IN THE COURT OF APPEALS OF IOWA

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CLERK SUPREME COURT

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FRED L. PLETKA,	)	
Applicant-Appellant,	)	
vs.	)	
STATE OF IOWA,	)	9-157 88-562
Resister-Appellee.	)	

Appeal from the Iowa District Court for Woodbury County (No. 94620C), Dewie J. Gaul, Judge.

Applicant appeals from the denial of his application for postconviction relief after a jury found him guilty of first-degree murder and manslaughter. **AFFIRMED.**

William L. Wegman, State Public Defender, and Linda Del Gallo, Assistant Public Defender, for applicant-appellant.

Thomas J. Miller, Attorney General, and Ann E. Brenden, Assistant Attorney General, for resister-appellee.

Considered by Oxberger, C.J., and Schlegel and Habhab, JJ.

HABHAB, J. 513

In his postconviction application, Fred L. Pletka, claims his trial counsel was ineffective for failing to object to the felony-murder marshaling instruction given during his trial. The facts of this case are set out in State v. Pletka, 310 N.W.2d 525 (Iowa 1981), and need not be repeated here. We affirm.

On his claim of error petitioner has the burden to show by a preponderance of the evidence that (1) counsel's performance was deficient in that he failed to perform an essential duty and (2) that prejudice resulted "to the extent that but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2952, 2069, 80 L. Ed. 2d 674, 698 (1984); Hall v. State, 360 N.W.2d 836, 838 (Iowa 1985); Taylor v. State, 352 N.W.2d 683, 685 (Iowa 1984).

The first prong requires an affirmative factual basis demonstrating the alleged inadequacy of representation to be set forth. Hinkle v. State, 290 N.W.2d 28, 31 (Iowa 1980). There is a strong presumption of counsel's competency. Sims v. State, 295 N.W.2d 420, 423 (Iowa 1983).

This case at trial was submitted against the petitioner on alternative theories of premeditated murder and felony murder. The petitioner in this postconviction action claims ineffective assistance of counsel because of error

in the felony-murder instruction.[1] In this respect, petitioner focuses on the following paragraph of marshaling instruction no. 20, which he claims is defective because it omitted malice aforethought as an element the State had to prove for the jury to find first-degree murder was committed under the felony-murder rule:

> 3. That such action of the defendant was done by him with malice aforethought and willfully, deliberately and premeditatedly and with a specific intent on the part of the defendant to kill the said Robert Frederick Schmeckpepper, or that such action of the defendant was in the perpetration or attempt to perpetrate the crime of robbery.

It is clear that that part of paragraph 3 of instruction no. 20 relating to felony murder does omit the element of malice aforethought. It is equally clear that malice aforethought is a necessary element under the felony-murder theory. However, while this paragraph by itself could be interpreted as being defective, our courts have considered all the instructions together to ascertain their sufficiency and to evaluate a counsel's failure to object to a questionable instruction. Lamphere v. State, 348 N.W.2d 212, 217 (Iowa 1984); State v. Blackford, 335 N.W.2d 173, 177-78 (Iowa 1983); State v. Conner, 241 N.W.2d 447, 462 (Iowa 1976). This same instruction first asks the

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1. As it relates to the instruction, the defendant at trial did not object to the court's instructions. Thus, the question was not resolved on direct appeal. State v. Pletka, 310 N.W.2d 525, 528 (Iowa 1981).

jury to keep in mind the definition of murder in the first degree[2] when determining the defendant's guilt of this crime. The definitional first-degree murder instruction (instruction no. 11) given stated:

> Whoever kills any human being with malice aforethought either expressed or implied, is guilty of murder.

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2. Marshaling instruction no. 20, in its entirety, provides:

> In Case No. 39220, you will first determine whether the defendant is guilty of murder in the first degree, bearing in mind the definition of murder in the first degree heretofore given you in these instructions.
>
> Before the defendant can be found guilty of the crime of murder in the first degree as charged in the Information, the State must establish by the evidence beyond a reasonable doubt each of the following propositions:
>
> 1. That on or about October 6, 1977, in the County of Woodbury, and State of Iowa, the defendant did unlawfully stab Robert Frederick Schmeckpepper.
>
> 2. That Robert Frederick Schmeckpepper died as a result of being stabbed by the defendant.
>
> 3. That such action of the defendant was done by him with malice aforethought and willfully, deliberately and premeditatedly and with a specific intent on the part of the defendant to kill the said Robert Frederick Schmeckpepper, or that such action of the defendant was in the perpetration or attempt to perpetrate the crime of robbery.
>
> 4. That such action of the defendant was not taken by him in self-defense as that term is defined in these instructions.

> All murder perpetrated by willful, deliberate and premeditated killing of a human being is murder in the first degree.
>
> All murder committed in the perpetration or attempt to perpetrate the crime of robbery is murder in the first degree. (Emphasis supplied).

When we review the entire record, we do not believe the petitioner was prejudiced by this omission.[3] As the supreme court held on direct appeal, "the evidence was sufficient to support submission of the case on the felony-murder theory. . . . Substantial evidence existed from which the jury could find defendant killed Schmeckpepper deliberately after premeditation, and with specific intent to kill." State v. Pletka, 310 N.W.2d 525, 529-30 (Iowa 1981).

As in State v. Blackford, "practical considerations make it unlikely that the inclusion of a particular element in the marshaling instruction would have produced any difference in the verdict of the jury." 335 N.W.2d at 178. These practical considerations are: (1) the nature of the evidence as it relates to the missing element and (2) the overwhelming evidence, even when the various defenses are considered, of the petitioner-defendant's guilt beyond a reasonable doubt.

The State sought to show that defendant was the perpetrator and that the offense was first-degree murder on

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3. We admit the marshaling instruction could be more clear as to malice aforethought element and suggest a more careful drafting when using a conjunctive definition such as this one.

either of its alternative theories. The applicant in this case claimed self-defense and/or diminished capacity during his trial which would appear to make malice aforethought a real issue. As it relates to the self-defense issue, the supreme court in Pletka stated:

> He [defendant] admits stealing money and King's automobile but claims he did so after having killed the men in self-defense. Apart from other issues affecting defendant's credibility, the jury may have questioned whether Schmeckpepper was killed in self-defense when defendant admitted he walked into the victim's bedroom with a knife, observed him bent over the foot of his bed with his back toward defendant, stabbed him in the back, and, after killing him by additional stabbings, carved an "X" in his back.
>
> It was necessary for the State to prove the victims were murdered "in the perpetration or attempt to perpetrate . . . robbery . . . ." [citations omitted] The jury could find from the circumstantial evidence that defendant intended to rob the victims at the time he killed them. The State was not required to prove the property was taken before the alleged murders. [citations omitted] We hold that the evidence was sufficient for submission of the case under the State's felony-murder theory.

State v. Pletka, 310 N.W.2d 525, 527-28.

In addition to the aforesaid circumstances, the testimony at trial reveals the following: Although the defendant did not testify at trial, defendant's version of the events was introduced by two police officers to whom he confessed. Pletka indicated that on the night in question he met the other victim, James King, in a bar. He accompanied Mr. King to another bar and then to the victims' home. They had more to drink, after which

defendant became tired and lay down on Mr. King's bed. Defendant indicated that Mr. King then came to the bedroom door, saying "let's get it on, baby," at which time defendant told him to leave. Mr. King complied. Defendant advised that shortly thereafter Mr. King and the other victim (Robert Schmeckpepper) appeared together, nude, at the bedroom door. Mr. King supposedly had a shiny object in his hand. Defendant kicked Mr. King in the stomach, grabbed the knife, and slashed at King. The other victim (Schmeckpepper) ran from the room. After repeatedly stabbing Mr. King, defendant went to the kitchen to wash the knife and get another, determined to find the other man. Defendant supposedly believed that the other man had gone to arm himself, although one of the officers understood defendant to be looking for a gun himself. Defendant found this victim in the other bedroom. At this time, Mr. Schmeckpepper's back was to the defendant. Defendant approached the victim and stabbed him in the back. Defendant then pushed or kicked Mr. Schmeckpepper onto the bed and cut and stabbed him several times. Pletka advised the authorities that this victim tried to shield himself from the attack with a bedsheet. Mr. Schmeckpepper's injuries consisted of several stab wounds, one of which collapsed his lung and another of which severed the left common carotid artery. A large "X" was carved on his back. After the attacks, defendant washed

his hands, disconnected the telephone in Mr. King's bedroom, and stole the victims' money, alcohol, and car keys.

From these facts, it is clear that no real issue existed that the slaying of Robert Schmeckpepper was without malice. Defendant sought out this victim after he ran away, and by Pletka's own admission, stabbed him in the back. The vicious attack continued as the victim tried to shield himself with a sheet from the bed. The mutilation of Mr. Schmeckpepper's body precludes any finding that defendant's acts were without malice.

In light of the evidence, we find the applicant has failed to carry his burden of showing prejudice from trial counsel's failure to object to an erroneous marshaling instruction. The district court's denial of postconviction relief is affirmed.

AFFIRMED.