

IN THE COURT OF APPEALS OF IOWA

No. 6-021 / 95-284

STATE OF IOWA,

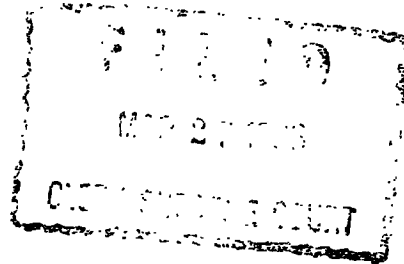
Appellee,

vs.

ALAN D. PAINTER,

Appellant.

000343



Appeal from the Iowa District Court for Scott County, Edward B. deSilva,
Judge.

Alan Painter appeals his conviction, following a jury trial, for robbery in the
first degree. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Sarah E. Hennesy, Assistant
State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General,
William E. Davis, County Attorney, and Kelly Raines, Assistant County Attorney, for
appellee.

Considered by Sackett, P.J., and Habhab and Cady, JJ.

CADY, J.

Alan Painter challenges his conviction for robbery in the first degree, in violation of Iowa Code sections 711.1(1) and 711.2 (1993). He claims his trial counsel rendered ineffective assistance by failing to object to a marshaling instruction on the basis it included an uncharged element of first-degree robbery. We affirm.

On October 6, 1994, Joe Brooks, Jr., was working the night-shift at Vicker's, a convenience store in Davenport. Brooks' friend, Romario Thomas, was in the store visiting him. Sometime around midnight, Alan Painter entered the store and went back to the deli area. Brooks became suspicious because Painter seemed to gain weight after he came in, and Brooks believed he was stealing food. Thomas testified Painter had "billowed arms full of sandwiches."

Brooks confronted Painter and told him to return the sandwiches. Painter said, "F--- you, n-----." He pulled out a knife and told Brooks he would "kill" him. Brooks jumped back to avoid the knife blade. Thomas gave Brooks a can of mace, and Brooks sprayed Painter with mace. Painter swung his knife at Brooks a few more times. He then ran from the store, leaving a trail of sandwiches.

During the confrontation, Thomas called the police. Police officer William Hurt arrived at the scene a few minutes after Painter left. Officer Hurt apprehended Painter a few blocks from Vicker's. Painter was found to be carrying seventeen packets of condiments and a knife with a blade about three or three and one-half inches long. Two sandwiches were found on the ground near where Painter was

apprehended. Police officers brought Painter to Vicker's, and Brooks and Thomas identified him as the person who had been in the store.

Painter was charged with robbery in the first degree. A jury found him guilty of this crime. He was sentenced to a term of imprisonment not to exceed twenty-five years. He now appeals.

Painter claims he received ineffective assistance of trial counsel because his attorney failed to object to the marshaling instruction on the ground it was at variance with the trial information. The trial information provided:

The said ALAN D. PAINTER on or about the 7TH day of OCTOBER, A.D., 1994, in the County of Scott, and State of Iowa: Did, having the intent to commit a theft, the defendant committed an assault upon another to assist or further the commission of the intended theft or the person's escape from the scene thereof, with or without the stolen property, and was armed with a dangerous weapon, to wit: The defendant stole three sandwiches from a convenience store. When confronted by the clerk the defendant pulled out a knife and assaulted the clerk with such, in violation of Sections 711.1(1) and 711.2 of the Iowa Code.

Section 711.2 contains two alternative methods to commit robbery in the first degree.

One alternative is where the person purposely inflicts or attempts to inflict serious injury, and the other is where the person is armed with a dangerous weapon. The trial information alleges Painter was armed with a dangerous weapon, and thus comes under the second alternative.

The relevant part of the marshaling instruction provided:

3. The defendant purposely inflicted or attempted to inflict a serious injury on Joe Brooks or was armed with a dangerous weapon.

Painter asserts the marshaling instruction improperly included the language “inflicted or attempted to inflict a serious injury on Joe Brooks,” because this alternative of section 711.2 was not charged. He furthermore asserts there was insufficient evidence he was armed with a dangerous weapon and claims he would have been acquitted if the jury had been properly instructed.

To establish a claim of ineffective assistance of counsel, a defendant must show that (1) the attorney failed to perform an essential duty, and (2) prejudice resulted to the extent that it denied defendant a fair trial. *Caldwell v. State*, 494 N.W.2d 213, 214 (Iowa 1992).

Concerning deficiency of performance, the ultimate test is whether counsel’s performance was within the range of normal competency. *Brewer v. State*, 444 N.W.2d 77, 93 (Iowa 1989). Improvident trial strategy, miscalculated tactics, and mistakes in judgment do not necessarily amount to ineffective assistance of counsel. *Kane v. State*, 436 N.W.2d 624, 627 (Iowa 1989).

Concerning proof of prejudice, defendant must show counsel’s failure worked to his substantial and actual disadvantage, to the end that there is a reasonable probability that but for counsel’s unprofessional errors, the result of the proceeding would have been different. *Brewer*, 444 N.W.2d at 83.

We first examine Painter’s claim there was insufficient evidence presented at trial to show he was in possession of a dangerous weapon. “Dangerous weapon” is

defined in section 702.7, which gives three means by which an instrument may be considered a dangerous weapon--by design, by actual use, and *per se*.

No evidence was presented in this case concerning the design of the knife, and thus, we do not find the knife was a dangerous weapon by design. A knife having a blade exceeding five inches in length is considered a dangerous weapon *per se* under the statute. Iowa Code §702.7. The blade of the knife in the present case was less than five inches and cannot be considered a dangerous weapon *per se*.

A knife with a blade length less than the length required to be considered a dangerous weapon *per se* may be considered a dangerous weapon on a showing of its actual use as a dangerous weapon. *State v. Durham*, 323 N.W.2d 243, 245 (Iowa 1982). Under the actual use alternative, a dangerous weapon is:

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.

Iowa Code §702.7.

We find there was overwhelming evidence in this case to show Painter actually used the knife as a dangerous weapon. Brooks testified Painter swung the knife at him several times and told him he was going to kill him. Brooks stated he would have been stabbed if he had not been able to move quickly enough from the knife's path. Thomas testified Painter had jabbed the knife at Brooks four or five times, trying to cut him. He also heard Painter tell Brooks, "I will kill you."

Due to our finding there was overwhelming evidence Painter was armed with a dangerous weapon, we conclude he has not met his burden to show the prejudice component of his ineffective assistance of counsel claim. We conclude Painter has not shown there was a reasonable probability the outcome of the trial would have been different if the language “inflicted or attempted to inflict a serious injury on Joe Brooks,” had not been included in the marshaling instruction.

We affirm Painter’s conviction for the crime of robbery in the first degree. Costs of this appeal are assessed to Painter.

AFFIRMED.