**IN THE COURT OF APPEALS OF IOWA**

No. 0-383 / 99-0571
Filed November 8, 2000

**STATE OF IOWA,**
Appellee,

vs.

**JAMES HAYES III,**
Appellant.

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Appeal from the Iowa District Court for Polk County, Larry J. Eisenhauer, Judge.

James Hayes III appeals the judgment and sentence entered upon his conviction of willful injury in violation of Iowa Code section 708.4 (1997) and first-degree murder in violation of Iowa Code sections 707.1 and 707.2. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Martha J. Lucey, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, John P. Sarcone, County Attorney, and Steve Foritano and Teresa Vens, Assistant County Attorneys, for appellee.

Heard by Vogel, P.J., and Miller and Hecht, JJ.

**VOGEL, P.J.**

James Hayes III appeals the judgment and sentence entered upon his conviction of willful injury in violation of Iowa Code section 708.4 (1997) and first-degree murder in violation of Iowa Code sections 707.1 and 707.2 (1997). We find the record contains substantial evidence to sustain the convictions. We preserve two of his claims of ineffective assistance of counsel for possible post conviction relief.

***Background facts.*** From the evidence adduced at trial, the jury could have found the following facts. In the early morning hours of October 10, 1998, Brent Miklus and Ricky Green went out to purchase cocaine. While traveling down 21st Street in Des Moines, Hayes stopped Green's car to speak to Miklus. Miklus attempted to purchase crack cocaine from Hayes. Hayes, intending to take Miklus' money and give him rocks from the ground rather than crack, became angry during the attempted transaction. Hayes began yelling that he had been "ganked," a street term in this case meaning Miklus had attempted to buy drugs without first showing his money. He then punched Miklus in the face. Jeremiah Canada, Brandon Cason, and Derrick Ellis, friends of Hayes, ran over to the car and joined in the fray. Green was attacked from the driver's side of the car and hit several times. As he attempted to get out of the car, he was hit in the side of the face with a hard object. He yelled to Miklus to get out of there and ran down the road to a convenience store to get help. He could not identify his attacker beyond wearing a blue-green jacket with the Hornets logo. Green lost his left eye from the attack.

Miklus was dragged out of the car and beaten by the four men. One witness, Charles Waters testified he heard someone yelling about money and saw a group of guys fighting in the street. The car driven by Green was demolished; almost every window was broken, there was an asphalt slab on the passenger's seat that had been thrown into the car and footprints all over the car where it had been walked on and kicked. Miklus was stabbed three times during the incident. Hayes told police he did not stab Miklus and did not know who did. Linda Cason, the mother of Brandon Cason who lived across the street from the crime scene, testified Hayes asked her for a knife during the attack. She alleged she told him he did not need a knife and refused to give him one. Ranae Smothers, a neighbor, heard a woman at the scene yell to put the knife away. Miklus died from a stab wound to the lungs and heart. His jacket was taken from his body, the money removed from it, and the jacket left next to the body. Linda Cason stated Hayes was the person that took the money from Miklus' jacket.

The medical examiner, Francis Garrity, testified Miklus received three stab wounds, including a compound wound in the chest. He further explained that although the knife only entered the compound wound site one time, there was additional damage done internally, indicating the knife was either repositioned or twisted within the body, producing two distinct marks to the sternum. He determined Miklus' death was caused by the compound stab wound to the chest.

Criminalist, Carl Bessman, testified footprints were evident around the body and on the hood of the car. Shoes were taken and analyzed from all of the defendants. Although he could not say Hayes' shoes were an exact match,

Bessman did testify that they were consistent with some of the footprints left at the crime scene and on the car.

Police conducted an interview with Hayes several days after the incident. During this interview, Hayes made several admissions. He informed police that he and the victims were known to each other and he had stopped their car intending to "gank" Miklus, or take his money and give him ordinary rocks rather than drugs. He told police he got "really mad" when Miklus "ganked" him first, by failing to show his money for the intended transaction. He yelled to his friends who then came over and joined in the attack. When Hayes saw his friends beating on Green, the black victim, Hayes redirected the aggression away from Green and toward the white victim, Miklus. He told the police he did not take any money from Miklus but correctly mentioned the amount of money stolen without being told that amount by officers during the interview. Lastly, he admitted Miklus was on the ground and not moving when he left the scene. He appeals, claiming there was insufficient evidence to sustain the jury's verdict and also makes three claims of ineffective assistance of counsel.

***Scope of review.*** The standard of review is for errors at law. *State v. Phams,* 342 N.W.2d 792, 795 (Iowa 1983). A jury's guilty verdict is binding upon us unless we conclude the record lacks substantial evidence to support such a finding. *State v. Bush,* 518 N.W.2d 778, 779 (Iowa 1994). Substantial evidence means such evidence as could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. *State v. Astello,* 602 N.W.2d 190, 197 (Iowa 1999). Substantial evidence does not, however, denote

some elevated quantity of proof. *State v. Anderson,* 517 N.W.2d 208, 211 (Iowa 1994). Rather, the relevant question in our review of the case "is whether, after viewing all the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.*

The evidence is viewed in the light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the record. *State v. Blair,* 347 N.W.2d 416, 418-19 (Iowa 1984). Circumstantial evidence is just as probative as direct evidence. *State v. Parrish,* 502 N.W.2d 1, 3 (Iowa 1993); *State v. Garr,* 461 N.W.2d 171, 173 (Iowa 1990). We consider all the evidence at trial, not just the evidence that supports the verdict. *State v. Thornton,* 498 N.W.2d 670, 673 (Iowa 1993). A verdict is binding unless the finding is clearly against the weight of the evidence. *State v. Schrier,* 300 N.W.2d 305, 306 (Iowa 1981).

***A. Sufficiency of the Evidence.*** The State charged Hayes with first-degree murder[1] for the death of Miklus and willful injury[2] for the injury caused to

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[1] ***Iowa Code section 707.1 (1997)*** Murder defined:
A person who kills another person with malice aforethought either express or implied commits murder.
***Iowa Code section 707.2 (1997)*** Murder in the first degree:
A person commits murder in the first degree when the person commits murder under any of the following circumstances:
1. The person willfully, deliberately, and with premeditation kills another person.
2. The person kills another person while participating in a forcible felony.
* * *

[2] ***Iowa Code section 708.4 (1997)*** Willful Injury.
Any person who does an act which is not justified and which is intended to cause and does cause serious injury to another commits a class "C" felony.

Green. The State alleged several different theories for each charge, including premeditated murder as the principal, as an aider and abettor, engaging in joint criminal conduct, and felony murder with an underlying felony of robbery or willful injury. For the charge of willful injury against Green, the State offered theories of aiding and abetting and joint criminal conduct. Hayes argues the record does not contain sufficient evidence to find him guilty beyond a reasonable doubt of the charges under any theory.

**Premeditated murder of Miklus, as the principal or aider and abettor.** Hayes argues the state failed to present sufficient evidence he or someone he aided and abetted acted willfully, deliberately, premeditatedly and with the specific intent to kill Miklus. The marshalling instruction given for first-degree murder states:

> The State must prove all of the following elements of Murder In The First Degree:
>
> 1. On or about the 10th day of October, 1998, the Defendant or a person he aided and abetted beat and stabbed Brent Miklus.
> 2. Brent Miklus died as a result of being beaten and stabbed.
> 3. The Defendant or someone he aided and abetted acted with malice aforethought.
> 4a. The Defendant or someone he aided and abetted acted willfully, deliberately, premeditatedly and with a specific intent to kill Brent Miklus; or
> 4b. The Defendant or someone he aided and abetted was participating in the forcible felony of Willful Injury or Robbery.

The jury instruction for aiding and abetting reads as follows:

> "Aid and abet" means to knowingly approve and agree to the commission of a crime, either by active participation in it or by knowingly advising or encouraging the act in some way before or when it is committed.

The record shows Hayes admitted that he started the altercation by stopping the car with the intent to "gank" Miklus and initiated the attack by punching Miklus in the face. Further, he admitted he was "really mad" when Miklus failed to show his money for the drug transaction and he started yelling that he'd been "ganked," thereby summoning his friends' assistance. Once his friends joined in the fray, rather than leave or attempt to stop the attack, he encouraged it by his continued participation, reprimanding those beating on Green and redirecting the assault to Miklus. In addition, Linda Cason testified that Hayes asked her for a knife during the altercation. The medical examiner's testimony included the fact that the knife wound to the chest was a compound wound. Hayes told police that he was involved throughout the attack and did not leave the scene until the victim lay still on the ground.

His admissions were corroborated by witness testimony placing him at the scene and identifying him as the one who took the victim's money. Additionally there were footprints consistent with his shoes at the scene and on the car. The record contains substantial evidence to support Hayes' conviction under a theory of premeditated murder, either as the principal or an aider and abettor.

**Felony murder – willful injury and robbery.** The marshalling instruction also provided Hayes could be found guilty of first-degree murder if "[t]he Defendant or someone he aided and abetted was participating in the forcible felony of Willful Injury or Robbery."

Instruction No. 35 defined willful injury and robbery as follows:

> A person commits Willful Injury when he or someone he aids and abets assaults a victim with the intent to inflict serious injury and the victim sustains serious injury.
>
> A person commits Robbery when a person or someone he aids and abets, having the intent to commit a theft, and to carry out that intention or to assist the person in escaping from the scene, with or without the stolen property, assaults a victim.

Hayes asserts the State failed to provide evidence he had the necessary intent to inflict either serious injury or commit a theft. The supreme court has previously stated:

> [s]ubjective intent of an actor is almost never capable of direct proof and must be inferred from those objective facts which tend to illuminate the actor's motives. One technique often employed in this regard is to infer that the actor intends that which is the natural consequence of the actions taken.

*State v. Rademacher,* 433 N.W.2d 754, 758 (Iowa 1988) (citations omitted).

Hayes initiated the attack, alerted and involved his friends and continued to participate in the attack, bringing Miklus down to the ground until he was no longer moving. The jury could infer that Hayes, or someone he aided and abetted, intended to cause serious injury to Miklus.

During his police interview, Hayes admitted he approached the car intending to take Miklus' money in exchange for rocks from the ground. When Miklus did not present his money, Hayes began yelling that he had been "ganked." Charles Water heard a man yelling, "Where is my God damn money?" Linda Cason reported Hayes was the person who removed Miklus' jacket, took the money from it and threw the jacket on the ground next to the victim. Later, during his interview with police, Hayes disclosed the amount stolen from the victim before officers informed him of that amount. The jury could have inferred

an intent to commit a theft. The record, therefore, contains substantial evidence to support a finding of first-degree murder under the felony murder instruction.

**Willful injury to Green.** Hayes next argues the record lacked sufficient evidence to sustain his separate conviction of willful injury for the attack on Green, as Green could not identify his attacker. The jury was instructed that Hayes is guilty of willful injury if he or someone he aided and abetted specifically intended to cause serious injury to Green. Although the evidence does not establish Hayes as the principal in the direct attack on Green, he initiated the first blow to Miklus, summoned his friends to the scene and, participated throughout the entire incident, which encompassed the attack on Green. There is substantial evidence to support Hayes' conviction of willful injury.

**Joint criminal conduct.** The jury was also given an instruction on joint criminal conduct as follows:

> When two or more persons act together and knowingly commit a crime, each is responsible for the other's acts during the commission of the crime or escape from the scene. The Defendant's guilt is the same as the other person's unless the act could not reasonably be expected to be done in aiding the commission of the crime.

The evidence clearly established that the four men were acting in concert to commit an assault against both Green and Miklus. Hayes initiated the attack by striking Miklus and then involving three of his friends, resulting in the death of Miklus and serious injury to Green. The jury could have found that regardless of who caused the fatal wound to Miklus or who caused the serious injury to Green, the resulting consequences to both victims were reasonably foreseeable from the onset of the confrontation.

***Ineffective assistance of counsel.*** Hayes asserts he received ineffective assistance of his trial counsel based on three different grounds. The first two grounds are regarding evidence Hayes' alleges is inadmissible hearsay. He contends his trial counsel was ineffective for failing to object to hearsay evidence contained within the taped police interview played for the jury and counsel's failure to redact hearsay statements from the search warrant before offering it into evidence. Both the taped interview and the search warrant referred to statements from the other participants in or witnesses to the attack naming Hayes as the person who stabbed Miklus.

Our review of an allegation of ineffective assistance of counsel is de novo. *State v. Howes,* 525 N.W.2d 874, 876 (Iowa App. 1994). A defendant has the burden of proving by a preponderance of the evidence his attorney did not perform an essential duty and, as a result, he was prejudiced. *State v. Howell,* 557 N.W.2d 908, 913 (Iowa App. 1996). Where the record on direct appeal is not adequate to permit us to resolve the issue, we preserve the claim for postconviction proceedings so the facts may be so developed. *State v. Koenighain,* 356 N.W.2d 237, 238 (Iowa App. 1984). This also gives the allegedly-ineffective attorney the opportunity to explain his or her conduct. *State v. Coil,* 264 N.W.2d 293, 296 (Iowa 1978). We find the record inadequate to allow us to determine whether Hayes' trial counsel's performance was deficient regarding the hearsay claims and, therefore, reserve these claims for possible postconviction relief.

Hayes next alleges his trial counsel was ineffective for failing to object to the DNA testimony by Marie Sides without a statistical presentation as to the accuracy of her conclusion. We find the record is sufficient to allow us to address this issue on direct appeal. *State v. Mulder,* 313 N.W.2d 885, 890 (Iowa 1981) (holding ineffective assistance of counsel claims may be resolved on direct appeal where the record is adequate to evaluate the merits of the claim).

Hayes relies on a supreme court decision which states, "Today we go one step further and hold that the admission of evidence of a DNA match without accompanying statistical probability of a random match is error." *State v. Williams,* 574 N.W.2d 293, 298 (Iowa 1998). The testimony presented by Marie Sides, however, was painstakingly clear in stating she did not classify the stain from a blood mixture found on Hayes' shirt as a match to the known Hayes and Cason blood samples. She merely opined the two men could not be excluded as possible donors, stating:

> [I] just declared it a mixture and said that these are two possible persons who could contribute to that stain. I cannot say that Mr. Cason is a donor. I cannot say that Mr. Hayes is a donor. They are possible donors.

Because Marie Sides did not testify to a DNA match, the underlying statistical probability information was not necessary at trial. We find, therefore, no objection was necessary by Hayes' trial counsel.

We affirm Hayes' convictions and preserve his ineffective assistance of counsel claims regarding alleged hearsay evidence for possible post conviction relief.

**AFFIRMED.**