IN THE COURT OF APPEALS OF IOWA

No. 7-763 / 97-0349

000465

STATE OF IOWA,

Plaintiff-Appellee,

vs.

JOHN F. MOHR,

Defendant-Appellant.

FILED

FEB 25 1998

CLERK SUPREME COURT

Appeal from the Iowa District Court for Clinton County, David H. Sivright, Jr., Judge.

Defendant appeals from a judgment and sentence entered upon his conviction for second-degree murder in violation of Iowa Code section 707.3 (1995). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and David Arthur Adams, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, Lawrence H. Schultz, County Attorney, and Bruce Ingham, Assistant County Attorney, for appellee.

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

MAHAN, J.

John Mohr appeals his conviction of second-degree murder for the death of thirteen-month-old Justin Witt. He alleges: (1) the trial court erred when it denied his motion for judgment of acquittal because there was insufficient evidence of malice aforethought; (2) his trial counsel was ineffective, resulting in prejudice to Mohr; and (3) the trial court erred when it allowed a demonstration of the force necessary to inflict the injuries consistent with shaken baby syndrome. We affirm.

Renee Witt, Justin's mother, left Justin with Mohr, her boyfriend, while she went to work. While in Mohr's care, Justin received severe head injuries and was rushed to the hospital in Clinton. Justin was then flown to the University of Iowa Hospitals where he was pronounced brain dead.

An autopsy revealed signs of retinal bleeding and oozing blood in the sheath around the optic nerve. Justin's brain was swollen to the extent the sutures of the bone of the skull were separated. There was evidence of diffuse axonal injury and areas of blood collected inside the skull. These injuries were all consistent with violent shaking or slamming the child's head into something.

Dr. Randall Alexander, an associate professor of pediatrics at the University of Iowa who has testified in approximately two hundred cases as an expert on child abuse, testified that in shaken baby syndrome cases the primary injury is brain swelling; secondary injuries include bleeding between the brain and the skull and retinal hemorrhaging. Dr. Alexander testified Justin's injuries were consistent with

shaken baby syndrome and there was no other explanation for the pattern of injuries present in this case.

Mohr contends Justin fell off a table, appeared to lose consciousness, and he shook Justin to wake him up. Mohr testified he shook Justin until Justin moved his hands and started to cry. Mohr alleges he then laid Justin down to sleep. Shortly thereafter, Mohr noticed Justin tighten up and stop breathing. At trial, Mohr refused to demonstrate how hard he shook Justin, claiming he did not recall how hard or how fast he shook him.

Dr. Fred Lamb, a pediatric intensive care doctor at the University of Iowa, testified he treated Justin when he was transferred there and Mohr's explanation of a fall from a table was not consistent with the degree of injury Justin suffered. He claimed there was too much injury to be explained by a short fall.

I. JUDGMENT OF ACQUITTAL. Mohr contends the State did not present sufficient evidence to support a finding of malice aforethought, and the trial court erred in denying his motion for a judgment of acquittal. Our standard of review is substantial evidence when the denial of a motion for judgment of acquittal is based on the alleged insufficiency of the evidence. *State v. Coffman*, 562 N.W.2d 766, 768 (Iowa App. 1997). Substantial evidence means evidence that could convince a rational jury that the defendant is guilty of the crime charged beyond a reasonable doubt. *State v. Stallings*, 541 N.W.2d 855, 857 (Iowa 1995). We consider the evidence in the light most favorable to the State. *Coffman*, 562 N.W.2d at 768. We

must consider all of the evidence, not merely the evidence which supports the verdict. *Id.* Provided the evidence raises a fair inference of guilt and does more than create speculation, suspicion or conjecture, direct and circumstantial evidence are equally probative. *Id.*

To prove Mohr committed second-degree murder, the State had to present evidence: (1) on or about the 19th of November, 1995, Mohr shook Justin; (2) Justin died as a result of being shaken; and (3) Mohr acted with malice aforethought. Iowa Code §§ 707.1, 707.3 (1995); *State v. Pierson*, 554 N.W.2d 555, 559 (Iowa App. 1996). Malice aforethought is commonly defined as:

> A fixed purpose or design to do some physical harm to another which exists prior to the act committed. It need not exist for any particular length of time and requires only such deliberation as would make a person appreciate and understand the nature of the act and its consequences, as distinguished from an act done in the heat of passion.

State v. Kraus, 397 N.W.2d 671, 672 (Iowa 1986).

We find the State presented substantial evidence that could convince a rational trier of fact the defendant had the necessary malice aforethought to commit the crime charged. The substantial damage done to Justin's head and the testimony of the State's expert presented an in-depth factual basis.

II. INEFFECTIVE ASSISTANCE OF COUNSEL. Mohr contends he was prejudiced when his counsel failed to object to the introduction and testimony about alleged cumulative and gruesome autopsy photographs.

Our review of constitutional rights is de novo. *State v. Haviland*, 532 N.W.2d 767, 768 (Iowa 1995). Generally, claims of ineffective assistance of counsel are preserved for postconviction proceedings so that a more complete record may be developed on various issues. *State v. Baker*, 560 N.W.2d 10, 15 (Iowa 1997). "However, they may be resolved on direct appeal when the record adequately addresses the issues." *State v. Kone*, 557 N.W.2d 97, 102 (Iowa App. 1996). The record on this issue is insufficient for us to address it on direct appeal. Mohr must present this claim in an application for postconviction relief to permit a full development of the record and to give Mohr's counsel an opportunity to explain his decisions. We preserve the claim for postconviction relief proceedings.

III. DEMONSTRATION OF FORCE NECESSARY TO CAUSE INJURIES ASSOCIATED WITH SHAKEN BABY SYNDROME. Dr. Alexander, using a teddy bear, demonstrated the force necessary to cause the injuries associated with shaken baby syndrome. Defendant objected to this demonstration prior to trial and renewed his objection at trial.

We generally review evidentiary rulings for an abuse of discretion. *Williams v. Hedican*, 561 N.W.2d 817, 822 (Iowa 1997). We will not find an abuse of discretion unless such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *State v. Selestan*, 515 N.W.2d 356, 358 (Iowa App. 1994). Demonstrative evidence is usually received if it affords a

reasonable inference on a point in issue. *State v. Thornton*, 498 N.W.2d 670, 674 (Iowa 1993).

Mohr cites *United States v. Gaskell*, 985 F.2d 1056 (11th Cir. 1993), in support of his argument the trial court should have excluded the demonstration. We find *Gaskell* is distinguishable from the case at bar. In *Gaskell*, the doctor giving the demonstration used a doll with a shorter and stiffer neck than a real infant and this would increase the amount of force necessary to move the head in the required fashion. *Id.* at 1060. The doctor based his presentation on a demonstration he had seen performed by a police officer whose knowledge was derived from the confession of a father in a related case. *Id.* Further, the doctor was unable to state the number of oscillations it would have taken to cause the injuries sustained by the infant. *Id.* at 1061.

Dr. Alexander testified he spent the vast majority of his time working in the area of child abuse. He conducted extensive questioning on child abuse cases. Dr. Alexander examined Justin, reviewed his charts, and discussed Justin's condition with various hospital staff, including the attending physician. Dr. Alexander did testify the bear was not the same as a child, but he said it was his job to make sure the demonstration conformed to how it would be physically with the child based on weight and additional things he knew medically about how children would react. Dr. Alexander testified he did not know the exact number of oscillations Justin suffered,

but based on studies he conducted with another doctor, he did know the number generally thought to be required to cause such injuries as suffered by Justin.

We find the trial court did not abuse its discretion when it permitted the State to present the demonstration using the teddy bear. "As a general rule, the district court has wide discretion to admit evidence of experiments conducted under substantially similar conditions." *Barnes v. General Motors Corp.*, 547 F.2d 275, 277 (5th Cir. 1977). The conditions of a demonstration need not be identical to the event at issue. *Gaskell*, 985 F.2d at 1060. However, the burden was on the State to lay a proper foundation establishing a "similarity of circumstances and conditions." *Id.* The State met that burden.

For the reasons stated above, we affirm Mohr's conviction. We preserve Mohr's claim of ineffective assistance of counsel for postconviction relief proceedings.

AFFIRMED.