IN THE COURT OF APPEALS OF IOWA

No. 6-448 / 95-1074

STATE OF IOWA,

Plaintiff-Appellee,

vs.

DONALD LEE PICKETT,

Defendant-Appellant.

FILED
SEP 30 1996
CLERK SUPREME COURT

Appeal from the Iowa District Court for Scott County, David J. Sohr, Judge.

Defendant appeals from judgment and sentences, following jury trial, entered upon his convictions of first-degree murder and willful injury in violation of Iowa Code sections 707.1, 707.2(1), and 707.2(2) (1993). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Kevin Cmelik, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Susan M. Crawford, Assistant Attorney General, and William E. Davis, County Attorney, for appellee.

Heard by Sackett, C.J., and Huitink and Streit, JJ.

SACKETT, C.J.

Defendant Donald Lee Pickett appeals from judgment and sentences, following a jury trial, entered upon his convictions of first-degree murder and willful injury in violation of Iowa Code sections 707.1, 707.2(1), and 707.2(2) (1993). Defendant admittedly shot Leslie Thomas. The wounds resulted in her death. Defendant's primary defense was he had diminished capacity when he shot Thomas. On appeal, defendant contends his trial attorney was not effective because he failed to object to the court's response to a question from the jury concerning the felony murder rule. We affirm.

The facts show defendant moved in with Thomas, and on December 21, 1994, Thomas told defendant to pack his things and leave her house. Defendant packed his car, leaving his shotgun for last. Defendant loaded the shotgun with three shells and shot the television set. He then shot Thomas. When she turned to ask him why he had done that, he shot her again. He picked up the shell casings, wrapped the shotgun in a blanket, and drove to his brother's home in Fort Leonardwood, Missouri. Defendant told his brother he had shot Thomas twice and did not know if she was alive. He also told his brother he wanted to kill himself.

Defendant and his brother drove to Davenport, Iowa, the next day and went to the police station. They asked if there was a warrant for defendant's arrest. There was not, and defendant and his brother left the station. Defendant had his brother drive him to the hospital where defendant went to the psychiatric ward and eventually

told medical personnel he shot his girlfriend. Thomas's body was discovered. An autopsy showed she died from two gunshot wounds. Defendant was charged with first-degree murder and willful injury.

At trial, defendant presented expert testimony that defendant was suffering from schizo affective disorder of a depressed type. The expert testified that at the time of the shooting defendant was experiencing an acute psychotic reaction. Throughout the trial, defendant's attorney attempted to show defendant had a diminished capacity. In rebuttal, the State presented expert testimony that defendant was not exhibiting any diagnosable mental illness and at the time of the shooting he was perfectly capable of forming the necessary specific intent to injure another.

The jury retired a little before one in the afternoon and they were sent home at five o'clock that day. They returned at eight-thirty the next morning, and shortly thereafter the jury submitted the following question:

> Your Honor:
>
> If we find the defendant guilty of willful injury is that an automatic guilty of first degree due to the felony murder rule.
>
> Or can we find him guilty of willful injury and then convict him of a lesser charge in Count I.

The trial court consulted with the attorney for defendant and the attorney for the State. Defendant was also present. It was agreed the trial court would respond to the jury's questions. The court, after about a fifteen-minute break, told the jury, "As explained in Instruction No. 9, you must decide each count separately. Also, a careful reading of all of the instructions will answer your questions." The jury

returned its verdict a little before noon. Defendant was convicted as charged and sentenced to life in prison.

Defendant's sole issue on appeal is his trial attorney was not effective because he did not object to the court's response to the jury inquiry. Defendant contends the response given was inadequate and his trial attorney should have requested the trial court to (1) instruct the jury not all killings in perpetration of a felony are murder, only those killings committed with malice aforethought in the perpetration of a felony, or (2) refer the jury specifically to the felony murder instruction and any instructions defining malice. Defendant further contends the first question asked by the jury should have been answered "yes" and the second should have been answered "no."

The State contends defendant has failed to show the jury was not correctly instructed on the malice element of felony murder. The State further claims defendant has failed to establish his trial attorney breached a duty or that he was prejudiced.

Murder is committed when a "person kills another person with malice aforethought." Iowa Code § 707.1. A murder becomes first-degree murder when it is committed under any of four sets of circumstances. Iowa Code § 707.2. A murder is in the first degree when committed "while participating in a forcible felony." Iowa Code § 707.2(2); *State v. Rogland*, 420 N.W.2d 791, 792 (Iowa 1988). An

intentionally and knowingly caused death is not an element of felony-murder. Iowa Code § 707.1, 707.2(2).

In enacting section 707.2(2), the legislature did not relieve the State of proving any element of murder nor did it create any presumptions which shifted the burden of proof from the State to the defendant. *Rogland*, 420 N.W.2d at 794. Not all killings which occur during designated felonies are first-degree murder. *Id.* Rather, only murders which occur during designated felonies are first-degree murder. *Id.* Under our statute, the difference between killing and murder is malice aforethought. *Id.* If the State does not prove this malice, there can be no finding of murder. *Id.; see also State v. Oliver*, 341 N.W.2d 744, 747 (Iowa 1983).

In the context of willful injury as the underlying felony, evidence establishing the intent required for that crime will often be the same as that proving the malice aforethought required for murder. *Rogland*, 420 N.W.2d at 794. However, malice aforethought and intent to cause serious injury are distinct elements and the presence of one does not necessarily prove the presence of the other. *Id.* The State is required to prove both elements. *Id.*

We recognize, as defendant argues, this issue is complex and the jury's question was an issue they found difficult. Defendant is not claiming the manner the jury initially was instructed was not correct. Defendant does not claim the supplemental direction by the trial court was not correct. We need not decide

whether there is a more understandable manner to instruct the jury under similar circumstances.

Because a constitutional right is presented, the standard of review is de novo. *Taylor v. State*, 352 N.W.2d 683, 684 (Iowa 1984). The test in determining if defendant received the effective assistance of counsel is "whether under the entire record and totality of the circumstances counsel's performance was within the normal range of competence." *Snethen v. State*, 308 N.W.2d 11, 14 (Iowa 1981).

Defendant has failed to make the requisite showing to succeed on a claim of ineffective assistance of counsel.

AFFIRMED.