FILED
AUG 23 1989
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-314 / 88-852

STATE OF IOWA,

Appellee,

vs.

806

JAMES WILLIAM LANGDEAUX,

Appellant.

Appeal from the Iowa District Court for Dickinson County, Charles H. Barlow, Judge.

Defendant appeals from his conviction, following a jury trial, of first-degree murder and going armed with intent. **AFFIRMED.**

William L. Wegman, State Public Defender, and Linda Del Gallo, Assistant State Public Defender, for appellant.

Thomas J. Miller, Attorney General; Mark Joel Zbieroski, Assistant Attorney General; and Charles Thoman, Assistant Attorney General; and Jon M. Martin, County Attorney, for appellee.

Considered by Oxberger, C.J., and Hayden and Habhab, JJ. Sackett, J. takes no part.

OXBERGER, C.J.

Defendant James William Langdeaux (Langdeaux) appeals from his jury trial where he was convicted of first-degree murder and going armed with intent. He contends that he was denied effective assistance of counsel based first, on his trial counsel's failure to raise a timely objection to a jury instruction of felony murder with willful injury as the underlying felony and second, on his failure to challenge one of the jurors for cause. Our review is of the totality of the circumstances. State v. Johnson, 395 N.W.2d 661, 663 (Iowa App. 1986). We affirm.

A jury found James Langdeaux guilty of first-degree murder and going armed with intent after hearing testimony of a fatal stabbing. On appeal, he alleges ineffective assistance of counsel. First, he contends that trial counsel's failure to timely object to the submission of the felony murder instruction constituted ineffective assistance of counsel. He asserts that because willful injury is a lesser included offense of premeditated murder, the merger doctrine precludes it from being used to elevate the crime to first-degree murder.

Normally, ineffective assistance of counsel claims are preserved for postconviction proceedings to allow trial counsel an opportunity to defend the charge. State v. Mulder, 313 N.W.2d 885 (Iowa 1981); State v. Nebinger, 412 N.W.2d 180 (Iowa App. 1987). However, when the record is

sufficient to allow us to consider the issue, we resolve it on direct appeal. State v. Uedding, 400 N.W.2d 550, 553 (Iowa 1987).

Our ultimate concern in claims of ineffective assistance is with the "fundamental fairness of the proceeding whose result is being challenged." State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987), quoting Strickland v. Washington, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984). We review de novo the totality of the circumstances relating to counsel's conduct, keeping in mind the presumption that counsel performed competently. Risdal, 404 N.W.2d at 131. The burden is on the defendant to prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted.

At trial defense counsel did not object to the submission of the felony murder instruction to the jury. Langdeaux acknowledges that the Iowa Supreme Court rejected his present argument in State v. Beeman, 315 N.W.2d 770, 776-77 (Iowa 1982), but he urges that the analysis in Beeman misinterpreted the intent of the legislature and should be reconsidered. We disagree.

In Iowa the law is settled that willful injury can serve as the basis of a felony-murder conviction. See State v. Ragland, 420 N.W.2d 791 (Iowa 1988), State v. Mayberry, 411 N.W.2d 677, 682 (1987), State v. Phams, 342

N.W.2d 792 (Iowa 1983), State v. Beeman, 315 N.W.2d 770 (Iowa 1982). In Beeman the court stated that the legislature "intended that felonious assaults, including willful injury under section 708.4, be felonies that may serve as the basis of a felony-murder and that the merger doctrine . . . not apply to such assaults." Beeman, 315 N.W.2d at 777. "We see no reason to retreat from . . . [the court's] previous decisions." Ragland, 420 N.W.2d at 793.

Even if we were to agree with Langdeaux, defense counsel does not breach a duty to defendant by failing "to raise a claim that has not been recognized or suggested by previous case law or other authority." Shertz v. State, 380 N.W.2d 404, 415 (Iowa 1985). "Counsel need not be a crystal gazer . . . ." Snethen v. State, 308 N.W. 2d 11, 16 (Iowa 1981) (citations omitted). Counsel's failure to anticipate a change in existing law does not rise to the status of omitting an essential duty to his client. "[I]t is not necessary to know what the law will become in the future to provide effective assistance of counsel." Snethen, 308 N.W.2d at 16 (citing Boyer v. Patton, 579 F.2d 284, 288 (3rd Cir. 1978). As long as counsel's actions amount to principled decisions within the normal range of competency, counsel is not ineffective. Hall v. State, 360 N.W.2d 836, 839 (Iowa 1985).

In light of Iowa precedent we find defense counsel's action to be reasonable and that they fall within the range of normal competency. We do not find counsel ineffective for accepting, as a correct statement of the law, the decisions of the Iowa courts. See Cuevas v. State, 415 N.W.2d 630, 632-33 (Iowa 1987). We find defendant's contention without merit.

Second, Langdeaux contends that his trial attorney's failure to challenge for cause or strike a juror resulted in ineffective assistance of counsel. He asserts that the presence of juror Rosemary Stellinga denied him a trial by a fair and impartial jury. Langdeaux claims that Stellinga had already formed an opinion about his guilt or innocence which is evidence by her answers to voir dire questions, her discussion with her daughter who was at the Windjammer bar at the time of the stabbing, and the fact that her cousin's daughter had gone to school with the victim.

The transcript of the voir dire examination reveals that juror Stellinga indicated that her daughter was present at the Windjammer bar when the stabbing occurred. She further indicated that they discussed the stabbing and that she found it troubling. Mrs. Stellinga's daughter did not see the incident and was not a witness in the case. The prosecutor asked Mrs. Stellinga the following questions:

> MR. THOMAN [PROSECUTOR]: I guess what I'm really concerned about, could you put aside those things that you have heard?
> . . .

MRS. STELLINGA: I had a daughter that was on the premise of the Windjammer the night of the incident.

. . .

MR. THOMAN: Have you sat down and -- Without really telling us what you might have -- she might have told you about it, have you sat down and talked about it at all?

MRS. STELLINGA: Yes, we did, at the time it happened.

MR. THOMAN: Did she see -- anything?

MRS. STELLINGA: Not at the time it happened. Afterwards.

MR. THOMAN: And talked to some of the other people?

MRS. STELLINGA: Mm-hmm. I read a lot about it because I was concerned. When you have children that are frequenting those establishments, you do want to know what is going on.

MR. THOMAN: Let me ask you the same question I asked Mr. Watts. Whatever she's told you she heard or was told, or whatever happened, can you put those -- those kinds of things out of your mind and decide this strictly on the evidence --

MRS. STELLINGA: I --

MR. THOMAN: -- that you hear?

MRS. STELLINGA: I would hope I could.

MR. THOMAN: Is there -- is there anything that particularly -- And, again, I don't want you to necessarily tell us what it might be at this point. But is there something you heard about the incident that particularly troubled you or --

MRS. STELLINGA: Yes. I think there was.

MR. THOMAN: And that's why you're not -- that's why today you're telling us --

MRS. STELLINGA: Yes.

MR. THOMAN: -- you hope you can, but you're not sure?

MRS. STELLINGA: Yes.

The defense counsel later asked the following questions of Stellinga:

MR. CLARITY [DEFENSE COUNSEL]: . . . What about this other thing that you talked to your daughter about? I'd love to know, but I don't want you to tell me. You said --

MRS. STELLINGA: Well --

MR. CLARITY: You said it troubled you. Is it something bad that my guy did, or is it

something bad that their guy did? Let's put it in real simple terms.

MRS. STELLINGA: I guess I'm concerned of the situation there at the time. Is this something that happens on a frequent basis that --

MR. CLARITY: Down at the Windjammer?

MRS. STELLINGA: -- that fights do happen down there?

MR. CLARITY: Yeah.

MRS. STELLINGA: That's why I was concerned. I had a child there. I'm concerned that --

MR. CLARITY: Yes.

MRS. STELLINGA: -- sometimes you can be in the wrong place at the wrong time and something does happen to you. And I don't want her there if this is something that --

MR. CLARITY: Okay.

MRS. STELLINGA: --happens on a frequent basis.

MR. CLARITY: That's --

MRS. STELLINGA: -- when this happened.

In determining juror prejudice the crucial question is not what the juror has been exposed to, but whether the juror holds a fixed opinion that prevents them from judging impartially the defendant's guilt or innocence. State v. Walters, 426 N.W.2d 136, 139 (1988); State v. Gavin, 360 N.W. 817, 819 (Iowa 1985); State v. Lanscak, 404 N.W.2d 192, 194 (Iowa App. 1987). "Impartiality does not demand complete juror ignorance of issues and events." Walters, 426 N.W.2d at 138. (citing Gavin, 360 N.W.2d at 819).

The United States Supreme Court identified the impartial juror standard and stated:

> To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Irvin v. Dowd, 366 U.S. 717, 722-23, 81 S. Ct. 1639, 1642-43, 6 L. Ed. 2d 751, 756 (1961). 813

We do not find the voir dire transcript to reveal that Mrs. Stellinga had formed or expressed such an opinion as to the guilt or innocence of Langdeaux.

We find defense counsel's action to not strike or challenge juror Stellinga for cause to fall within the range of normal competency. We find the the defendant has failed to meet the burden on both contentions. We affirm.

AFFIRMED.