IN THE COURT OF APPEALS OF IOWA

No. 2-1051 / 11-0354
Filed January 24, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BRYAN KEITH TROUPE,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Robert A. Hutchison, Judge.

Defendant appeals his conviction for robbery in the first degree. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and David Arthur Adams, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, John P. Sarcone, County Attorney, and Michael Hunter, Assistant County Attorney, for appellee.

Considered by Potterfield, P.J., Danilson, J., and Mahan, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2013).

MAHAN, S.J.

I. Background Facts & Proceedings.

In the afternoon on August 15, 2010, two teenagers, Jennifer Jensen and Morgan Chicchelly, were working at a Dairy Queen in Windsor Heights, Iowa. Chicchelly noticed a man standing outside staring into the store. A little later she again saw him looking into the store. He then sat down on a bench outside the door. The man was wearing a striped shirt. After Chicchelly finished helping some customers she went into the back room as part of her duties.

The man entered the store when no other customers were present, and Jensen helped him at the counter. He told Jensen, "Open the register," but due to shock she did not respond. He stated again, "Open the register." Jensen saw he had "a bigger knife" he was waving around. He stated, "I'm not playing. Open the register." Jensen opened the cash register, and the man grabbed about $200 to $300 then ran out of the store. Jensen noted he was wearing, "a short-sleeved, button-up striped shirt with red and green and tan stripes."

Jensen called out to Chicchelly, who called 911. Police officers arrived a few minutes later. They were able to retrieve surveillance video from the Dairy Queen, and a picture of the robber from the surveillance video was broadcast on the local news that evening. David Jorgensen recognized the robber from a tattoo on his arm and the shirt he was wearing. Jorgensen called Crime Stoppers and identified the man as Bryan Troupe.

Police officers assembled a photographic array of six photographs to show Jensen. Jensen identified the picture of Troupe, stating she was 100% sure of the identification. Officers then went to Troupe's home. Hanging on a doorknob

in the kitchen was a shirt very similar to the shirt seen in the surveillance video. Additionally, Troupe had a tattoo on his arm like that seen in the video.

Troupe was charged with first-degree robbery, in violation of Iowa Code sections 711.1 and 711.2 (2009). Evidence was presented during the jury trial as outlined above. Both Jensen and Chicchelly identified Troupe in the courtroom as the person they had seen at the Dairy Queen that day. The jury found Troupe guilty of first-degree robbery. He was sentenced to a term of imprisonment not to exceed twenty-five years. Troupe appeals, claiming he received ineffective assistance of counsel.

II. Standard of Review.

We review claims of ineffective assistance of counsel de novo. *Ennenga v. State*, 812 N.W.2d 696, 701 (Iowa 2012). To establish a claim of ineffective assistance of counsel, a defendant must show (1) the attorney failed to perform an essential duty and (2) prejudice resulted to the extent it denied applicant a fair trial. *State v. Carroll*, 767 N.W.2d 638, 641 (Iowa 2008). "In determining whether an attorney failed in performance of an essential duty, we avoid second-guessing reasonable trial strategy." *Everett v. State*, 789 N.W.2d 151, 158 (Iowa 2010). In order to show prejudice, a defendant must show that, but for counsel's breach of duty, the result of the proceeding would have been different. *State v. Brubaker*, 805 N.W.2d 164, 174 (Iowa 2011).

III. Ineffective Assistance.

A. Troupe was charged with robbery "while armed with a dangerous weapon, to wit: a knife." *See* Iowa Code § 711.2 (providing one alternative means of committing first-degree robbery is robbery while "armed with a

dangerous weapon"). The term "dangerous weapon" is defined in section 702.7 as follows:

> [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, ... 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.

The statute also sets forth a list of items that are considered to be dangerous weapons per se. Iowa Code § 702.7.

Troupe claims he received ineffective assistance because defense counsel did not argue in the motion for judgment of acquittal that the State had failed to show he had been armed with a dangerous weapon during the robbery. He claims there is insufficient evidence the knife was capable of inflicting death upon a person.

A motion for judgment of acquittal will be denied if there is substantial evidence in the record to support the charges. *State v. Schooley*, 804 N.W.2d 105, 106 (Iowa Ct. App. 2011). "Evidence is substantial if that would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt." *State v. Quinn*, 691 N.W.2d 403, 407 (Iowa 2005). We consider all the evidence in the record, not just the evidence supporting guilt, but view the evidence in the light most favorable to the State. *State v. Carter*, 696 N.W.2d 31, 36 (Iowa 2005).

Under section 702.7, there are three ways to show a device is a dangerous weapon. *State v. Tusing*, 344 N.W.2d 253, 255 (Iowa 1984). First, there are those weapons which are specifically listed in the statute. *State v.*

Ortiz, 789 N.W.2d 761, 765-66 (Iowa 2010). Second, a device is a dangerous weapon, regardless of its use or intended use, if it is designed to inflict death or injury and actually capable of causing death to a human being. *Tusing*, 344 N.W.2d at 255; *State v. Mitchell*, 371 N.W.2d 432, 433 (Iowa Ct. App. 1985). Third, a device is a dangerous weapon if it is used in a manner to show an intent to inflict death or serious injury, and it is capable of inflicting death upon a human being. *Ortiz*, 789 N.W.2d at 767; *Tusing*, 344 N.W.2d at 255. This case does not involve the first alternative, and the jurors were instructed on the second and third alternatives.

We conclude there is substantial evidence in the record to support a finding the knife was a dangerous weapon under the second or third alternative. Jensen testified the knife "was a bigger knife. It wasn't, like, a butter knife." Troupe told Jensen, "I'm not playing," and he waved the knife around. While the knife itself was not recovered, the jurors were able to see Troupe with the knife in the surveillance video. They were able to observe the size of the knife and Troupe's use of it in assessing whether it was a dangerous weapon. It was a question of fact for the jury to determine whether the knife was a dangerous weapon. *See Tusing*, 344 N.W.2d at 254.

We conclude Troupe has not shown he received ineffective assistance due to counsel's failure to specifically raise in a motion for judgment of acquittal a claim the State had not presented substantial evidence he had a dangerous weapon, because such an argument would have been unsuccessful. *See State v. Griffin*, 691 N.W.2d 734, 737 (Iowa 2005) (noting counsel has no duty to raise an issue that has no merit).

B. Troupe claims he received ineffective assistance because defense counsel did not obtain an expert witness to testify on the issue of eyewitness identification. He asserts the result of the trial might have been different if an expert had testified about the dangers of misidentification.

On our de novo review, we determine Troupe has not shown he was prejudiced by counsel's conduct. *See State v. Ledezma*, 626 N.W.2d 134, 142 (Iowa 2001) (noting we may first consider the prejudice prong of a claim of ineffective assistance of counsel). There is ample evidence in the record to show Troupe was the person who robbed the Dairy Queen on August 15, 2010. We do not find it likely the result of the trial would have been different even if an expert had testified.

Jensen picked Troupe's picture out of a photographic array, stating she was 100% sure of her identification. Jensen also identified Troupe in the courtroom. Chicchelly identified Troupe in the courtroom, stating she was almost 100% sure he was the person she saw looking into the store that day. Jorgensen identified Troupe from the picture shown on the news, stating he recognized "[h]is build, the height, the forehead. You could see the tattoo on the right arm, clothing which is similar to what he wore at work." An officer testified about the shirt found hanging in Troupe's kitchen, which had the same striped pattern as the shirt in the surveillance video. Another officer testified Troupe had a tattoo on his left arm of a cat or panther similar to that seen on the surveillance video. Additionally, the jury was able to see the robbery from the surveillance video and to observe Troupe in the courtroom to determine for themselves whether he was the same person who committed the robbery.

We conclude Troupe has not shown he received ineffective assistance of counsel. We affirm his conviction for first-degree robbery.

AFFIRMED.