

IN THE COURT OF APPEALS OF IOWA

No. 3-1108 / 13-0468
Filed December 18, 2013

EDWARD ALAN ROHN,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

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

A postconviction-relief applicant appeals the district court's denial of his
application. **AFFIRMED.**

Lars Anderson of Holland & Anderson L.L.P., Iowa City, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney
General, Janet M. Lyness, County Attorney, and Anne Lahey, Assistant County
Attorney, for appellee.

Considered by Danilson, C.J., and Vaitheswaran and Potterfield, JJ.

DANILSON, C.J.

Edward Rohn appeals the district court's denial of his application for postconviction relief. He argues his trial attorney was ineffective for failing to challenge the sufficiency of the evidence supporting his conviction for burglary in the first degree, pursuant to Iowa Code section 713.3 (2009). Because we find there was sufficient evidence to support Rohn's conviction, we conclude trial counsel was not ineffective, and we affirm.

I. Background Facts and Proceedings.

As both parties did, we accept the factual background provided by the district court in its ruling on the application for postconviction relief:

On July 22, 2009, Vernon Nerad, an elderly man in his late seventies, was contacted by his friend, Tammy Long, for a ride. After picking Ms. Long up in his car, Mr. Nerad felt uncomfortable and asked Ms. Long to exit the vehicle. Approximately one hour later, Ms. Long came to Mr. Nerad's residence. While inside the home, Ms. Long went to the back door and unlocked it. She later left through the front door of the residence.

The subsequent events of the evening were disputed at trial. Rita Sotelo-Henry, who lived across the street from Mr. Nerad's home, noticed two men were lingering outside of his house. The State presented evidence that Mr. Nerad was watching television in his living room when two men came into his home through the back door. At trial, Mr. Nerad testified that one of the men had a knife and pointed it at him. Mr. Nerad testified that he was frightened for his life and immediately tried to escape by running to the front door. Testimony at trial indicated that Mr. Nerad had trouble opening the front screen door, and one of the men sprayed him in the face with pepper spray. Mr. Nerad also testified that one of the men also punched him in the jaw. Once he reached the front door, Mr. Nerad yelled for help. Several of Mr. Nerad's neighbors heard him shouting, and they called the police. Hearing the commotion, Ms. Sotelo-Henry looked out her front door and saw the same two men walking away from Mr. Nerad's house.

Mr. Nerad's neighbors found him on his knees in his doorway, with blood on his face and shirt. Mr. Nerad later noticed that some checkbooks and two phones were missing from his

home. Once the police responded, they searched the area for the two men. Officers found two men, who matched [. . .] Ms. Sotelo-Henry's general description, walking on different sides of the street nearby. Ms. Sotelo-Henry subsequently identified the two men, Larry Halligan and Applicant, as the men she saw outside Mr. Nerad's home earlier that night.

At trial, testimony indicated that Mr. Nerad owed Ms. Long fifty dollars. Evidence also showed that earlier in the day Ms. Long had requested Mr. Nerad pay her and he refused, scaring her in the process. Applicant and Mr. Halligan agreed to help Ms. Long by going to Mr. Nerad's house and collecting her money. The defense argued that when the men arrived at the house. Applicant became uncomfortable by the situation and did not enter the house. The defense argued Applicant walked away, and Mr. Halligan caught up with him shortly thereafter. It was the defense's theory that Mr. Halligan pepper sprayed Mr. Nerad and either Mr. Halligan or Ms. Long took Mr. Nerad's missing property.

At the criminal proceeding, the police officers testified that they looked that night for the pepper spray canister, which Mr. Halligan told officers he discarded while fleeing. The police officers did not look for a knife because they were unaware that a knife was used during the intrusion. However, the officers did testify that they would have picked up a knife had they discovered one. The officers testified that the area had quite a bit of vegetation and brush, as well as drainage grates, where the items could have been easily discarded. The police's search did not recover a pepper spray bottle or a knife.

It was undisputed that Mr. Nerad had been drinking earlier in the night and was intoxicated at the time of the incident. A preliminary breath test taken by Mr. Nerad later that night indicated he had a blood alcohol content of 0.17, over twice the legal limit to drive. Several witnesses testified that he was confused, hard to understand, incoherent at times, and extremely agitated.

After being taken into custody, both Mr. Halligan and Applicant spoke with police officers. In their versions of the night's events, neither ever disclosed the presence of a knife. Mr. Nerad did not mention a knife to any of his neighbors or the police that night. One of Mr. Nerad's neighbors testified he responded to Mr. Nerad's cries for help, carrying a small knife for protection, which he put [. . .] away once he discovered Mr. Nerad was alone. Only two days after the incident, when Mr. Nerad turned in a written statement about the night's events to police, did Mr. Nerad first mention that one of the men had a knife and pointed it at him upon entering the house.

The State filed a trial information charging Rohn with burglary in the first degree or aiding and abetting burglary in the first degree¹ on August 3, 2009. On December 3, 2009, the State filed an amended trial information, adding a dangerous weapon alternative to the burglary in the first degree charge.² Rohn was convicted following a jury trial and subsequently sentenced to twenty-five years imprisonment.

Rohn filed a pro se application for postconviction relief on June 2, 2011. He later filed an amended application with the assistance of counsel. The State responded, and the matter proceeded to trial on October 18, 2012. The district court entered a ruling, denying Rohn's application, on March 7, 2013. Rohn appeals.

II. Standard of Review.

We review claims for ineffective assistance of counsel de novo. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006). This is our standard because such claims have their basis in the Sixth Amendment to the United States Constitution. *State v. Clay*, 824 N.W.2d 488, 494 (Iowa 2012). To prevail on a claim of

¹ Iowa Code § 713.3 defines burglary in the first degree, in part:

1. A person commits burglary in the first degree if, while perpetrating a burglary in or upon an occupied structure in which one or more persons are present, any of the following circumstances apply:

...

b. The person has possession of a dangerous weapon.

c. The person intentionally or recklessly inflicts bodily injury on any person.

² The first trial information filed by the State alleged Rohn, "acting with another, did unlawfully enter an occupied structure without any right or license to do so with the intent to commit a theft, assault or forcible felony or aid and abet another in doing so, causing bodily injury." The amended trial information alleged Rohn, "acting with another, did unlawfully enter an occupied structure without any right or license to do so with the intent to commit theft, assault or forcible felony or aid and abet another in doing so, causing bodily injury, *or armed with a dangerous weapon.*" (Emphasis added).

ineffective assistance of counsel, the applicant must prove by a preponderance of the evidence (1) counsel failed to perform an essential duty and (2) prejudice resulted. See *State v. Rodriguez*, 804 N.W.2d 844, 848 (Iowa 2011). We can affirm if either prong is absent and need not engage in both prongs of the analysis if one is lacking. See *Everett v. State*, 789 N.W.2d 151, 159 (Iowa 2010). Judicial scrutiny of counsel's performance is highly deferential. *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

III. Discussion.

Rohn contends his trial counsel was ineffective for failing to move for judgment of acquittal, failing to move for a new trial, and failing to object to jury instructions because there was insufficient evidence to support the dangerous weapon alternative of burglary in the first degree.

The State filed trial information charging Rohn with burglary in the first degree under two alternatives, intentional or reckless infliction of bodily injury and possession of a dangerous weapon. See Iowa Code § 713.36(b),(c). The jury ultimately returned a general guilty verdict. Rohn argues there was not sufficient evidence to support a guilty verdict based on the dangerous weapon alternative, and thus, his counsel was ineffective for failing to challenge it.

“[T]he validity of a verdict based on facts legally supporting one theory for conviction of a defendant does not negate the possibility of a wrongful conviction of a defendant under a theory containing legal error.” *State v. Martens*, 569 N.W.2d 482, 485 (Iowa 1997). “With a general verdict of guilty, we have no way of determining which theory the jury accepted.” *State v. Hogrefe*, 557 N.W.2d

871, 881 (Iowa 1996). When a general verdict does not reveal the basis for a guilty verdict, reversal is required. *State v. Heemstra*, 721 N.W.2d 549, 558 (Iowa 2006). Thus, if Rohn can establish there was insufficient evidence for the dangerous weapon alternative to be submitted to the jury, trial counsel was ineffective for failing to raise the issue. See *State v. Truesdell*, 679 N.W.2d 611, 616 (Iowa 2004). On the other hand, if the record reveals substantial evidence supports the conviction under the dangerous weapon alternative, then counsel's failure to raise the claim of error could not be prejudicial, and we will affirm. *Id.*

Substantial evidence exists to support a verdict when the record reveals a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *State v. Thomas*, 561 N.W.2d 37, 39 (Iowa 1997). In making this determination, we view the evidence in the light most favorable to the verdict, including all reasonable inferences that may be deduced from the record. *Truesdell*, 679 N.W.2d at 615.

Iowa Code section 702.7³ defines the term dangerous weapon in three different manners: (1) an instrument designed primarily for the purpose of

³ Iowa Code section 702.7 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

inflicting death or injury, (2) dangerous weapon per se, and (3) dangerous weapon in the manner used. See *State v. Ortiz*, 789 N.W.2d 761, 765–67 (Iowa 2010). Rohn contends, and the State concedes, there was not sufficient evidence the alleged knife was an instrument designed primarily for the purpose of inflicting death or injury, or that it was a dangerous weapon per se. Thus, we must determine whether there was substantial evidence to support the finding the alleged knife was a dangerous weapon because of the manner in which it was used. See Iowa Code § 702.7.

The first question under this definition is whether a knife, “when so used, is capable of inflicting death upon a human being.” *Ortiz*, 789 N.W.2d at 767 (quoting Iowa Code § 702.7). Next, we must consider whether Rohn “actually used [the instrument] in such a manner as to indicate that the defendant intends to inflict death or serious injury upon the other.” *Id.*

Rohn argues there was insufficient evidence to support the finding because Nerad’s testimony, the only evidence offered by the State regarding the existence of a knife and its use, was not credible. Rohn supports his assertion by contending Nerad was intoxicated at the time of the incident in question and Nerad did not mention the existence of a knife to anyone until a day or two after the burglary. Rohn also notes no knife was found by the police during their investigation nor submitted by the State as evidence at trial. Furthermore, Nerad did not provide any detail or description of the knife during testimony. Rohn

any portable device or weapon directing an electric current, impulse, wave, or beam that produces a high-voltage pulse designed to immobilize a person.

argues the jury had no way of assessing whether the alleged knife was capable of causing death.

Viewing the evidence in the light most favorable to the verdict, we find sufficient evidence supports the finding Rohn was in possession of a dangerous weapon as defined in section 702.7. The fact that the knife itself was not found or admitted into evidence is not fatal to the State's argument, as we may consider practical experience in making this determination. See *Ortiz*, 789 N.W.2d at 776 ("Practical experience tells us that a box cutter or utility knife when so intended is capable of inflicting death.") Furthermore, our supreme court has noted, "[d]angerous weapons, in fact, can encompass almost any instrumentality under certain circumstances." *State v. Greene*, 709 N.W.2d 535, 537 (Iowa 2006); see also 79 Am. Jur. 2d *Weapons & Firearms* § 1, at 5 (2002) ("[I]t 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.").

The record demonstrates that a rational juror could determine a dangerous weapon was used in the burglary. Nerad testified the man "pointed" a knife at him and approached him with it. Because of the man's actions, Nerad was "scared to death" and ran for the door. Nerad also testified he was afraid the man would stab him with the knife. Clearly the knife caused an immediate action and response by Nerad. Moreover, the knife was of sufficient size that Nerad could observe it from some distance as he was able to get up from his chair and run to the front door before being assaulted by one of the two men. "Our past

cases suggest that a defendant objectively indicates intent to inflict harm when the defendant engages in a personal confrontation with another while possessing an instrument capable of causing bodily harm.” *Ortiz*, 789 N.W.2d at 767.

Although we acknowledge Nerad was intoxicated at the time of the burglary and delayed reporting the use of the knife to the officials, it is the task of the jury to evaluate evidence and determine its credibility. See *State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993). “The jury is free to believe or disbelieve any testimony as it chooses and give weight to the evidence as in its judgment such evidence should receive. *Id.* As our supreme court has stated, the question is properly one for the jury:

[T]he question whether there was an assault with a dangerous or deadly weapon is to be submitted to the jury where the instrument used is not one declared by statute to be a deadly weapon or where its character, whether dangerous or deadly, or not, is doubtful, or where its character depends on the manner in which it is used.

See *Greene*, 709 N.W.2d at 537. As the district court stated:

A jury could have inferred that neither man mentioned the knife during the police interviews to downplay the severity of their actions, just like neither mentioned hitting Mr. Nerad, despite the evidence that his injuries were consistent with such an action. A jury could have found the knife was not located because of the many drainage grates and shrubbery in the area, similar to the unrecovered pepper spray bottle, which was undisputedly used in the incident. The dangerous weapon instruction accurately outlined the law regarding the dangerous weapon, and that issue was properly submitted to the jury for a determination

Furthermore, although Nerad was intoxicated at the time of the incident, we cannot say his testimony was wholly unreliable. Some facts to which he testified were corroborated by other witnesses and evidence, such as having seen the

direction the men went after leaving his house, having heard Long unlock the back door, and having been sprayed with pepper spray by the men.

Considering practical experience, we find there was substantial evidence that the knife, pointed at Nerad during the burglary, was both capable of inflicting death and was used in a manner as to indicate the intent to inflict death or serious injury. Because we find substantial evidence supports Rohn's conviction under the dangerous weapon alternative, counsel's failure to raise the claim of error by a motion for judgment of acquittal, motion for new trial, or objection to jury instructions was not prejudicial and does not constitute ineffective assistance. See *State v. Griffin*, 691 N.W.2d 734, 737 (Iowa 2005) (“[T]rial counsel has no duty to raise an issue that has no merit.”). We affirm.

AFFIRMED.