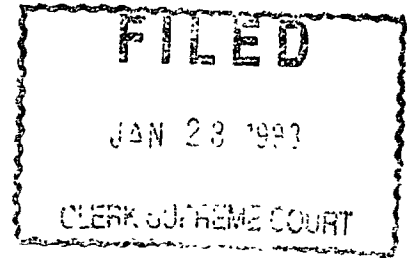


IN THE COURT OF APPEALS OF IOWA

000349

No. 7-589 / 96-1973
Filed January 28, 1998



STATE OF IOWA,
Appellee,

vs.

SCOTT ALAN BRADY,
Appellant.

Appeal from the Iowa District Court for Dubuque County, Lawrence H. Fautsch, Judge.

Brady appeals his conviction for the offenses of going armed with intent, assault while participating in a felony, assault with intent to inflict serious injury, and leaving the scene of a personal injury accident. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and David Arthur Adams, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, Fred H. McCaw, County Attorney, and Ralph Potter, Assistant County Attorney, for appellee.

Heard by Cady, C.J., and Sackett and Streit, JJ.

STREIT, J.

Defendant Brady appeals the trial court's denial of his motion for acquittal arguing his pickup was not a dangerous weapon and the evidence did not support a finding he went armed with intent. He also asserts ineffective assistance of counsel. We find defendant used his vehicle as a dangerous weapon, that substantial evidence supports he went armed with intent, and we preserve the ineffective assistance of counsel claim for postconviction proceedings.

I. Background & Facts.

In December 1995, a friend of Brady's tried to return a Christmas gift to Software Etc. for a cash refund. Brady argued with the store manager about the store's return policy, raised his voice, and used profanity. Security guard Michael Sand assisted the manager in dealing with Brady. As Brady and his friend left the store, Brady made an obscene gesture at Sand and threatened him. Sand followed the two to the mall parking lot to make sure they were leaving. In the parking lot, Brady launched his truck at Sand, striking him and running over his left foot. Brady fled the scene.

Brady was charged and tried by jury for going armed with a dangerous weapon with intent, assault while participating in a felony, assault with intent to inflict serious injury, and leaving the scene of a personal injury accident. Brady moved for judgment of acquittal arguing the State had not presented sufficient evidence he went armed with a dangerous weapon. His motion was denied. The jury returned a guilty

verdict on all counts. He was sentenced to consecutive indeterminate five-year terms for the offenses of going armed with intent and assault while participating in a felony, and concurrent terms of two years for the offense of assault with intent to inflict serious injury, and one year for the offense of leaving the scene of an accident. He appeals the denial of his motion for judgment of acquittal.

II. Standard of Review.

Brady argues the trial court erred in failing to grant his motion for judgment of acquittal based on his contention the State did not produce sufficient evidence to prove he went armed with intent. Our standard of review is substantial evidence when the denial of a motion for judgment of acquittal is based on the alleged insufficiency of the evidence. *State v. Coffman*, 562 N.W.2d 766, 768 (Iowa App. 1997). The evidence is considered in a light most favorable to the State. *Id.* We consider all the evidence, not just the evidence supporting the verdict. *State v. Blair*, 347 N.W.2d 416, 419 (Iowa 1984). We will affirm the verdict provided the evidence raises “a fair inference of guilt and [does] more than create speculation, suspicion or conjecture.” *Coffman*, 562 N.W.2d at 768.

III. Is a Vehicle a Dangerous Weapon?

The State had the burden to prove, beyond a reasonable doubt, Brady went armed with intent. To meet its burden the State was required to prove Brady had: (1) gone armed; (2) with a dangerous weapon; (3) with intent to use the weapon

against another. Iowa Code § 708.8 (1983); *State v. Hill*, 363 N.W.2d 599, 601 (Iowa App. 1984).

The words “dangerous weapon” in the second element have been defined, in part, as any instrument or device of any sort whatsoever which is actually used in a manner indicating 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 (1997). A vehicle may be considered a dangerous weapon if it is used in a manner indicating the intent to inflict death or serious injury. *State v. Oldfather*, 306 N.W.2d 760, 763-64 (Iowa 1981). The vehicle here was used as a dangerous weapon. There is substantial evidence in the record that prior to striking Mr. Sands, Brady formed the intent to use his vehicle to injure Sands. At that point the vehicle became a dangerous weapon for the purposes of going armed with intent.

The words of the first element “go” and “armed” have been defined. “Go” implicates proof of movement. *State v. Alexander*, 322 N.W.2d 71, 72 (Iowa 1982). “Armed” means “the conscious and deliberate keeping of a [dangerous weapon] on or about the person, available for immediate use.” *Id.* The presence of Brady’s intent to hit Sand with his truck, in combination with his driving the truck toward Sand, was sufficient to prove Brady was armed. The “go” of “go armed” was satisfied by Brady’s left turn toward Sand and his veer across the center line to hit Sand.

There is substantial evidence which supports each element of the crime of going armed with intent. The trial court correctly denied defendant's motion for directed verdict of acquittal.

III. Ineffective Assistance of Counsel.

Brady asserts his counsel was ineffective by: (1) not preserving Brady's contention one cannot "go armed" with a vehicle; (2) not objecting to Jury Instruction Nos. 9, 16, and 23 dealing with the testimony of the State's witness, the elements of the offenses Brady was charged.

When a defendant asserts a constitutional violation, such as ineffective assistance of counsel, we resolve the issue by making an independent evaluation of the totality of the circumstances. *Nims v. State*, 401 N.W.2d 231, 233 (Iowa App. 1986). This is equivalent to a de novo review. *Id.* The burden of proving ineffective assistance of counsel by a preponderance of the evidence is on Brady. *State v. Wissing*, 528 N.W.2d 561, 563 (Iowa 1995).

To establish his claim of ineffective assistance of counsel, Brady must establish: (1) his counsel's performance did not fall within the range of normal competency; and (2) the deficient performance so prejudiced him as to deprive Brady of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984). We keep in mind the admonition of the Supreme Court in *Strickland* that "the court should recognize that counsel is strongly presumed to have

rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Id.*

Where the record on direct appeal is not adequate to permit us to resolve the issue, we preserve the defendant's claim for postconviction proceedings so the facts may be so developed. *State v. Koenighain*, 356 N.W.2d 237, 238 (Iowa App. 1984). This also gives the allegedly-ineffective attorney the opportunity to explain his or her conduct. *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978).

Brady's first claim that his counsel did not properly preserve is moot. We have decided the issue of whether a vehicle is dangerous weapon with which one can “go armed” with intent on the merits. From the record before us, we can not determine whether counsel's not objecting to certain jury instructions amounted to ineffective assistance of counsel. Improvident trial strategy, miscalculated tactic, or mistakes in judgment do not necessarily amount to ineffective assistance. *State v. Kone*, 557 N.W.2d 97, 102 (Iowa App. 1996). Whether Brady's counsel was ineffective for not objecting to jury instructions Nos. 9, 16, and 23 is preserved for a postconviction proceedings.

AFFIRMED.