

**IN THE COURT OF APPEALS OF IOWA**

No. 7-587 / 96-1960

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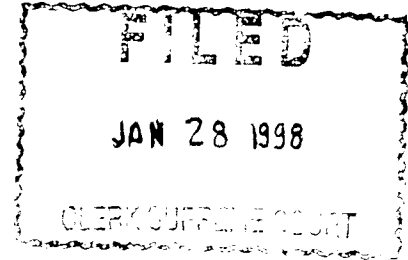
**STATE OF IOWA,**

Appellee,

vs.

**BRADLEY WINTERS,**

Appellant.



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Appeal from the Iowa District Court for Cerro Gordo County, Jon Stuart  
Scoles, Judge.

Bradley Winters appeals from his guilty plea to the offense of child  
endangerment in violation of Iowa Code section 726.61(1) (1995). **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney  
General, Paul L. Martin, County Attorney, and Gregg Rosenblatt, Assistant County  
Attorney, for appellee.

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

**CADY, C.J.**

Bradley Winters appeals the judgment and sentence, following his guilty plea, on a charge of child endangerment. He claims he received ineffective assistance of counsel. We disagree and affirm the conviction.

Winters is the father of a child he had with Cory Hollander. He went to the residence occupied by Hollander and the child. After arguing, Winters left but later returned. Upon his return, Winters kicked in the front door and forced Hollander to the floor while she was holding her baby. He then pulled the baby from Hollander's arms, ran out to his car, and drove off quickly with the baby in his arms. He was subsequently charged with child endangerment.

Winters entered a plea of guilty. The factual basis for the plea was presented at a guilty plea hearing through the following colloquy:

THE COURT: ....Can you tell the court what occurred on that date that gives rise to this charge?

THE DEFENDANT: I drove a car with my daughter in my arms....

THE COURT: Mr. Martin, [prosecutor] do you believe that that constitutes a factual basis for the charge of child endangerment?

MR. MARTIN: I do, your Honor....

THE COURT: Ms. Flander, [defense counsel] do you believe that that would constitute a factual basis for the charge of child endangerment?

MS. FLANDER: Yes, Your Honor.

Winters also signed a written guilty plea to child endangerment. Paragraph nine of the written plea provided the court could rely on the minutes of testimony as a further factual basis. The minutes of testimony included a description of Winters forcing

Hollander to the ground and then grabbing the baby, as well as information describing how Winters drove his vehicle with the baby on his lap.

On appeal Winters claims he received ineffective assistance of counsel. Specifically, he claims his counsel was ineffective by permitting him to plead guilty when the record failed to establish a factual basis for the offense.

### **I. Preservation of Error**

Winters did not file a motion in arrest of judgment following the guilty plea. Consequently, he is barred from proving his claim on direct appeal. *See* Iowa R. Crim. P. 23(3)(a). This failure will not, however, bar a challenge to a guilty plea if the failure to file a motion in arrest of judgment resulted from ineffective assistance of counsel. *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996). Although Winters claims we should rule the factual basis for a guilty plea is always subject to direct review regardless of a failure to challenge the factual basis in the trial court, we decline to adopt this rule.

### **II. Standard of Review**

Winters' ineffective assistance of counsel claim involves a constitutional challenge. Therefore, our scope of review is de novo. *State v. Cook*, 565 N.W.2d 611, 613 (Iowa 1997).

### **III. Ineffective Assistance**

Ordinarily, ineffective assistance of counsel proceedings are preserved for postconviction proceedings. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994); *see*

also *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). These claims may be resolved on direct appeal, however, when the record adequately addresses the issues. *Ray*, 516 N.W.2d at 865.

To prevail on an ineffective assistance of counsel claim, Winters must prove by a preponderance of the evidence that: (1) counsel failed to perform an essential duty; and (2) prejudice resulted. *State v. Allen*, 565 N.W.2d 333, 336 (Iowa 1997). Winters must therefore overcome the strong presumption of counsel's competence and that counsel's error worked to his actual and substantial disadvantage, creating a probability that, but for the error, the trial's result would have been different. *Ray*, 516 N.W.2d at 865 (citing *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984)).

We will find counsel failed to perform an essential duty if defense counsel allows the defendant to plead guilty to a charge for which no factual basis exists and thereafter fails to file a motion in arrest of judgment challenging the plea. *Brooks*, 555 N.W.2d at 448 (citations omitted). Conversely, where a factual basis exists for the plea, counsel will not usually be found ineffective for allowing the defendant to plead guilty. *Id.* In determining whether a factual basis for Winters' plea exists, we consider the entire record, including the minutes of testimony and the plea colloquy. *See id.* at 448-49; *State v. Hack*, 545 N.W.2d 262, 263 (Iowa 1996).

A defendant is guilty of child endangerment if, as a parent of a child, the defendant "knowingly acts in a manner that creates a substantial risk to a child or

minor's physical, mental, or emotional health or safety." Iowa Code § 726.6(1)(a) (1995). A substantial risk of death in the context of a serious injury has been defined to mean "more than any risk of death, but does not mean death is likely." *See State v. Taylor*, 538 N.W.2d 314, 316 (Iowa App. 1995). Likewise, we believe a substantial risk to a child's physical safety includes more than any risk of physical harm, but does not mean physical harm is likely. *See, e.g., State v. Eldrenkamp*, 541 N.W.2d 877, 879 (Iowa 1995) (jury convicted father of child endangerment pursuant to Iowa Code § 726.6(1)(a) after father and son were involved in a motorcycle accident); *State v. Smith*, 522 N.W.2d 591, 592 (Iowa 1994) (father abusive to mother and who pushed mother resulting in child falling to the floor was convicted of child endangerment); *In re J.W.D.*, 458 N.W.2d 8, 9 (Iowa App. 1990) (in termination of parental rights context, parents' volatile relationship presented a substantial risk to the well being of child).

In considering whether a factual basis existed in this case for the plea of guilty to child endangerment under Iowa Code section 726.6(1)(a), we look to all the circumstances together, including Winters' conduct in driving carelessly with his baby daughter on his lap, preceded by his conduct in forcing himself into the residence and pushing Hollander to the floor as she held the baby. *See Hack*, 545 N.W.2d at 263 (court reviewed minutes of testimony to evaluate factual basis for plea). Considering the totality of the circumstances, we find this conduct created a substantial risk to the child's physical safety. Because we find a factual basis for the

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guilty plea exists in the record, we find Winters received effective assistance of counsel.

**AFFIRMED.**