IN THE COURT OF APPEALS OF IOWA

No. 2-464 / 11-1272
Filed April 24, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TOMMY GINES JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Douglas F. Staskal, Judge.

Tommy Gines appeals from the conviction and sentences entered after his guilty pleas to three counts of intimidation with a dangerous weapon. He further asserts a claim of ineffective assistance of counsel. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Dennis Hendrickson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, John P. Sarcone, County Attorney, and James Ward, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Doyle and Danilson, JJ.

DANILSON, J.

Tommy Gines appeals from the conviction and sentences entered after his guilty pleas to three counts of intimidation with a dangerous weapon. He asserts the charges should have merged and that the charges are not "separate offenses" for purposes of consecutive sentencing. Finally, Gines asserts that his counsel failed in an essential duty by allowing him to plead guilty to three counts of intimidation without a factual basis to support three separate charges. Pursuant to *State v. Velez*, ___ N.W.2d ___, (2013 WL 1497308) (Iowa 2013), we find the offense of intimidation with a dangerous weapon was completed when a shot was fired. The plea proceedings adequately established a factual basis for three counts. We therefore affirm.

I. Background Facts and Proceedings.

On May 6, 2011, after having an argument with his wife, Tommy Gines was asked to leave the Courtside Bar. He left and returned to the bar with a gun in his hand, yelling and demanding re-entry into the bar. When he was denied re-entry, Gines fired at least three shots[1] at the building and into the air. Gines had been previously convicted of a felony, and his right to possess firearms had not been restored.

On July 7, 2011, Gines pleaded guilty to three counts of intimidation with a dangerous weapon and a felon in possession of a firearm charge. He was immediately sentenced to consecutive terms of imprisonment: ten years for each

[1] The minutes of testimony indicate that he fired five to six shots.

intimidation charge and five years for the felon-in-possession charge, for a total of thirty-five years.[2]

Gines asserts his convictions and sentences are in violation of Iowa Code sections 901.8 (2011)[3] and 701.9[4] and the Fifth Amendment to the United States Constitution. He further asserts his counsel was ineffective by allowing him to plead guilty to three counts of intimidation when the factual basis does not support separate charges.

II. Standard of Review.

Generally, we review challenges to guilty pleas for the correction of errors at law. *State v. Ortiz*, 789 N.W.2d 761, 764 (Iowa 2010). However, Gines claims his trial counsel was ineffective for allowing him to enter a guilty plea without a factual basis. We review constitutional claims de novo. *See Velez*, ___ N.W.2d at ___, 2013 WL 14997308 at *2 (Iowa 2013).

III. Discussion.

Gines' claims on appeal are intertwined. If there is a factual basis for three counts of intimidation with a dangerous weapon with intent, trial counsel was not ineffective. The threshold question then is whether Gines committed three acts meeting the statutory definition of intimidation with a dangerous

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[2] Suspended sentences on two unrelated charges were also revoked, and those sentences were imposed concurrent to the thirty-five-year term.

[3] Iowa Code section 901.8 provides, in pertinent part: "If a person is sentenced for two or more separate offenses, the sentencing judge may order the second or further sentence to begin at the expiration of the first or succeeding sentence."

[4] Iowa Code section 701.9 provides, in pertinent part:

> No person shall be convicted of a public offense which is necessarily included in another public offense of which the person is convicted. If the jury returns a verdict of guilty of more than one offense and such verdict conflicts with this section, the court shall enter judgment of guilty of the greater of the offenses only.

weapon with intent. *See id.*, at *11. Gines argues that all three charges for intimidation with a dangerous weapon are based on the same act—"rapidly fir[ing] a pistol."

To establish a claim of ineffective assistance of counsel, Gines must satisfy a two-pronged test. *See Ennenga v. State*, 812 N.W.2d 696, 701 (Iowa 2012). He must demonstrate by a preponderance of the evidence that "(1) counsel failed to perform an essential duty, and (2) prejudice resulted." *Id*. (citation and internal quotation marks omitted). "Defense counsel violates an essential duty when counsel permits defendant to plead guilty and waive his right to file a motion in arrest of judgment when there is no factual basis to support defendant's guilty plea. Prejudice is presumed under these circumstances." *Ortiz*, 789 N.W.2d at 764–65 (citations omitted). Thus, in order to determine if Gines' counsel violated an essential duty resulting in prejudice, we must determine if there is a factual basis to support his guilty pleas.

In *Velez*, our supreme court observed that whether there exist sufficient factual bases to support multiple counts is determined by what the legislature intended as a "unit of prosecution" for a particular crime. 2013 WL 1497308 at *5-6. "In construing legislative intent, we look first to see if the legislature has defined the words it uses." *Id.* at *6. "If the legislature has not defined words of a statute, we may refer to prior decisions of this court and others, similar statutes, dictionary definitions, and common usage." *Jack v. P & A Farms, Ltd*., 822 N.W.2d 511, 515 (Iowa 2012) (citation and internal quotation marks omitted).

Our analysis centers on what constitutes an act under Iowa Code section 708.6. Section 708.6 provides in pertinent part:

> A person commits a class "C" felony when the person, with the intent to injure or provoke fear or anger in another, shoots, . . . or discharges a dangerous weapon at, into, or in a building, . . . or 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.

The statute provides that when one "shoots or discharges" or "threatens to commit such *an* act," under certain circumstances, the offense has been committed. Iowa Code § 708.6 (emphasis added). In *Velez*, 2013 WL 1497308 at *7, the court noted that it had "laboriously analyzed the meaning of the word 'an'" in *State v. Kidd*, 562 N.W.2d 764, 765 (Iowa 1997) ("'An' is a euphonic mutation of the article 'a.' The letter 'n' allows an audible distinction to be made between the article 'a' and the word it precedes. Consequently, the resolution of this appeal turns on an interpretation of the article 'a.' 'A' is defined as an article which is 'used as a function word before most *singular* nouns other than proper and mass nouns when the individual in question is undetermined, unidentified, or unspecified. . . .'" (citations omitted)).

To "shoot" a gun means "[t]o fire or let fly (a missile) from a weapon." The American Heritage College Dictionary 1281 (4th ed. 2004).

To "discharge" means "[t]o go off; fire." *Id.* at 403.

Section 708.6 does not delineate a "course of conduct," which would establish a continuing offense; but rather, prohibits a single act of shooting or discharging a dangerous weapon. *See Velez*, 2013 WL 1497308 at *7-10 (differentiating between possession of stolen items, which is not a continuing offense, and stalking, which is). Thus under a "separate-acts test," firing a

weapon three times would provide a factual basis for three offenses. *See id.* at *7-8 (discussing separate-acts test).

Moreover, the act of shooting a weapon is complete upon a single firing or discharge of the weapon. Thus, under a "completed-acts test," we think it clear from the language used that the legislature intended a single shot or discharge of a weapon constitutes a completed act and a unit of prosecution for the offense. *See id.* at *9-10 (discussing completed-acts test).

Here, we conclude the legislature intended each discharge of a dangerous weapon into a building or assembly of people, which thereby places the occupants in reasonable apprehension of serious injury, could constitute a separate count.

"[W]e are only required to find minimal support in the record in order to support a factual basis" for three separate crimes. *Id.* at *7; *State v. Walker*, 610 N.W.2d 524, 527 (Iowa 2000) (affirming the defendant's guilty pleas because "the record minimally supports a factual basis for two separate crimes"). In questioning Gines, the district court stated that "each of Counts I, II, and III are based on an individual shot of the weapon. Did you shoot the weapon three times at least?" Gines admitted, "Yes." He also admitted that the people nearby when he was firing these shots were put in reasonable apprehension of serious injury and that it was his intent to injure or provoke fear or anger in them.

There is thus a factual basis for each of the three counts of intimidation with a dangerous weapon with intent. Consequently, Gines' trial counsel was not ineffective in allowing him to plead guilty to the three counts. *See id.* at *2, 11.

We also reject Gines' claim that the court erred in imposing sentence on each of the counts. *See id.* at *11 (finding no double jeopardy issue where legislature intended discrete, punishable units of prosecution); *State v. Smith*, 573 N.W.2d 14, 19 (Iowa 1997) (stating "multiple punishments can be assessed after a defendant is convicted of two offenses that are not the same"). In *State v. Criswell*, 242 N.W.2d 259, 260 (Iowa 1976), our supreme court stated that the great weight of authority

> generally recognized that if accused . . . is convicted on several counts of an indictment, and each count is for a separate and distinct offense, a separate sentence may be pronounced on each count, and the court may pronounce separate and distinct sentences which are cumulative, and are to run consecutively. This is true, even though the several offenses were committed in the course of a single transaction.

The court further recognized that this issue is a matter of statutory construction and not one of constitutional dimension. *Criswell*, 242 N.W.2d at 260. In *State v. Taylor*, 596 N.W.2d 55, 57 (Iowa 1999), the court reaffirmed the rationale of *Criswell*, and explained that the decision to impose consecutive sentences is discretionary.

We also decline the invitation to require the minutes of testimony or the factual basis for Gines' pleas to identify a separate victim for each separate gunshot. Iowa Code section 708.6 references both a "person or an assembly of people." Further, in the plea proceedings, Gines acknowledged that his actions put people in reasonable apprehension of serious injury.

We acknowledge the concerns expressed in Gines' appeal. Other jurisdictions do not permit consecutive sentences where the offenses arise from a "single continuous criminal episode" with some limited exceptions. *See, e.g.*,

Gardner v. State, 515 So. 2d 408, 411 (Fla. Ct. App. 1987). Other states require a separation in time and location to constitute distinct acts. *See, e.g*., *Spencer v. State*, 868 A.2d 821, 822-23 (Del. 2005) (determining the multiplicity doctrine of the Double Jeopardy Clause of the Constitution requires separation in time or location to prevent successive prosecutions for the same crime). However, we are bound by the principles espoused in *Velez*, which permit prosecution of two separate offenses if "either the completed-acts test or the break-in-the-action test" are met. *Velez*, 2013 WL 1497308 at *11.

We affirm Gines' convictions and the sentences imposed.

AFFIRMED.