IN THE COURT OF APPEALS OF IOWA

No. 7-398 / 96-643

000361

STATE OF IOWA,

Appellee,

vs.

GARTH ANDERSON,

Appellant.

FILED
SEP 24 1997

Appeal from the Iowa District Court for Scott County, James R. Havercamp, Judge.

Garth Anderson appeals his convictions and sentences, following a jury trial, for first-degree murder, first-degree robbery, and willful injury. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Julie H. Brown, Assistant Attorney General, and William E. Davis, County Attorney, for appellee.

Considered by Cady, P.J., Huitink, J., and McCartney, S.J.*

*Senior judge from the 2nd Judicial District serving on this court by order of the Iowa Supreme Court.

CADY, P.J.

Garth Lee-Alan Anderson appeals the judgment and sentence for his conviction of murder in the first degree, robbery in the first degree, and willful injury He claims the trial court erred in overruling a hearsay objection, insufficient evidence existed to support a finding he possessed specific intent to commit the crimes, and his trial counsel was ineffective. We affirm Anderson's conviction.

Anderson was charged with murder and robbery after his aunt, Elizabeth Cleo Williams (Cleo), was found dead in her home. She died of strangulation. In the hours preceding her death, Anderson consumed large quantities of crack cocaine and alcohol, including approximately ten rocks of crack cocaine, six alcoholic drinks in a bar, four thirty-two-ounce beers, and marijuana. He then went to Cleo's house, where he planned to go to sleep. Instead he developed a craving for more drugs. In order to procure money for the drugs, he searched Cleo's purse. While looking through the purse, Cleo awoke and discovered what he was doing. Anderson responded by grabbing her by the neck until she went limp. He later left with her wallet and cigarette case.

At trial, witness Holly Leathers testified she was staying at a crack house where she routinely swept the basement floor. While cleaning she found a cigarette case and wallet which contained papers with the name of Elizabeth Cleopatra Williams. Another witness, David Lacy, testified Holly stated Garth Anderson gave

her the cigarette case. Anderson's attorney objected to the testimony on hearsay grounds after the answer to the initiating question was completed.

The jury found Anderson guilty. The court sentenced him to life imprisonment for murder in the first degree, twenty-five years for robbery in the first degree, and ten years for willful injury.

On appeal Anderson argues the trial court erred in admitting the hearsay testimony of David Lacy, insufficient evidence existed for the jury to find he had the specific intent to commit the crimes, and counsel was ineffective in failing to preserve error on the hearsay testimony of Lacy.

I. Hearsay Objection

Our scope of review is for the correction of errors of law. Iowa R. App. P. 4.

To properly preserve error, objections must be made at the time the grounds for the objection become apparent. *State v. Washington*, 356 N.W.2d 192, 194 (Iowa 1984). When an objection to a question follows the answer, then a motion to strike and application to have the objection precede the answer must be made, or an excuse for the delay must be offered. *Id.* In this case, defense counsel failed to move to strike the objectionable hearsay testimony after the answer or offer an excuse for the tardiness. Therefore, no error was preserved regarding the hearsay testimony of David Lacy. Without adequate preservation of error, we reserve our consideration of the issue for a claim of ineffective assistance of counsel. *Earnest v. State*, 508 N.W.2d 630, 632 (Iowa 1993) (claim of ineffective assistance of counsel is an

exception to the general rule that an issue must be timely raised to preserve error for appeal).

II. Sufficiency of Evidence

We review claims of insufficient evidence for errors at law. Iowa R. App. P. 4. A verdict of guilty is binding on appeal unless there is no substantial evidence in the record to support it, or it is clearly against the weight of the evidence. *State v Schrier*, 300 N.W.2d 305, 306 (Iowa 1981), *see also State v. Anderson*, 517 N.W 2d 208, 211 (Iowa 1994); *State v. Geier*, 484 N.W.2d 167, 170-71 (Iowa 1992). Substantial evidence means evidence that could convince a rational trier of fact the defendant is guilty beyond a reasonable doubt. *Schrier*, 300 N.W.2d at 306. In determining the sufficiency of evidence, we view the record in a light most favorable to the State. *State v. Robinson*, 288 N.W.2d 337, 339 (Iowa 1980); *see also State v McGrew*, 515 N.W.2d 36, 37 (Iowa 1994). All evidence is considered, not simply the evidence supporting the verdict. *Id.* at 340; *see also State v. Walker*, 538 N.W.2d 316, 319 (Iowa App. 1995).

Anderson asserts he could not possibly have formed the specific intent necessary to support the convictions in light of all the drugs and alcohol he had consumed.[1] He essentially relies on a diminished responsibility defense.

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[1] First-degree premeditated murder requires a specific intent to kill. Iowa Code § 707.2. Robbery requires a specific intent to commit a theft. Iowa Code § 711.1. Willful injury requires a specific intent to cause serious injury. Iowa Code § 708.4.

We find substantial support for the convictions. Considering the testimony of both the State's and defendant's experts, it is possible for a rational trier of fact to find Anderson guilty beyond a reasonable doubt. Anderson's own expert testified a person in cocaine delirium *may* lose contact with reality Thus, it is possible for the jury to conclude in this case diminished capacity did not occur Additionally, the State pointed out Anderson's attempt to obtain more crack cocaine involved rational goal oriented activities such as selling various items to obtain money for drugs Moreover, the State's expert, Dr. William Nissen, testified that determining whether an individual intended their actions may not be determined by looking exclusively at the amount of cocaine the person ingested. Dr. Nissen's testimony indicated many variables are considered in determining how a person would react after ingesting ten rocks of cocaine. Thus, based on the evidence presented at trial, a rational trier of fact could find Anderson had the specific intent to commit the crimes.

Anderson further argues there was insufficient evidence of specific intent because Dr. Nissen acknowledged science was not advanced enough to determine specific intent from the amount of cocaine ingested. Anderson claims this admission renders the State's evidence contradictory and insufficient to support a finding of specific intent. We disagree.

First, Anderson's argument misconstrues the testimony. Dr. Nissen testified state of mind cannot be determined merely from the amount of a drug ingested because drugs affect people differently. Additionally, Dr. Nissen described various

000366

factors which could influence a person who ingested cocaine. Based on these factors, together with the other evidence of Anderson's behavior, a reasonable jury could conclude Anderson formulated the required intent. Finally, the lack of scientific proof does not render evidence insufficient to support a finding of specific intent Intent is seldom capable of direct proof. *State v. Rinehart*, 283 N.W.2d 319, 321 (Iowa 1979). Thus, inferences are permissible. *Id.* These inferences, together with all the facts and circumstances support a finding of specific intent.

III. Ineffective Assistance of Counsel

Anderson's ineffective assistance of counsel claim involves a constitutional challenge. Our scope of review, therefore, is de novo. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994). Ordinarily, ineffective assistance of counsel claims are reserved for postconviction proceedings. *Id.; see also State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). These claims may be resolved on direct appeal, however, when the record adequately addresses the underlying issues. *Ray*, 516 N.W.2d at 865.

To prevail on an ineffective assistance of counsel claim, Anderson must prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Ray*, 516 N.W.2d at 865. The applicant must overcome the strong presumption counsel was competent and that counsel's error worked to his actual and substantial disadvantage, creating a reasonable probability that but for the error the trial's result would have been different. *Id.* (citing *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2069, 80 L.Ed.2d 674, 699

(1984)). We often most efficiently dispose of the ineffective assistance of counsel claim by looking first to the question of prejudice *State v Hildebrant*, 405 N W 2d 839, 841 (Iowa 1987).[2]

The ineffective assistance of counsel claim involves David Lacy's testimony that Holly Leathers told him Anderson gave her a cigarette pouch which belonged to Cleo. Trial counsel made a hearsay objection after Lacy answered the question, but failed to make a motion to strike the testimony or provide an acceptable excuse for the tardiness. Although counsel failed to adequately preserve error, this did not result in prejudice to Anderson. Anderson admitted he stole the items belonging to Cleo and that he killed her Thus, Lacy's testimony was cumulative. Additionally, considering the other overwhelming trial evidence of guilt, we are convinced Lacy's testimony did not prejudice Anderson.

For the reasons expressed, we affirm the conviction.

AFFIRMED.

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[2] Hearsay is defined as "a statement other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Iowa R. Evid. 801(c). The state in this case carries the burden of establishing the admissibility of the testimony. *State v. Miller*, 204 N.W.2d 834, 839-840 (Iowa 1973). We acknowledge David Lacy's testimony that Holly Leathers told him Anderson gave her the cigarette case and wallet constituted hearsay.