

IN THE SUPREME COURT OF IOWA

No. 119 / 02-1752

Filed October 6, 2004

STATE OF IOWA,

Appellee,

vs.

HASIM KOSTIC,

Appellant.

Appeal from the Iowa District Court for Black Hawk County, James D. Coil, District Associate Judge.

Defendant appeals from judgment of conviction and sentence for carrying concealed weapons. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Dennis D. Hendrickson, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Joel Dalrymple and Jill Dashner, Assistant County Attorneys, for appellee.

PER CURIAM.

Hasim Kostic, who speaks and understands little English, appeals from a judgment of conviction and sentence for carrying concealed weapons. He contends his trial counsel was ineffective for allowing repeated episodes in which the interpreter failed to interpret trial testimony for him. He also contends the court erred in continuing a no-contact order. We do not address the issue concerning the no-contact order because it is moot. We affirm on the claim of ineffective assistance of counsel because we find no prejudice.

On April 29, 2002, Waterloo police officers responded to a report of a domestic abuse assault. Officers were told the suspect was walking, and when they reached the area, they encountered Kostic. Kostic was holding a knife behind his leg. The officers told Kostic to drop the knife, and he eventually did. One officer was pointing his gun at Kostic when he commanded Kostic to drop the knife. The officer was speaking in English, and unknown to him at the time, Kostic speaks Bosnian and very little English.

Two officers took Kostic down and handcuffed him while a third officer kicked the knife away. Kostic was then taken into custody. At his initial appearance the next day, a no-contact order was entered against him.

Later, the State charged Kostic with domestic abuse assault (enhanced), an aggravated misdemeanor, in violation of Iowa Code section 708.2A(3)(b), and carrying concealed weapons, a serious misdemeanor, in violation of Iowa Code section 724.4(3)(b) (2001). Shortly before the trial began, the district court granted the State's motion to amend the trial information. The amendment changed the domestic abuse assault

(enhanced) from an aggravated misdemeanor to a class D felony in violation of Iowa Code section 708.2A(4).

The jury acquitted Kostic of domestic abuse assault, but convicted him of carrying concealed weapons. On October 23, 2002, the court sentenced Kostic to 270 days in jail and continued the no-contact order for a year.

Kostic appealed. He contends his trial counsel was ineffective for allowing repeated episodes in which the interpreter failed to interpret trial testimony for him. He also contends the sentencing court erred in continuing the no-contact order. We do not address the second issue because it is moot: More than one year has passed since the order was entered.

Because Kostic's claims of ineffective assistance of counsel arise from his Sixth Amendment right to counsel, our review is de novo. *State v. Scalise*, 660 N.W.2d 58, 61 (Iowa 2003). To prevail on this claim, Kostic must show that his "trial counsel failed to perform an essential duty *and* that prejudice resulted from this failure." *Id.* "Failing to perform an essential duty means counsel's performance fell outside the normal range of competency." *Id.* at 61-62. To establish prejudice, Kostic must show "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). Failing to prove either the duty or prejudice prong defeats the claim of ineffective assistance of counsel. *Scalise*, 660 N.W.2d at 62.

Even though claims of ineffective assistance of counsel are generally preserved for postconviction relief proceedings, we resolve them on direct

appeal in two situations. We will affirm the conviction without preserving the claim when the record shows that the defendant cannot prevail on the claim as a matter of law. *State v. Martinez*, 679 N.W.2d 620, 625-26 (Iowa 2004). Conversely, we will reverse the conviction and remand for new trial when the record establishes both elements of the claim. *Id.* at 626. Here, for reasons that follow, we conclude the record shows as a matter of law that Kostic cannot prevail on his claim of ineffective assistance of counsel.

The jury found Kostic not guilty of the more serious charge—domestic abuse assault. So we are only concerned with the carrying concealed weapons charge. More to the point, we must determine whether, but for counsel’s conduct regarding the interpreter, there is a reasonable probability the result on that charge would have been different.

Iowa Code section 724.4(3)(b) provides that a person commits a serious misdemeanor if the person goes armed with a knife concealed on or about his person, if the knife has a blade exceeding five inches in length. It is uncontroverted that the knife in question exceeded five inches in length.

Moreover, the alleged victim testified that Kostic came to her apartment, assaulted her and her friend, grabbed a knife from her kitchen, and left—apparently in pursuit of the friend. One of the officers testified that as he approached Kostic, Kostic had a knife in his hand and appeared to be hiding it behind his left leg. Another officer similarly testified. All of this happened within a short period of time on the date of the incident. The record shows that the interpreter was interpreting all of this testimony for Kostic.

Kostic himself testified through the interpreter that he indeed had the knife when stopped by the police, but that either the alleged victim or her friend had put the knife in his jacket pocket before he left the scene. He claimed he did not know the knife was in his pocket until the police said

something about a knife, at which point he touched his jacket pocket and felt the knife. He then threw the knife to the ground as the police ordered him to do.

From all of this testimony, the jury could easily find that Kostic was armed with a knife concealed on or about his person. Although there indeed were a number of times the interpreter was not interpreting testimony for Kostic, we cannot say that such failure was prejudicial to Kostic regarding the only charge of which he was found guilty. Even had the interpreter done an exemplary job of interpreting, we cannot say there is a reasonable probability the result would have been different.

Although we conclude there was no prejudice, we reaffirm our holding that the general standard for adequate translation of trial proceedings mandates a “word for word translation of everything relating to the trial a defendant conversing in English would be privy to hear.” *Thongvanh v. State*, 494 N.W.2d 679, 681 (Iowa 1993) (quoting *United States v. Joshi*, 896 F.2d 1303, 1309 (11th Cir. 1990)). We also recognize that an interpreter’s deficiency can be imputed to the attorney as ineffective assistance of counsel. See *Ledezma v. State*, 626 N.W.2d 134, 149 (Iowa 2001).

On the other hand,

“[o]nly if the defendant makes any difficulty with the interpreter known to the court can the judge take corrective measures. To allow a defendant to remain silent throughout the trial and then, upon being found guilty, to assert a claim of inadequate translation would be an open invitation to abuse.”

Thongvanh, 494 N.W.2d at 682 (quoting *Valladares v. United States*, 871 F.2d 1564, 1566 (11th Cir. 1989)). The record does not reflect that Kostic ever made counsel or the district court aware he was having any such difficulty. To the contrary, according to the interpreter, there were times that Kostic simply did not want to know what the witnesses were saying.

AFFIRMED.

This opinion shall not be published.