

FILED

AUG 29 1985

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

RAYMOND W. ASWEGAN,

)

Petitioner-Appellant,

)

Filed August 29, 1985

vs.

)

STATE OF IOWA,

)

5-332

84-1476

Respondent-Appellee.

)

Appeal from the Iowa District Court for Polk County - Gene L. Needles,
Judge.

Petitioner appeals from a denial of postconviction relief based on ineffective assistance of counsel. **AFFIRMED.**

Charles L. Harrington, Appellate Defender, and Linda Del Gallo, Assistant
Appellate Defender, for petitioner-appellant.

Thomas J. Miller, Attorney General, and Marcia Mason, Assistant Attorney
General, for respondent-appellee.

Considered by Donielson, P.J., and Schlegel and Sackett, JJ.

The petitioner was convicted of first-degree murder in 1981. He later filed the present application for postconviction relief, alleging ineffective assistance of counsel. The district court denied postconviction relief, and the petitioner has appealed. He contends his attorney in the 1981 trial rendered ineffective assistance by failing to object to certain instructions which allegedly negated the element of malice aforethought.

In 1981 Raymond Aswegan was convicted of murder in the first degree and was sentenced to life in prison. The supreme court affirmed his conviction in 1983. See State v. Aswegan, 331 N.W.2d 93 (Iowa 1983).

Aswegan later filed the present application for postconviction relief, alleging ineffective assistance of counsel. The district court denied postconviction relief, and Aswegan has appealed. He contends his attorney in the 1981 trial rendered ineffective assistance by failing to object to certain instructions which allegedly misstated or omitted the element of malice aforethought.

This appeal centers on several instructions which provided as follows:

Instruction No. 13

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

All murder perpetrated by willful, deliberate and premeditated killing of a human being is Murder in the First Degree.

All murder perpetrated by a person while participating in a forcible felony is Murder in the First Degree. The crime of Arson in the First Degree is, by law, a forcible felony

Instruction No. 15

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

All murder committed in the perpetration or attempt to perpetrate the crime of arson in the first degree is

murder in the first degree, and the malice aforethought is implied.

Instruction No. 16

You will first determine whether the defendant is guilty of murder in the first degree, bearing in mind the definitions of murder in the first degree heretofore given you in these instructions.

In this instruction, one of the propositions required to be proved by the State is in the alternative. You are instructed that where such proposition is stated in the alternative, the State will have met its burden of proof if it is proved by the evidence beyond a reasonable doubt either of such alternatives.

Before the defendant can be found guilty of the crime of murder in the first degree, under Counts I, II and III, the State must establish by the evidence beyond a reasonable doubt each of the following propositions:

1. That on or about the 29th day of June, 1980, the defendant did unlawfully kill a human being.
2. That such action on the part of the defendant was done with malice aforethought, willfully, deliberately, premeditatedly, and with specific intent to kill a human being.

OR

That such action of the defendant was done during the perpetration of a forcible felony, to-wit, arson in the first degree. . . .

Petitioner submits that the instructions removed the element of malice aforethought from the jury's deliberation under the felony murder alternative of instruction 16.

The jury was presented with two alternatives to convict defendant of first-degree murder. The marshalling instruction, number 16, informed the jury that if it found a human being was unlawfully killed either (1) with malice aforethought or (2) during a forcible felony, then defendant was guilty of first-degree murder.

For purposes of this appeal, defendant assumes the conviction came under the felony murder prong of instruction 16. The alleged error is that instruction 15, when applied to the felony murder prong of instruction 16, negated the jury's discretion to find malice aforethought. Instruction 15 provided that malice aforethought is implied in first-degree murder convictions under the felony murder rule. This was an incorrect statement of the law. Iowa law provides that malice aforethought may be implied during commission of forcible felony, but such a finding is not mandatory. See State v. Taylor, 287 N.W.2d 576, 578 (Iowa 1980); State v. Veverka, 271 N.W.2d 744, 747 (Iowa 1978); State v. Nowlin, 244 N.W.2d 596, 605 (Iowa 1976); State v. Conner, 241 N.W.2d 447, 464 (Iowa 1976); State v. Hall, 214 N.W.2d 205, 210-11 (Iowa 1974). Instruction 15 was unclear because it stated "the malice aforethought is implied" instead of informing the jury that malice aforethought may be implied. The effect of instruction 15 and 16 may have been to confuse the jury as to its discretion to imply malice aforethought under the felony murder prong of the instructions.

Nevertheless, it is well-established that in a postconviction appeal the petitioner has the burden of proof to establish by a preponderance of the evidence a claim of ineffective assistance of counsel. Kellogg v. State, 288 N.W.2d 561, 563 (Iowa 1980). To succeed, petitioner must show (1) cause (or Iowa Code section 663A.8, "sufficient reason") for failure to challenge the alleged errors and (2) actual prejudice resulting from these errors. McKnight v. State, 356 N.W.2d 532, 537 (Iowa 1984); Polly v. State, 355 N.W.2d 849, 856 (Iowa 1984). On an ineffective assistance of counsel claim such as this, the prejudice prong can be analyzed first. See Taylor v. State, 352 N.W.2d 683, 685 (Iowa 1984).

The general verdict returned by the jury did not indicate whether the defendant was convicted under the premeditated murder or felony murder prong of instruction 16. Although some deficiencies may have existed in the felony

murder prong, we cannot find prejudice resulted because it is not probable that the verdict would have been different if trial counsel had objected to instructions 15 and 16. There was ample evidence to support a conviction under the premeditated murder portion of instruction 16. The record indicates overwhelming evidence of malice aforethought to lead the jury to find defendant committed premeditated murder. See State v. Miles, 344 N.W.2d 231, 235 (Iowa 1984) (denial of appeal of ineffective assistance of counsel for failure to object to felony murder instruction when (1) instruction properly informed the jury that malice aforethought is an element of murder and murder must be proved before participation in a felony can enhance the offense to first-degree murder [authorities cited] and (2) malice aforethought was not a fighting issue in the case). Miles provides an instructive comparison because the court did not find prejudice under a similar situation. As in Miles, the trial court did indicate in instructions 13 and 16 that malice aforethought is an element of murder and murder committed during first-degree arson is murder in the first degree. This was a correct statement of the law.

Furthermore, the record showed that malice aforethought was not a fighting issue in this case. Petitioner's wife, Patty Aswegan, filed for divorce and petitioner tried to have her committed to a mental institution. After commitment of Patty was denied, petitioner said he would have to do something else about her. He said he would have to "do it the hard way." He repeatedly indicated he was going to kill his wife. On one occasion, Patty's supervisor listened in on the conversation and heard petitioner say that Patty was not safe anywhere and that anyone who was with her would "get it" too. The supervisor could tell that Patty took the threats seriously and was concerned about the safety of herself and other family members.

Petitioner also knew where Patty had been living and where she slept in the house. Patty normally slept in the same part of the house where the fire originated. Petitioner was told at 12:30 a.m. on June 29th, by a person who lived near the burned house, that people were in the house. Two hours later, petitioner went to the residence where his wife was living, carried two gallons of kerosene to the house, returned to the car for a different cigarette lighter, and said, "It's going. Let's get out of here." He had earlier told a person that he was going to use the kerosene to burn the house where his wife lived. At 3:00 a.m., a neighbor heard glass breaking and saw fire coming from the house.

The supreme court noted that petitioner's trial testimony was "a last ditch, desperate attempt to avoid the State's overwhelming case against him." Aswegan, 331 N.W.2d at 96. This evidence demonstrates the cogent case the State made to the jury on the malice aforethought issue.

In spite of the mentioned shortcomings in the instructions, we are persuaded that no prejudice resulted to defendant from counsel's failure to object to parts of the jury instructions.

AFFIRMED.