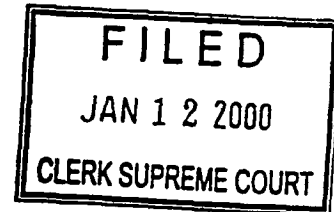


IN THE COURT OF APPEALS OF IOWA

No. 1999-464 (9-721) / 98-2011
Filed January 12, 2000



STATE OF IOWA,
Plaintiff-Appellee,

vs.

LEE EDWARD WALLS,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Jon Fister,
Judge.

Defendant appeals from the judgment and sentence entered upon a jury verdict finding him guilty of possession of a controlled substance with intent to deliver while in the immediate possession or control of a firearm, in violation of Iowa Code sections 124.401(1)(a) and (1)(e) (1997); failure to affix a drug tax stamp, in violation of Iowa Code section 453B.12; and possession of a controlled substance, in violation of Iowa Code section 124.401(5). He contends he was denied effective assistance of counsel because trial counsel failed to object to a jury instruction that stated a firearm need not be operable to apply the enhancement pursuant to section 124.401(1)(e). **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kimberly Griffith, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Vogel and Hecht, JJ.

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PER CURIAM

Defendant-Appellant Lee Edward Walls was found guilty of possession of a controlled substance with intent to deliver while in the immediate possession or control of a firearm, in violation of Iowa Code sections 124.401(1)(a) and 124.401(1)(e) (1997); failure to affix a drug tax stamp, in violation of Iowa Code section 453B.12 (1997); and possession of a controlled substance, in violation of Iowa Code section 124.401(5) (1997). Defendant appeals contending his trial attorney was not effective because he did not object to a jury instruction that told the jury a firearm need not be operable for Iowa Code section 124.401(1)(e) to apply. The state advances among other things that defendant has failed to prove prejudice. We agree and affirm.

The jury answered a special interrogatory finding defendant possessed more than fifty grams of crack cocaine with an intent to deliver and that defendant was in the immediate possession or control of a firearm while participating in the crime of possession with intent to deliver.

Defendant contends the sentence enhancement for immediate possession or control of a firearm while participating in a drug offense under Iowa Code section 124.401(1)(e) (1997) requires a finding the firearm is operable before the enhancement applies. He contends his trial attorney was ineffective in failing to object to the district court's instruction that "[t]he state is not required to prove that the firearm was loaded or that it was operable."

We review ineffective-assistance-of-counsel claims under a de novo standard. *State v. Breuer*, 577 N.W.2d 41, 44 (Iowa 1998); *State v. Allison*, 576 N.W.2d 371, 373 (Iowa 1998). To prevail, defendant must prove both that his attorney failed in an essential duty and that prejudice resulted. *See State v. McPhillips*, 580 N.W.2d 748, 754 (Iowa 1998).

Without deciding whether defendant's trial attorney should have objected to the challenged instruction we look to whether defendant has shown he was prejudiced by the instruction. To establish prejudice, defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Collins v. State*, 588 N.W.2d 399, 402 (Iowa 1998); *State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the defendant's trial. *State v. Kraus*, 397 N.W.2d 671, 673 (Iowa 1986).

Five handguns were found in defendant's bedroom all in close proximity to large amounts of crack cocaine. Defendant admitted possession of the crack cocaine and the guns. He does not contend any of the firearms were not operable. Defendant has failed to show he was prejudiced by the instruction given.

AFFIRMED.

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