

IN THE COURT OF APPEALS OF IOWA

No. 2-1171 / 12-1329
Filed January 24, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BARRY LYNN SPENCER,
Defendant-Appellant.

Appeal from the Iowa District Court for Calhoun County, William C. Ostlund, Judge.

A defendant appeals his conviction and sentence for assault causing bodily injury. **AFFIRMED.**

Robert E. Peterson, Carroll, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, and Cynthia Voorde, County Attorney.

Considered by Eisenhauer, C.J., and Vogel and Vaitheswaran, JJ.

VOGEL, J.

Barry Lynn Spencer, appeals his conviction and sentence for assault causing serious injury in violation of Iowa Code section 708.2(4) (2011), a class D felony.¹ He claims his trial counsel was ineffective for failing to file a motion in arrest of judgment, and failing to object at both the plea proceeding and the sentencing because of the alleged lack of factual basis for the plea. Because trial counsel was not ineffective, we affirm.

Our review of ineffective-assistance-of-counsel claims is de novo. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). In order to succeed on his claim, Spencer must prove by a preponderance of evidence (1) counsel failed to perform an essential duty, and (2) prejudice resulted. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish prejudice, Spencer must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. See *State v. Bugley*, 562 N.W.2d 173, 178 (Iowa 1997). The ultimate test is whether under the entire record and totality of the circumstances counsel's performance was within the normal range of competency. *Collins v. State*, 588 N.W.2d 399, 402 (Iowa 1998). Although we often preserve claims of ineffective assistance of counsel for postconviction relief proceedings, we will consider such claims on direct appeal if the record is adequate to resolve them. *State v. Henderson*, 804 N.W.2d 723, 725 (Iowa Ct. App. 2011). We find the record is adequate to address Spencer's claims on direct appeal.

¹ Spencer was also convicted of obstruction of prosecution in violation of Iowa Code section 719.3. He does not appeal that conviction.

Spencer contends his trial counsel was ineffective for failing to challenge the adequacy of his guilty plea in a motion in arrest of judgment. See Iowa R. Crim. P. 2.24(3)(a) (“A motion in arrest of judgment is an application by the defendant that no judgment be rendered on a finding, plea, or verdict of guilty.”). He claims there was no factual basis to support the plea. A district court may not accept a guilty plea without first determining that the plea has a factual basis. *State v. Hallock*, 765 N.W.2d 598, 603 (Iowa Ct. App. 2009). The court may determine a factual basis for a guilty plea by (1) inquiry of the defendant, (2) inquiry of the prosecutor, (3) examination of the presentence report, or (4) reference to the minutes of testimony. *State v. Hightower*, 587 N.W.2d 611, 614 (Iowa Ct. App. 1998).

Spencer pleaded guilty to committing assault without intent to inflict serious injury, but causing serious injury. See Iowa Code § 708.2(4). Assault is a general intent crime, done without justification, and any of the following:

1. Any act which is intended to cause pain or injury to, or which is intended to result in physical contact which will be insulting or offensive to another, coupled with the apparent ability to execute the act.
2. Any act which is intended to place another in fear of immediate physical contact which will be painful, injurious, insulting, or offensive, coupled with the apparent ability to execute the act.
3. Intentionally points any firearm toward another, or displays in a threatening manner any dangerous weapon toward another

Id. § 708.1. Justification is an affirmative defense to assault, rather than an element of the crime. *State v. Delay*, 320 N.W.2d 831, 833 (Iowa 1982). Because it is an affirmative defense, a defendant asserting it has the burden of going forward with sufficient evidence to show the defense applies. *State v. Lawler*, 571 N.W.2d 486, 489 (Iowa 1997). At that point, the burden shifts to the

State to disprove the justification defense beyond a reasonable doubt. *Delay*, 320 N.W.2d at 834. Any guilty plea taken in conformity with Iowa Rule of Criminal Procedure 2.8 waives all defenses and objections. *State v. LaRue*, 619 N.W.2d 395, 398 (Iowa 2000).

Here, Spencer signed a written plea of guilty and the district court engaged him in a discussion regarding his competency to enter a plea, whether he understood the charges, and the constitutional rights he would be surrendering if he chose to enter a guilty plea. Spencer stated to the district court he understood the rights he was waiving and pleaded guilty to assault causing serious injury. Next, the district court asked Spencer to provide a factual basis for the plea. Counsel for Spencer responded by stating, "Your honor I think the defendant has clearly entered a plea pursuant to the statute. He is reluctant to say more, and I don't think he's required to." The district court, however, continued and questioned Spencer, particularly because he stated he was concerned about establishing the serious injury element.² When asked about the charge, Spencer answered the victim did not receive an injury to her mouth and her teeth because of an act he committed. The court then asked:

THE COURT: All right. And would you agree with me that based upon the minutes of testimony and based upon the investigative reports that you have reviewed from your reading of those materials, there would be sufficient evidence to convict?

SPENCER: No.

(The Defendant talked to [his attorney]).

THE DEFENDANT: From other people's report, yes. Nothing to substantiate it; but yes.

² Spencer was charged with and pleaded guilty to a felony. An in court colloquy was required by our rules. See Iowa R. Crim. P. 2.8(2)(5) (providing a defendant may waive an in court plea colloquy for a serious or aggravated misdemeanor, and may sign a written plea of guilty).

This is akin to an Alford plea. *State v. Knight*, 701 N.W.2d 83, 88 (Iowa 2005) (stating that a defendant enters an Alford plea by pleading guilty while still maintaining his innocence). While he was hesitant to admit the details of the crime, Spencer specifically consented to the use of the trial information, with attached minutes of testimony and police reports, to establish a factual basis. The reference to and acceptance of the minutes of testimony during the plea colloquy, along with Spencer's acknowledgement the State could prove the charges the court detailed and the prosecutor's additional explanation of the injuries, were sufficient to establish a factual basis. We find that counsel was not ineffective for failing to challenge the guilty plea.

Spencer also more specifically claims the plea colloquy failed to prove a factual basis for one particular "element"—lack of justification. However, even though Spencer filed a notice of defense showing his intent to use the defense of justification at trial, because it is an affirmative defense, he had the initial burden of proving it applicable. Although in his written version of the incident in the presentence investigation report he claimed the victim lied, there is no evidence in the record of Spencer attempting to prove justification. The district court carefully discussed with Spencer each element the State would need to prove for the charge. Looking at the record as a whole, there is sufficient evidence in the record the State could prove beyond a reasonable doubt each element of the crime; he assaulted the victim, causing serious injury.

Because we find there was a proper factual basis for the district court to accept Spencer's guilty plea, trial counsel did not breach an essential duty by not filing a motion in arrest of judgment, or objecting to the court's acceptance of the

guilty plea, the subsequent conviction, and sentence. Because we find sufficient factual basis for the plea, Spencer's three remaining arguments—counsel was ineffective for allowing Spencer to plead guilty, ineffective for failing to object to inadequate colloquy, and ineffective for failing to object to sentencing based on a defective plea—also fail.

AFFIRMED.