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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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STATE OF IOWA,	)	**Filed August 29, 1985**
Plaintiff-Appellee,	)	
vs.	)	5-275 84-1082
GARRY LUST,	)	
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Polk County, Louis A. Lavorato, Judge.

The defendant appeals from his convictions for two counts of second-degree murder. AFFIRMED.

John R. Sandre and Keith E. Uhl of Scalise, Scism, Sandre & Uhl, Des Moines, for the plaintiff-appellee.

Thomas J. Miller, Attorney General, and Rebecca L. Claypool, Assistant Attorney General, for the plaintiff-appellee.

Heard by Oxberger, C.J., Schlegel, and Sackett, JJ.

The defendant has appealed from his convictions on two counts of second-degree murder. He says the court erred in rejecting his defense of insanity and in finding him guilty of second-degree murder after concluding he had shown a defense of diminished responsibility. We affirm.

The facts are largely uncontested. The key issue for this court to decide is whether the defendant, Garry Lust, was insane at the time he killed his ex-wife and the man with whom she was living. At 8:30 a.m. on July 29, 1983, Lust bought a gun and ammunition, then phoned his ex-wife, Linda, to ask her to come to his residence. She arrived, along with Steve Harvey, and Lust then shot both of them. He left his house, taking with him the three-year-old daughter of Linda and another man. Both defense and the State agree that Lust then deliberately rammed his automobile into a cement bridge in an attempt to kill himself.

A number of witnesses were called by the defendant, including his father, nephew, employer, co-workers, customers on his dairy route, renters, and close friends. All the witnesses testified they had observed Lust's mental condition deteriorate in the six-week period prior to the killings. Lust became increasingly agitated and depressed about the conditions he believed his children were living in with their mother. He referred to the fact his 38-year-old ex-wife lived with an 18-year-old man, along with her five children and a 19-year-old man. Lust had told the witnesses of how one daughter had run away with a former boyfriend of Linda's and the man had threatened to go after Lust's other daughters. He also expressed concern about the presence of drugs and alcohol around the children. Those called in the defense's behalf told how Lust was increasingly incoherent as he became depressed about his inability to take the children out of the

environment. Lust began telling relatives and his pastor that he thought he needed an exorcist since the devil possessed him and showed him pictures in his mind. He told the pastor that he thought about eliminating himself and his ex-wife in order to save the children.

At trial the defense also presented the testimony of psychiatrist Michael Taylor. He determined, after spending over 100 hours with the defendant, that Lust had suffered from a major depressive episode with psychotic features. The doctor determined Lust was unable to appreciate the nature and quality of his acts or to distinguish between right and wrong.

As the defense points out, a considerable amount of evidence was presented to show that the defendant was insane as defined by section 701.4 of the Code. However, our duty on review is not to make an independent determination of whether defendant was sane or not, but to ascertain whether the trial court's decision is supported by substantial evidence. Iowa R. App. P. 4.

When the defendant gives proper notice of intent to rely on the defense of insanity, and adequately raises the issue, the burden then shifts to the State to prove beyond a reasonable doubt that the defendant is sane. State v. Thomas, 219 N.W.2d 3, 5 (Iowa 1974). The evidence outlined shifted that burden to the State in this case. The presumption remains, however, that the defendant is sane. Id.

The State did not present an expert witness to rebutt the contention defendant was insane, and defendant says this points out the weakness of the State's case. However, our federal appeals court has noted that the burden of proof of sanity can be fulfilled even though the State presents only lay evidence and the defendant provides expert testimony. Dusky v. United States, 295 F.2d 743, 754 (8th Cir. 1961) cert. denied, 368 U.S. 998, 82 S. Ct. 625, 7 L. Ed. 2d 553 (1962).

The State's evidence absent the testimony of an expert was sufficient to allow it to conclude defendant was not insane. The State showed when Lust purchased the gun the morning of the killings the clerk at the store indicated there was nothing unusual about his appearance or the way Lust acted. Lust remembered to bring a copy of his permit and completed a number of forms necessary to purchase the gun. Lust declined the sales clerk's suggestion he buy the cheapest shells and insisted on buying heavier ammunition. After Lust shot Linda once, he chased her, reloaded his gun, and then shot her three more times. An eyewitness said she saw Linda lying by the road, with the defendant standing over her and heard him say, "I hope you're dead bitch. I'm going to make sure you're dead."

From this information the fact finder could infer that Lust had sufficient mental capacity to understand the nature and quality of his actions through his ability to carry out the gun purchase, chose heavier bullets to use in the weapon, arrange for his wife to come to his house, and assure that she was dead.

Although the testimony by Dr. Taylor was convincing, the court did not have to accept his opinion as conclusive and may accept the opinion in part or not at all. State v. Schultz, 231 N.W.2d 585, 587 (Iowa 1975). Taylor stated at trial that it was "inconceivable" Lust would be capable of understanding his acts at the time of the shootings, but the State points out that prior to trial Taylor had indicated the defendant was able to understand the nature and quality of his acts on the day in question. Taylor explained that he changed his opinion after reviewing notes the week before trial. He also stated it is possible for someone diagnosed as suffering from a major depressive episode with psychotic features to be accountable for their criminal acts.

Certain statements made by the defendant to the doctor are also revealing. The doctor asked Lust whether he knew it was wrong to shoot people, and Lust

responded, "I was caught between three lives or the five girls." As the State points out, the court could infer that defendant consciously decided to take matters into his own hands after other methods had failed. Lust also stated when asked why he had put the child in the car after killing Linda and Harvey, "I don't know why I put her in the car. She was innocent." This statement tends to show Lust recognized "innocent" from "guilty" and could distinguish right from wrong.

We believe the testimony taken as a whole provides substantial evidence for the court's conclusion.

Defendant also claims the court erred in finding him guilty of second-degree murder after accepting a diminished responsibility defense. He argues that manslaughter or some lesser included offense should have been found once the court determined specific intent did not exist because of diminished responsibility.

The court in State v. Gramenz, 256 Iowa 134, 142, 126 N.W.2d 285, 290 (1964) held diminished capacity is to be considered regarding the issues of willfulness, deliberation, premeditation, and specific intent to kill, and can reduce first-degree murder to second-degree murder. The defense may not be considered, however, regarding malice aforethought and general criminal intent, and therefore cannot reduce second-degree murder to manslaughter. Id. The court has also stated, "In the absence of the premeditation requirement, murder is not a specific intent crime and therefore is not subject to the defense of diminished capacity." Veverka v. Cash, 318 N.W.2d 447, 449 (Iowa 1982).

We find no error in the trial court's holdings and affirm defendant's convictions.

AFFIRMED.