

**IN THE COURT OF APPEALS OF IOWA**

No. 3-996 / 12-1876  
Filed November 20, 2013

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

**vs.**

**DONOVAN RASHA DEAN,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Scott County, Joel W. Barrows,  
Judge.

Donovan Dean appeals from his conviction following a jury trial for  
intimidation with a dangerous weapon and conviction following a bench trial, held  
simultaneously, for felon in possession of a firearm. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, Martha J. Lucey, Assistant  
Appellate Defender, and Matt Jarvey, Student Legal Intern, for appellant.

Thomas J. Miller, Attorney General, Tyler J. Buller, Assistant Attorney  
General, Mathias Robinson, Student Legal Intern, Michael J. Walton, County  
Attorney, and Will R. Ripley, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Mullins and McDonald, JJ.

**VOGEL, P.J.**

Donovan Dean appeals from his conviction following a jury trial for intimidation with a dangerous weapon and conviction following a bench trial for felon in possession of a firearm. Dean asserts substantial evidence does not support either conviction because there was no physical evidence he had a “real gun,” as opposed to a “fake gun.” Dean further asserts trial counsel was ineffective in failing to object to a jury instruction defining “within” (an assembly of people) as well as failing to argue there was insufficient evidence to prove Dean shot “into or through” an assembly of people. We find there was sufficient evidence to support the jury’s verdict. We further find counsel breached no essential duty and no prejudice can be established by the lack of objection to the jury instruction. Therefore, we affirm.

**I. Factual and Procedural Background**

On April 6, 2012, Dean was at a mall in Davenport. In one of the stores, he and his group of friends saw people “they had problems with.” Dean and his friends then walked to the food court, where they observed two of the other group walking toward the food court’s south doors. A fight ensued, which was captured on security video. During the fight, a chair was thrown at Dean, and it struck him in the face.

Dean, his friends, and the other group ran outside toward their cars. Witnesses testified Dean appeared to be chasing members of the other group. Dean then ran to the car in which he came to the mall and retrieved a black revolver. A disinterested eyewitness testified she saw Dean pull out “a short-barreled revolver—black” and fire it at the group running away, down the parking

lot's aisle. One of the alleged victims testified he heard gun shots coming from behind him. Police apprehended Dean approximately four months later. Neither the gun nor any other forensic evidence was obtained.

On June 13, 2012, the State charged Dean with intimidation with a dangerous weapon with intent, in violation of Iowa Code section 708.6 (2011), and felon in possession of a firearm, in violation of Iowa Code section 724.26(1). The intimidation-with-intent charge was tried before a jury, and the felon-in-possession charge was tried before the judge. Dean stipulated to the fact he had been previously adjudicated delinquent for committing a class "D" felony. He was found guilty on both counts and sentenced on October 11, 2012, to a term not to exceed ten years on the intimidation count and five years on the felon in possession count, to be served concurrently. Dean now appeals.

## **II. Sufficiency of the Evidence**

Dean argues there is not sufficient evidence to support either guilty verdict. He claims that, because there was no physical evidence he fired a gun, as opposed to a starter's pistol or a non-functioning replica, and the eyewitness only testified she saw him fire a short-barreled black revolver, the fact finder must have necessarily speculated as to whether he actually used a "dangerous weapon" or firearm. Consequently, a rational trier of fact could not find him guilty beyond a reasonable doubt under either count.

We review challenges to the sufficiency of the evidence for correction of errors at law. *State v. Quinn*, 691 N.W.2d 403, 407 (Iowa 2005). We view the record in the light most favorable to the non-moving party—the State—and make all legitimate inferences and presumptions that may be reasonably deduced from

the evidence. *Id.* If substantial evidence supports the verdict, we will affirm. *Id.* Evidence is substantial if it would convince a reasonable trier of fact the defendant is guilty beyond a reasonable doubt. *Id.*

Circumstantial evidence is equally as probative as direct evidence. *State v. O'Connell*, 275 N.W.2d 197, 205 (Iowa 1979). However, “[i]nferences drawn from the evidence must raise a fair inference of guilt on each essential element.” *State v. Truesdell*, 679 N.W.2d 611, 618 (Iowa 2004). Thus, the inference must do more than create speculation or conjecture, and evidence that allows two or more inferences to be drawn, without more, is insufficient to support guilt. *Id.* at 618–19.

To be convicted of intimidation with a dangerous weapon with intent, the State must prove beyond a reasonable doubt Dean:

[W]ith the intent to injure or provoke fear or anger in another, shoots, throws, launches, or discharges a dangerous weapon . . . within an assembly of people, and thereby places the occupants or people in reasonable apprehension of serious injury or threatens to commit such an act under circumstances raising a reasonable expectation that the threat will be carried out.

Iowa Code § 708.6.

Dangerous weapon is defined 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 . . . .

Iowa Code § 702.7.

We further note that “as a matter of law pistols and revolvers are dangerous weapons.” *State v. Ashland*, 145 N.W.2d 910, 911 (Iowa 1966); see also *State v. Dallen*, 452 N.W.2d 398, 399 (Iowa 1990) (holding a .177-caliber CO<sub>2</sub> revolver that could fire either pellets or BBs was a dangerous weapon); *State v. Hemminger*, 308 N.W.2d 17, 20 (Iowa 1981) (holding that, to qualify as a dangerous weapon, the weapon must “be capable of inflicting death upon a human being when used in the manner for which it was designed.” (internal citations omitted)).

To be guilty of the crime of felon in possession of a firearm, the State must prove Dean is a felon and “knowingly has under [his] dominion and control or possession, receives, or transports or causes to be transported a firearm or offensive weapon.” Iowa Code § 724.26(1). However, a revolver is not considered an offensive weapon, so the State must prove Dean possessed a firearm. See *id.* § 724.1(3). A firearm is defined as “a small arms weapon from which a projectile is fired by gunpowder.” *State v. Lawr*, 263 N.W.2d 747, 749 (Iowa 1978) (holding a starter’s pistol did not qualify as an offensive weapon or firearm); see also *State v. Jespersen*, 360 N.W.2d 804, 807 n.1 (Iowa 1985) (holding the definition of “dangerous weapon” is “substantially identical” to the definition set forth in *Lawr*).

Upon our review of the record, we find sufficient evidence to sustain both guilty verdicts. Though Dean relies on *State v. Brubaker*, 805 N.W.2d 164 (Iowa 2011), to support his argument, we do not find the cases to be factually similar. The *Brubaker* court held the evidence was insufficient to support a conviction for

possession of a controlled substance because it was not clear the pills were actually a controlled substance due to their similarity in appearance to over-the-counter pills, in addition to the lack of testimony and other evidence as to what the pills actually were. 805 N.W.2d at 172. However, *Brubaker* is distinguishable because there is circumstantial and contextual evidence Dean possessed a functional gun. The fact he engaged in a fight with people he “had some trouble with,” chased them out of the mall, and ran to his car to grab and then fire a “black revolver,” all indicate he possessed a working firearm. As the district court noted, “the context does not support [Dean’s] theory [he could have possessed a starter’s pistol or replica], nor does common sense.”

Furthermore, an eyewitness testified she saw Dean “pull out a gun” from the passenger side of a vehicle, “aim it toward the children that were running, and ‘pop pop’ twice.” She described the gun as “a short-barreled revolver—black” and identified the type of gun she believed it to be using a police document with eight pictures of pistols on it. Additionally, one of the victims testified he heard gun shots fired behind him, that is, from Dean’s location. Combined with the context, this evidence is sufficient for a reasonable trier of fact to conclude, beyond a reasonable doubt, that Dean possessed and fired a firearm, as delineated in the Iowa Code. Therefore, we find sufficient evidence to support the guilty verdicts, and we affirm Dean’s convictions.

### **III. Ineffective Assistance of Counsel**

Dean next asserts trial counsel was ineffective on several grounds. First, counsel failed to argue the State’s evidence was insufficient to prove Dean fired at “an assembly of people” or “into or through” a group of people, as required by

Iowa Code section 708.6. He also claims counsel failed to object to the definition of “within” in jury instruction number sixteen.

A defendant may raise an ineffective-assistance claim on direct appeal if the record is adequate to address the claim. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006). We may either decide the record is adequate and issue a ruling on the merits, or we may choose to preserve the claim for postconviction proceedings. *Id.* We review ineffective-assistance claims de novo. *Id.* To succeed on this claim, the defendant must show: first, that counsel breached an essential duty, and second, that he was prejudiced by counsel’s failure. *Id.*

As an initial matter, Dean cannot establish prejudice with regard to his claim counsel was ineffective for failing to object to the jury instruction defining “within.” The jury instruction stated the jury must find Dean “discharged a gun within an assembly of people,” and defined within as “into or through.” At the time of trial, Iowa law used this definition for within. *State v. Bush*, 518 N.W.2d 778, 780 (Iowa 1994) (citing Black’s Law Dictionary and holding “‘within’ means ‘into’ or ‘through’”); see also Iowa Crim. Jury Instruction 800.14.2. Because this claim is meritless, Dean was not prejudiced by, and counsel was not ineffective for failing to object to, this definition.

We further find Dean cannot prevail on his claim counsel was ineffective for failing to argue the State’s evidence was insufficient to prove he fired into or through an assembly of people. When a claim of insufficient evidence is raised, we view the evidence in the light most favorable to the State. *Quinn*, 691 N.W.2d at 407. Here, Akeem Smith testified he and his “people,” Anthony, Antwunette, and Jamal, ran out of the mall to Jamal’s car, after which he heard shots fired.

He testified he heard the shots fire from behind him. The disinterested eyewitness also testified she saw Dean aim and fire his revolver down the parking lot aisle toward Smith and his friends. Detectives then testified the fact there was no physical evidence could still be consistent with a bullet having traveled through this group.

Given this testimony, a reasonable jury could conclude Dean fired his gun “into or through” an “assembly of people,” that is, a bullet traveled in the direction in which Dean fired toward more than one person. *See Bush*, 518 N.W.2d at 780 (holding “within an assembly of people” is a phrase having “its common and ordinary meaning”). Consequently, viewing the evidence in the light most favorable to the State, the claim the State’s evidence was insufficient to prove Dean fired into or through an assembly of people is without merit. Therefore, counsel was not ineffective for failing to raise a sufficiency of the evidence argument on these grounds.

Having considered all of Dean’s claims, we affirm his convictions.

**AFFIRMED.**