

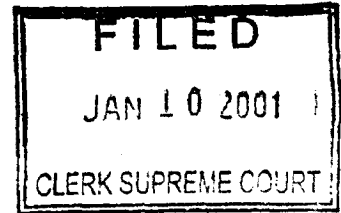
IN THE COURT OF APPEALS OF IOWA

No. 0-589 / 99-1269
Filed January 10, 2001

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MATTHEW JAMES PAYNE,
Defendant-Appellant.



Appeal from the Iowa District Court for Black Hawk County, K.D. Briner,
Judge.

Defendant appeals from his judgment and sentence for first-degree
murder. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney
General, Thomas J. Ferguson, County Attorney, and Douglas Eicholz, Assistant
County Attorney, for appellee.

Heard by Streit, P.J., and Vogel and Hecht, JJ.

HECHT, J.

On appeal from his judgment and sentence for first-degree murder, Matthew James Payne contends trial counsel was ineffective for failing to move for a new trial based upon inadequate findings of fact and conclusions of law after a bench trial. He also maintains trial counsel was ineffective for failing to object to evidence of "other crimes." We affirm.

I. Factual Background and Proceedings. In the early morning hours of July 26, 1998, Karen Salisbury was murdered in her home in Black Hawk County. After an investigation of the homicide, Payne was charged with murder in the first degree pursuant to Iowa Code section 707.2(1) (1997) (premeditated murder) and section 707.2(2) (felony murder). He asserted a defense of intoxication and waived jury trial.

Evidence introduced at trial established Payne was a sixteen-year-old alcoholic who had ingested alcohol and marijuana during the twelve hours before the murder. The district court found Payne guilty of forcible felonies including burglary in the first degree (with specific intent to commit a theft), robbery (specific intent to commit a theft), and willful injury (specific intent to cause serious injury) and therefore also guilty of first-degree murder under the felony murder theory. In its findings pertinent to the intoxication defense, the court found:

The evidence shows that Payne suffers from moderate depression, from alcohol abuse and possibly other substance abuse, and that he has a conduct disorder. The evidence does not show that Payne was so intoxicated on July 25 and July 26, 1998, as to be incapable of forming a specific intent. To the contrary, the evidence shows that Payne was capable of forming the specific intent to

commit a theft, the specific intent to inflict a bodily injury and the specific intent to inflict a serious injury.

The district court further found the evidence did not prove beyond a reasonable doubt Payne acted with the specific intent to kill Salisbury. The court did not make a special finding on the issue of whether Payne was capable of forming the specific intent to kill.

II. Standard of Review. We review claims of ineffective assistance of counsel de novo. *State v. Oetken*, 613 N.W.2d 679, 683 (Iowa 2000). Such claims are usually preserved for postconviction relief proceedings unless, as here, the record is adequate on direct appeal to address them. *State v. Pace*, 602 N.W.2d 764, 768 (Iowa 1999).

III. The Merits. The defendant bears the burden of demonstrating ineffective assistance of counsel. *State v. Morgan*, 559 N.W.2d 603, 612 (Iowa 1997). Counsel is entitled to a heavy presumption of competence. *Osborn v. State*, 573 N.W.2d 917, 922 (Iowa 1998). To prevail, Payne must prove by a preponderance of the evidence his counsel failed in an essential duty and prejudice resulted. See *State v. Westeen*, 591 N.W.2d 203, 207 (Iowa 1999). Prejudice is shown where there is a reasonable probability the result would have been different if counsel had performed competently. *Id.* at 211. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Wemark v. State*, 602 N.W.2d 810, 817 (Iowa 1999). In resolving an ineffective assistance of counsel claim, the ultimate test is whether under the entire record and totality of the circumstances counsel's performance was within the normal range of competency. *State v. Artzer*, 609 N.W.2d 526, 531 (Iowa 2000) (quoting

Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981)). With these principles in mind, we now discuss the specific claims made by Payne.

A. *Counsel's Failure to Move for New Trial.* Payne acknowledges the district court found he possessed the specific intent to commit theft and to cause serious injury to Karen Salisbury. He contends, however, the district court erred in failing to make a specific finding of whether he was capable of forming the specific intent to kill the victim. Payne argues the district court's finding the State failed to prove intent to kill does not conclusively determine he had the ability to form such intent. Moreover, Payne posits there is at least a theoretical possibility the district court could on this record both determine such intent to kill was not proved, and he was incapable of forming such intent. He further reasons if he was incapable of forming the intent to kill Salisbury, he would necessarily also have been unable to form the intent required under the felony murder count. Thus, he argues, so long as there remains a possibility he could be found not to have possessed the ability to form the intent to kill, the possibility exists the record could not logically have supported the district court's findings with respect to specific intent elements of felony murder. He urges us either to remand for a special finding as to his ability to form the specific intent to kill or to reverse and remand for new trial.

The State asserts counsel had no duty to challenge the district court's failure to make a finding on Payne's ability to form the specific intent to kill because a finding of such ability is inferred from the findings of his intent to commit theft and inflict serious injury. We agree. Findings of fact by trial courts

are given a liberal construction favorable to the judgment. *Bahnsen v. Rabe*, 276 N.W.2d 413, 414 (Iowa 1979); see also *State v. Blanford*, 306 N.W.2d 93, 97 (Iowa 1981). Independent claims not specifically ruled on in the findings but inconsistent with the judgment are deemed to have been resolved adversely to the losing party. *Bahnsen*, 276 N.W.2d at 414. We conclude the district court clearly found Payne was capable of forming specific intent, but simply determined the State failed to prove the intent to kill beyond a reasonable doubt. Payne's claim he was incapable of forming the specific intent to kill is inconsistent with the district court's judgment and is deemed to have been resolved adversely to him. Payne has failed to show a reasonable probability the result would have been different if trial counsel had filed a post-trial motion to obtain a finding on the issue. *Westeen*, 591 N.W.2d at 211. Therefore, Payne has not demonstrated he suffered the requisite prejudice and cannot succeed on this claim of ineffective assistance of counsel.

B. Counsel's Failure to Object to Other Crimes Evidence. Payne also contends his trial counsel breached a duty to object to certain "other crimes" evidence. Officer Rob Camarata testified Payne was arrested in connection with a vandalism incident, which occurred on July 6, 1998. Police officers photographed Payne's shoes during the vandalism investigation because shoe prints were left at the scene and matched the prints from a pair of Payne's shoes. The shoes were also a subject of interest in the prosecution of the Salisbury murder because shoe prints were found on the back porch of the victim's house. Those prints matched the prints taken from the July vandalism incident. Payne

asserts testimony about the prior crime was inadmissible under Iowa rules of evidence 404(b) and 403; and trial counsel was ineffective for failing to object to it. The State asserts the evidence was relevant because it tended to place Payne inside the victim's house, and not prejudicial because it was cumulative of Payne's mother's testimony about Payne's arrest for kicking out windows on July 6, 1998. After careful review of this issue, we conclude Payne has failed to establish prejudice resulting from trial counsel's failure to object to Camarata's testimony. The other evidence of Payne's guilt was overwhelming in this case. His wallet was found in the victim's house after the murder. Bite marks on the victim's body were consistent with his dentition. An acquaintance testified Payne entered the victim's house during the early morning hours on the date of the murder. Under the circumstances, we do not find a reasonable probability the result would have been different if counsel had objected to the officer's testimony about the prior crime. Accordingly, we affirm.

AFFIRMED.