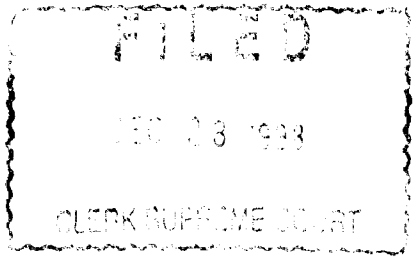
IN THE COURT OF APPEALS OF IOWA

No. 8-556 / 97-1988
Filed December 28, 1998



STATE OF IOWA,
Appellee,

vs.

JOSEPH J. KONCEL,
Appellant.

Appeal from the Iowa District Court for Jackson County, J. Hobart Darbyshire, Judge.

Joseph Koncel appeals his conviction and sentence, following a jury trial, for first-degree murder and first-degree kidnapping. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR NEW TRIAL.**

Linda Del Gallo, State Appellate Defender, and Dennis D. Hendrickson, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Julie H. Brown, Assistant Attorney General, James Kivi, Assistant Attorney General (Area Prosecutor), and Phillip J. Tabor, County Attorney, for appellee.

Heard by Streit, P.J., and Vogel and Mahan, JJ.

VOGEL, J.

Joseph Koncel appeals his conviction and sentence, following a jury trial, for first-degree murder and first-degree kidnapping. As we find Koncel's trial counsel was not ineffective for failing to secure an independent pathologist to challenge the findings of the state medical examiner, we affirm his conviction and sentence for first-degree kidnapping. However, we find Koncel was prejudiced by his trial counsel's failure to object to the erroneous marshalling instruction for first-degree murder, and therefore reverse that conviction and remand for new trial.

Background facts. Around midnight on March 5, 1997, Marty Budde and a friend were returning home from a bar when they drove by a farm owned by Budde's parents. Budde noticed some lights that should not have been on and told his friend he was going back to turn them off. Budde dropped his friend off at home and apparently returned to the farm.

On the morning of March 6, the Bellevue police were informed that Budde was missing. Bellevue police chief Lynn Schwager went to the farm where he observed a fifteen to twenty-foot trail of blood leading from the farmhouse toward the highway.

The highway patrol searched an area where Koncel had previously resided, and there found a dark pickup truck later identified as Budde's. A trail of blood from the pickup led officers to Budde's body.

In an initial interview, Koncel told a DCI agent that he had not seen Budde on the evening of March 5th. In a second interview, he stated that on the night in

question, his brother Brian had come into the house and told him he had gotten into an argument with "the landlord." Koncel said he found Budde outside, badly beaten and semi-conscious. At Brian's request, Koncel helped put Budde in the back of the pickup. Koncel further admitted driving the pickup to a remote area.

Koncel was ultimately charged with first-degree murder and first-degree kidnapping. A jury trial was held in September and October of 1997. The jury found Koncel guilty on both counts. Koncel raises two claims of ineffective assistance of counsel on appeal.

Ineffective assistance. To prevail on an ineffective assistance of counsel claim the defendant must show by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *State v. Pearson*, 547 N.W.2d 236, 240 (Iowa App. 1996). Our standard of review is de novo. *See State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997).

Generally, ineffective assistance of counsel claims are preserved for postconviction to allow trial counsel an opportunity to defend the charge. *Pearson*, 547 N.W.2d at 241. However, such claims may be decided on direct appeal if the defendant fails to show one of the two prongs. *See State v. Welch*, 507 N.W.2d 580, 584 (Iowa 1993); *State v. Walker*, 538 N.W.2d 316, 322 (Iowa App. 1995). If it is more efficient to dispose of an ineffective assistance claim by looking first to the question of prejudice, we will do so. *State v. Hildebrant*, 405 N.W.2d 839, 841 (Iowa 1987); *Gering v. State*, 382 N.W.2d 151, 154 (Iowa 1986).

I. Independent pathologist. Dr. Thomas Bennett, then State Medical Examiner, testified that it was his opinion that Marty Budde was still alive when he was transported from the farmhouse to the remote area where his body was later found. This point was crucial to supporting both the kidnapping and felony murder charges since it is not possible to kidnap a corpse. Koncel asserts that his trial counsel was ineffective for failing to secure an independent pathologist to challenge Dr. Bennett's testimony.[1] He argues that the evidence supports that Budde was dead before he was transported off the farm, and that if his counsel had secured an independent pathologist's opinion on that point, it would have raised reasonable doubt for both the kidnapping and felony murder charges.

Dr. Bennett testified that the amount of blood in the truck indicated that Budde was alive when placed within. He explained that there was too much blood present than could occur from mere "drainage," and that Budde had to have blood pressure and circulation in order to produce that amount of blood. Dr. Bennett further opined that it would have taken Budde up to thirty minutes to die from his head wounds. Koncel's defense counsel cross-examined Bennett thoroughly on these points. Furthermore, Koncel made repeated statements to investigators indicating that Budde was still alive when he helped load him into the truck. Koncel stated that Budde was groggy and "talking back," and was even able to stand on his own. As Koncel's own

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[1] The record does reflect that, prior to trial, Koncel's defense counsel had conferred with Dr. Paul Koob, Jackson County Medical Examiner, who had been present during Budde's autopsy.

version of events was that Budde was alive when placed in the pickup, his counsel had no duty to try to find a pathologist to testify that Budde was already dead. Koncel's claim of ineffective assistance must therefore fail.

II. Felony murder instruction. Koncel next argues that his trial counsel was ineffective in failing to object to an erroneous marshalling instruction on felony murder.

An error in instructing the jury does not necessitate reversal unless it is prejudicial. *See State v. Webb*, 516 N.W.2d 824, 831 (Iowa 1994); *State v. Boley*, 456 N.W.2d 674, 679 (Iowa 1990). Such error is presumed prejudicial, though, unless the contrary appears beyond a reasonable doubt from a review of the whole case. *State v. Caldwell*, 423 N.W.2d 564, 566 (Iowa App. 1988) (citing *State v. Davis*, 228 N.W.2d 67, 73 (Iowa 1975)). The inquiry is whether the evidence was so dispositive of the issue that a reviewing court can say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the instruction. *Id.* (citation omitted).

The marshalling instruction at issue stated:

> For the defendant to be found guilty of the crime of Murder in the First Degree under Count I of the Trial Information, the State must prove all of the following elements:
>
> > 1a. On or between March 5 and March 6, 1997, the defendant ***or Brian Koncel*** struck Marty Lee Budde; or
> > 1b. On or between March 5 and March 6, 1997, the defendant aided and abetted Brian Koncel in striking Marty Lee Budde.
> > 2. Marty Lee Budde died as a result of being struck.
> > 3. The defendant acted with malice aforethought.

> 4. The defendant was participating in the crime of kidnapping.

(Emphasis added). Koncel asserts that the phrase "or Brian Koncel" in element 1(a), together with elements 2, 3 and 4, allowed the jury to find him guilty of first-degree murder even if he had not personally committed the assault nor aided and abetted his brother. The State asserts that the word "acted" in element 3 required the jury to interpret the instruction to mean that Koncel must have either struck Budde or aided and abetted Brian in striking Budde. While that may have been an interpretation the jury gave the instruction, we find the ambiguity too great to allow the instruction to stand without objection. The jury could have reasoned that Brian struck Budde and Koncel "acted" by helping load Budde in the truck. Koncel asserts that the presumption of error cannot be discharged beyond a reasonable doubt. We agree. Objecting to this error was an essential duty which Koncel's trial counsel failed to perform. The prejudice to Koncel is clear because there was sufficient evidence presented at trial to allow the jury to find that Brain Koncel was the sole assailant who caused the fatal injuries to Budde.

We therefore affirm the conviction for first-degree kidnapping but reverse Koncel's conviction of felony murder and remand for a new trial.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR NEW TRIAL.