IN THE COURT OF APPEALS OF IOWA

No. 2-661 / 11-1306
Filed September 6, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DEVON JAMES LUKINICH,
Defendant-Appellant.

Appeal from the Iowa District Court for Des Moines County, Cynthia H. Danielson, Judge.

A defendant appeals his judgment and sentence on two counts of first-degree robbery and two counts of first-degree burglary, contending (A) the district court erred in failing to ask the jury to answer a special interrogatory; (B) the evidence was insufficient to establish that the BB gun he used was a dangerous weapon; and (C) his trial attorney was ineffective in failing to retain a ballistics expert. **AFFIRMED.**

Thomas Hurd and Jeffrey Lipman of Lipman Law Firm, P.C., Clive, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, Patrick C. Jackson, County Attorney, and Tyron Rogers, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Bower, JJ.

VAITHESWARAN, P.J.

Devon Lukinich appeals his judgment and sentence on two counts of first-degree robbery and two counts of first-degree burglary. He contends: (A) the district court erred in failing to ask the jury to answer, by way of a special interrogatory, whether he committed the crimes while in possession of a dangerous weapon; (B) the evidence was insufficient to establish that the BB gun he used was a dangerous weapon; and (C) his trial attorney was ineffective in failing to retain a ballistics expert.

I. Background Facts and Proceedings

This court summarized the key facts leading up to the robbery and burglary charges in a recent opinion involving Lukinich's co-defendant, Desirae Pearson. We wrote:

> Pearson came to the door of Zachary Moore's home and, when Moore opened the door, pointed a gun at him and told him he was being robbed. She and co-defendant Devon Lukinich entered Moore's house, stole several items, and left, while Moore cowered on the ground with his face to the floor.
>
> Later, Pearson and Lukinich broke into the home of eighty-one-year-old Joan Wright. When Wright awoke and yelled for her son, Lukinich pushed her down, causing an injury to her shoulder. Pearson and Lukinich again left the home with several items.
>
> Officers subsequently stopped the two. On searching Pearson's vehicle, they discovered items taken from Wright's house. A later search of the home Pearson shared with Lukinich uncovered items taken from Moore's house.

State v. Pearson, No. 07-1103, 2012 WL 3194101, at *1 (Iowa Ct. App. Aug. 8, 2012). Also pertinent to this appeal is the fact that two BB guns were found in the trunk. One of the guns was "an exact image of" a .40 caliber Glock. The other looked like a Taurus PT 1911 .45 caliber handgun.

The State charged Lukinich with two counts of first-degree robbery and two counts of first-degree burglary, as well as criminal mischief arising from a third incident that evening. Following a joint trial with Pearson, the jury found Lukinich guilty on the robbery and burglary counts but deadlocked on the criminal mischief count. The district court declared a mistrial on that count. The court entered judgment and sentence. On the robbery counts, the court imposed a seventy percent mandatory minimum sentence prescribed by Iowa Code section 902.12(5) (2009). This appeal followed.

II. Analysis

A. Special Interrogatory

Lukinich contends the district court erred in failing to give the jury a special interrogatory on the question of whether he possessed a "dangerous weapon." *See* Iowa R. Crim. P. 2.22(2) (requiring the submission of special interrogatories to the jury in certain situations). As Lukinich's attorney failed to bring this claimed omission to the court's attention, the State suggests we review the issue under an ineffective-assistance-of-counsel rubric. We agree this is the framework for analysis.

To prevail, Lukinich must show that counsel breached an essential duty and that prejudice resulted. *Strickland v*. *Washington*, 466 U.S. 668, 687 (1984). Our review is de novo. *Everett v*. *State*, 789 N.W.2d 151, 155 (Iowa 2010).[1]

[1] Both parties agree that the record on appeal is sufficient to resolve this issue without preserving the claim for postconviction proceedings. *See State v. Truesdell*, 679 N.W.2d 611, 616 (Iowa 2004) (stating that while ineffective-assistance-of-counsel claims are generally preserved for postconviction relief, sometimes, the appellate record is adequate to resolve the issue on direct appeal).

Rule 2.22(2) states in pertinent part:

> Where a defendant is alleged to be subject to *the minimum sentence provisions of Iowa Code section 902.7*, *(use of a dangerous weapon)*, and the allegation is supported by the evidence, the court shall submit a special interrogatory concerning that matter to the jury.

(Emphasis added.) Iowa Code section 902.7, in turn, states in pertinent part:

> At the trial of a person charged with participating in a forcible felony, if the trier of fact finds beyond a reasonable doubt that the person is guilty of a forcible felony and that the person represented that the person was in the immediate possession and control of a dangerous weapon, displayed a dangerous weapon in a threatening manner, or was armed with a dangerous weapon while participating in the forcible felony the convicted person shall serve a minimum of five years of the sentence imposed by law.

Section 902.7 provides for a mandatory minimum sentence of five years. The provision is implemented by rule 2.22(2); when a defendant is alleged to be subject to the sentence, the court is to submit a special interrogatory asking whether a dangerous weapon was involved. *State v*. *Baker*, 560 N.W.2d 10, 14–15 (Iowa 1997); *State v*. *Teeters*, 487 N.W.2d 346, 349 (Iowa 1992).

Lukinich argues the mandatory minimum sentence imposed upon him under section 902.12(5) is also implemented by rule 2.22(2). He contends the court was obligated to submit a special interrogatory on whether he used a dangerous weapon, as a precondition to imposing that sentence.

By its terms, rule 2.22(2) only requires a special interrogatory if section 902.7 is invoked. That sentencing provision was not invoked in Lukinich's case. Therefore, the special interrogatory requirement of rule 2.22(2) was inapplicable.

Lukinich acknowledges that rule 2.22(2) as written does little if anything to advance his argument. He nonetheless asserts that the "true intent of [the rule]

is to [have it] apply in all forcible felony dangerous weapon[s] cases." In his view, the mandatory minimum sentence in section 902.12(5) was enacted recently and was inadvertently not referenced in rule 2.22(2). He characterizes the rule's reference to section 902.7 alone as a "historical fossil."

Lukinich's argument is untenable for a number of reasons, which we find unnecessary to explicate in light of the rule's plain wording. It is enough to reiterate that rule 2.22(2) makes no mention of section 902.12(5).

Because the special interrogatory requirement of rule 2.22(2) does not apply to mandatory minimum sentences under section 902.12(5), Lukinich's trial attorney did not breach an essential duty in failing to insist on a special interrogatory. Luckinich's ineffective-assistance-of-counsel claim necessarily fails.

B. Sufficiency of the Evidence

Lukinich next contends there was insufficient evidence to establish that the BB guns used in the crimes were "dangerous weapons," an element of both the robbery and burglary counts. The jury was instructed that a

> dangerous weapon is any device or instrument designed primarily for use in inflicting death or injury, and when used in its designed manner is capable of inflicting death. It is also any sort of instrument or device actually used in such a way as to indicate the user intended to inflict death or serious injury, and when so used is capable of inflicting death.

Under this instruction, the State could satisfy its proof in one of two ways; it could either establish that the BB gun was "designed primarily for use in inflicting death or injury," or it could establish that the BB gun was a "device of any sort whatsoever which is actually used in such a manner as to indicate that the user

intended to inflict death or serious injury." Iowa Code § 702.7; *accord State v*. *Greene*, 709 N.W.2d 535, 536–37 (Iowa 2006). Both definitions also require a showing that the weapon "is capable of inflicting death." Iowa Code § 702.7.

Our review is to determine whether substantial evidence supports at least one of these two definitions. *See State v*. *Bass*, 349 N.W.2d 498, 500 (Iowa 1984). We are convinced substantial evidence supported both the definitions.

With respect to the first definition (whether the object was "designed primarily for use in inflicting death or injury"), a Department of Criminal Investigation criminologist testified that he checked the manufacturer specifications of velocities for those guns as well as the velocities of the guns found in the car. He testified the velocity of these guns was higher than the textbook ranges required to break the skin or penetrate the eye of a person. He also stated the average velocity of shots fired from the guns was enough to cause serious injury or death. This testimony amounts to substantial evidence in support of the first definition of dangerous weapon. It also constitutes substantial evidence in support of the common component of both definitions, that the weapon was "capable of inflicting death."

We turn to the second definition: whether the BB gun was a "device of any sort whatsoever which is actually used in such a way as to indicate that the user intended to inflict death or serious injury." The criminologist testified that he tested the guns, and both functioned properly.

The record further reveals that Lukinich and his co-defendant came to Moore's house. When Moore opened the door, Lukinich's co-defendant pointed a gun "right at" him and said this was a robbery. Lukinich then stated, "If she

won't shoot you, I will." Moore assumed Lukinich also had a gun, as he placed a metal object on the coffee table after he entered the home. He testified he believed the gun was real.

Wright similarly testified that both Lukinich and Pearson had pistols and they "kind of opened their jackets and showed" them to her during the robbery. While she did not know whether the guns were "real," she stated, "I'm sure they were pistols."

A reasonable fact-finder could have found from this evidence that Lukinich used the BB gun "in such a way as to indicate that [he] intended to inflict death or serious injury" on Moore and Wright. *See State v*. *Dallen*, 452 N.W.2d 398, 399 (Iowa 1990) ("Testimony and exhibits at trial clearly demonstrate the gun was fired six times at the victim with each BB piercing the skin of the victim causing bleeding.").

C. Ineffective-Assistance-of-Counsel Claim

Lukinich finally contends his trial attorney was ineffective in failing to hire a ballistics expert to assist in challenging the testimony of the State's ballistics expert. "Ordinarily, ineffective assistance of counsel claims are best resolved by postconviction proceedings to enable a complete record to be developed and afford trial counsel an opportunity to respond to the claim." *Truesdell*, 679 N.W.2d at 616. Both Lukinich and the State agree the evidence is inadequate to decide this issue on direct appeal. Accordingly, we preserve this ineffective-assistance-of-counsel claim for postconviction relief.

III. Disposition

We affirm Lukinich's judgment and sentence for two counts of first-degree robbery and two counts of first-degree burglary and preserve one of his ineffective-assistance-of-counsel claims for postconviction relief.

AFFIRMED.