

IN THE COURT OF APPEALS OF IOWA

No. 1-210 / 10-1321
Filed June 15, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

SCOTT ALLAN MASON,
Defendant-Appellant.

Appeal from the Iowa District Court for Decatur County, Gary G. Kimes,
Judge.

Scott Mason appeals from the judgment and sentence entered on his
conviction for stalking while in possession of a dangerous weapon. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Stephan Japuntich,
Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney
General, and Lisa Hynden Jeanes, County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Eisenhauer and Danilson, JJ.
Tabor, J., takes no part.

DANILSON, J.

Scott Mason appeals from the judgment and sentence entered on his conviction following a jury trial for stalking while in possession of a dangerous weapon, in violation of Iowa Code section 708.11(2), (3), and (4) (2007). Mason contends the district court erred in overruling his motion for judgment of acquittal and allowing the State to reopen its case-in-chief following the motion, overruling his proposed jury instructions, and overruling his motions for judgment of acquittal for reasons other than a failure to identify defendant. Alternatively, Mason claims his trial counsel was ineffective for failing to raise the issues and thereby to preserve error on his current claims that the evidence was insufficient to support the verdict. Upon our review, we find the district court did not abuse its discretion by reopening the record for the limited purpose of allowing an in-court identification of Mason. We conclude the court's jury instructions fairly state the law, and in light of the evidence of his guilt, Mason cannot show the outcome of trial would have been different had alternate instructions been given. Similarly, we find the court properly denied Mason's motions for judgment of acquittal because substantial evidence supports the verdict. Finally, we conclude Mason's ineffective assistance of counsel claims must fail because we find no breach of counsel's duty or prejudice. We therefore affirm Mason's conviction and sentence.

I. Background Facts and Proceedings.

William Hamaker and his wife have lived on their farm in Decatur County for over forty years. Hamaker has known Scott Mason for nearly that long. Mason grew up on the farm to the north of Hamaker's farm, where he continues

to farm for his father. Mason is approximately the same age as Hamaker's two sons (now ages thirty-six and forty-one), and the boys were friends growing up. For many years, Hamaker considered Mason a family friend.

An incident occurred on an evening in the fall of 1996 that changed the friendly relationship. It was dark and Hamaker was helping his son repair farm equipment in a field south of Hamaker's house. Mason, dressed up like he was going on a date, pulled up in his car and spoke to Hamaker. Mason then returned to his car and drove off in the same direction he had come, toward Hamaker's house. Hamaker was troubled by the interaction, so he ran into his son's house and called his wife to warn her to lock the doors.

In 1999, Mason called Hamaker and said, "This is Scott Mason, and I will be down and I will shoot you and kill you." From the tone of Mason's voice, Hamaker could tell he was serious about the threat. Hamaker was frightened, and did not know the reasoning behind the threat.

One morning in March 2000, around 12:30 a.m., Hamaker was in a tractor putting anhydrous on one of his fields. As he neared the property line shared with Mason's farm, Mason shined a bright spotlight directly on Hamaker. Hamaker was "nervous and scared," and he turned his tractor around to continue fertilizing the field. Mason shut off the spotlight. When Hamaker returned to the edge of the field, Mason turned on the spotlight again. Hamaker was "scared to death" due to the previous threat against his life. At that point, Hamaker decided to stop working and hastily retreated to his house. Mason got in his truck and drove around to the gate where Hamaker was heading and parked his truck in the middle of the road. Mason yelled and cursed at Hamaker.

In 2003 during a snowstorm, Hamaker's son, Clint, was driving to Hamaker's house from the north. Just as Clint was turning into Hamaker's driveway, Mason "came roaring down the road" and passed Clint on the right side. Mason's truck almost went into the ditch, and items in the back of the truck spilled out into the snow along the road. Mason was angry, turned around, and sped back by Hamaker's house.

A short time later, Mason drove back to pick up his things. Hamaker asked Mason to stop driving foolishly in the snowstorm in front of his house. Mason ignored him and drove away. Later that afternoon, after Clint left, Mason returned in his truck and blocked Hamaker in his driveway. Mason yelled at Hamaker and accused him of beating Mason's horses. Hamaker told Mason to leave. Mason reached for a gun in his truck, and said "I have a gun and I will use it." Hamaker felt "threatened" and "scared."

After that incident, Hamaker requested a no-contact order against Mason, which the district court granted. Hamaker did not have any significant problems with Mason for several years.

On the morning of January 30, 2008, Hamaker, along with his dog, prepared to do chores. Hamaker observed Mason driving his van south on the road toward him. Hamaker was driving a tractor and feed wagon, so he stopped at the end of his driveway to allow Mason to pass. Mason passed and Hamaker pulled out into the road, also heading south. Hamaker noticed Mason slow down, and Hamaker also slowed down, hoping Mason would get back in his van and leave. Mason stopped the van, got out and walked to the rear, and started

doing stretches and squats in the road, “like he was stretching, getting limbered up.”

The dog stayed approximately ten to fifteen feet ahead of the tractor, and did not bark, growl, or act aggressively toward Mason. Mason bent down and tried to coax the dog to come to him. Then, he reached in the van and grabbed a three-foot long silver pipe. Mason swung the pipe in a threatening manner and started walking toward the tractor looking directly at Hamaker. Mason came within twenty-five feet from the tractor. Hamaker was scared, thought Mason was going to beat him with the pipe, and was unable to defend himself. He tried to call 911.

In addition to these incidents, Mason would often drive up and down the road in front of Hamaker’s farm without any purpose. He floored the engine as he passed and “flipped off” Hamaker. As a result of Mason’s behavior, Hamaker is “afraid” and “very threatened” by Mason. Hamaker has changed his daily life, and “constantly” worries about where Mason is at, when he is coming next, and what he is going to do next. Hamaker believes Mason’s threats are real and takes them seriously. He is afraid for the safety of himself and his family.

Mason was thereafter arrested and charged by trial information with (Count I) assault while using or displaying a dangerous weapon and (Count II) stalking second offense. A jury trial commenced on May 5, 2008. As part of its case-in-chief, the State presented the testimony of Hamaker and Decatur County Deputy Sheriff Barry Peterson. The State also introduced a plat map into evidence.

At the end of the day, the State rested, and the jury was excused. A bench conference followed, and defense counsel moved for a judgment of acquittal. The following colloquy ensued:

DEFENSE COUNSEL: Under Rule 2.19(8) of the Iowa Rules of Criminal Procedure, we would move for a judgment of acquittal at this time. I don't believe that there has been any witness who identified my client as one in same as the Scott Mason referred to in the testimony. And based on that, there has been a complete failure to identify him and prove the State's case, the identity of this Defendant and the person who allegedly did the things testified about. It is a critical, essential part of the State's proof. In the event the Court denies or overrules that motion, we would ask the Court to also entertain a motion for directed verdict as to the dangerous weapon portion of this case. Both the assault charge and the enhancement on the stalking charge depend upon proof of a dangerous weapon and we think as a matter of law that a pipe is not a dangerous weapon and the description of Mr. Hamaker, even if it is taken as completely true, does not meet the requirement of the law under the subsection that defines a dangerous weapon. A pipe is not listed there specifically and we would contend as a matter of law if does not fall within the description under 702.7. And failing that, the Court would be required to grant a judgment of acquittal on the assault charge and on the stalking charge. The State has failed to prove a prima facie case on each of the elements of the various offenses.

THE COURT: Counsel for the State?

STATE: Your Honor, while I believe that I did ask Mr. Hamaker to identify the Defendant, I am having this overwhelming sinking feeling that perhaps the defense is correct, without seeing a copy of the transcript. Mr. Hamaker testified as to the description of a pipe. A pipe may not be enumerated as a dangerous weapon under that section, but it certainly does fall under the section that deals with any weapon that could, if used in that manner, inflict bodily injury or harm. And based on that, I would request that the Defendant's motion be denied.

THE COURT: Well, I am going to overrule the motion regarding the dangerous weapon and failure to prove all of the elements. The last witness testified in his experience, law enforcement experience, a pipe would be a dangerous weapon so I don't have any problem with that. I am concerned about the first portion. Are you telling this Court that if there was not an appropriate identification of this Defendant, that your case fails?

STATE: Your Honor, what I am telling the Court is that I am 100 percent certain that both witnesses are very familiar with the

Defendant that is located in the courtroom and that both witnesses would identify him as the one and only Scott Mason. If that has not been made clear on the record, I would ask the Court to reopen the case for the sole purpose to identify him as the same person.

THE COURT: The record is replete with the testimony of Mr. Hamaker as follows; in referring to this Defendant as threatening to kill him, of identifying this Defendant as spotlighting him in the middle of the night, identified this Defendant as yelling and cussing at him and using the F-word, identified the Defendant as the person with the gun that threatened him. So it appears to this Court that the motion regarding that particular issue should be overruled and I am going to overrule it. However, if the State is concerned about the same, I will allow the State to reopen the evidence for that sole purpose and only that purpose for making that specific identification by pointing out the Defendant in open court on the record, and you will be able to do that tomorrow morning.

The next morning, the State moved “to reopen its case for the purpose of identifying the Defendant.” Over defense counsel’s objection, the court granted the State’s motion. The State recalled Hamaker, who identified the defendant Mason present in the courtroom as the Scott Mason “that committed those acts” Hamaker had testified to the previous day. The State then rested, and defense counsel renewed its motion for directed verdict, which the court denied. The defense then rested without presentation of any evidence.

The jury thereafter found Mason guilty of stalking second offense and not guilty of assault while using or displaying a dangerous weapon. On June 1, 2008, Mason filed consolidated motions for judgment of acquittal, motion in arrest of judgment, and motion for a new trial. The court reviewed the motions at the sentencing hearing on August 10, 2010. The court overruled the motions and sentenced Mason to a term of incarceration not to exceed five years and fined him \$1000. Mason now appeals.

II. Reopening the Record.

Mason argues the district court erred in overruling his motion for judgment of acquittal and in allowing the State to reopen the record to allow Hamaker to make in-court identification of Mason. A challenge to the district court's decision to reopen the record is reviewed for abuse of discretion. *State v. Jefferson*, 545 N.W.2d 248, 251 (Iowa 1996). An abuse of discretion occurs when "such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *Id.*; *State v. Teeters*, 487 N.W.2d 346, 349 (Iowa 1992).

Mason contends that allowing the State to recall Hamaker "unduly emphasized the State's evidence." The State disagrees, and asserts the district court did not abuse its discretion by reopening the record "for the limited purpose" of allowing an in-court identification of Mason. The State further argues, "even without the unequivocal in-court identification, the record contains substantial evidence" that the defendant Scott Mason present in the courtroom was the same Scott Mason who stalked Hamaker.

Our supreme court has set forth several factors a court should consider in ruling on a motion to reopen the record:

(1) the reason for the failure to introduce the evidence; (2) the surprise or unfair prejudice inuring to the opponent that might be caused by introducing the evidence; (3) the diligence used by the proponent to secure the evidence in a timely fashion; (4) the admissibility and materiality of the evidence; (5) the stage of the trial when the motion is made; (6) the time and effort expended upon the trial; and (7) the inconvenience reopening the case would cause to the proceeding.

Teeters, 487 N.W.2d 346, 348 (Iowa 1992).

Upon our review, we find most of these factors militate in favor of the court's decision to reopen the record. See *id.* The record reveals the State's omission of an in-court identification of Mason was an inadvertent omission, as the State believed Hamaker or Deputy Peterson had already been asked to point out Mason in court. The State acted quickly by immediately requesting to reopen the record for the sole purpose of securing an in-court identification of Mason, evidence that was both admissible and material to the State's case. The State's motion was made prior to jury instructions, closing statements, and submission to the jury. Further, reopening the record for the limited purpose of an in-court identification (Hamaker's new testimony amounted to less than one page of the trial transcript) did not inconvenience or unduly extend the trial.

Mason's argument appears to focus on the second factor, i.e., "the surprise or unfair prejudice inuring to the opponent that might be caused by introducing the evidence." *Id.* Mason claims he was "prejudiced" by defense counsel's "strategy to hold the State to its burden of proof by ensuring that the State proved each and every fact of each and every element" because of the court's decision to allow the State to reopen the record. He argues the State's opportunity to recall Hamaker "unduly emphasized" the State's evidence. Alternatively, Mason contends his counsel was ineffective for failed trial strategy.

We disagree. Upon our review, we cannot find Mason was surprised or unfairly prejudiced by Hamaker's in-court identification. The record contains more than enough evidence to allow the jury to infer the defendant Scott Mason present in the courtroom was the Scott Mason that Hamaker and Deputy Peterson testified about. As the court observed:

The record is replete with the testimony of Mr. Hamaker . . . in referring to this Defendant as threatening to kill him, of identifying this Defendant as spotlighting him in the middle of the night, identified this Defendant as yelling and cussing at him and using the F-word, identified the Defendant as the person with the gun that threatened him. So it appears to this Court that the motion regarding that particular issue should be overruled and I am going to overrule it. However, if the State is concerned about the same, I will allow the State to reopen the evidence for that sole purpose and only that purpose for making that specific identification by pointing out the Defendant in open court on the record, and you will be able to do that tomorrow morning.

We further note that defense counsel's statements inferred his client was the defendant Scott Mason, and Mason himself never objected that the wrong person had been brought to trial. The evidence presented at trial eliminated any reasonable doubt that defendant Scott Mason was not the same Mason who allegedly stalked Hamaker.

Further, the limited testimony and the timing of the testimony did not unfairly prejudice Mason. The case had not been submitted to the jury, so there was less chance the newly presented evidence would be unduly emphasized. *Cf. Jefferson*, 545 N.W.2d at 250 ("One problem with reopening the case after submission to the jury is said to be that it might unduly emphasize the newly presented evidence."). Hamaker's identification of Mason was innocuous and took only a few minutes to complete.

The standard for finding abuse requires us to find the court exercised its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *Teeters*, 487 N.W.2d at 349; *State v. Morrison*, 323 N.W.2d 254, 256 (Iowa 1982). We find the exercise of discretion here fell short of "clearly unreasonable." *Teeters*, 487 N.W.2d at 349. As Mason was not unfairly

prejudiced by the new testimony, we also find his claim as to defense counsel's effectiveness on this issue also fails.

III. Jury Instructions.

Mason argues the district court erred in instructing the jury on the burden of proof (Jury Instruction No. 7) and the definition of a dangerous weapon (Jury Instruction No. 12). Our review of challenges to jury instructions is for the corrections of errors at law. *State v. Marin*, 788 N.W.2d 833, 836 (Iowa 2010). "We review the related claim that the trial court should have given the defendant's requested instructions for an abuse of discretion." *Id.* Error in giving or refusing to give a particular instruction does not require reversal unless prejudice is shown. *Id.* When the error is not of constitutional magnitude, the test of prejudice is whether it sufficiently appears that the rights of the complaining party have been injuriously affected or that the party has suffered a miscarriage of justice. *Id.*

A. *Jury Instruction No. 7.* The court gave Jury Instruction No. 7 as follows:

The burden of proving the defendant guilty beyond a reasonable doubt always rests upon the prosecution. A defendant has the absolute right not to testify, and you must not draw any inference against the defendant for not testifying. Thus, a reasonable doubt may arise not only from the evidence produced, but also from a lack of evidence. Since the burden is upon the prosecution to prove every essential element of the crime charged, beyond a reasonable doubt, a defendant has the right to rely upon the failure of the prosecution to establish such proof. A defendant may also rely upon evidence brought out on cross-examination of witnesses for the prosecution.

This instruction is not taken from the uniform jury instructions, but instead appears to be an expansion of the statement of the case and portions of Jury

Instruction No. 6. It was included upon Mason's request, but defense counsel also proposed the additional language: "This burden never shifts throughout the trial, for the law never imposes upon a Defendant in a criminal case the burden or duty of calling any witness or producing any evidence." Mason contends the court erred in failing to include the additional language.

The court was required to instruct the jury as to the law applicable to all material issues in the case. *Id.* However, the court is not required to give any particular form of an instruction; it must merely give instructions that fairly state the law as applied to the facts of the case. *Id.*

We find Jury Instruction No. 7 more than fairly states the law as applied to these facts. Further, the additional language Mason proposed that the "burden never shifts throughout the trial," was set forth by the portions of the instruction stating that the "burden of proving the defendant guilty . . . always rests upon the prosecution" and "[s]ince the burden is upon the prosecution to prove every essential element of the crime charged" We find no abuse of discretion in the court's decision to use the instruction proposed by Mason, but with that omission.

B. Jury Instruction No. 12. The court gave Jury Instruction No. 12 as follows:

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

This instruction is taken from the uniform jury instruction 200.21 and closely recites the statutory definition of dangerous weapon pursuant to Iowa Code section 702.7. However, defense counsel requested the instruction also include the portion of section 702.7 that recites a list of instruments that have been deemed as per se dangerous weapons.¹

The uniform jury instruction does not require submission of the list of per se dangerous weapons. See *State v. Mitchell*, 568 N.W.2d 493, 501 (Iowa 1997) (“[T]rial courts should generally adhere to the uniform instructions.”). Jury Instruction No. 12 properly conveyed the definition of dangerous weapon to the jury. *Marin*, 788 N.W.2d at 836. We find no abuse of discretion in the court’s decision to use the instruction given rather than that proposed by Mason.

C. Proposed Instruction. Mason also alleges the court should have included an instruction “advising the jury that defendant was not on trial of previous bad acts referred to in the course of testimony.” At the hearing on jury instructions, defense counsel argued any wrongful acts other than the January 2008 incident could not be used in the jury’s consideration of the assault charge against Mason. However, defense counsel conceded the jury could use Mason’s previous bad acts to establish “a course of conduct as it relates to the stalking charge.” Because Mason was acquitted of the assault charge and the prior acts

¹ This part of the statute provides:
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.

were admissible on the stalking charge, we cannot find Mason was prejudiced by the omission of his proposed instruction.

The court's instructions fairly state the law. Furthermore, in light of the evidence of his guilt, Mason cannot show the outcome of trial would have been different had alternate instructions been given. Accordingly, we affirm.

IV. Sufficiency of the Evidence.

Mason argues the court erred in overruling his motions for judgment of acquittal because there was insufficient evidence to support his conviction. In addition to the identity issue discussed above, Mason challenges whether the pipe was a dangerous weapon, and points to a number of "discrepancies" in the evidence as to the remaining elements of stalking. Alternatively, Mason claims defense counsel was ineffective for failing to raise the issues and thereby to preserve error on his current claims that the evidence was insufficient to support the verdict.

A. Preservation of Error. The State concedes defense counsel preserved error on the dangerous weapon issue in his motions for judgment of acquittal but alleges counsel failed to preserve error on the remaining claims. We agree. Our error preservation rules require issues be presented to and passed upon by the trial court prior to being raised and decided on appeal. See *State v. Eames*, 565 N.W.2d 323, 326 (Iowa 1997). Mason did not raise the other sufficiency of the evidence claims in the district court, and therefore, the claims are not preserved for our review. Because we conclude Mason has failed to preserve error, we will consider below his alternative argument that defense counsel was ineffective in failing to preserve error on the claims.

B. Dangerous Weapon. Mason contends the evidence is insufficient to prove the pipe he possessed was a dangerous weapon. We review challenges to the sufficiency of the evidence for the correction of errors of law. Iowa R. App. P. 6.907; *State v. Keeton*, 710 N.W.2d 531, 532 (Iowa 2006). A jury's findings of guilt are binding on appeal if supported by substantial evidence. *State v. Enderle*, 745 N.W.2d 438, 443 (Iowa 2007). Substantial evidence is evidence that could convince a rational trier of fact a defendant is guilty beyond a reasonable doubt. *Id.* In reviewing challenges to the sufficiency of the evidence supporting a guilty verdict, we consider all of the evidence in the record in the light most favorable to the State and make all reasonable inferences that may fairly be drawn from the evidence. *Keeton*, 710 N.W.2d at 532.

The issue is whether the pipe, in view of the way it was used, fits the definition of a dangerous weapon so as to constitute an aggravating factor under the stalking statute, Iowa Code section 708.11(2). Section 708.11(3)(b)(2) provides:

A person who commits stalking in violation of this section commits a class "D" felony if any of the following apply:

. . . .
(2) The person commits stalking while in possession of a dangerous weapon, as defined in section 702.7.

Section 702.7, in turn, defines a "dangerous weapon" as:

[A]ny 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.

Whether an item not listed in the statute is a dangerous weapon is a fact issue for the fact finder. As our supreme court has observed:

Dangerous weapons, in fact, can encompass almost any instrumentality under certain circumstances.

“Where the issue is whether an assault or a murder has been committed with a deadly weapon, it may be held that a stick, stone, hoe, or any one of many other instruments is a deadly weapon, according to the manner in which it is used, the determination of the lethal nature of the instrumentality being a question of fact for the jury.”

State v. Greene, 709 N.W.2d 535, 536-37 (Iowa 2006) (quoting 79 Am. Jur. 2d *Weapons & Firearms* § 1, at 5 (2002)); see *State v. Dallen*, 452 N.W.2d 398, 399 (Iowa 1990) (concluding the State presented sufficient evidence to permit the jury to find a BB gun was a dangerous weapon); *State v. Tusing*, 344 N.W.2d 253, 254 (Iowa 1984) (holding “it is an issue for the fact-finder” whether brass knuckles are “capable of inflicting death” as required by the statutory definition of “dangerous weapons”); *State v. Ashland*, 259 Iowa 728, 730, 145 N.W.2d 910, 911 (1966) (explaining “[i]tems not specifically named [in the statute] might be factually found to be dangerous weapons,” but it was unnecessary to submit the question to the jury in this case because pistols and revolvers were specifically referred to in the statute as dangerous weapons); *State v. Brown*, 67 Iowa 289, 290, 25 N.W. 248, 249 (1885) (holding that the question of whether a piece of wood was a deadly weapon should be left to the jury to determine); *State v. Mitchell*, 371 N.W.2d 432, 434 (Iowa Ct. App. 1985) (holding that evidence

presented at trial was sufficient to allow the fact finder to decide nunchakus are dangerous weapons); see also *State v. Ortiz*, 789 N.W.2d 761, 766-67 (Iowa 2010) (observing “dangerous weapons, in fact, can encompass almost any instrumentality under certain circumstances”); *State v. Lambert*, 612 N.W.2d 810, 815 (Iowa 2000) (finding three-foot metal pipe could be considered a per se dangerous weapon when defendant stood over victim “poised to strike”).

In this case, Hamaker testified at trial about the pipe. He stated Mason was carrying a “silver,” “metal pipe” that was 3/4 inch wide and “a little over three feet” long. Hamaker testified Mason came toward him swinging the pipe in a threatening manner and he was afraid Mason was going to beat him with the pipe.

Upon our review, we find sufficient evidence in the record supported a finding of actual use by Mason of the pipe, the pipe’s capability of inflicting death, and Mason’s intent to inflict serious injury. See Iowa Code § 702.7. And in any event, the question of whether the pipe was a deadly weapon must be decided by the trier of fact. See, e.g., *Greene*, 709 N.W.2d at 536-37. Viewing the evidence in the light most favorable to upholding the verdict, we conclude the district court properly denied Mason’s motions for judgment of acquittal because substantial evidence supports the verdict.

V. Ineffective Assistance of Counsel.

Mason contends defense counsel was ineffective in failing to preserve an appellate challenge to the sufficiency of the evidence of the remaining elements of the stalking charge. Specifically, Mason points to a number of “discrepancies” in the evidence (i.e., whether Hamaker’s dog liked Mason; whether Mason was

swinging the pipe; how far Mason was from the tractor; what Hamaker actually heard Mason say; and how long it took Deputy Peterson to arrest Mason) that negated his guilt. The State contends defense counsel did fail to preserve error on Mason's remaining sufficiency of the evidence claims, but that such failure did not constitute ineffective assistance because Mason did not prove that defense counsel breached an essential duty or that Mason was prejudiced.

"Ineffective-assistance-of-counsel claims are an exception to the traditional error-preservation rules." *State v. Fountain*, 786 N.W.2d 260, 262-63 (Iowa 2010). We conduct a de novo review of ineffective assistance of counsel claims. *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008). In order to prevail on his claim of ineffective assistance of counsel, Mason must show (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Id.* Failure to prove either element by a preponderance of the evidence is fatal to Mason's claim of ineffective assistance. *State v. Polly*, 657 N.W.2d 462, 465 (Iowa 2003). If we determine the claim cannot be addressed on appeal, we must preserve it for a possible postconviction relief proceeding, regardless of our view of the potential viability of the claim. *State v. Johnson*, 784 N.W.2d 192, 198 (Iowa 2010).

Generally, we do not resolve claims of ineffective assistance of counsel on direct appeal. *State v. Barse*, 748 N.W.2d 211, 214 (Iowa 2008). We prefer to leave ineffective-assistance-of-counsel claims for postconviction relief proceedings. *Id.* Those proceedings allow an adequate record of the claim to be developed and the attorney charged with providing ineffective assistance may have an opportunity to respond to defendant's claims and explain his or her

conduct, strategies, and tactical decisions. *Id.*; *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002). In this case, we deem the record adequate to address Mason's claim. See Iowa Code § 814.7(3). We therefore turn to the merits of the claim. See *Johnson*, 784 N.W.2d at 198 ("If the defendant requests that the court decide the claim on direct appeal, it is for the court to determine whether the record is adequate and, if so, to resolve the claim.").

In addition to the dangerous weapon element, the jury had to find Mason guilty under the remaining elements of stalking:

1. On or about the 30th day of January, 2008, the defendant purposely engaged in a course of conduct directed at William Hamaker that would cause a reasonable person to fear bodily injury to, or the death of William Hamaker.
2. The defendant knew or should have known that William Hamaker would be placed in reasonable fear of bodily injury or death to William Hamaker.
3. The defendant's course of conduct caused William Hamaker to fear bodily injury or death to himself.

See Jury Instruction No. 13; see *also* Iowa Code § 708.11(2). The jury was further instructed that "course of conduct" means "repeatedly maintaining a visual or physical proximity to a person without legitimate purpose or repeatedly conveying oral or written threats, threats implied by conduct, or a combination of the two, directed at or toward a person." See Jury Instruction No. 14; see *also* Iowa Code § 708.11(1)(b).

In this case, Mason's course of conduct occurred for more than ten years, beginning in 1996 when Mason alarmed Hamaker to the point that Hamaker called his wife to warn her to lock the doors. In 1999, Mason called Hamaker and threatened to shoot and kill him. In 2000, Mason shined a bright spotlight on Hamaker in the middle of the night in a field, cornered Hamaker when he was

going home, and yelled and cursed at him. In 2003, Mason blocked Hamaker in his driveway and threatened him with a gun. Hamaker requested a no-contact order after this incident, which was issued by the court. In January 2008, Mason stopped in the middle of the road in front of Hamaker's tractor and approached Hamaker, swinging a pipe in a threatening manner.

Over the years, Mason also drove back and forth on the road in front of Hamaker's house for no apparent reason, making obscene gestures toward Hamaker and gunning his engine. Hamaker testified at length in regard to his fear of Mason. He explained that he took Mason's death threat seriously and feared Mason would kill him. He testified he was constantly afraid and worried about what Mason would do next, and that his fear of Mason caused him to change his daily life.

Upon our review, we find substantial evidence in the record to establish Mason's guilt. A reasonable jury could have found Mason's course of conduct would cause a reasonable person to fear death or injury to Hamaker; Mason knew or should have known his course of conduct would place Hamaker in fear of death or injury; and Hamaker was placed in fear of death or injury. See Jury Instruction No. 13; see also Iowa Code § 708.11(2).

Mason's instant claims can be, at best, described as minor and insignificant discrepancies in the record. And despite any discrepancies, we are convinced the State proved all the elements of stalking beyond a reasonable doubt. We cannot say defense counsel failed to perform an essential duty in declining to challenge these elements. See *State v. Vance*, 790 N.W.2d 775, 785 (Iowa 2010) (noting that defendant must prove counsel "made errors so

serious” that counsel was not functioning as the “counsel” guaranteed by the Sixth Amendment); *State v. Dudley*, 766 N.W.2d 606, 620 (Iowa 2009) (acknowledging that we begin with a presumption that counsel performed his or her duties competently). Further, Mason has not proven he was prejudiced by counsel’s alleged breach. *Dudley*, 766 N.W.2d at 620 (observing prejudice exists when it is reasonably probable that the result of the proceeding would have been different but for counsel’s alleged breach). We therefore conclude defense counsel was not ineffective for failing to preserve these issues for appellate review.

VI. Conclusion.

Upon consideration of all issues raised on appeal, we affirm Mason’s conviction and sentence.

AFFIRMED.