

FILED

OCT 25 1983

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

)

Filed October 25, 1983

Plaintiff-Appellee,

)

365

vs.

)

3-276

69141

MARTY LAVERNE JAMES,

)

Defendant-Appellant.

)

Appeal from Jasper District Court, Thomas Mott, District Associate Judge.

Defendant appeals from the judgment entered on his conviction by a jury of tampering with a witness. **AFFIRMED.**

Daniel Cornelison, Des Moines, for defendant-appellant.

Thomas J. Miller, Attorney General, and Teresa Baustian, Assistant Attorney General, for plaintiff-appellee.

Considered by Oxberger, C.J., and Donielson, Snell, Schlegel, Hayden, and Sackett, JJ.

OXBERGER, C.J.

Defendant appeals from the judgment entered on his conviction by a jury of tampering with a witness. See Iowa Code § 720.4 (1981). On appeal, he asserts that: (1) the trial information should have been dismissed, as the State did not adequately allege the details of the crime; (2) his motion for directed verdict should have been sustained, as there was not substantial evidence the person he allegedly harassed had been or was going to be a witness in a judicial proceeding, or that defendant intended to "improperly influence" the witness; (3) several jury instructions were erroneous; (4) assault is a lesser included offense of tampering with a witness; (5) he was denied effective assistance of counsel by his attorney's failure to object during trial; and (6) the trial court abused its discretion in sentencing.

I. Motion to Dismiss Trial Information

James contends the trial information was fatally defective in several certain particulars. The rule is that an indictment or information is valid if it charges the offense by using the statutory name of the crime or by stating so much of the definition of the crime as gives notice of the offense. State v. Lass, 228 N.W.2d 758, 765 (Iowa 1975). We find the amended trial information in the case at bar did both. Therefore, we affirm that portion of the trial court's decision.

II. Sufficiency of the Evidence

We find no merit in James's contention that the State charged James with posttrial tampering. We do not agree that Iowa Code section 720.4 makes a pretrial and posttrial distinction within the meaning of State v. Smith, 309 N.W.2d 454, 456 (Iowa 1981). Therefore, it is irrelevant whether the offense occurred before or after the trial.

James's second contention is that there was insufficient evidence to show that James possessed the requisite intent to improperly influence a witness. That error was not preserved in the trial court and we will not consider it now. State v. Rosewall, 239 N.W.2d 171, 173 (Iowa 1976).

James's third contention is that there was insufficient evidence that he possessed the requisite knowledge that O'Connor had been or might be summoned as a witness. James was arrested for shoplifting at the store where O'Connor was employed. James testified that it was O'Connor who ran after him, threw himself on him, and then threw him on the counter. He further testified that the treatment O'Connor gave him made him angry. James admitted he did not really know O'Connor, nor did he have any grudges against O'Connor previous to this occasion. However, James, subsequent to the theft and prior to the trial, came into the store where O'Connor was working, went directly to the back room to locate O'Connor, and proceeded to punch him in the jaw. A scuffle ensued; the police came and then took James away.

If there is substantial evidence to support a verdict, the jury's verdict is conclusive. State v. York, 256 N.W.2d 922, 927 (Iowa 1977). Evidence is considered to be "substantial" when a reasonable fact finder would accept it as adequate to reach a conclusion. State v. Robinson, 288 N.W.2d 337, 338 (Iowa 1980). Applying the foregoing evidence to these general principles, we must affirm the jury's verdict.

III. Instructions

James argues that certain instructions were prejudicially erroneous. However, there was no objection made in the trial court. As such, objections to instructions, or the lack thereof, may not be raised for the first time on appeal. State v. Wellington, 264 N.W.2d 739, 742 (Iowa 1978). Therefore, we find no merit

-3-

in his arguments that the trial court erred: (1) by submitting the instructions to the jury and (2) by not granting his motion for a new trial based upon the erroneous jury instructions.

IV. Assault as a Lesser Included Offense

Appellant counsel, who did not represent James at trial, asserts that the trial court erred because it did not submit assault as a lesser included offense of tampering with a witness. James faces several obstacles in his attempt to urge this issue on appeal because he waived any such error by the record made at trial and he failed to enter proper objection at trial to preserve the issue even without the waiver. State v. Rouse, 290 N.W.2d 911, 913 (Iowa 1980). Furthermore, we cannot agree that assault is a lesser included offense of tampering with a witness. Therefore, we find no error in the trial court's actions.

V. Ineffective Assistance of Counsel

Counsel is presumed to be competent and as such, it is the burden of defendant to prove by a preponderance of the evidence that counsel rendered ineffective assistance. Sims v. State, 295 N.W.2d 420, 423 (Iowa 1980). To warrant a finding of ineffective assistance, there must be an "affirmative factual basis demonstrating counsel's inadequacy of representation." State v. Aldape, 307 N.W. 2d 32, 42 (Iowa 1981) (quoting In re Parker, 423 F.2d 1021, 1025 (8th cir. 1970)). Other than a general allegation, James specifies no facts on which to base this claim. Therefore, we deny him any relief.

VI. Sentencing

James contends the trial court abused its discretion in the sentencing proceeding. This court will not find an abuse of discretion unless James has shown that "such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable." State v. Morrison, 323 N.W.2d 254, 256 (Iowa 1982) (quoting State v. Buck, 275 N.W.2d 194, 195 (Iowa 1979)). The court indicated that it considered all the facts, the nature of the offense, and James's past history in the judicial system. We affirm its decision and find no abuse of discretion.