

IN THE COURT OF APPEALS OF IOWA

No. 7-523 / 96-0672
Filed December 29, 1997

STATE OF IOWA,
Appellee,

vs.

NEAL ANTHONY NORLES, SR.,
Appellant.

Appeal from the Iowa District Court for Scott County, James R. Havercamp,
Judge.

Neal Norles appeals from his conviction, following a jury trial, for going
armed with intent, in violation of Iowa Code section 708.8 (1995). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and John P. Messina, Assistant
State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney
General, William E. Davis, County Attorney, and Kelly G. Raines, Assistant County
Attorney, for appellee.

Considered by Streit, P.J., and Vogel and Mahan, JJ.

STREIT, P.J.

Neal Norles was found guilty by jury of trespass with injury, assault while participating in a felony, and going armed with intent. The State's evidence showed Norles entered the apartment of his pregnant girlfriend, beat her, and threatened her with a knife. Lucinda Londrie told the police and others at the scene her boyfriend, Norles, inserted a knife in her vagina and threatened to commit an abortion and cut the inside of her mouth with the knife. She recanted these statements at trial. Norles testified although he was in close proximity to the knife, it was not available for immediate use and he did not threaten Londrie with the knife. In searching Londrie's apartment for evidence related to the beating, officers found a serrated knife lying on top of a pillow on a chair outside the bedroom door.

Norles contends his counsel was ineffective for not objecting to a jury instruction which defined the words "go armed" in the crime "going armed with intent." He contends prejudice from the court's instruction because it could have led the jury to convict him for "going armed with intent" based on his admitted close proximity to the knife, when he can only be convicted of "going armed with intent" if the knife was on or about his person and available for immediate use. Because we find the instruction was properly submitted to the jury and no prejudice resulted to Norles, he cannot prove his ineffective assistance of counsel claim.

II. Standard of Review.

When a defendant asserts an alleged 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 Norles. *State v. Wissing*, 528 N.W.2d 561, 563 (Iowa 1995).

It is possible for a defendant to establish a claim of ineffective assistance of counsel based upon counsel's failure to object to and preserve error on the validity of an instruction to the jury. *See State v. Hill*, 449 N.W.2d 626, 628 (Iowa 1989). However, such a claim can be established only when prejudice resulted from the counsel's failure. *Id.* Norles must overcome the presumption counsel was competent and demonstrate the counsel's performance was not within the normal range of competency. *Irving v. State*, 533 N.W.2d 538, 540 (Iowa 1995).

A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674, 694-95 (1984). To prove counsel's failure to object prejudiced him, Norles must show the failure caused an actual and substantial disadvantage so that a reasonable

probability exists that were it not for counsel's error, the result of the proceeding would have been different. *Irving*, 533 N.W.2d at 540.

II. Jury Instruction Defining "Go Armed."

To assess whether Norles was prejudiced by his counsel's failure to object to the instruction we must first determine whether the trial court's instruction was improper. A trial court does not need to instruct the jury in a particular way as long as the subject of the applicable law is correctly covered when all the instructions are read together. *State v. Monk*, 514 N.W.2d 448, 450-51 (Iowa 1994).

A person commits the crime of going armed with intent when he or she "goes armed with any dangerous weapon with the intent to use without justification such weapon against the person of another" Iowa Code § 708.8 (1997).

Norles argues the court's submission of jury instruction number twenty-five defining the words "go armed" prejudiced him. The court's instruction read: "To 'go armed' means the defendant was aware of the weapon and it was in a place where it was readily accessible to the defendant."¹ Norles argues the uniform jury instruction for the word "armed" should have been used instead. The uniform instruction defines "armed" as a "conscious and deliberate possession of a [dangerous weapon] on or

¹ This instruction is supported by numerous authorities. For example, in *State v. Alexander*, 322 N.W.2d 71, 72 (Iowa 1982), the court found that a weapon that was easily "accessible" in an automobile violated prohibitions against "carrying" or "concealing" weapons.

about one's person so it is available for immediate use." Iowa Uniform Jury Instruction 800.16.

Norles argues he was prejudiced by his counsel's failure to object to the "go armed" instruction because it caused the jury to misunderstand the proof necessary for an essential element of the crime "going armed with intent." He contends the words "readily accessible" are broader than the words "on or about one's person" in the Uniform Jury Instructions. Norles argues under the court's definition the jury could have found he was armed with intent merely on his acknowledged proximity to the knife.

Although it may have been preferable for the court to have used the uniform instruction for its definition of "go armed," the jury instruction correctly paraphrases the meaning of the words "go armed" so as to adequately instruct the jury on this element of the offense. Norles' concern that the words "readily accessible" may have led the jury to find he was armed because of his proximity to the knife would not have been cured by use of the uniform instruction. The words "about one's person" in the uniform instruction are just as broad as "readily accessible" and just as likely to have led the jury to find Norles armed because of his proximity to the gun. Because we find there is not a reasonable probability use of the uniform instruction would have changed the decision of the jury, Norles cannot establish prejudice.

Even if standing alone the instruction was improper, when read with the other instructions it did not mislead the jury. The uniform instruction Norles contends should have been given, was given to the jury in instruction twenty-four.²

We find the court's instruction defining the words "go armed" was properly submitted to the jury. Accordingly, Norles was not prejudiced by counsel's failure to object to the court's instruction and Norles cannot establish his ineffective assistance of counsel claim.

AFFIRMED.

² Jury instruction number twenty-four states: "The term armed means a conscious and deliberate possession of a dangerous weapon on or about one's person, so it is available for immediate use."