

IN THE COURT OF APPEALS OF IOWA

No. 6-744 / 06-0063
Filed November 16, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DESHONE T. OUTLAW,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Jon Fister,
Judge.

Deshone T. Outlaw appeals his conviction for willful injury, reckless use of
a firearm, intimidation with a dangerous weapon, and going armed with intent.

AFFIRMED.

Linda Del Gallo, State Appellate Defender, and David Adams, Assistant
Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas Tauber, Assistant Attorney
General, Thomas J. Ferguson, County Attorney, and Joel Dalrymple, Assistant
County Attorney, for appellee.

Considered by Huitink, P.J., and Mahan and Zimmer, JJ.

HUITINK, P.J.

I. Background Facts & Proceedings.

On August 23, 2005, the State charged Deshone T. Outlaw with willful injury in violation of Iowa Code section 708.4 (2005), reckless use of a firearm in violation of section 724.30(1), intimidation with a dangerous weapon in violation of section 708.6, going armed with intent in violation of section 708.8, and possession of a firearm by a felon in violation of section 724.26. The charges were based on an altercation involving Outlaw and Chris Passenheim outside of a Waterloo bar on August 12, 2005.

At trial the State's witnesses testified Outlaw confronted Passenheim and one or more passengers in Passenheim's car. Following a brief argument, Passenheim got out of his car and fought with Outlaw. After they were separated by several bystanders, Outlaw pulled a .357 revolver from his pants' pocket and fired twice at Passenheim, striking him once in the buttocks. Passenheim returned to his car. Outlaw followed and pointed the gun at Passenheim's head. Several more shots were fired as Passenheim attempted to take the gun from Outlaw.

Outlaw moved for judgment of acquittal at the close of the State's evidence and again at the close of all of the evidence. Outlaw's attorney argued:

Your Honor, we would make a – at the close of the State's evidence, at this point we would make a motion for judgment of acquittal as to all counts. It is a sufficiency – lack of sufficiency of the evidence argument in this particular case. Also, that the defendant was justified in his actions and that was shown through the evidence that was already presented to the jury. So in any event what we're arguing is, Your Honor, is, is that the witness's statements for the State, Mr. Passenheim, both Andre [Passenheim] and Christopher [Passenheim], and Miss Wright

[another passenger in Passenheim's car] are not credible enough given the fact that they talk about varying distances when the event occurred, varying events as to Andre saying that they – testifying that there had been an argument before; Mr. Chris Passenheim saying that there had not been an argument before, prior to the alleged shooting; that Miss Wright claims that the defendant, before the shooting, went to the northeast corner of the parking lot and then turned around and shot back at them; that Mr. Andre Passenheim said that he was at least 10 feet away when he shot Mr. Passenheim the first time; that Mr. Passenheim also stated that – didn't give a distance as to how far away he was when he was shot except he said that he was running away and that the defendant had been pulled away by other people prior to that and then allegedly brandished this firearm out of his pocket and shot him. And that is completely contrary to the physical evidence of Mr. Marillo from the criminalist laboratory and the DCI saying that these were close contact or weapon to clothes contact shooting in the backside of Mr. Passenheim. To that extent it's completely contrary to the evidence, which is more consistent with the testimony of Officer Lake as to what Mr. Outlaw explained to him when he came in and voluntarily talked with him.

It's a situation where you have the – And to that extent they have a motivation to lie, they're the only three people out of there that – out of all the people in the parking lot that were there, the State has presented no other evidence to that extent, that anyone else saw this but the three of them. They have a motivation to lie because it was their gun and they were covering this up and so they created this fictitious story to cover their own criminal activity. To that extent it's a situation where also given the defendant's testimony through – or the testimony of Officer Lake as to the defendant's statements, he talked about how he was defending himself and how he did not have a gun and that they produced the weapon and that what we would ask the Court to do is to find – and I realize it's still in the light most favorable to the State – but we'd ask the Court to look at the witnesses for the State's testimony, the DNA evidence that the State alleges also is tainted in that they didn't check the blood samples, the explanation as to how – what the second part of the DNA in Exhibit N came from and what it was raises enough of a question that it's not credible enough evidence to believe beyond a reasonable doubt in – given that they're the only three witnesses, the both criminalists' reports can be refuted to the point that they are not believable beyond a reasonable doubt, we would ask the Court to enter judgment of acquittal in all counts.

The trial court denied Outlaw's motion for judgment of acquittal and submitted all counts charged to the jury. The jury returned guilty verdicts on all counts except

possession of a firearm by a felon. The trial court subsequently entered a judgment of conviction and sentence in accordance with the verdicts.

On appeal, Outlaw argues:

I. Defendant-Appellant was denied the effective assistance of counsel by counsel's failure to specifically identify elements of the various offenses for which the state's evidence was insufficient.

II. Standard of Review.

We review the entire record de novo in order to assess both the reasonableness of counsel's conduct and any resulting prejudice. *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001). If an ineffective assistance of counsel claim is raised on direct appeal, and the record is adequate to permit us to assess trial counsel's effectiveness, or the record is sufficient to determine whether prejudice resulted from counsel's alleged unprofessional error, we may decide the ineffectiveness claim on direct appeal. *State v. Allen*, 348 N.W.2d 243, 248 (Iowa 1984). A claim of ineffective assistance of trial counsel based on the failure of counsel to raise a claim of insufficient evidence to support a conviction is a matter that normally can be decided on direct appeal. See *State v. Scalise*, 660 N.W.2d 58, 62 (Iowa 2003).

III. Merits.

Outlaw claims counsel was ineffective for failing to cite specific failures of proof in the State's evidence when arguing Outlaw's motion for judgment of acquittal. Outlaw's claims are limited to his convictions for intimidation with a dangerous weapon and going armed with intent. A defendant receives ineffective assistance of counsel when (1) trial counsel fails in an essential duty and (2) prejudice results. *Strickland v. Washington*, 466 U.S. 668, 687, 104

S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). Outlaw bears the burden of demonstrating ineffective assistance of counsel, and both prongs of the claim must be established by a preponderance of the evidence before relief can be granted. *Ledezma*, 626 N.W.2d at 142. To establish prejudice from an alleged breach, Outlaw must prove “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* If Outlaw fails to meet his burden with respect to either prong, his claim is without merit and will be dismissed. *Id.* at 697, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699.

“A motion for judgment of acquittal is a means for challenging the sufficiency of the evidence to sustain a conviction.” *Allen*, 304 N.W.2d at 206. Resolving conflicts in the evidence, passing upon the credibility of witnesses, and weighing the evidence are issues for the jury and not issues to be resolved by motions for judgments of acquittal. *State v. Hutchinson*, ___ N.W.2d ___, ___ (Iowa 2006). We note that evidence is sufficient to withstand a motion for judgment of acquittal when, viewing the evidence in the light most favorable to the State, “there is substantial evidence in the record to support a finding of the challenged element.” *State v. Reynolds*, 670 N.W.2d 405, 409 (Iowa 2003). In this context, if the record fails to disclose substantial evidence supporting one or both of the challenged convictions, counsel was ineffective, and Outlaw is entitled to relief. If, however, we find substantial evidence supporting both

convictions, Outlaw is not entitled to relief. See *State v. Truesdell*, 679 N.W.2d 611, 616 (Iowa 2004).

To convict Outlaw of intimidation with a dangerous weapon under the theory advanced at trial, the State had to prove he discharged or threatened to discharge a dangerous weapon within an assembly of people. Iowa Code § 708.6. Outlaw argues trial counsel breached an essential duty by failing to challenge the sufficiency of the State's proof of the "within an assembly of people" element.

The phrase "within an assembly of people" means into or through two or more persons at the same place. *State v. Bush*, 518 N.W.2d 778, 780 (Iowa 1994). The trial court instructed the jury to use this definition in determining Outlaw's guilt or innocence of this offense.

Contrary to Outlaw's contention, we find substantial evidence from which the jury could conclude he discharged a dangerous weapon into an assembly of people. As noted earlier, there were several bystanders within ten feet of Outlaw when he fired the gun, wounding Passenheim. The record also indicates that others were in or around Passenheim's vehicle when shots were fired during the subsequent struggle for the gun. Because the record included substantial evidence supporting this element of intimidation with a dangerous weapon, counsel did not breach an essential duty by failing to argue to the contrary. We affirm on this issue.

To convict Outlaw of going armed with intent, the State had to prove Outlaw went armed with a dangerous weapon with the intent to use without justification the weapon against the person of another. Iowa Code § 708.8. The

phrase “going armed” or “goes armed” means the conscious and deliberate keeping of a dangerous weapon on or about the person, available for immediate use. *State v. Alexander*, 322 N.W.2d 71, 72 (Iowa 1982); *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994).

Outlaw argues counsel breached an essential duty by failing to challenge the sufficiency of the evidence supporting his intended use of the weapon. The gist of his argument is that “[t]he spur of the moment use of a weapon at hand cannot support a finding that [Outlaw] went armed with intent to use that weapon.” We disagree.

Contrary to Outlaw’s argument, we find the record contains substantial evidence supporting all of the elements of going armed with intent. The evidence indicates Outlaw was armed with a revolver when he approached Passenheim’s vehicle. There is also evidence indicating he attempted to take the keys from Passenheim’s vehicle, told the occupants of Passenheim’s vehicle they were not going anywhere, and that he tried to open the passenger door where the passenger with whom he argued was seated. Moreover, the record indicates that following the first two shots, Outlaw followed Passenheim back to the vehicle carrying the revolver, pointed the revolver at Passenheim’s head, and several shots were fired during the ensuing struggle for the revolver. Because the record included substantial evidence supporting all of the elements of going armed with intent, trial counsel had no duty to argue to the contrary. We also affirm on this issue.

AFFIRMED.