

**IN THE COURT OF APPEALS OF IOWA**

No. 9-588 / 08-1531  
Filed October 7, 2009

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**LEWIS LONEDALE LEE,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Scott County, Gary D. McKenrick,  
Judge.

Defendant appeals his conviction for intimidation with a dangerous  
weapon with intent. **AFFIRMED.**

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

Lewis Lee, Fort Madison, appellant pro se.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney  
General, Michael Walton, County Attorney, and Jerald Feurbach, Assistant  
County Attorney, for appellee.

Considered by Vogel, P.J., and Potterfield, J., and Beeghly, S.J.\*

\*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

**POTTERFIELD, J.****I. Background Facts & Proceedings**

On May 18, 2008, a group of people, including Lewis Lee and Roylee Richardson, were denigrating the 17th Street Boys outside the home of Gerald Phelps, Virgie Bogan, and their sons Kevin and Phillip Bogan.<sup>1</sup> The entire family went outside and told the group to leave. Lee asked Kevin to come into the street to fight. Kevin stepped forward, and Richardson pulled out a gun. Kevin and Philip turned and ran back toward their house. Gerald and Virgie ran to the side of a neighbor's garage.

Richardson fired about four shots into the house from the street, one of which hit Kevin in the back. Lee then took the gun from Richardson and proceeded to chase Kevin and Phillip into the house. The gun went off and took out a chunk of sidewalk. Lee came up to the doorway and started firing into the hallway of the house. He then turned and ran across the lawn to where Gerald and Virgie were standing, pointed the gun at them and said, "I ought to shoot you old motherfuckers." Gerald and Virgie ran away. Lee and Richardson then left the scene.

Lee was charged with willful injury with serious injury, going armed with intent, and intimidation with a dangerous weapon with intent. A jury found Lee not guilty of willful injury, but returned guilty verdicts for going armed with intent and intimidation with a dangerous weapon with intent. Lee was sentenced to a term of imprisonment not to exceed five years on the going armed with intent

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<sup>1</sup> The 17th Street Boys is a gang. There was disputed evidence as to whether Kevin was associated with the 17th Street Boys.

count and ten years on the intimidation count, to be served concurrently. Lee appeals his conviction for intimidation with a dangerous weapon.

## **II. Ineffective Assistance**

Lee contends his counsel was constitutionally ineffective for failing to raise a sufficiently specific motion for judgment of acquittal. Lee asserts that his counsel should have argued there was insufficient evidence someone in the house actually experienced fear of serious injury, which is an element of intimidation with a dangerous weapon. He states no one in the house testified to being fearful of serious injury when he fired the handgun.

We review claims of ineffective assistance of counsel *de novo*. *State v. Bergmann*, 600 N.W.2d 311, 313 (Iowa 1999). 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 defendant a fair trial. *Id.* Absent evidence to the contrary, we assume that the attorney's conduct falls within the wide range of reasonable professional assistance. *State v. Hepperle*, 530 N.W.2d 735, 739 (Iowa 1995).

Lee was convicted under the first paragraph of Iowa Code section 708.6 (2007), which provides:

A person commits a class "C" felony when the person, with the intent to injure or provoke fear or anger in another, shoots, throws, launches, or discharges a dangerous weapon at, into, or in a building, vehicle, airplane, railroad engine, railroad car, or boat, occupied by another person, 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.

Under this section, the state of mind of both the actor and the victim is an element. *State v. White*, 319 N.W.2d 213, 215 (Iowa 1982). “The actor must intend to injure or to provoke fear or anger in another.” *Id.* Also, the victim must experience apprehension of serious injury. *Id.* It is not sufficient to present evidence a reasonable person in the position of the victim would have been frightened. *Id.* at 216. There must be evidence of the “actual effect of the shooting on this particular victim.” *Id.*; see also *In re N.W.E.*, 564 N.W.2d 451, 454 (Iowa Ct. App. 1997) (noting the State must prove the victim actually experienced fear of serious injury from the defendant’s act).

Lee correctly argues the State was required to present evidence of the reasonable fear of one of the young men in the house in order to satisfy the standard established by the supreme court in *State v. White*, 319 N.W.2d 213, 215 (Iowa 1982).<sup>2</sup> Kevin Bogan testified that he ran as fast as he could when Richardson was chasing him with a gun. Bogan was shot in the back, either on the porch or just inside the house. Bogan then described his perception of the events that followed, at a time when Lee was shooting the gun, saying, “And then I heard the door come open and I heard shots in the hallway and heard something hitting the wall, you know what I’m saying, and so everybody got down in the house.”

Bogan was not asked, and did not state, whether he personally experienced apprehension of serious injury during the shooting by Lee, but the

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<sup>2</sup> *State v. White* involved a charge of terrorism, which was codified at Iowa Code section 708.6 (Supp. 1977) and was the predecessor statute to intimidation with a dangerous weapon. Both statutes required the State to prove reasonable fear on the part of the victim.

sequence of events would place Lee as the shooter in the hallway when “everybody got down in the house.”

The State acknowledges that the victims did not testify regarding their fear but argues that we should infer the element of apprehension of serious injury from the circumstances. See *White*, 319 N.W.2d at 216 (finding the element of apprehension can be “inferred” in some cases). This is the same argument made by the State in *White*, where the defendant fired two shots into a car occupied by two persons, neither of whom testified to experiencing fear. *Id.* In that case, shots were fired from a car driving by, without warning and without time for the occupants to dodge or evade the shots. *Id.* The supreme court ruled that the necessary element of apprehension could not be inferred from the circumstances in *White*. *Id.*

The facts here are significantly different. Bogan saw the gun in Richardson’s hand and ran away. He was shot and ran into the house, a place of relative safety, but heard the shots continue and get closer. As he tried to hide, he heard gunshots and bullets striking the wall in the hallway of the house. These circumstances and Bogan’s description of getting down to avoid further injury are facts from which the necessary element of apprehension of serious injury can be inferred. See *State v. Baldenegro* 932 P. 2d 275, 278 (Ariz. Ct. App. 1996) (finding a victim’s abrupt braking of his car in reaction to shots allowed an inference of fear as to that victim, whereas the evidence did not support an inference of fear for another victim who never saw the gun before the shooting and did not try to maneuver to avoid getting shot).

We conclude there is sufficient evidence in the record to support a finding that the persons in the house where Lee fired the gunshots were in reasonable apprehension of serious injury.<sup>3</sup> We determine that even if defense counsel had made a more specific motion for judgment of acquittal, the district court, considering the evidence in the light most favorable to the State, would have overruled the motion. See *State v. Lane*, 743 N.W.2d 178, 184 (Iowa 2007) (finding attorney was not ineffective for failing to articulate grounds for acquittal that would have been overruled).

After considering all of the arguments in the brief submitted by Lee's counsel and in Lee's pro se brief, we affirm Lee's conviction for intimidation with a dangerous weapon with intent.

**AFFIRMED.**

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<sup>3</sup> Although we also agree with the State's argument that Lee aided and abetted Richardson's actions in shooting into the Brogan household and into the assembly of people on the porch, we need not decide the case on that ground because Lee grabbed the gun and shot into the house himself.