IN THE COURT OF APPEALS OF IOWA

No. 8-524 / 07-1445
Filed August 13, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ALFRED LEE LUCIUS,
Defendant-Appellant.

Appeal from the Iowa District Court for Dubuque County, Alan L. Pearson, Judge.

Alfred Lucius appeals his judgment and sentence for first-degree robbery. **REVERSED AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Jason Shaw, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Mary E. Tabor, Assistant Attorney General, Ralph Potter, County Attorney, and Christine Corken, Assistant County Attorney, for appellee.

Considered by Miller, P.J., and Vaitheswaran and Eisenhauer, JJ.

VAITHESWARAN, J.

Alfred Lucius appeals his judgment and sentence for first-degree robbery. Iowa Code §§ 711.1, .2 (2005). He argues his trial attorney was ineffective in failing to move for judgment of acquittal on the ground that a BB gun is not a dangerous weapon. We agree with Lucius that this issue requires reversal.

I. Background Facts and Proceedings

After Benjamin O'Malley and Walter Link finished their shifts at a bar and grill in Dubuque, they decided to buy some marijuana. As they waited behind a building, Lucius approached them and yelled "This is a bust." O'Malley and Link saw that Lucius was holding a gun. They heard a sound "like metal on metal" and believed Lucius had cocked the gun. Lucius stated, "It's Christmastime, I need the money more than you guys do." The two handed Lucius their money.

The Dubuque police executed a search warrant at Lucius's apartment. They found a plastic BB gun that looked like a Beretta pistol. It had a slide function and was powered by spring-action. There were no BBs in the gun when it was found and officers did not test it to see if it worked.

The State charged Lucius with two counts of first-degree robbery. *See* Iowa Code §§ 711.1, .2. At the close of the State's case and the close of the evidence, Lucius made general motions for judgment of acquittal. The motions did not specify the elements on which he believed there was insufficient proof. The court denied the motions. A jury found Lucius guilty on both counts.

Lucius's appellate attorney argues his trial attorney was ineffective in "failing to argue that the State had failed to prove the BB gun was a dangerous weapon during motion for judgment of acquittal." Lucius separately reiterates

this argument and raises several other grounds for reversal. We find it unnecessary to address these other grounds except as they relate to the lesser-included offense of second-degree robbery.

II. Analysis

Our framework for analysis is set forth in *State v. Truesdell*, 679 N.W.2d 611 (Iowa 2004). "To preserve error on a claim of insufficient evidence for appellate review in a criminal case, the defendant must make a motion for judgment of acquittal at trial that identifies the specific grounds raised on appeal." *Id.* at 615 (citing *State v. Crone*, 545 N.W.2d 267, 270 (Iowa 1996)). Counsel's failure to preserve error at trial can support an ineffective-assistance-of-counsel claim. *Id.* Such a claim "normally can be decided on direct appeal." *Id.* at 616. "[I]f the record . . . fails to reveal substantial evidence to support the convictions, counsel was ineffective for failing to properly raise the issue and prejudice resulted." *Id.*

The jury was instructed as follows:

> In order to convict Alfred Lucius of Robbery in the First Degree as charged in Count I, the State must prove all of the following elements:
>
> 1. On or about December 19, 2006 the defendant had the specific intent to commit a theft.
> 2. To carry out his intention the defendant threatened Benjamin O'Malley with, or purposely put Benjamin O'Malley in fear of, immediate serious injury.
> 3. The defendant was armed with a dangerous weapon.[1]

The jury was additionally 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 which is actually used in such a way as to

[1] The same instruction was given with respect to Count II, involving Link.

> indicate the user intended to inflict death or serious injury, and, when so used, is capable of inflicting death.

The State was required to show that the BB gun fit either the first half of the definition (a "device designed primarily for use in inflicting death or injury"), or the second half ("any sort of instrument or device which is 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."). *See State v. Greene*, 709 N.W.2d 535, 537 (Iowa 2006).

With respect to the first half of the definition, the State argues "[a] fact finder could infer that all BB guns are designed, for the most part, to inflict injury on animals or humans." The State did not present any evidence that the BB gun was "designed primarily for use in inflicting death or injury." *Cf. State v. Dallen*, 452 N.W.2d 398, 399 (Iowa 1990) (noting State presented expert testimony that BB gun was capable of inflicting death upon a human being). In the absence of expert testimony or other evidence on this design question, the jury had no basis for finding that this alternative was satisfied.

The State faces the same proof problem with respect to the second half of the definition, which included a requirement that the BB gun was "capable of inflicting death." Nothing in the record spoke to this question. Indeed, a police officer testified that the gun was unloaded and had not been tested to see if it was operable.

We conclude the jury's finding of guilt on the first-degree robbery charges was not supported by substantial evidence. "As a matter of law, counsel was ineffective for failing to raise this issue and prejudice resulted." *Truesdell* at 619.

Lucius's attorney asks us "to enter a conviction for the lesser included offense of Robbery in the Second Degree." Having found Lucius guilty of first-degree robbery, the jury necessarily found him guilty of the lesser-included offense of second-degree robbery. *State v. Morris*, 677 N.W.2d 787, 788-89 (Iowa 2004). In his separate brief, Lucius does not expressly challenge the sufficiency of the evidence supporting a finding of guilt on this lesser-included offense. Assuming without deciding that those separate arguments could be construed as challenges to a conviction on the lesser-included offense, we summarily reject them. We reverse and remand for entry of judgment and sentence on the lesser-included offense of second-degree robbery. *State v. Pace*, 602 N.W.2d 764, 774 (Iowa 1999).

REVERSED AND REMANDED.