

**IN THE COURT OF APPEALS OF IOWA**

No. 1-488 / 10-1158  
Filed September 8, 2011

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**DARNELL GARRETT DEMERY,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Black Hawk County, Bruce B. Zager, Judge.

Demery appeals his convictions and sentences for numerous offenses.

**AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Bradley M. Bender, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Benjamin M. Parrott, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Joel Dalrymple, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Doyle and Danilson, JJ.

**DOYLE, J.**

Darnell Demery appeals his convictions and sentences for numerous offenses, contending the district court erred in denying his motion to suppress and in not finding the evidence was insufficient to convict him of the offenses charged. Demery also asserts his trial counsel was ineffective for failing to challenge the going armed with intent jury instruction. We affirm.

***I. Background Facts and Proceedings.***

On July 23, 2009, Demery was charged with attempt to commit murder,<sup>1</sup> possession or dominion and control of a firearm as a felon,<sup>2</sup> assault on a peace officer by use or display of a dangerous weapon,<sup>3</sup> going armed with intent,<sup>4</sup> and carrying weapons.<sup>5</sup> Based upon the testimony and other evidence presented at trial, a jury could have found the following facts.

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<sup>1</sup> Iowa Code section 707.11 provides, in relevant part, that a person commits attempt to commit murder when, with the intent to cause the death of another person and not under circumstances which would justify the person's actions, the person does any act by which the person expects to set in motion a force or chain of events which will cause or result in the death of the other person.

<sup>2</sup> Under section 724.26, a person is guilty of possession or dominion and control of a firearm as a felon if [a] person who is convicted of a felony . . . and who knowingly has under the person's dominion and control or possession, receives, or transports or causes to be transported a firearm or offensive weapon is guilty of a class "D" felony.

<sup>3</sup> A person is guilty of assault on a peace officer by use or display of a dangerous weapon pursuant to section 708.3A(2) when [a] person who commits an assault . . . against a peace officer, who knows that the person against whom the assault is committed is a peace officer, and who uses or displays a dangerous weapon in connection with the assault, is guilty of a class "D" felony.

<sup>4</sup> Section 708.8 provides, in relevant part, that a person commits going armed with intent when "[a] person who goes armed with any dangerous weapon with the intent to use without justification such weapon against the person of another . . . ."

<sup>5</sup> A person is guilty of carrying weapons pursuant to section 724.4(1) when a person who goes armed with a dangerous weapon concealed on or about the person, or who, within the limits of any city, goes armed with a

In the late hours of July 11, 2009, Waterloo police officers received reports from multiple drivers that a white vehicle had rear-ended another vehicle in traffic and had fled the scene. Two drivers followed the vehicle and reported to police that it was parked in a restaurant parking lot. Waterloo police officers Joseph Saunders and Spencer Gann responded to the report.

Upon arriving at the restaurant, Officer Saunders made contact with the driver of the white vehicle, Demery. Demery told the officer he was picking up his friend Luzelena Bravo, the owner of the vehicle, from work at the restaurant. Demery gave Officer Saunders his identification, and Bravo got in the passenger side of the vehicle. Thereafter, upon Demery's request, Officer Saunders allowed Demery and Bravo to get out of Bravo's vehicle to look at the vehicle's damage. Officer Saunders patted Demery down; no weapons were found.

Officer Gann subsequently arrived at the restaurant, and Officer Saunders went to Officer Gann's patrol car to speak with him. While the officers were conversing, Demery told Bravo that he was going to run and that he was "hot." Although Demery did not elaborate, Bravo understood him to mean he had "something to hide. . . . [H]e has been convicted . . . in the past of some type of charge and he was scared and . . . wanted to run away." Demery then began walking away from the restaurant.

After the officers noticed Demery had walked away, Officer Gann followed Demery in his patrol car. Demery broke out into a full run, and Officer Gann exited his vehicle and pursued Demery on foot. Demery ran into a grassy area

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pistol or revolver, or any loaded firearm of any kind, whether concealed or not, or who knowingly carries or transports in a vehicle a pistol or revolver.

behind a car lot neighboring the restaurant, eventually running into an area with “very tall, wet grass.” Officer Gann yelled to Demery to stop. Officer Gann saw Demery turn around, and then Officer Gann saw the barrel of a gun. He saw Demery fire two shots at him, observing the flash from the gun and hearing the loud noise from the shots. Officer Gann dropped to the ground to conceal himself and then fired four or five rounds from his Glock .40 caliber gun back towards Demery. Demery again fired more rounds back at Officer Gann, which Officer Gann returned with seven or eight more rounds. Officer Gann observed Demery turn to run and fall down. Demery got back up and headed further into the foliage. Officer Gann took cover, reloading his gun with another magazine of bullets. Officer Gann radioed in about the incident, and slowly backed away from the tall grass until he reached his patrol car.

Robert Coombs lived nearby the area where the shooting occurred. Just before midnight on July 11 into July 12, Coombs was sitting on his back porch smoking a cigarette when he saw “a flashlight coming up through the weeds” and then “saw an individual wearing a white t-shirt run in front of [him].” Coombs identified the person with a flashlight to be a police officer, and observed the person in the white t-shirt to be running ahead of the officer. Coombs heard the officer yell at the person, “Stop. Stop now.” Coombs saw the person in the white t-shirt turn to the left, raise his right arm, and fire three or four shots in the direction of the officer. Coombs observed the flash from the gun’s muzzle. Coombs dropped to the ground and crawled back into his home.

Additional officers arrived on the scene and a perimeter was set up. The heavy foliage was scanned with thermal imagery from the ground, but Demery

was not found. Officers called for a plane to scan the area with thermal imagery from above, but Demery was not found. Officers went to Bravo's apartment, which was near the area and searched for Demery and firearms. Neither was found.

The next morning, officers again went back to the area of the shooting. The officers fought their way through the thick foliage, and they found blood on some of the foliage which later was determined to match Demery's known DNA profile. No other items were recovered from within the foliage area at that time.

On July 12, Demery's girlfriend, Shelby Wilson, was interviewed by officers concerning Demery's whereabouts. Wilson initially told the officers she had not been in contact with Demery, but later told them she expected to meet Demery at ten o'clock on July 11. She tried to call him repeatedly on his cell phone after he failed to arrive at her home, but he did not answer at first. She told the officers that when Demery later answered his phone, he told her that "he was hit" and explained that he had been shot by a police officer. Wilson told him to come to her home or go to the hospital, but Demery refused, telling her that "he didn't want to go back to prison." Wilson was concerned, but Demery continued to tell her that "he didn't do anything." However, he later told her that "he got into a shoot-out and he got hit twice."

On July 13, Officer Andrea Frana and Sergeant Ron Camarin learned Demery was going to the Allen Hospital to receive medical treatment and to turn himself in. Demery arrived at the hospital with his mother and a few other people. Members from the NAACP were also present at the hospital. Officer Frana observed an injury on Demery's right forearm. Officer Frana and Sergeant

Camarin accompanied Demery to his treatment room. In Officer Frana and Sergeant Camarin's presence, the nurse asked Demery what had happened, to which Demery responded he had "fallen down a couple of days ago." There was further inquiry in Officer Frana and Sergeant Camarin's presence by the medical staff about the nature of Demery's injuries, to which Demery responded "he wasn't going to answer any more questions. He told them to just fix it."

Sergeant Camarin was present for Demery's examination by Dr. Wilkins. Dr. Wilkins told Demery, in Sergeant Camarin's presence, that he had observed bullet fragments in Demery's wound after looking at his wound and X-rays, which was not consistent with Demery's explanation of his wound. The doctor asked Demery questions concerning Demery's cleaning of the wound.

The same day, the tactical team of the Waterloo Police Department went back to the foliage area on to look for shell casings but found none. The foliage was burned down to a manageable level a few days later to make searching easier. The team found seven shell casings, all of which were consistent with being fired from Officer Gann's Glock. No actual bullets were found in the grassy area. On July 18, a bullet was recovered from a car on the car lot bordering the foliage area that could have been fired from Officer Gann's Glock or another firearm, but could not be confirmed either way. Another bullet was later recovered from an interior garage wall from the residence next to Coombs, consistent with having originated from a .38 or .357 caliber firearm.

Surgery was ultimately performed on Demery, and shrapnel was recovered from his wound. Demery was later arrested and charged by trial information with the crimes stated above in connection with the shooting.

On February 12, 2010, Demery filed a “motion to suppress,” asserting the officers present during his treatment at the Allen Hospital requested and obtained confidential, privileged information from hospital personnel without Demery’s consent in violation of his rights. He requested that evidence of the hospital’s communications with Demery in the officers’ presence be suppressed. The State resisted.

Hearing on the motion to suppress was held on March 19, 2010. There, the district court noted it would treat Demery’s motion as a motion in limine, as the substance of the motion requested a predetermination of the admissibility of certain statements Demery made to medical professionals while at the hospital. Demery argued the communications were protected under the doctor-patient privilege, Iowa Code section 622.10 (2009). The State argued that even if the communications between Demery and the treating staff could be deemed subject to the section 622.10 privilege, Demery waived the privilege by making the communications in the presence of third-parties. The district court agreed with the State, finding the officers were at the hospital to take Demery into custody, not for assisting medical professionals in treating or diagnosing Demery. Demery did not request the officers leave his examining room. The court concluded the communications heard by the officers were not intended to be confidential and under the circumstances of this case, the privilege was destroyed by the presence of the officers.

A jury trial commenced in May 2010. Among other evidence and testimony presented, Officer Frana and Sergeant Camarin testified as to Demery’s responses to medical professionals during treatment. Sergeant

Christian Camarta, an investigator for the Waterloo Police Department, testified that the vast majority of .38 and .357 caliber weapons are revolvers, which do not typically leave shell casings when the bullets are fired.

At the close of the State's evidence, Demery's counsel moved for a judgment of acquittal, asserting the evidence was insufficient to find Demery guilty of the charged offenses. The district court denied Demery's motion.

Instructions were later submitted to the jury. Relevant here, the instructions given concerning the offense of going armed with intent, based upon the Iowa Uniform Jury Instructions, stated:

The State must prove all of the following elements . . . :

1. On or about July 11, 2009, [Demery] was armed with [a] handgun.
2. The handgun was a dangerous weapon as defined in [an earlier instruction].
3. [Demery] was armed with the specific intent to use the handgun against another person.

If you find the State has proved all of the elements, [Demery] is guilty of . . . [g]oing [a]rmed [w]ith [i]ntent. If the State has failed to prove any one of the elements, [Demery] is not guilty of [this offense].

Demery's counsel did not object to this instruction.

The jury found Demery guilty as charged. Demery was thereafter sentenced. Demery's counsel filed a motion for a new trial alleging, among other things, that the jury's verdict was against the evidence and law presented in the case. The district court denied Demery's motion.

Demery now appeals.

## ***II. Discussion.***

On appeal, Demery contends the district court erred in denying his motion to suppress and in not finding the evidence was insufficient to convict him of the

offenses charge. Demery also asserts his trial counsel was ineffective for failing to challenge the going armed with intent jury instruction. We address his arguments in turn.

**A. “Motion to Suppress.”**

Demery first argues the district court erred in denied his motion to suppress. We note the district court considered this motion to be a motion in limine, to which Demery did not object and does not challenge here. We will therefore construe Demery’s motion to be a motion in limine. The State concedes and we find the district court’s ruling on the motion in limine preserved the issue for our review. See *State v. Alberts*, 722 N.W.2d 402, 406-07 (Iowa 2006).

We review evidentiary rulings for an abuse of discretion. *State v. Parker*, 747 N.W.2d 196, 203 (Iowa 2008). However, we review a district court’s interpretation of Iowa Code section 622.10 for errors of law. See *State v. Deases*, 518 N.W.2d 784, 787 (Iowa 1994).

Section 622.10(1) sets forth Iowa’s professional communications privilege, providing, in relevant part:

A . . . physician, surgeon, physician assistant, advanced registered nurse practitioner, mental health professional, or the stenographer or confidential clerk of any such person, who obtains information by reason of the person’s employment, . . . shall not be allowed, in giving testimony, to disclose any confidential communication properly entrusted to the person in the person’s professional capacity, and necessary and proper to enable the person to discharge the functions of the person’s office according to the usual course of practice or discipline.

“The physician-patient privilege is intended to promote free and full communication between a patient and his doctor so that the doctor will have the

information necessary to competently diagnose and treat the patient.” *Deases*, 518 N.W.2d at 787. Section 622.10 “is to be liberally construed to carry out its manifest purpose.” *State v. Tornquist*, 254 Iowa 1135, 1154, 120 N.W.2d 483, 494 (1963), *abrogated on other grounds by State v. Moorehead*, 699 N.W.2d 667, 674-75 (Iowa 2005).

Even when the elements of the professional communications privilege are present, “the privilege may be lost if the patient makes statements in the presence of a third person.” *Id.*

It is evident that if a communication, otherwise privileged, is made in the presence of a third party not an employe[e] of or an assistant to the physician, attorney or other person coming within the terms of the statute, the reason for the privilege is gone. It is not then a secret between the patient, or client, and the professional man.

*Id.* at 1155, 120 N.W.2d at 495. On the other hand:

If the third person is present to assist the physician in some way or the third person’s presence is necessary to enable the defendant to obtain treatment, then the privilege protects confidential communications made in the presence of the third person.

*Deases*, 518 N.W.2d at 788.

Demery argues the Iowa Supreme Court’s holding in *State v. Deases* required the district court to find Demery’s remarks made to his nurse and physician were privileged communications under section 622.10(1) and that his communications in the presence of officers did not destroy the privilege. See *Deases*, 518 N.W.2d at 786-88. Upon our review, we disagree.

In *Deases*, *Deases*, while a prisoner at Iowa State Penitentiary, was involved in a fight involving shanks which resulted in the death of another inmate. *Deases*, 518 N.W.2d at 786. *Deases* was cut on the palm of his hand and taken

to the prison health care unit for treatment. *Id.* Three correctional officers were present while Deases was treated. *Id.* at 787. In the officers' and the treating physician's presence, Deases's treating nurse asked Deases where he got the shank so that she could decide whether to give Deases a tetanus shot. *Id.* Deases later filed a motion to suppress his statement to the nurse, which the district court overruled. *Id.* On appeal, our supreme court reversed, specifically finding

that the presence of the correctional officers . . . was necessary for Deases to be treated. They were not casual observers. The State acknowledges the guards were there for security. The need to protect the doctor and nurse from Deases is understandable since Deases had just stabbed and killed another inmate and had previously been convicted of the brutal killing of a young woman. Any attempt by Deases to ask the guards to step outside would have been futile. Under these circumstances, the presence of the correctional officers did not destroy the doctor-patient privilege.

We believe this interpretation of the statute promotes its intended purpose of allowing free and full communication between the doctor and patient as needed for adequate treatment. Any other interpretation would unfairly require a prisoner to risk inadequate treatment or surrender his doctor-patient privilege.

*Id.* at 788 (internal citation omitted).

Here, the district court found that although Demery's communications with his treating medical professionals met the elements of the section 622.10(1)'s professional communications privilege, Officer Frana and Sergeant Camarin's presence was not necessary for Demery to be treated. Therefore, their presence destroyed the professional communications privilege between Demery and his treating medical professional. We agree.

*Deases* is distinguishable from the case at hand. The correctional officers were present in Deases's examining room to protect the doctor and the nurse.

*Deases*, 518 N.W.2d at 788. The protection was necessary for Deases to be treated. *Id.* The need for this protection was understandable since Deases, previously convicted of brutally killing a young woman, had just stabbed and killed another inmate. *Id.* As the supreme court noted, any attempt by Deases to ask the officers to step outside the room would have been futile. *Id.*

The case here is significantly different. The medical professionals did not ask for officers to be present, nor did they testify that they would not have treated Demery but for the officers' presence. The officers' presence in Demery's treatment room was not for the protection of the doctor and nurse. Instead, the officers' presence was to guarantee that Demery did not again flee. The officers testified they were there to apprehend Demery. Indeed, Sergeant Camarin's testimony suggests had he been asked or required to leave the room, he could have. So, we, unlike the *Deases* court, cannot conclude it would have been futile for Demery (or his medical treaters for that matter) to ask the officers to step outside. We agree with the district court that *Deases* is distinguishable from the present case, and we accordingly find the court did not err in denying Demery's motion in limine.

***B. Sufficiency of the Evidence.***

Demery next contends the district court erred in not finding the evidence was insufficient to convict him of the charged offenses. We review challenges to the sufficiency of the evidence for the correction of errors at law. Iowa R. App. P. 6.907; *State v. Hennings*, 791 N.W.2d 828, 832 (Iowa 2010). "We will uphold a trial court's denial of a motion for judgment of acquittal if the record contains substantial evidence supporting the defendant's conviction." *State v. McCullah*,

787 N.W.2d 90, 93 (Iowa 2010). “Evidence is substantial if it would convince a rational trier of fact the defendant is guilty beyond a reasonable doubt.” *State v. Jorgensen*, 758 N.W.2d 830, 834 (Iowa 2008). In making this determination, we view the evidence in the light most favorable to the State, including all legitimate inferences and presumptions that may be fairly and reasonably deduced from the evidence. *State v. Leckington*, 713 N.W.2d 208, 213 (Iowa 2006). “Direct and circumstantial evidence are equally probative.” Iowa R. App. P. 6.904(3)(p). We give consideration to all evidence, not just the evidence that supports the verdict. *State v. Schmidt*, 588 N.W.2d 416, 418 (Iowa 1998). “The State has the burden to prove every fact necessary to constitute the crime with which the defendant is charged.” *State v. Cashen*, 666 N.W.2d 566, 569 (Iowa 2003) (internal quotation omitted).

Demery was convicted of the offenses of attempt to commit murder; possession or dominion and control of a firearm as a felon; assault on a peace officer by use or display of a dangerous weapon; going armed with intent; and carrying weapons. Each of these offenses required the State to prove Demery shot a firearm, possessed a firearm, pointed a firearm, or was armed with a firearm. Demery argues there was insufficient evidence to prove he had a weapon in his possession or he used a firearm in any way consistent with these offenses. To support his argument, Demery points to the absence of certain evidence that could potentially support a finding he did not possess a firearm. Specifically, Demery emphasizes that Bravo did not observe that Demery had a gun, no gun was found during Officer Saunders pat down of Demery, no gun was

found during the searches of various residences, and the only casings in the grassy area were determined to have been fired from Officer Gann's Glock.

Although this evidence, if found credible by the jury, might serve to acquit Demery, "the jury is at liberty to believe or disbelieve the testimony of witnesses as it chooses, and give such weight to the evidence as in its judgment the evidence was entitled to receive." *State v. Blair*, 347 N.W.2d 416, 420 (Iowa 1984) (citation omitted). "The very function of the jury is to sort out the evidence presented and place credibility where it belongs." *Id.* In addition, the existence of evidence that might support a different verdict does not negate the existence of substantial evidence sufficient to support the verdict. *See State v. Frake*, 450 N.W.2d 817, 818–19 (Iowa 1990). Viewing the evidence in a light most favorable to the State, we find there is substantial evidence in this record to support the challenged offenses' elements concerning Demery's possession and other uses of a firearm.

Here, there is no question Demery was the driver of the white car and that after he fled from the restaurant Officer Gann chased him into an area with tall, wet grass. Officer Gann testified he saw Demery point a gun at him and fire. He specifically testified he saw the flash from the weapon and heard the shots ring out. Coombs testified he saw a police officer chasing someone that night in the area where Officer Gann had chased Demery. Coombs testified he saw the person running ahead of the officer turn around and fire shots at the officer, specifically testifying he saw the flash from the weapon. A bullet was recovered from Coombs's neighbor's garage consistent with a .38 or .357 caliber weapon, likely a revolver, which does not leave shell casings. Demery told his girlfriend

he had been shot by a police officer during a shoot out. Demery received treatment at the hospital for an infection from a wound consistent with being shot. We accordingly find the district court did not err in finding the evidence was sufficient to convict Demery of the charged offenses.

***C. Jury Instruction.***

Demery finally argues his attorney was ineffective for failing to challenge the going armed with intent jury instruction. We review claims of ineffective assistance of counsel de novo. *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008). Although we generally preserve such claims for postconviction relief, where the record is sufficient to address the issues, we may resolve the claims on direct appeal. *Id.* We find the record here is adequate to address the issue.

In order to establish a claim for ineffective assistance of counsel, Demery must demonstrate his trial counsel (1) failed to perform an essential duty and (2) prejudice resulted. *Anfinson v. State*, 758 N.W.2d 496, 499 (Iowa 2008) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984)). If either element is not met, the claim will fail. *Id.* There is a strong presumption counsel's representation fell within the wide range of reasonable professional assistance, and Demery is not denied effective assistance by counsel's failure to raise a meritless issue. *State v. Graves*, 668 N.W.2d 860, 881 (Iowa 2003). To demonstrate prejudice, Demery must show that the result of the proceeding would have been different "but for the counsel's unprofessional errors." *Anfinson*, 758 N.W.2d at 499. "The probability of a different result must be sufficient to undermine confidence in the outcome." *Id.* (internal quotations omitted).

The jury instruction submitted to the jury for the elements of the offense was based upon Iowa Criminal Jury Instruction 800.15, “Going Armed With Intent—Elements.” Additionally, a jury instruction based upon Iowa Criminal Jury Instruction 800.16 was given defining “armed” as meaning “a conscious and deliberate possession of a (dangerous weapon) on or about one’s person so it is available for immediate use.” See Iowa Crim. Jury Inst. 800.16 (2009). However, the instruction did not specifically require to jury to find “proof of movement” by Demery, which the Iowa Supreme Court has indicated it believes the term “going’ armed” implicates. See *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994); see also *State v. Taylor*, 596 N.W.2d 55, 57 (Iowa 1999) (“going armed with intent involves movement”). Because Demery’s trial counsel did not object to the jury instructions’ lack of a finding of movement by Demery, Demery asserts his trial counsel rendered ineffective assistance.

Upon our de novo review of this issue, we conclude, even assuming without deciding that Demery’s trial counsel failed to perform an essential duty, Demery cannot establish the requisite prejudice. Generally, trial courts should adhere to the uniform instructions. See *State v. Mitchell*, 568 N.W.2d 493, 501 (Iowa 1997). Furthermore, our courts have

a long history of not reversing on the ground of technical defects in procedure unless it appears in some way they have prejudiced the complaining party or deprived him or her of full opportunity to make defense to the charge presented in the indictment or information.

*State v. Negrete*, 486 N.W.2d 297, 299 (Iowa 1992) (citation omitted).

Here, the undisputed evidence indicated Demery ran away from Officer Gann after he began pursuing him. Additionally, Officer Gann testified that

during the pursuit, Demery turned around and fired shots at him. Coombs testified he saw a person in a white t-shirt running ahead of an officer in the same area where the shooting occurred and he saw the person in the white t-shirt turn to the left, raise his right arm, and fire three or four shots in the direction of the officer. Based upon the evidence and testimony at trial, there is no reasonable probability the jury would have found the movement element to be lacking. We agree with the State that the

factual scenario presented by this record simply does not support an inference that a reasonable jury could have found Demery committed the other four crimes of which the jury found him guilty yet did not, in fact, engage in the movement required by Iowa Code section 708.8.

Accordingly, we find Demery's trial counsel was not ineffective for failing to challenge the going armed with intent jury instruction.

### ***III. Conclusion.***

For the reasons stated above, we affirm Demery's convictions and sentences.

**AFFIRMED.**