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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 2-490 / 91-1721

TODD GILBERT HOFFER,

Appellant,

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Polk County, George W. Bergeson, Judge.

The applicant appeals his conviction and sentence for first-degree murder. **AFFIRMED.**

David D. Butler of Law Offices of David D. Butler, Des Moines, for appellant.

Bonnie J. Campbell, Attorney General, Ann E. Brenden, Assistant Attorney General, John P. Sarcone, County Attorney, and Nan Horvat, Assistant County Attorney, for appellee.

Considered by Oxberger, C.J., and Hayden and Sackett, JJ.

HAYDEN, J.

Todd Hoffer was convicted, following a jury trial, of first-degree murder in connection with the shooting death of Juanita Weaver of Des Moines. The Iowa Supreme Court affirmed the conviction. State v. Hoffer, 383 N.W.2d 543 (Iowa 1986). Hoffer's application for postconviction relief was denied, and he now appeals. We affirm.

On September 2, 1984, Hoffer was hosting a keg beer party at his residence. Hoffer began drinking at 4 p.m. and consumed approximately eight to ten twelve-ounce glasses of beer. At approximately 2 a.m. Hoffer left with James Dorsey and Bill Lane for the purpose of retrieving a gun from Kenneth Weaver.

The three men left the party and went to David Bailey's house to pick up a shotgun. They drove directly from Bailey's house to the Weaver residence. Dorsey approached the Weaver apartment carrying the shotgun. Hoffer was walking behind Dorsey. Hoffer testified he believed Dorsey kicked open the door to the apartment. Kenneth Weaver was not at home, but his mother, Juanita Weaver, and a friend were in the bedroom. Juanita came out to the living room to see what was happening. Dorsey began yelling at her and then shot at her. Dorsey missed, and Juanita ran into the bathroom, where Dorsey shot her at close range. The three men then fled the scene.

Hoffer was ultimately charged with first-degree murder. At trial, counsel argued Hoffer had been so

intoxicated he was not capable of forming the specific intent to commit first-degree murder. Hoffer rejected the State's offer to plead guilty to first-degree burglary only.

On appeal Hoffer argues his trial counsel, who also served as appellate counsel in the original action, was ineffective. Specifically he contends (1) counsel's use of an intoxication defense was a useless strategy given the crime charged, (2) counsel failed to adequately inform him of the consequences of rejecting the State's plea offer, and (3) counsel failed to timely object to the reading of a memorandum relating to his out-of-court statement detailing facts sufficient to support a conviction under a felony-murder instruction.

Ordinarily, our review of postconviction relief proceedings is for errors of law. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980). However, when a postconviction petitioner asserts violation of constitutional safeguards--such as ineffective assistance of counsel--we make our own evaluation based on the totality of the circumstances. This is the equivalent of de novo review. Id. The burden is on Hoffer to prove by a preponderance of evidence "(1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom." State v. Risdal, 404 N.W.2d 130, 131-32 (Iowa 1987) (citation omitted). There is a presumption trial counsel is competent. Kane v. State, 436 N.W.2d 624, 627 (Iowa 1989).

I. Intoxication Defense. Hoffer contends counsel's tactical decision to use an intoxication defense constituted ineffective assistance. At the postconviction hearing trial counsel testified he pursued the intoxication defense on the ground Hoffer's intoxication prevented him from forming the specific intent to commit first-degree murder. Evidence of intoxication negates the element of specific intent which is required for a conviction of first-degree murder. Counsel's assertion of an intoxication defense was a tactical decision and does not alone amount to ineffective counsel. See United States v. Weir, 657 F.2d 1005, 1008 (8th Cir. 1981); Sims v. State, 295 N.W.2d 420, 423 (Iowa 1980) (citations omitted). Counsel testified he engaged in extensive pretrial discovery and preparation. Based on the information gathered, counsel based their trial strategy on an intoxication defense. The fact the trial tactic proved unwise in retrospect does not render the assistance of counsel ineffective. See State v. Aldape, 307 N.W.2d 32, 42 (Iowa 1972). We hold Hoffer's trial counsel made a reasonable tactical decision under the circumstances. Hoffer failed to prove his counsel breached an essential duty or prejudiced his case.

II. Plea Bargain. Hoffer contends counsel failed to adequately explain the plea offer. Hoffer testified counsel discussed the plea offer and he did not accept it because he did not commit any crime. Evidence shows

Hoffer's counsel adequately conveyed the plea offer to Hoffer and explained the consequences of each charges, including the sentencing limits.

III. Objection. Hoffer contends counsel was ineffective in failing to make a best evidence objection when his statement to the police was read into the record at trial. Counsel's failure to object did not deprive Hoffer of effective assistance in that there was no reasonable probability the absence of error would have caused the jury to reach a different result. State v. Hill, 449 N.W.2d 626, 628-29 (Iowa 1989).

We determine the actions of Hoffer's counsel were within the range of normal competency. We affirm the decision of the trial court denying Hoffer's application for postconviction relief.

The costs of this appeal are taxed to Hoffer.

AFFIRMED.