

IN THE COURT OF APPEALS OF IOWA

No. 6-816 / 05-1549
Filed December 13, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ELDONTE LAMAR NATHANIEL KIRK,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, John A. Nahra,
Judge.

Eldonte Kirk appeals his conviction of two counts of willful injury with serious injury, going armed with intent, and intimidation with a dangerous weapon with intent. **CONDITIONALLY AFFIRMED AND REMANDED.**

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

Thomas J. Miller, Attorney General, Richard Bennett, Assistant Attorney General, William E. Davis, County Attorney, and Jerald Feuerbach, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., Vogel, J., and Brown, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2005).

HUITINK, P.J.

Eldonte Kirk appeals his conviction of two counts of willful injury with serious injury, in violation of Iowa Code section 708.4(1) (2003); going armed with intent, in violation of section 708.8; and intimidation with a dangerous weapon with intent, in violation of section 708.6. We conditionally affirm Kirk's convictions and remand to the trial court for a ruling on Kirk's motion for a new trial.

I. Background Facts and Proceedings.

Kirk was charged with the foregoing offenses after he was implicated in a drive-by shooting in which Laushante Howard was shot in the leg and Anthony Blanks was shot in the hand. Kirk denied any involvement and entered not guilty pleas to all counts charged in the trial information.

At the close of the State's evidence, and at the close of all the evidence at trial, Kirk's trial counsel moved for a judgment of acquittal, citing the insufficiency of the evidence identifying Kirk as the person who shot Howard and Blanks. The trial court denied Kirk's motions for judgment of acquittal and submitted all counts charged to the jury. The jury returned a guilty verdict on each count charged. Kirk's motion for a new trial was denied. The trial judge entered a judgment of conviction on each count and sentenced Kirk to an indeterminate term not to exceed twenty years.

On appeal, Kirk argues as follows:

- I. The district court erred in finding sufficient evidence to support defendant-appellant's convictions.
- II. The district court erred in denying defendant-appellant's motion for a new trial.

- III. 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. Judgment of Acquittal.

"A motion for judgment of acquittal is a means for challenging the sufficiency of the evidence to sustain a conviction." *State v. Allen*, 304 N.W.2d 203, 206 (Iowa 1981). 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).

To convict Kirk of any offense charged, the State was required to prove he was the person who perpetrated those offenses. Contrary to Kirk's claims, we find the record contains substantial evidence supporting the identity element of each offense. Most notably, Perry Slater testified that Kirk told him he shot at a group of kids who Kirk believed had shot at him earlier on the day the shootings occurred. In addition to other testimony linking Kirk to the car involved in the shootings, Kirk's fingerprints were found in the car. We accordingly affirm on this issue.

III. Ineffective Assistance of Counsel.

We review ineffective assistance of counsel claims de novo. *State v. Martin*, 704 N.W.2d 665, 668 (Iowa 2005). A defendant receives ineffective assistance of counsel when (1) trial counsel fails in an essential duty and (2) prejudice results. *Strickland v. Washington*, 406 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). Although we generally preserve ineffective assistance of counsel claims for postconviction relief, a claim based on counsel's failure to challenge the sufficiency of the evidence supporting a conviction can ordinarily be resolved on direct appeal. See *State v. Scalise*, 660 N.W.2d 58, 62 (Iowa 2003). If the record in this case fails to reveal substantial evidence to support the convictions, counsel was ineffective for failing to properly raise the issue and prejudice resulted. See, e.g., *State v. Truesdell*, 679 N.W.2d 611, 616 (Iowa 2004). On the other hand, if the record reveals substantial evidence, counsel's failure to challenge the sufficiency of the evidence could not have been prejudicial. *Id.*

Kirk claims trial counsel was ineffective because counsel's motion for judgment of acquittal failed to challenge the sufficiency of the evidence supporting the serious injury element of the willful injury counts. To convict Kirk of willful injury causing serious injury, the State had to prove Kirk committed an act intended to cause serious injury to another and he caused serious injury to another. Iowa Code § 708.4(1). The definition of serious injury includes a bodily injury that causes a protracted loss or impairment of the function of any bodily member or organ. *Id.* § 702.18(1). Bodily injury means "physical pain, illness, or

any impairment of physical condition.” *State v. Gordon*, 560 N.W.2d 4, 6 (Iowa 1997). Protracted means “to draw out or lengthen in time or space.” *State v. Welton*, 300 N.W.2d 157, 160 (Iowa 1981). Not every harm is an impairment within the meaning of section 702.18(1). *State v. McKee*, 312 N.W.2d 907, 913 (Iowa 1981). “[A] harm which substantially interferes with an organ’s function meets the statutory test.” *Id.* “An impairment, according to common usage, means any deviation from normal health.” *Id.*

The record indicates Howard was shot in the leg, that he was hospitalized for a day and a half, and a bullet remains lodged in his leg. The record also indicates he was treated with medication and was ordered to stay off his leg for approximately one week. Although he denied any pain or other related disability, we nevertheless conclude the jury could find Howard’s injuries were substantial enough to be an impairment as that term is used in the definition of serious injury. We similarly conclude the jury could find Blanks suffered a serious injury as a result of his gun shot wound. The record indicates a bullet passed through his hand, an injury for which he was treated and released at a local hospital. Moreover, Blanks testified that although his injury was not painful, he continues to experience numbness in one of his fingers. Because we find substantial evidence supporting submission of both willful injury counts to the jury, Kirk has failed to establish the prejudice prong of his ineffective assistance of counsel claim. We accordingly affirm on this issue.

Kirk also claims counsel was ineffective for failing to challenge the sufficiency of the evidence supporting the going-armed-with-intent count. We disagree.

The elements of going armed with intent are that (1) a person was armed with a dangerous weapon (2) with the intent to use the weapon against another person without justification. Iowa Code § 708.8 (2003). The term “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).

We find the record includes substantial evidence supporting each element of the going-armed-with-intent charge. As noted earlier, witness testimony and fingerprint evidence identified Kirk as the person who was armed with a handgun while riding in the car from which the shots that struck Howard and Blanks were fired. We also note Kirk’s conversation with Perry Slater in which Kirk admitted that he got into it with the “kids” and that he intended to retaliate by shooting at the group of people who he claimed had earlier shot at him. Because substantial evidence supports Kirk’s conviction of going armed with intent, he cannot establish the prejudice prong of his ineffective assistance of counsel claim. We therefore affirm on this issue.

IV. Motion for New Trial.

Rulings on motions for a new trial are reviewed for abuse of discretion. *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998). Trial courts have broad discretion in deciding motions for new trial. *State v. Atley*, 564 N.W.2d 817, 821

(Iowa 1997). A trial court may grant a new trial “[w]hen the verdict is contrary to law or evidence.” Iowa R. Crim. P. 2.24(2)(b)(6). “Contrary to the evidence” means “contrary to the weight of the evidence.” *Ellis*, 578 N.W.2d at 659. Weight of the evidence refers to a determination by the trier of fact “that a greater amount of credible evidence supports one side of an issue or cause than the other.” *Id.* at 658 (quoting *Tibbs v. Florida*, 457 U.S. 31, 37-38, 102 S. Ct. 2211, 2216, 72 L. Ed. 2d 652, 658 (1982)).

In a combined motion in arrest of judgment and motion for new trial, Kirk argued that the jury’s verdicts were contrary to the evidence. He specifically challenged the jury’s findings that he was the person who shot Howard and Blanks and that both were seriously injured. Based on our review of the resulting ruling, we are unable to determine whether the trial court applied the contrary-to-the-weight-of-the-evidence standard to all or part of Kirk’s motion. We accordingly reverse the trial court’s ruling on Kirk’s motion for a new trial and remand that issue to the trial court for a ruling based on application of the correct legal standard. See *Ellis*, 578 N.W.2d at 659.

We conditionally affirm Kirk’s convictions and remand to the trial court for a ruling on Kirk’s motion for a new trial.

CONDITIONALLY AFFIRMED AND REMANDED.