IN THE COURT OF APPEALS OF IOWA

No. 1-076 / 10-0381
Filed March 7, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ELVIS MUSEDINOVIC,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Thomas N. Bower, Judge.

A defendant appeals from his convictions on two counts of willful injury and two counts of going armed with intent. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Dennis D. Hendrickson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kim Griffith, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Potterfield and Mansfield, JJ. Tabor, J., takes no part.

MANSFIELD, J.

Elvis Musedinovic appeals his convictions on two counts of willful injury and two counts of going armed with intent in violation of Iowa Code sections 708.4(1) and 708.8 (2007). He challenges the sufficiency of the evidence and raises two ineffective-assistance-of-counsel claims, arguing his trial counsel should have objected to a jury instruction defining "dangerous weapon" and to the submission of a lesser-included offense. We find Musedinovic did not preserve his sufficiency of the evidence challenge. We also find he cannot demonstrate prejudice for either of his ineffective-assistance-of-counsel claims. For these reasons, we affirm the judgment below.

I. Background Facts and Proceedings.

Several witnesses testified that on November 30, 2008, Musedinovic was at a bar in Waterloo when he got into a verbal altercation with Zilhad Kantarevic and was asked to leave by the bar's owner. Musedinovic went outside and smoked a cigarette, but then reentered the bar, and a physical fight ensued during which Musedinovic stabbed Fahrudin Sabic three times and Sulejman Hadzic once. At that point, Musedinovic left the bar. Police officers arrived and Sabic and Hadzic were taken to the emergency room with "serious injuries." Musedinovic was found on a nearby street with a knife in his pocket that had a blade approximately two inches in length. The knife was wrapped in paper towels. Musedinovic had blood on his pants and a cut on his leg. After being told the particular crimes he was being charged with, Musedinovic responded, "Because I stabbed someone?"

Relating a different version of events, Musedinovic testified he went back inside the bar to retrieve his coat. He claimed he was knocked down from behind whereupon the bar owner recognized him and kicked him out of the bar. He claimed he never took the knife out of his pocket and denied stabbing Hadzic and Sabic.

No blood was found on the knife. One of the two paper towels had blood on it, but not enough so that a DNA profile could be developed. Musedinovic's blood was detected on his own clothing; Sabic's blood was detected on his own clothing; and Sabic's and Hadzic's blood was detected on Hadzic's clothing. No blood from Sabic or Hadzic was found on Musedinovic's clothing. However, the emergency room doctor testified Musedinovic's knife was capable of causing the injuries to Sabic and Hadzic.

Musedinovic was charged with two counts of willful injury in violation of Iowa Code section 708.4(1), enhanced pursuant to section 902.7, and two counts of going armed with intent in violation of section 708.8. A jury trial was held in November 2009, after which Musedinovic was convicted as charged. He was sentenced to concurrent sentences not to exceed ten years on the willful injury counts and five years on the going armed counts, with a five-year minimum.

Musedinovic appeals. He asserts there was insufficient evidence that his knife was a "dangerous weapon."[1] Additionally, he alleges his trial counsel was ineffective for failing to object to a jury instruction that defined "dangerous weapon" and stated that a knife is "by law" a "dangerous weapon," and for failing

[1] Being armed with a "dangerous weapon" was an essential element of the going armed counts and also an essential element of the section 902.7 enhancements to the willful injury counts.

to object to the submission of assault by use or display of a dangerous weapon as a lesser-included offense of willful injury.

II. Sufficiency of the Evidence.

We review challenges to the sufficiency of the evidence for correction of errors at law. *State v. Webb*, 648 N.W.2d 72, 76 (Iowa 2002). Iowa Code section 702.7 provides that an instrument or device may be a dangerous weapon in one of three ways—design and capability, actual use and capability, and per se. *State v. Ortiz*, 789 N.W.2d 761, 765 (Iowa 2010). It states:

> A "dangerous weapon" is any instrument or device designed primarily for use in inflicting death or injury upon a human being or animal, and which is capable of inflicting death upon a human being when used in the manner for which it was designed, except a bow and arrow when possessed and used for hunting or any other lawful purpose. Additionally, 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, is a dangerous weapon. Dangerous weapons include but are not limited to any offensive weapon, pistol, revolver, or other firearm, dagger, razor, stiletto, switchblade knife, knife having a blade exceeding five inches in length, or any portable device or weapon directing an electric current, impulse, wave, or beam that produces a high-voltage pulse designed to immobilize a person.

Iowa Code § 702.7.

The jury was instructed:

> A "dangerous weapon" is any device or instrument designed primarily for use in inflicting death or injury, and when used in its designed manner is capable of inflicting death. It is also any sort of instrument or device which is actually used in such a way as to indicate the user intended to inflict death or serious injury, and when so used is capable of inflicting death.
>
> You are instructed that a knife is, by law, a dangerous weapon.

Musedinovic did not object to the instruction. Therefore, "the challenged instruction—right or wrong—became the law of the case." *State v. Maghee*, 573 N.W.2d 1, 8 (Iowa 1997); (citing *State v. Taggart*, 430 N.W.2d 423, 425 (Iowa 1988) ("Failure to timely object to an instruction not only waives the right to assert error on appeal, but also 'the instruction, right or wrong, becomes the law of the case.'" (citations omitted))).

Musedinovic argues there is insufficient evidence that the knife was a dangerous weapon. The State responds that this issue is not preserved for appeal. *See State v. Greene*, 592 N.W.2d 24, 29 (Iowa 1999) (explaining that a motion for judgment of acquittal does not preserve error where defendant fails to identity specific elements of charge insufficiently supported by the evidence). The State further responds that even if Musedinovic's challenge to the sufficiency of the evidence were preserved, a reasonable jury could have found the knife to be a dangerous weapon under the actual use and capability alternative—i.e., the knife was "actually used in such a manner as to indicate that the defendant intends to inflict death or serious injury upon the other, and . . . when so used, [was] capable of inflicting death upon a human being . . . ." *See* Iowa Code § 702.7.

We agree with both of the State's arguments. Furthermore, Musedinovic did not object to the jury instruction that treated the knife as a dangerous weapon as a matter of law. Therefore, Musedinovic cannot now argue evidence is lacking that the knife was a dangerous weapon. The law of the case establishes its dangerousness. *Maghee*, 573 N.W.2d at 8. For all these reasons, we reject Musedinovic's first ground for appeal.

III. Ineffective Assistance of Counsel.

A. Jury Instruction.

Musedinovic next argues his trial counsel was ineffective for failing to challenge the aforementioned jury instruction that "a knife is, by law, a dangerous weapon." Here the knife was clearly less than five inches long; it was not a switchblade; and thus it was not a dangerous weapon per se. *See* Iowa Code § 702.7.

We review ineffective-assistance-of-counsel claims de novo. *State v. Oetken*, 613 N.W.2d 679, 683 (Iowa 2000). When a defendant raises a claim on direct appeal, we may find the record is adequate and resolve the claim. *State v. Johnson*, 784 N.W.2d 192, 198 (Iowa 2010). If we find the claim cannot be resolved on direct appeal, we must preserve the claim for postconviction relief proceedings, "regardless of the [our] view of the potential viability of the claim." *Id*. In the present case, we find the record is adequate to decide Musedinovic's claims.

To succeed on an ineffective-assistance-of-counsel claim, a defendant has the burden to prove by a preponderance of the evidence that: "(1) counsel failed to perform an essential duty; and (2) prejudice resulted." *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008). To establish the first prong, a "defendant must overcome the presumption that counsel was competent and show that counsel's performance was not within the range of normal competency." *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). To establish the second prong, a defendant must show counsel's failure worked to his actual and substantial disadvantage, such that a reasonable probability exists that but for counsel's

error the result of the proceeding would have differed. *State v. Lambert*, 612 N.W.2d 810, 814 (Iowa 2000). "'Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.'" *Maxwell*, 743 N.W.2d at 195. Therefore, we may resolve the claim on either prong. *Id*.

We agree with Musedinovic that his trial counsel should have objected to the instruction because the knife was not a dangerous weapon as a matter of law.

Nevertheless, we find Musedinovic cannot prevail on the prejudice prong. In other words, we cannot conclude that if his trial counsel had objected, there is a reasonable probability the outcome of the proceeding would have been different. *See Lambert*, 612 N.W.2d at 815 (holding that even though the jury was incorrectly instructed that a metal pipe was a dangerous weapon as a matter of law, the defendant could not prevail on the prejudice prong).

The testimony demonstrated that Musedinovic was removed from the bar and stayed outside only for a short amount of time. When he reentered the bar, he approached Sabic and Hadzic, whom he knew to be friends with Kantarevic—the man with whom he had just had the verbal altercation. A physical fight immediately ensued. During the fight, Musedinovic used a punching motion to stab them four times—Sabic was stabbed twice in his leg and once in his back, and Hadzic was stabbed in his lower abdomen. Sabic testified that after he was stabbed, he "felt a lot of pain" and the blood was "like water going down." Officers arrived and one described Sabic's leg injury as "bleeding pretty profusely." The emergency room doctor testified Sabic had a "large wound" on

his left leg that extended into his muscle, and Sabic was complaining of significant pain and difficulty using his leg. Additionally, Sabic had a stab wound on his back that potentially could have gone into his chest cavity. The doctor also testified Hadzic's wound to the lower abdomen had penetrated into his muscle and had to be surgically repaired. He described their injuries as "serious."

In short, we think there is ample evidence Musedinovic actually used the knife "in such a manner as to indicate that [he intended] to inflict death or serious injury upon [Sabic and Hadzic]," and that "when so used, [the knife was] capable of inflicting death upon a human being." *See* Iowa Code § 702.7. Notably, Musedinovic did *not* try to argue justification or otherwise explain away or downplay his use of the knife. Rather, his defense was that he never used a knife. By relying on this somewhat implausible defense, Musedinovic put himself in a weak position to argue his use of the knife was less lethal than section 702.7 requires. "In light of this evidence, we find there is not a reasonable probability, even if counsel erred in failing to object to the instruction, the result of the trial would have been different." *Lambert*, 612 N.W.2d at 815 (holding that although the jury was inaccurately instructed that a metal pipe was by law a dangerous weapon, the defendant failed to establish prejudice).

B. Lesser-Included Offense.

Finally, Musedinovic argues his counsel was ineffective for failing to object to the district court's submission of an uncharged offense that was not actually a lesser-included offense. Here, the jury was instructed on "assault by use or display of a dangerous weapon" in violation of section 708.2(3) as a lesser-

included offense of the charged offense of "willful injury causing serious injury" in violation of section 708.4(1). Musedinovic maintains that it is possible to commit the latter offense without committing the former; hence section 708.2(3) is not a lesser-included offense and should not have been presented to the jury.

We need not determine whether section 708.2(3) is a lesser-included offense, however, because Musedinovic cannot prevail on the prejudice prong. Generally, where a defendant is convicted of the greater offense, an error in instructing on the lesser offense is not prejudicial. *State v. Sharpe*, 304 N.W.2d 220, 225 (Iowa 1981); *see also State v. Douglas*, 485 N.W.2d 619, 623 (Iowa 1992) ("The general rule applies that when a defendant is convicted of a greater offense he cannot complain of the fact the jury was permitted to consider his guilt of a lesser offense."); *Everett v. Brewer*, 215 N.W.2d 244, 248 (Iowa 1974) ("Where a defendant has been convicted as charged of a major offense he cannot complain because a lesser offense was improperly submitted."). We find that rule applicable here. Musedinovic was found guilty of the greater offense of "willful injury causing serious injury," so any error in instructing on the other offense of which he was not found guilty did not prejudice him.

For the foregoing reasons, we affirm Musedinovic's convictions and sentence.

AFFIRMED.