IN THE COURT OF APPEALS OF IOWA

No. 6-569 / 95-0578

000468

FILED
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CLERK OF APPEALS COURT

STATE OF IOWA,

Plaintiff-Appellee,

vs.

BRIAN ROBERT SILLICK,

Defendant-Appellant.

Appeal from the Iowa District Court for Linn County, Van D. Zimmer, Judge.

Brian Sillick appeals from his conviction, following a jury trial, of first-degree murder in violation of Iowa Code section 707.2 (1993). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and John Priester and Sharon R. Stevens, Assistant State Appellate Defenders, for appellant.

Thomas J. Miller, Attorney General, Susan M. Crawford, Assistant Attorney General, and Denver D. Dillard, County Attorney, for appellee.

Heard by Sackett, P.J., and Cady and Huitink, JJ.

PER CURIAM

Brian Sillick was convicted by a jury of first-degree murder for killing his girlfriend, Tami Wilson. He appeals contending (1) the district court abused its discretion by excluding impeachment evidence; (2) his trial attorney was not effective in not objecting to a diminished responsibility/intoxication instruction he contends was incomplete and misleading; (3) his trial attorney should have impeached the State's expert witness; and (4) the district court erred in denying his motions for judgment of acquittal. We affirm.

Sillick shot and killed Wilson on a Monday evening. The preceding Saturday and Sunday, Wilson and Sillick smoked crack cocaine. Sillick continued doing so on Monday. He had not slept for four days and reported repeated hallucinations. He repeatedly walked around the house, carrying a sawed-off shotgun, looking for drug dealers.

Wilson's eight-year-old daughter, Lindsey, heard Sillick and her mother arguing just prior to the shooting. Sillick was angry. Lindsey heard gunshots and heard Sillick leave. She ran to a neighbor's house, where a call was made to law enforcement authorities.

Shortly after the call was made, Sillick went to the Cedar Rapids police station. He told officers, "I just shot somebody. I want to give myself up." He repeated the shooting was an accident. One of the officers observed Sillick was cooperative and

showed no signs he was intoxicated. Another officer also observed no signs of intoxication.

At trial, defendant presented the testimony of an expert indicating defendant was suffering from cocaine intoxication and cocaine-induced psychosis at the time of the shooting. Dr. Perry from the University of Iowa testified, based on a positive drug screen for cocaine metabolite and Sillick's psychiatric history, he was "100 percent sure defendant had cocaine-induced psychosis." Dr. Dan Rogers, a psychologist, also testified Sillick was in a cocaine-induced psychosis at the time of the shooting. He concluded Sillick could not deliberate, premeditate, or form the specific intent to kill at that time.

The State presented the testimony of two expert witnesses on rebuttal. Dr. Leonard Welsch, a psychologist at the IMCC at Oakdale, concluded Sillick's actions at the time of the shooting were "intentional, logical, and goal-oriented." Dr. Curtis testified Sillick was not psychotic or delusional at the time of the shooting. He said Sillick showed "no signs of any intoxication or psychotic symptoms" at the police station immediately after the shooting.

Experts on both sides testified Sillick had a history of physically abusing Wilson. There was testimony a fight between Sillick and Wilson started because Wilson stayed out until 5:00 a.m.

We first consider the claim the trial court abused its discretion in excluding impeachment evidence. This challenge concerns a discharge summary prepared by Dr. Curtis Frederickson, a psychiatrist at Oakdale. The summary provided:

> Other Follow Up: Mr. Sillick is seen as fully competent. He also is seen as accountable to some degree. Even though extremely angry and upset at the time of the alleged crime and maybe even psychotic to some degree, he still retained a degree of knowledge of right from wrong and an ability to form intent. He shot the person he was fighting with and who he was angry at. He did not shoot the gun at some hallucination. To what degree this was or was not premeditated is a legal issue. Actually this writer is not sure he was even all that psychotic; especially in regards to the victim. He may have been more paranoid than usual and having some hallucinations but I do not see where that had anything to do with the fight he and his victim were having. Also his turning himself in indicates guilt and that he realized he had done something wrong.
>
> I would note that most inmates who commit crimes like this are doing time for second-degree murder.

(Emphasis added.)

The State filed a motion in limine asking the underlined portion of the discharge summary be excluded from evidence. Sillick resisted the motion. The district court granted the State's motion and excluded the evidence on the basis it was irrelevant, improper opinion testimony, and unduly prejudicial to the State. Sillick made no offer of proof.

Sillick contends the exclusion of the written statement limited his ability to cross-examine and impeach Dr. Frederickson. Dr. Frederickson mentioned the punishment received by two of his other patients on direct examination. Defendant contends Dr. Frederickson changed his opinion between the time he prepared the

discharge summary and trial, and the underlined portion of the summary was admissible for purposes of impeaching Dr. Frederickson's testimony. *See State v. Smith*, 522 N.W.2d 591, 593 (Iowa 1994); *State v. Oliver*, 341 N.W.2d 25, 33 (Iowa 1983).

We first consider Sillick's claim the trial court abused its discretion in excluding a portion of a written report by Dr. Frederickson. The State sought to exclude this evidence through a motion in limine. Sillick did not object or otherwise raise the issue during trial. Clearly, error was not preserved.

We next consider Sillick's claim of ineffective assistance of counsel. The thrust of this claim is the failure of his trial counsel to object to the trial court's combined instruction on his defenses of intoxication and diminished responsibility.

Sillick introduced evidence he suffered from cocaine intoxication and cocaine-induced psychosis at the time he shot Wilson. He was entitled to intructions on both defenses. However, the combined instruction properly explained both legal principles to the jury and guided them in its application to the case. We find no error in the combined instruction. Accordingly, Sillick's attorney had no duty to object to the instruction.

We also reject Sillick's claim his trial counsel should have impeached the State's expert witness. The impeachment claim was weak, even assuming it should

have been pursued, and we cannot conclude the trial outcome would have been different. *See State v. Bach*, 510 N.W.2d 850, 853 (Iowa 1994).

We also reject Sillick's claim there was no substantial evidence to support the premeditation, deliberation, or intent to kill elements of first-degree murder. Under our standard of review, we find substantial evidence. *See State v. Parrish*, 502 N.W.2d 1, 3 (Iowa 1993) (evidence viewed in light most favorable to State, together with legitimate inferences and presumptions fairly and reasonably deduced from the record).

AFFIRMED.

Cady and Huitink, JJ., concur; Sackett, P.J., partially dissents.

SACKETT, P.J. (concurring in part and dissenting in part)

I concur in part and dissent in part.

I disagree with the majority's conclusion that defendant received effective assistance of trial counsel when his attorney failed to object to instructions that confused his defenses of intoxication and diminished responsibility. While defendant does not dispute he fired the shots that caused Wilson's death, he does contend the State did not show the necessary elements to convict him of first-degree murder and he should have been convicted of a lesser-included offense.

Defendant specifically contends his trial attorney was not effective when he failed to object to a jury instruction that confused concepts of intoxication and diminished responsibility. The jury instruction given read:

> "Diminished responsibility" means a mental condition which does not allow the person to form a specific intent. Concerning element number 4 of Instruction 15 [first-degree murder], it means a mental condition which does not allow the person to form a premeditated, deliberate, specific intent to kill.
>
> "Diminished responsibility" does not entirely relieve a person of the responsibility for his actions and is not the same as an insanity defense.
>
> The defendant claims he was under the influence of drugs at the time of the alleged crime. The fact that a person is under the influence of drugs does not excuse nor aggravate his guilt.
>
> Even if a person is under the influence of a drug, he is responsible for his act if he had sufficient mental ability to form the specific intent necessary to the crime charged or had the specific intent before he fell under the influence of the drug and then committed the act. Intoxication is a defense only when it causes a mental disability which makes the person incapable of forming the specific intent.

> Neither "diminished capacity" nor "intoxication" can reduce Second-Degree Murder to Manslaughter.
>
> The defendant does not have to prove "diminished capacity" or "intoxication"; rather, the burden is on the State to prove the defendant was able to, and did, form the specific intent required.

Defendant contends the instruction is in error because it presents the law on diminished responsibility and intoxication in a single instruction and did not properly instruct on diminished responsibility.

The instruction given omits the following portions of Uniform Instruction 200.12:

> You should determine from the evidence if the defendant was capable of premeditating, deliberation, and forming a specific intent to kill.
>
> If you have a reasonable doubt the defendant was capable of acting deliberately, with premeditation, and the specific intent to kill, then the defendant cannot be guilty of First Degree Murder. You should then consider the lesser-included charges.

Defendant contends the omitted text informs the jury how to apply the law in relation to the defense. Defendant advances because of the omission, the instruction confuses the definitions of diminished responsibility and intoxication. I agree.

These defenses relate to different conditions. *See State v. Collins*, 305 N.W.2d 434, 436-37 (Iowa 1981). "[D]iminished responsibility may be offered as a defense where an accused, because of a limited capacity to think, is unable to form a necessary criminal intent. It differs from the usual insanity situation where illness confuses or distorts the thinking process." *Collins*, 305 N.W.2d at 436; *see also* J.

Yeager and R. Carlson, *Iowa Practice: Criminal Law and Procedure* § 142, at 40 (1979). While "temporary intoxication is simply evidence to be considered by the jury on the issue of intent." *Collins*, 305 N.W.2d at 437; *see also* Iowa Code § 701.5 (1993).

Defendant contends he was entitled to an instruction on both and there was substantial evidence supporting an instruction on both. Defendant's expert testified there was evidence defendant suffered from cocaine intoxication *and* cocaine-induced psychosis. Defendant was entitled to an instruction on diminished responsibility *and* intoxication. The instruction given blurred the two and did not clearly define each.

Because defendant failed to request the separate instructions or object to the one given, he must show that his trial counsel was not effective in agreeing to the instruction given. The burden of proving trial counsel's conduct was ineffective falls on defendant. *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987). Defendant must prove by a preponderance of the evidence that (1) trial counsel failed to perform an essential duty, and (2) prejudice resulted. *Id.* at 131-32. To meet the first prong of this test, defendant must overcome a strong presumption his attorney's actions were reasonable under the circumstances and fell within the normal range of competency. *See Strickland v. Washington*, 466 U.S. 668, ___, 104 S. Ct. 2052, ____, 80 L. Ed. 2d 674, 694 (1984); *State v. Hildebrant*, 405 N.W.2d 839, 841 (Iowa). To meet the second prong, defendant must show a reasonable probability that, but for his

attorney's error, the trial outcome would have been different. *Strickland*, 466 U.S. at 694, 104 S. Ct. at ____, 80 L. Ed. 2d at 698; *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994).

Defendant's attorney under the evidence could have requested both instructions. A finding that defendant had either a diminished responsibility or was intoxicated could have caused the jury to reduce defendant's crime to second-degree murder. Such a finding could have come under the offered evidence.

Additionally, defendant's trial attorney neglected to impeach Dr. Frederickson's testimony of punishment of other patients with his prior written statement, "most inmates who commit crimes like this are doing time for second-degree murder." Impeachment by a prior writing contrary to a witness's statement is admissible. *Bauer v. Cole*, 467 N.W.2d 221, 225 (Iowa 1991).

I agree with the majority that the evidence can support a finding of first-degree murder. However, if the jury had been correctly instructed and Dr. Frederickson had been impeached with his prior written statement, the jury might well have found defendant guilty of second-degree murder instead of first-degree murder.

Defendant has shown the required prejudice. Defendant should have a fair trial. I would reverse and remand for that purpose.