

IN THE COURT OF APPEALS OF IOWA

FILED 4720

DEC 30 1981

CLERK SUPREME COURT

STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed December 30, 1981

vs.

)

LANE SCOTT WOLFE,

)

1-326

65094

Defendant-Appellant.

)

Appeal from Polk District Court - Ray A. Fenton, Judge.

Defendant appeals from his conviction of second degree murder in violation of sections 707.1 and 707.3, The Code. AFFIRMED.

Mark C. Smith, West Des Moines, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and John P. Messina, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

The defendant appeals from his conviction of second degree murder in violation of sections 707.1 and 707.3, The Code. He claims that he was denied a fair trial by the trial court's failure to properly instruct the jury on reaching a unanimous verdict in determining the victim's cause of death, on the definition of a dangerous weapon, on the permissible inference from the use of a dangerous weapon, and by ineffective assistance of counsel who failed to object at trial to the alleged deficiencies in the instructions now urged on appeal. We find that the majority of alleged errors were not preserved and affirm the conviction but reserve the defendant's right to raise the issue of ineffective assistance of counsel through postconviction relief proceedings.

The body of Kenneth Teer was discovered floating in Maffit Reservoir south of Des Moines October 12, 1979. Autopsy reports showed gunshot wounds to the body as well as lung fluid; trial testimony indicated that, if untreated, one of the gunshot wounds would have been fatal while certain other evidence, such as the fluid and hemorrhaging in the ear, tended to show that Teer could have still been alive when his body was placed in the reservoir.

After investigation, on December 4, 1979, Lane Scott Wolfe, defendant herein, his mother Doris, and his older brother Randy Wolfe were charged with first degree murder. Randy was subsequently granted immunity to testify against defendant and Doris in separate trials; by jury verdict both were found guilty of murder in the second degree. Defendant's jury, in a special interrogatory, found the cause of Teer's death to be a combination of gunshot and drowning.

I. On this appeal defendant delineates several errors in the trial itself. They include alleged deficiencies in the court's instructions as well as a claim of ineffective assistance of counsel largely premised on counsel's failure to object to these same instructions, and failure to note that the court agreed to give defendant's requested instruction on death by accident but then neglected to do so. This omission, as well as the other possible instructional errors, was not mentioned in defendant's motion for a new trial. All errors raised by defendant, with the exception of his challenge to the instruction on cause of death, are raised for the first time on this appeal.

Defendant seeks to avoid his preservation of error problem by asserting that the trial court has a duty independent of trial counsel to instruct the jury fully and fairly in the applicable law, and that failure by the trial court to do so requires a new trial. For this proposition he relies upon State v. Rupp, 282 N.W.2d 125 (Iowa 1979); State v. Sallis,

202 N.W.2d 240 (Iowa 1976); and State v. Jacoby, 260 N.W.2d 628 (Iowa 1977). While counsel is correct that in each of these cases the duty of the trial court to properly instruct the jury is recognized, Jacoby and Rupp are inapposite since counsel in each of those cases did object to the trial court's proposed instructions, thereby preserving error. The court's comments in Sallis, 262 N.W.2d at 248, seem particularly appropriate to the present case.:

Counsel on appeal, who was not trial counsel, concedes this record but insists it was the trial court's duty to so instruct without the necessity of any request therefor.

It is the trial court's duty to instruct a jury fully and fairly, even without request, but our adversary system imposes the burden upon counsel to make a proper record to preserve error, if any, in this factual circumstance by specifically objecting to instructions in their final form, requesting instructions and voicing specific exception in event they are refused. State v. Overmann, 220 N.W.2d 914, 918 (Iowa 1974).

Defendant's failure to make known to the trial court before the instructions were given to the jury his wish to so instruct deprives him of a basis for successful appeal in this court for such failure to instruct. See State v. Russell, 245 Iowa 1190, 1205, 66 N.W.2d 35, 43.

We think the foregoing controls our view of the record here, and we find that, with the exception of trial counsel's objection as to the instruction concerning the victim's cause of death, any objections to the court's instructions were not made at trial. Consequently, no record was made, no error relating to those instructions was preserved, and we have nothing to review on direct appeal. See State v. Rouse, 290 N.W.2d 911, 913-15 (Iowa 1980).

II. Trial counsel did timely object to the court's instructions on the matter of the victim's cause of death whereby the jury was permitted to find that Teer died of a gunshot wound, drowning, or a combination of both. Essentially trial counsel's objection was that there was insufficient evidence from any of the three pathologists who testified to show that Teer died from any cause other than either gunshot or drowning. In addition, appellate counsel argues that the cause of death instruction permitted the jury to find the cause of death by a less than unanimous verdict.

We think a jury question was made out as to the cause of death and that the evidence from the pathologists was sufficient for the jury to find that Teer's death resulted from a combination of gunshot and drowning beyond a reasonable doubt. Furthermore, our supreme court in a recent case, State v. Duncan, ___ N.W.2d ___, ___ (Iowa 1981), cited the following with approval: "It is not necessary that a jury, in order

to find a verdict, should concur in a single view of the transaction disclosed by the evidence. If the conclusion may be justified upon either of two interpretations of the evidence, the verdict cannot be impeached by showing that a part of the jury proceeded upon one interpretation and part upon another." People v. Sullivan, 173 N.Y. 122, 127, 65 N.E. 989, 989 (1903). "[I]f substantial evidence is presented to support each alternative method of committing a single crime, and the alternatives are not repugnant to each other, then unanimity of the jury as to the mode of commission of the crime is not required." State v. Arndt, 12 Wash. App. 248, 252, 529 P.2d 887, 889 (1974). We think, therefore, that counsel's objection to this instruction regarding cause of death and the possible conclusion of the jury is without merit.

III. The defendant has also claimed ineffective assistance of trial counsel. Generally, our Iowa appellate courts prefer to consider such claims by way of post conviction relief where a full hearing may be held before such a determination is made. See, e.g., State v. O'Connell, 275 N.W.2d 197 (Iowa 1979); State v. Coil, 264 N.W.2d 293 (Iowa 1978). We think such a posture is particularly apt in this case where we are unable to consider the majority of defendant's alleged errors at trial because of trial counsel's failure to preserve any such errors for our review. We therefore decline to consider defendant's ineffective assistance of counsel claim on this direct appeal without prejudice to his right to raise such arguments by way of post conviction relief.

We have considered all of defendant's arguments, and on the record presented to us, find no reason to overturn his conviction. It is affirmed.

AFFIRMED.