

IN THE COURT OF APPEALS OF IOWA

No. 8-149 / 97-623

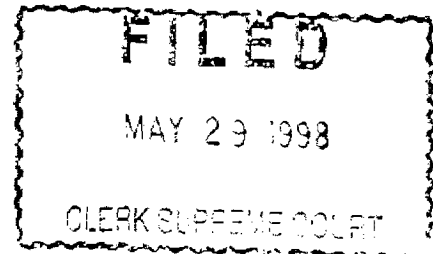
STATE OF IOWA,

Appellee,

vs.

MAGNUS MICHAEL HAVENSTEIN,

Appellant.



Appeal from the Iowa District Court for Dubuque County, Robert J. Curnan,
Judge.

The defendant appeals from judgment and sentence entered for first-degree
murder. **AFFIRMED.**

Alfredo Parrish of Parrish, Kruidenier, Moss, Dunn & Montgomery, Des
Moines, for appellant.

Thomas J. Miller, Attorney General, Julie H. Brown, Assistant Attorney
General, Fred H. McCaw, County Attorney, and Christine Corken, Assistant County
Attorney, for appellee.

Heard by Cady, C.J., and Huitink, and Vogel, JJ.

CADY, C.J.

Magnus Michael Havenstein appeals the judgment and sentence following his conviction of first-degree murder. He claims insufficient evidence exists to support the verdict, the district court erred by failing to suppress certain pretrial statements, and he received ineffective assistance of counsel. We affirm the district court.

On October 14, 1996, Havenstein was caring for his sixteen-month-old son, Miles, while his wife, Ellen, was working. Ellen testified Miles was “a happy child” and in good health before she left for work. When she arrived home later, Miles was playing with his toys and happy to see her. Ellen left again to purchase a new vehicle for the family. Upon her return, Havenstein told her Miles was not breathing. Ellen observed Miles’ “breathing was quite irregular and his eyes were closed and his arms were very rigid along the sides of him.” At this point, Havenstein and Ellen drove Miles to the hospital. While en route, Havenstein explained to Ellen that Miles had been rocking on the couch, fell, and hit his head.

Dr. Robert Lawson was the emergency room physician who initially treated Miles for his injuries. Dr. Lawson testified Miles had “massive retinal hemorrhages” in both of his eyes, which led him to suspect Miles was a victim of shaken baby syndrome. He also recognized a tremendous force would be required to fracture a child’s skull, and this type of force would not occur from an accidental fall.

Dr. R. Michael McGill, a pediatrician, also treated Miles at the emergency room and had an opportunity to form an opinion about his injuries. Dr. McGill also

concluded Miles suffered from shaken baby syndrome. He believed it would have been impossible for a child to fall off furniture and sustain the type of injuries Miles sustained.

Dr. Bernie Saks, a radiologist, performed a CT scan on Miles. He testified the scan revealed the right side of Miles' brain was swollen, displacing normal structures, and causing a "midline shift" of his brain. In addition, he observed subarachnoid and subdural bleeding. He testified to observing both acute and chronic bleeding.

Dr. Othmar Albrand performed a right-sided craniotomy on Miles and removed a hematoma. Dr. Albrand testified he saw acute brain damage, but did not see a chronic hematoma. He explained the suspected chronic subdural hematoma may have actually been an arachnoid bleed which gave the appearance of a chronic subdural hematoma on the CT scan. Dr. Albrand also concluded Miles' injuries were consistent with shaken baby syndrome and a severe force caused his skull fracture.

Dr. James Royall, a pediatric critical care specialist, also concluded Miles exhibited all of the signs of shaken/slammed baby syndrome. On October 18, 1996, when Miles lost all evidence of brain function, Dr. Royall withdrew life support and Miles died.

Following Miles' death, Dr. Thomas Bennett performed an autopsy. Dr. Bennett determined the cause of death was shaken/slammed baby syndrome based on the hemorrhages in the back of the eyes and the skull fracture. Dr. Bennett further

found numerous bruises on Miles' body that were not consistent with bruises a child would normally receive during play.

Finally, Dr. Wilbur Smith and Dr. Randell Alexander concurred with the conclusions of the other experts. Dr. Smith testified that short falls do not cause the type of injuries suffered by Miles. He agreed with the other experts that Miles was violently shaken and his injuries were caused by tremendous force. In his deposition, Dr. Smith testified Miles had a prior head injury. At trial, he stated he was uncertain whether there was a prior head injury. Dr. Alexander also testified Miles' injuries could not have come from falling off of a couch as Havenstein maintained and he was the victim of shaken/slammed baby syndrome.

The jury found Havenstein guilty of first-degree murder and the district court sentenced him to life imprisonment. On appeal Havenstein maintains: (1) insufficient evidence exists to support the verdict; (2) the district court erred by failing to suppress pretrial statements; and (3) he received ineffective assistance of counsel.

I. Sufficiency of Evidence

Our standard of review for claims of insufficient evidence is well established. We review such claims for errors at law. Iowa R. App. P. 4. A verdict of guilty is binding on appeal unless no substantial evidence in the record exists to support it, or it is clearly against the weight of the evidence. *State v. Schrier*, 300 N.W.2d 305, 306 (Iowa 1981); *State v. Forsyth*, 547 N.W.2d 833, 834 (Iowa App. 1996). Substantial evidence means evidence that could convince a rational trier of fact the defendant is

guilty beyond a reasonable doubt. *Schrier*, 300 N.W.2d at 306; *see also State v. Anderson*, 517 N.W.2d 208, 211 (Iowa 1994); *State v. Geier*, 484 N.W.2d 167, 170-71 (Iowa 1992).

In determining the sufficiency of the evidence, we view the record in a light most favorable to the State. *State v. Robinson*, 288 N.W.2d 337, 340 (Iowa 1980); *see also State v. McGrew*, 515 N.W.2d 36, 37 (Iowa 1994); *State v. Zahner*, 545 N.W.2d 337, 339 (Iowa App. 1996). All evidence is considered, not merely the evidence supporting the verdict. *Robinson*, 288 N.W.2d at 340; *see also State v. Walker*, 538 N.W.2d 316, 319 (Iowa App. 1995). We give the State the benefit of all legitimate inferences and presumptions which can fairly and reasonably be deduced from the evidence. *State v. Conyers*, 506 N.W.2d 442, 444 (Iowa 1993). Direct and circumstantial evidence is equally probative. Iowa R. App. P. 14(f)(16). Although a jury verdict can rest on circumstantial evidence, the evidence must raise a fair inference of guilt as to each element of the crimes. *State v. Casady*, 491 N.W.2d 782, 787 (Iowa 1992). Additionally, discrepancies in testimony do not, in and of themselves, preclude proof beyond a reasonable doubt. *See generally State v. Phanhsouvanh*, 494 N.W.2d 219, 223 (Iowa 1992) (jury could adopt evidence it found credible); *Forsyth*, 547 N.W.2d at 836 (jury's function to determine credibility and resolve conflicts in evidence).

Havenstein asserts the State failed to provide any direct evidence he caused Miles' death. Specifically, he claims the circumstantial evidence presented only

proves Miles died from some form of head trauma, but not that Havenstein caused the head trauma. Havenstein further points out he provided a consistent explanation for Miles' injuries to his wife, hospital personnel, and the police. Havenstein also points to a discrepancy in Dr. Smith's testimony concerning a prior injury. Finally, Havenstein contends the State failed to prove he acted with malice aforethought, or assuming he did shake Miles, that he understood the nature of the act and its consequences, as distinguished from an act done in the heat of passion.

The record provides more than substantial evidence for the jury to conclude Havenstein acted with malice aforethought in shaking/slamming Miles. Havenstein was alone with Miles at the time of his injuries. Numerous experts testified Miles injuries could not have occurred from a simple fall from furniture. All of the State's experts concluded Miles had been a victim of shaken baby syndrome. In light of the extensive expert testimony and circumstantial evidence, substantial evidence exists to support a finding Havenstein violently injured Miles, despite a discrepancy in Dr. Smith's testimony concerning a prior injury. Consequently, viewing the evidence in a light most favorable to the State, we find there is substantial evidence to support the jury's finding of first-degree murder.

II. Pretrial Statements

We review constitutional issues *de novo*. *State v. Beeson*, 569 N.W.2d 107, 109 (Iowa 1997). A motion to suppress evidence on the ground that it was illegally obtained must be raised no later than forty days after arraignment. *See Iowa R. Crim.*

P. 10(2)(c), 10(4). Failure to timely raise the objection prior to trial constitutes a waiver unless good cause is shown to grant relief from the waiver. Iowa R. Crim. P. 10(3).

Havenstein claims statements he made to police at the hospital were involuntary and elicited without a valid waiver of his Miranda rights. He has, however, failed to preserve error on this claim.

The trial court addressed the motion on its merits and determined the statements were voluntary in a noncustodial situation. We can, however, affirm on any ground in the record, whether urged below or not. *See State v. Rawlings*, 402 N.W.2d 406, 409 (Iowa 1987).

Havenstein was arraigned on October 22, 1996. The minutes of testimony filed on October 31, 1996, indicated the State intended to call officers to testify to statements made by Havenstein at the hospital. Havenstein did not file his motion to suppress until February 12, 1997. Havenstein's motion to suppress was not timely and the record reveals no good cause for the delay. Accordingly, we find he has failed to preserve error on this issue. Even if error was preserved, we find the district court properly admitted the statements.

III. Ineffective Assistance of Counsel

Ordinarily, ineffective assistance of counsel proceedings are preserved for postconviction proceedings. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). These claims may be resolved on direct appeal, however, when the record adequately

addresses the issues. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994). Moreover, a claim of ineffectiveness of counsel is an exception to the general rule that an issue must be raised timely and adequately in order to preserve error for appeal. *Earnest v. State*, 508 N.W.2d 630, 632 (Iowa 1993).

To prevail on an ineffective assistance of counsel claim, Havenstein must prove by a preponderance of the evidence that: (1) counsel failed to perform an essential duty; and (2) prejudice resulted. *State v. Allen*, 565 N.W.2d 333, 336 (Iowa 1997). Havenstein must therefore overcome the strong presumption of counsel's competence and that counsel's error worked to his actual and substantial disadvantage, creating a probability that, but for the error, the trial's result would have been different. *Ray*, 516 N.W.2d at 865 (citing *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2069, 80 L. Ed.2d 674, 699 (1984)). We often most efficiently dispose of the ineffective assistance of counsel claim by looking first to the question of prejudice. *State v. Hildebrant*, 405 N.W.2d 839, 841 (Iowa 1987).

Havenstein claims he was denied effective assistance of counsel by trial counsel's failure to: (1) hire an expert to investigate the source of Miles' injuries; (2) investigate the defense of intoxication; (3) object to improper character testimony of a neighbor girl; and (4) prepare an adequate defense at trial.

The record is insufficient for us to address all of Havenstein's claims on appeal. The record does not indicate whether defense counsel attempted to obtain an expert or whether counsel considered the defense of intoxication. Further, the record

does not reveal defense counsel's reasoning behind calling only one witness. In order to allow Havenstein's counsel to explain the trial decisions, we preserve the ineffective assistance of counsel claims concerning the hiring of an expert, the defense of intoxication, and the defense strategy of calling only one witness for postconviction relief.

We are able, however, to resolve Havenstein's claim concerning the testimony of Susie Rhomberg, a fourteen-year-old neighbor girl who observed Havenstein push Miles to the ground and yell at him, "[g]et the f--- out of here." Even if defense counsel had made a timely objection, the evidence would have been admissible to prove absence of mistake or accident pursuant to Iowa Rule of Evidence 404(b). Furthermore, considering the nature of the charge, the probative value of the evidence outweighed any unfair prejudice under rule 403. Consequently, Havenstein suffered no prejudice by defense counsel's failure to object to Rhomberg's testimony.

We have considered all of Havenstein's claims and affirm the district court. We preserve all of Havenstein's ineffective assistance of counsel claims for postconviction relief except the objection concerning Rhomberg's testimony.

AFFIRMED.