IN THE COURT OF APPEALS OF IOWA

No. 8-208 / 06-1408
Filed April 30, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BRYAN ST. PATRICK GALLIMORE,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Michael D. Huppert, Judge.

Defendant appeals his convictions for burglary in the first degree and stalking. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Erin M. Carr, Des Moines, for appellant.

Bryan St. Patrick Gallimore, Anamosa, pro se.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, John P. Sarcone, County Attorney, and Mark Sandon, Assistant County Attorney, for appellee.

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

SACKETT, C.J.

Defendant, Bryan St. Patrick Gallimore, appeals his convictions for burglary in the first degree, in violation of Iowa Code sections 713.1 (2005) and 713.3(1)(b), and stalking, in violation of section 708.11(3)(b). Defendant contends the State provided insufficient evidence to support these convictions and that he received ineffective assistance of counsel. We affirm in part, reverse in part, and remand.

I. BACKGROUND.

The defendant had a romantic relationship with Denetra Seymour from December 2002 until the summer of 2005. On August 25, 2005, Seymour obtained a Chapter 236 protective order against the defendant. The defendant violated the protective order twice. First, on September 17, 2005, Seymore noticed the defendant driving past her mobile home and called the police. The defendant was located, arrested, and found to be in violation of the protective order. Then, in the early morning hours of September 24, Seymour saw the defendant standing by her vehicle outside of her home and called the police. The police noticed that the gas tank lid was open but no damage was done to the vehicle. The defendant was located, arrested, and apparently found in violation of the protective order after this incident also. Despite the protective order, the parties called each other numerous times in October 2005.

On November 13, 2005, Seymour told the defendant if he contacted her anymore she would call the police. The following evening, on November 14, 2005, Seymour arrived at home around 10 p.m. and heard her dog barking loudly and saw a porch light was out. Upon inspection, she determined the bulb

had been unscrewed. When inside, Seymour discovered no water would come out of the sink faucets. Seymour called the manager of the trailer park. The manager came and crawled under the trailer to turn the water valve back on. Seymour told the manager she suspected the defendant may have turned the water off. Seymour then called the police.

As an officer was talking with Seymour and the manager, Seymour noticed the water had stopped working again. The manager went back under the trailer, turned the valve on, and rushed out, believing she saw someone moving under the trailer. The officer called for assistance and the police found the defendant under the trailer. They removed him and he was arrested. Under the trailer the police recovered a nylon bag, a pocket knife Seymour identified as the defendant's, a .177 caliber BB pistol, blue plastic twine, duct tape, gloves, and a spray bottle of herbicide.

The defendant was charged with burglary in the first degree, stalking as a Class D felony, going armed with intent, and harassment in the first degree. After a bench trial, the court found defendant guilty of burglary in the first degree, stalking, and harassment in the second degree. The defendant was found not guilty of going armed with intent. The defendant appeals his convictions of burglary and stalking and claims he received ineffective assistance of counsel in several respects.

II. STANDARD OF REVIEW.

"The standard of review for insufficient-evidence claims is for correction of errors of law." *State v. Enderle*, 745 N.W.2d 438, 443 (Iowa 2007). We uphold the guilty verdict if it is supported by substantial evidence. *Id.*

"Substantial evidence is evidence that could convince a rational trier of fact that a defendant is guilty beyond a reasonable doubt." *Id.* "[W]e view the evidence in the light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the evidence in the record."

Ineffective assistance of counsel claims implicate rights guaranteed by the Sixth Amendment of the United States Constitution and article 1, section 10 of the Iowa Constitution. *State v. Pace*, 602 N.W.2d 764, 774 (Iowa 1999). For these claims, we review the totality of the circumstances de novo. *State v. Lane*, 743 N.W.2d 178, 181 (Iowa 2007). These claims raised on direct appeal can be decided if the record is sufficient or, alternatively, the claim may be preserved for postconviction proceedings. Iowa Code § 814.7(3); *State v. Parker*, __ N.W.2d __, ___ (Iowa 2008).

III. BURGLARY IN THE FIRST DEGREE.

Defendant first contends there was insufficient evidence to convict him of burglary. Iowa Code section 713.1 defines burglary:

> Any person, having the intent to commit a felony, assault or theft therein, who, having no right, license or privilege to do so, enters an occupied structure, such occupied structure not being open to the public, or who remains therein after it is closed to the public or after the person's right, license or privilege to be there has expired, or any person having such intent who breaks an occupied structure, commits burglary.

The defendant claims he cannot be convicted of burglary because the area underneath the trailer is not an "occupied structure." Iowa Code section 702.12 defines "occupied structure" as:

> any building, structure, appurtenances to buildings and structures, land, water or air vehicle, or similar place adapted for overnight

> accommodation of persons, or occupied by persons for the purpose of carrying on business or other activity therein, or for the storage or safekeeping of anything of value. Such a structure is an "occupied structure" whether or not a person is actually present. However, for purposes of chapter 713, a box, chest, safe, changer, or other object or device which is adapted or used for the deposit or storage of anything of value but which is too small or not designed to allow a person to physically enter or occupy it is not an "occupied structure".

There are two prongs that must be satisfied to meet the definition of occupied structure. *Pace*, 602 N.W.2d at 769. "The first describes the type of place that can be the subject of burglary, and the second considers its purpose or use." *Id.*

Under the first prong, the types of places that can be burglarized under the statute include buildings, structures, appurtenances to structures, some vehicles, and similar places. Iowa Code § 702.12. The district court found the area under the trailer was an "appurtenance to the trailer." In *State v. Pace*, 602 N.W.2d 764, 770 (Iowa 1999), the Supreme Court advised "appurtenance" under the first prong is to be interpreted broadly. "A thing is an appurtenance when it stands in relation of an incident to a principal and is necessarily connected with the use and enjoyment of the latter." *Pace*, 602 N.W.2d at 770 (citations omitted).

The district court found the area under the trailer was essentially a crawlspace and akin to other areas found to be appurtenances, such as a driveway[1], stoop, or fenced enclosure. Defendant asserts the area beneath the trailer is not similar to other appurtenances and only exists because the trailer

[1] While determining in *State v. Baker*, 560 N.W.2d 10, 13 (Iowa 1997) that a driveway was an occupied structure, the court noted in *State v. Pace*, 602 N.W.2d 764, 772 (Iowa 1999) that it was not prepared to extend *Baker* beyond the facts of that case.

sits on its base. We find no error in the court's finding that the first prong was met. The space was enclosed by skirting which attached to the mobile home. This area is incident to the mobile home and closely associated with the home. As the defendant points out, the space exists solely because of the placement of the trailer.

The second prong of the definition of occupied structure considers the purpose or use of the area in question. *Id.* at 769. There are several alternative ways to meet this prong under the statute. The use or purpose requirement is met if the area is "[1] adapted for overnight accommodation of persons, or [2] occupied by persons for the purpose of carrying on business or other activity therein, or [3] for the storage or safekeeping of anything of value." Iowa Code § 702.12. The district court found the area beneath the mobile home satisfied the third alternative and therefore, was an occupied structure for purposes of the burglary statute. On appeal the defendant contends no evidence was presented at trial to show that any property of value was stored underneath the trailer.

We find the court did not err in concluding the space was "adapted . . . for the storage or safekeeping of anything of value" under section 702.12. One officer testified that components to the trailer were stored in this area. Specifically, he testified a wheel and tongue used to move the trailer were stored in this space. The officer testified that when the trailer is parked the tongue is disconnected and stored under the trailer. These items are of value to mobile home owners since they would be needed to relocate the mobile home.

Therefore, the space was used to store items of value and is an "occupied structure" under section 702.12.

The defendant also contends he cannot be convicted of burglary in the first degree because the State failed to prove he had "possession of a dangerous weapon." In general, burglary in the first degree occurs if, while perpetrating the crime, the person possesses an explosive device or dangerous weapon, or inflicts bodily injury or commits sexual abuse on another. Iowa Code § 713.3. The trial court found the defendant committed burglary in the first degree by entering the occupied structure while in possession of a pocket knife. On appeal, the State concedes it failed to prove the pocket knife seized from the scene is a dangerous weapon.[2] We therefore remand the case to the district court to enter judgment on the lesser included offense of burglary in the second degree. *See Pace*, 602 N.W.2d at 774; *State v. Lampman*, 342 N.W.2d 77, 81 (Iowa Ct. App. 1983) (remanding for entry of judgment of lesser offense when sufficient evidence supported a finding of burglary but there was insufficient evidence to support a conviction for burglary in the first degree).

IV. STALKING.

Defendant challenges his conviction for stalking. He claims the State provided insufficient proof to support this conviction when the trial information alleged the stalking occurred in November 2005 yet the trial court determined

[2] It notes the pocket knife blade seized was between four and five inches long and the statutory definition of a dangerous weapon in Iowa Code section 702.7 includes knife blades exceeding five inches. It also concedes absent proof the defendant used the knife in a threatening manner, a pocket knife is not considered a dangerous weapon under our prior case law. *See State v. State v. Hill*, 258 Iowa 932, 936, 140 N.W.2d 731, 733 (1966) (finding a pocket knife is not a dangerous weapon unless one uses or intends to use the knife as a weapon).

events from September 2005 showed a "course of conduct" to support a conviction for stalking.

Iowa Code section 708.11 outlines the elements of stalking and requires, among other things, proof the defendant "engage[d] in a course of conduct directed at a specific person that would cause a reasonable person to fear bodily injury to, or the death of, that specific person or a member of the specific person's immediate family." Iowa Code § 708.11(2)(a). A "course of conduct" is defined as "repeatedly maintaining a visual or physical proximity to a person without legitimate purpose or repeatedly conveying oral or written threats, threats implied by conduct, or a combination thereof, directed at or toward a person." Iowa Code § 708.11(1)(b). Repeatedly "means on two or more occasions." Iowa Code § 708.11(1)(d). Defendant's first argument is that the State was required to prove the "course of conduct" occurred within the time period listed in the trial information.

Defendant's argument is without merit. The rules of criminal procedure provide that indictment rules, including rules addressing an indictment's substance, are applicable when construing a trial information. Iowa R. Crim. P. 2.5(5). The rules provide an indictment shall include a brief statement of the time of the offense if known "where the time . . . is a material ingredient of the offense." Iowa R. Crim. P. 2.4(7)(c). The well-established rule is

> [t]he date or dates fixed in the indictment for the commission of a crime are not material, and a conviction can be returned upon any date within the limitation statute, *if there is no fatal variance between the indictment allegations and the proof offered*.

State v. Bell, 223 N.W.2d 181, 184 (Iowa 1974) (citing *State v. Hardesty*, 261 Iowa 382, 393, 153 N.W.2d 464, 471 (1967)). The defendant fails to establish

any fatal variance between the allegations and the proof offered at trial. The minutes of testimony attached to the trial information stated that Seymour would testify "that the defendant's actions since August of 2005 until November 14, 2005, did place her in fear of injury or death." The minutes also stated that the county clerk of court would testify about the entry of the protective orders. The trial information and minutes of testimony provided defendant with notice of the evidence to be presented against him and there is no indication the defendant's preparation for trial was hindered. *See id.* at 185 (finding defendant given adequate notice and no "fatal variance" when indictment listed a specific date assault occurred but minutes of testimony and proof at trial showed assaults occurring a month before the date listed in the indictment); *see also State v. Washington*, 356 N.W.2d 192, 196 (Iowa 1984) (finding "no fatal variance between a trial information charging defendant with possession of stolen property 'on or about' January 5, 1983, and evidence tending to show his possession of stolen property on that date and on earlier dates as well").

In this case the State had to prove the defendant engaged in a "course of conduct" directed at Seymour but it did not need to establish the specific dates the defendant threatened or made unlawful contact with the defendant. The trial court was not bound by the trial information in determining whether the defendant engaged in a "course of conduct" under the stalking statute. We also find substantial evidence supports the court's finding that the defendant's actions in September 2005 was part of a "course of conduct" directed at Seymour.

V. INEFFECTIVE ASSISTANCE OF COUNSEL.

The defendant last claims he received ineffective assistance of trial counsel. He contends his trial counsel was ineffective in (1) failing to fully investigate the legal definitions of "occupied structure" and "dangerous weapon," (2) failing to file a motion in limine or object to prior bad acts evidence, and (3) failing to present evidence of Seymour's alleged prior false accusations against defendant.

We generally do not decide ineffective-assistance-of-counsel claims on direct appeal because we prefer to give trial counsel an opportunity to respond to the claims in a postconviction proceeding. *State v. Tate*, 710 N.W.2d 237, 240 (Iowa 2006). To succeed in a claim of ineffective assistance of counsel, the defendant must prove: (1) counsel failed to perform an essential duty; and (2) prejudice resulted. *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984)). "[I]f the claim lacks the necessary prejudice, we can decide the case on the prejudice prong of the test without deciding whether the attorney performed deficiently." *Id.* at 196 (citing *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001)).

As for the defendant's first claim, given our resolution of this issue in part III of the opinion, we find the defendant has suffered no prejudice. The defendant requests we preserve the remaining claims for postconviction relief proceedings because the record is not adequate to resolve the issues. We agree the record needs further development on these claims and preserve them for consideration in a postconviction relief action.

We affirm in part, reverse in part, and remand for entry of a judgment consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.