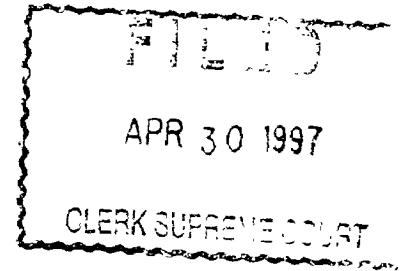


IN THE COURT OF APPEALS OF IOWA

No. 7-096 / 96-0727



STATE OF IOWA,
Plaintiff-Appellee,

vs.

TONY LANCE SPEARS,
Defendant-Appellant.

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

Tony Spears appeals the judgment and sentence entered upon his conviction of unauthorized possession of an offensive weapon and carrying weapons in violation of Iowa Code sections 724.3 and 724.4 (1995). **AFFIRMED.**

Lauren M. Phelps, Davenport, for appellant.

Thomas J. Miller, Attorney General, Ann E. Brenden, Assistant Attorney General, William E. Davis, County Attorney, and Robert E. Weinberg, Assistant County Attorney, for appellee.

Heard by Habhab, C.J., and Huitink and Streit, JJ.

HUITINK, J.

Defendant Tony Lance Spears appeals his conviction for possession of an offensive weapon in violation of Iowa Code section 724.3, carrying a dangerous weapon in violation of Iowa Code section 724.4, and interference with official acts in violation of Iowa Code section 719.1(1).

I. Background Facts and Proceedings.

The record contains evidence of the following events leading to Spears' arrest: During the early morning hours of December 15, 1995, Davenport police stopped a Chrysler New Yorker driven by Roosevelt Thomas. Spears was a passenger in the vehicle. The officers observed Spears looking back at them as they approached the vehicle. Before they reached the vehicle, Thomas sped away. A chase ensued that ended when the suspects' vehicle crashed into a tree. Both occupants fled the scene. Thomas was quickly apprehended and Spears was located shortly thereafter. Spears was positively identified as one of the occupants of the vehicle. Spears denied he was Thomas's passenger. He later recanted and admitted being in the car. A search of the vehicle uncovered a sawed-off shotgun and an AK-47 rifle located in the back seat hidden under a jacket.

Following a jury trial in March 1996, Spears was charged and convicted of possession of an offensive weapon, carrying a dangerous weapon, and interference

with official acts. He received a suspended sentence with three years probation and was also ordered to complete the residential correctional facilities program.

On appeal Spears challenges the sufficiency of the evidence supporting his convictions for the weapon charges. He also asserts his counsel was ineffective for failing to object to an incident of alleged prosecutorial misconduct.

II. Sufficiency of the Evidence.

Spears argues the State failed to present sufficient evidence concerning a critical element of the offense, to-wit, that he knew there were weapons in the vehicle. He asserts he was neither the owner or driver of the vehicle and the weapons in the back seat of the car were not visible to him as a passenger in the front seat. Furthermore, Spears emphasizes his fingerprints were not found on the weapons. He diminishes the significance of his attempted escape by explaining he fled because he was intoxicated at the time.

We review claims of insufficient evidence for errors at law. Iowa R. App. P. 4. A verdict of guilty is binding on appeal unless there is no substantial evidence in the record to support it, or it is clearly against the weight of the evidence. *State v. Schrier*, 300 N.W.2d 305, 306 (Iowa 1981). Substantial evidence means evidence that could convince a rational trier of fact the defendant is guilty beyond a reasonable doubt. *Id.* In determining the sufficiency of evidence, we view the record in a light

most favorable to the State. *State v. Robinson*, 288 N.W.2d 337, 340 (Iowa 1980).

All evidence is considered, not simply the evidence supporting the verdict. *Id.*

The State was required to prove the following elements on the charge of unauthorized possession of an offensive weapon:

- (1) On or about the 14th day of December, 1995, the defendants, or either of them, possessed an offensive weapon.
- (2) The defendants knew they possessed an offensive weapon.
- (3) A .12 gauge sawed-off shotgun is an offensive weapon.

See Iowa Code § 724.3 (1995); Jury Instruction No. 15.

For the charge of carrying weapons, the State was required to prove:

- (1) On or about the 14th day of December, 1995, the defendants, or either of them, were armed with a loaded firearm.
- (2) The defendants were within the city limits of Davenport.

See Iowa Code § 724.4(1) (1995); Jury Instruction No. 19.

Upon review of the record, we find sufficient evidence for the jury to infer that Spears knew there were weapons in the vehicle. Spears and Thomas sped away as police approached their vehicle. Thomas testified Spears instructed him to do so. After the vehicle crashed, Spears ran from police. Upon being captured, he denied being a passenger in the car and claimed instead that he was “going to his girlfriend’s house.” However, Spears later admitted he had been in the car and he was found in possession of a key to the vehicle.

The jury could have reasonably inferred from the evidence that Spears avoided apprehension because he was aware of the illegal weapons contained in the vehicle. *See State v. Webb*, 309 N.W.2d 404, 409 (Iowa 1981) (an individual's flight from scene of a crime is a circumstance from which jury may find defendant departed because of consciousness of guilt). The jury was free to accept or reject Spears' contrary explanation for absconding from law enforcement. *See State v. Allen*, 348 N.W.2d 243, 247 (Iowa 1984) (where evidence is in conflict jury is empowered to resolve conflicts in accordance with its own views). We also note Spears' attempt to deny his presence in the vehicle tends to support the inference that he knew about the presence of the guns. *See State v. Cox*, 500 N.W.2d 23, 25 (Iowa App. 1993) (false story told by defendant to explain or deny a material fact against him is an indication of guilt). Based on these circumstances, we conclude the evidence was sufficient to support Spears' conviction.

III. Ineffective Assistance of Counsel.

Spears asserts his counsel was ineffective for failing to object to prosecutorial misconduct. Spears testified on his own behalf and during cross-examination, he contends the prosecutor improperly stated allegations that were not in evidence.

Ordinarily, we preserve ineffective assistance of counsel claims for postconviction proceedings to allow counsel an opportunity to respond. *See State v. Taylor*, 310 N.W.2d 174, 179 (Iowa 1981). We will, however, depart from this

preference because the record in this case is sufficient to dispose of Spears' claim. See *State v. Schoelerman*, 315 N.W.2d 192, 195 (Iowa 1982).

Our ultimate concern in claims of ineffective assistance of counsel is with the "fundamental fairness of the proceeding whose result is being challenged." *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984)). We review de novo the totality of the circumstances relating to counsel's conduct, keeping in mind the presumption that counsel performed competently. *Risdal*, 404 N.W.2d at 131.

To prevail on a claim of ineffective assistance, the defendant must show: (1) his counsel failed to perform an essential duty; and (2) the failure prejudiced him. *Brewer v. State*, 444 N.W.2d 77, 83 (Iowa 1989). The defendant has the burden to prove both of these elements by a preponderance of the evidence. *Id.*; *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984).

The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984).

On review, we may initially determine whether Spears was prejudiced without resolving the duty element of the foregoing test. *State v. McKettrick*, 480 N.W.2d 52,

56 (Iowa 1992). Spears bears the burden to show a reasonable probability that but for his trial attorney's alleged deficiencies, the outcome of his trial would have been different. *State v. Bumpus*, 459 N.W.2d 619, 627 (Iowa 1990).

Spears asserts his counsel had a duty to object to the following remarks:

Q: Officer Bowers interviewed Roosevelt Thomas and Roosevelt told him that you picked him up right before he drove that car. Isn't that the way it happened, you picked him up?

Spears emphasizes Officer Bowers' earlier testimony did not indicate that Thomas ever made such a statement. He argues the prosecutor's statement was contrary to the evidence and therefore mistakenly implied that Spears, as the driver of the vehicle, knew about the weapons.

Upon de novo review of the record we conclude Spears has not demonstrated he was prejudiced by his attorney's failure to object to the prosecutor's remarks. There was testimony offered at trial indicating Spears was found in possession of the key to the vehicle when he was apprehended. The jury could have drawn a similar inference from this evidence, to-wit, that Spears had control over the vehicle in which the weapons were found. The other evidence introduced at trial of Spears' attempted flight and false statements to police also tends to support the inference that Spears knew about the weapons. Accordingly, Spears cannot establish a reasonable probability that but for counsel's alleged error, the outcome of his trial would have been different.

We affirm Spears' conviction in its entirety.

AFFIRMED.