conclusions implicit in one verdict are rationally incompatible with those implicit in the jury's findings as to the other counts."). His argument is premised on the specific intent element of each crime. In his view, these crimes "require two different and competing specific intents." We disagree.

Attempted murder requires that a person have the "intent to cause the death of another person." Iowa Code § 707.11 (2005). Willful injury requires that

the person do an act "which is intended to cause serious injury to another." *Id.* § 708.4. Both are specific intent crimes. *State v. Young*, 686 N.W.2d 182, 185 (Iowa 2004) (stating attempted murder is a specific intent crime); *State v. Escobedo*, 573 N.W.2d 271, 279 (Iowa Ct. App. 1997) (stating willful injury requires a specific intent to cause a serious injury). Neither is legally inconsistent with the other. *See* Iowa Code § 702.18 (defining several conditions that meet the definition of a "serious injury," including bodily injury that "[c]reates a substantial risk of death"); *State v. Clarke*, 475 N.W.2d 193, 195–96 (Iowa 1991) (stating "we see nothing to prevent the State from charging and convicting an individual for both attempting to murder and, at the same time, willfully injuring a victim"); *State v. Rhode*, 503 N.W.2d 27, 40 (Iowa Ct. App. 1993) (noting life-threatening injury "such as an injury which does in fact cause death, is by definition a 'serious injury'"); *cf. State v. McKettrick*, 480 N.W.2d 52, 55 (Iowa 1992) ("[I]t is impossible for an alleged assailant to commit a single assault both *with* the intent to inflict a serious injury and *without* the intent to inflict a serious injury."); *Pearson*, 547 N.W.2d at 241 (noting inconsistency between finding of guilt on crime with specific intent requirement and one without).

As Gaines concedes, the record is replete with evidence of his specific intent to cause the death of Williams. Gaines believed a man named Kellen Williams was involved in taking drugs belonging to him. A meeting was arranged between Gaines and Williams at a local restaurant. Before the meeting, a friend of Gaines received a message from him stating, "Kellen is dead." Outside the restaurant, Gaines met Williams and told him, "I'm going to need my shit back or I'm going to have to kill you." Moments later, Gaines shot Williams. Williams ran

away and Gaines shot him in the back two more times. This evidence was sufficient to establish Gaines's specific intent to cause the death of Williams and, in light of the authority cited above, was also sufficient to establish his specific intent to seriously injure Williams.

In the alternative, even if we were to accept Gaines's argument that a specific intent to cause the death of someone does not subsume a specific intent to seriously injure the person, the record contains independent evidence that Gaines intended to seriously injure Williams. Specifically, he told one woman that he would "fuck [a person he believed to be Williams] up."

We conclude the findings of guilt on attempted murder and willful injury were not legally or factually inconsistent. Accordingly, Gaines's attorney was not ineffective in failing to raise this challenge.

II. Jury Instruction on Crime of Going Armed with Intent

Gaines claims his trial attorney was ineffective in failing to challenge the jury instruction on going armed with intent. That instruction stated:

> The State must prove all of the following elements of Going Armed With Intent:
>
> 1. On or about the 21st day of May 2006 Alvin Lee Gaines Jr. was armed with a firearm.
>
> 2. The firearm was a dangerous weapon as defined in Instruction No. 21.
>
> 3. The defendant was armed with the specific intent to use the firearm against another person.
>
> If you find the State has proved all of the elements, the defendant is guilty of Going Armed With Intent. If the State has failed to prove any one of the elements, the defendant is not guilty under Count Three of the Trial Information.[1]

[1] This instruction tracks model Iowa Criminal Jury Instruction 800.15. The Iowa Supreme Court has expressed a reluctance to modify uniform instructions. *See State v. Beets*, 528 N.W.2d 521, 523 (Iowa 1995).

Gaines first argues the instruction misstates the law in that it only requires an intent to "use" rather than "shoot" the firearm. *See State v. Slayton*, 417 N.W.2d 432, 434 (Iowa 1987) (stating the "intent to use" element of section 708.8 requires "proof of an intent to shoot another person when a firearm is involved" and not simply an "intent to use by frightening or harassing a person with no intent to discharge the gun"). This language, in Gaines's view, would impermissibly permit a finding of guilt based on the brandishing of a weapon.

We need not decide whether counsel breached an essential duty in failing to challenge the jury instruction on this ground because we agree with the State that Gaines cannot establish *Strickland* prejudice. Specifically, as discussed above, the evidence overwhelmingly establishes that Gaines possessed an intent to shoot Williams with the gun rather than to simply brandish the weapon. *See id.* at 435. Therefore, there is no reasonable probability that a challenge to the instruction on this basis would have been successful.

Gaines next contends the instruction should have required the State to prove that he formed the intent to shoot at the time he armed himself. The statute defining the crime states, "A person who goes armed with any dangerous weapon with the intent to use without justification such weapon against the person of another commits a class 'D' felony." Iowa Code § 708.8; *see also State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994) (stating "armed" means "the conscious and deliberate keeping of a [dangerous weapon] on or about the person, available for immediate use" and the term "going" implicates proof of some sort of movement (citation omitted)). The statute does not by its terms require the intent to use the weapon to have been formed at the very moment of

arming. Gaines nonetheless suggests that *State v. Matlock*, 715 N.W.2d 1 (Iowa 2006) supports his reading.

In *Matlock*, the Iowa Supreme Court was asked to decide whether the district court abused its discretion in admitting evidence of prior crimes. *Matlock*, 715 N.W.2d at 3–4. In its discussion of that issue, the court made the following statement: "Our cases suggest that with respect to this crime that intent must be present at the time the accused arms himself and goes forth to harm another." *Id.* at 6. Gaines concedes this statement was not necessary to the resolution of the case. Therefore, it is not dispositive here. More importantly, if Gaines's reading of this sentence were accepted, an individual who happened to possess a dangerous weapon but who only later formed the intent to "go[]" and "use" the weapon, would escape conviction under section 708.8. As the State points out, such a reading is untenable. Accordingly, counsel did not breach an essential duty in failing to challenge this aspect of the jury instruction.

We conclude Gaines's trial attorney was not ineffective in failing to challenge the jury instruction on the crime of going armed with intent.

III. Disposition

We affirm the district court's denial of Gaines's application for postconviction relief.

AFFIRMED.