

IN THE COURT OF APPEALS OF IOWA

No. 2-326 / 91-667

FILED

OCT 27 1992

CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

DAVID ALLEN MACKEY,

Appellant.

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Appeal from the Iowa District Court for Polk County,  
Rodney J. Ryan, Judge.

David Allen Mackey appeals his conviction, following a  
jury trial, of first-degree robbery. **AFFIRMED.**

Lylea Dodson Critelli of Nick Critelli Associates,  
P.C., Des Moines, for appellant.

Bonnie J. Campbell, Attorney General, Thomas G. Fisher,  
Jr., Assistant Attorney General, John P. Sarcone, County  
Attorney, and Steven Foritano, Assistant County Attorney,  
for appellee.

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

**SCHLEGEL, J.**

David Allen Mackey appeals his conviction, following a jury trial, of first-degree robbery. He contends the district court erred in (1) refusing to instruct the jury on a diminished responsibility defense and (2) denying his motions for judgment of acquittal. Mackey also maintains he was denied a fair trial due to prosecutorial misconduct. He claims any failure to preserve error on his prosecutorial misconduct claim was due to ineffective assistance of trial counsel.

During the evening of October 24, 1990, someone robbed a Des Moines area Hy-Vee Food Store at gunpoint. A bystander observed a man in a blue hooded sweatshirt running from the store. The bystander watched the man enter what he believed to be a gold car and attempted to follow him, but the witness eventually lost track of the suspect's vehicle. Shortly thereafter, the police spotted a brown car, and the witness identified the car as the vehicle he had followed. The car contained papers in the back seat bearing David Mackey's name, but the car was not registered to Mackey.

The police saw a passenger in a passing car who resembled the broadcasted description of the robbery suspect. The officers chased the vehicle, and the passenger eventually fled on foot. The police arrested the passenger, David Allen Mackey, as a suspect in the robbery. The police then summoned the store clerk to the

arrest scene, and the clerk identified Mackey as the robber. At the time of the identification, Mackey was handcuffed and illuminated by headlights and spotlights. Mackey's eyes were bloodshot and beer cans were found in the car.

The State charged Mackey with first-degree robbery. Prior to trial, Mackey filed notices of his intent to rely upon alibi, insanity, diminished responsibility, and intoxication defenses. Trial commenced on March 4, 1991. During the redirect examination of police officer Douglas Harvey, the following exchange occurred:

Q: Would it [Mackey's nervousness and fidgetiness] be appropriate for someone that had committed a criminal act and just gotten caught?

A: Yes. We've taken interviewing and interrogation classes, and that's one of the body language signs you look for.

Later in the trial, Dr. Shahe Zenian, a clinical psychologist, testified that Mackey suffered from a mental condition which would have precluded him from being able to distinguish between right and wrong at the time of the offense. Zenian also opined that Mackey's use of alcohol would have caused an adverse reaction in conjunction with the medication he was taking for his mental condition.

The district court denied Mackey's motions for judgment of acquittal at the end of the State's evidence and at the close of all evidence. The court also refused to instruct the jury on both the insanity defense and the diminished responsibility defense because the court feared it would

confuse the jury. The jury found Mackey guilty as charged, and the district court denied Mackey's subsequent motions for new trial and in arrest of judgment. The court sentenced Mackey to an indeterminate prison term not to exceed twenty-five years.

Mackey has appealed. He contends the district court erred in refusing to instruct the jury on both the insanity and diminished responsibility defenses. He further argues that he was denied a fair trial due to the prosecutor's conduct in eliciting the remarks of Officer Harvey. He maintains Harvey's remarks constituted improper comments concerning his guilt, thus invading the province of the jury. He claims that if his counsel waived this issue by failing to object and move for a mistrial, then counsel rendered ineffective assistance. Finally, Mackey alleges insufficient evidence existed to support the jury's verdict. In particular, he maintains the clerk's identification at the arrest scene was unreliable.

We review for an abuse of discretion. In order to show an abuse of discretion, one generally must show that the court exercised its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." State v. Blackwell, 238 N.W.2d 131, 138 (Iowa 1976) (quoting State v. Burnor, 132 Vt. 603, 326 A.2d 138, 140 (1974)).

Mackey first contends the district court erred in refusing to instruct the jury on both the insanity and diminished responsibility defenses and in requiring him to

choose between the two defense theories. The court refused to instruct the jury on both defenses because the court was concerned the jury might confuse diminished responsibility with a "lesser included" submission of insanity.

The State contends the diminished responsibility defense is a separate defense than intoxication and claims no substantial evidence exists in the record to support Mackey's contention that a jury instruction regarding diminished responsibility should have been given. While the State does recognize the presence of evidence in the record concerning Mackey's possible intoxication, the State argues the intoxication "defense" has not been preserved for appellate review and an instruction regarding the intoxication "defense" was not even requested. As a result, the State claims the trial court appropriately refused to submit either issue to the jury.

The State argues in its brief, "[d]efendant's theory on appeal, 'diminished responsibility based on intoxication[,] is not a defense recognized in Iowa. Defendant confuses three separate defenses: insanity, diminished responsibility, and intoxication.'" We disagree. The diminished responsibility defense is not necessarily mutually exclusive from evidence regarding temporary intoxication. Both may be considered by the jury as evidence concerning a defendant's criminal intent in specific intent crimes such as first-degree robbery.

In State v. Collins, 305 N.W.2d 434, 436 (Iowa 1981), the court stated, "diminished responsibility may be offered as a defense where an accused, because of a limited capacity to think, is unable to form a necessary criminal intent." (Emphasis added.) The court went on to state, "[i]ntoxication is sometimes raised, and often inaccurately referred to as a 'defense,' in criminal prosecutions. . . . [t]emporary intoxication is simply evidence to be considered by the jury on the issue of intent." (Emphasis added.) Similarly, Iowa Code section 701.5 (1991) provides:

The fact that a person is under the influence of intoxicants or drugs neither excuses the person's act nor aggravates the person's guilt, but may be shown where it is relevant in proving the person's specific intent or recklessness at the time of the person's alleged criminal act or in proving any element of the public offense with which the person is charged.

(Emphasis supplied.)

In light of these principles, we conclude a defense based on diminished responsibility due to intoxication is recognized under Iowa law in accordance with Collins and the cases cited therein to support the proposition that "diminished responsibility may be offered as a defense where an accused, because of a limited capacity to think, is unable to form a necessary criminal intent." Id. at 436. In the present case, Mackey contends his limited capacity to think resulted from temporary intoxication.

Next, we move to the question of whether the district court abused its discretion in refusing to instruct the

jury on both the insanity and diminished responsibility defenses. We conclude the court did not abuse its discretion. In State v. Broughton, 425 N.W.2d 48 (Iowa 1988), the court stated:

A trial court must instruct on all material issues raised by the evidence. [Citations omitted.] In order to obtain such an instruction, the defendant must produce substantial evidence to support it. [Citation omitted.] "Substantial" evidence means evidence which could convince a rational finder of fact that the defendant has established his affirmative defense. [Citations omitted.]

Id. at 52.

In the instant case, the evidence of diminished responsibility based on intoxication is not substantial. Mackey told the police he had been drinking beer with an acquaintance prior to his arrest. At the time of his arrest, Mackey's eyes were bloodshot, and the police discovered beer bottles and a beer can in the vehicle which the police claimed had been used in the robbery. We cannot say this evidence could convince a rational fact finder that Mackey was intoxicated to the point of being unable to form specific intent to rob.

Next, Mackey contends the district court abused its discretion by permitting the prosecutor to elicit evidence from the arresting officer regarding whether Mackey's actions following the robbery suggested his guilt. We conclude defense counsel failed to preserve this issue since no objection to this evidence was lodged at trial. We hold the issue of ineffective assistance of counsel

concerning this assertion is preserved for postconviction proceedings since this contention cannot be decided on the record before us. See State v. Blair, 347 N.W.2d 416, 422 (Iowa 1984).

Finally, Mackey contends the evidence was insufficient to support the jury's verdict of guilty. "We are bound by the jury's verdict of guilty unless there is no substantial evidence in the record to support it or such finding is clearly against the weight of the evidence." State v. Clarke, 475 N.W.2d 193, 197 (Iowa 1991) (citing State v. LaPointe, 418 N.W.2d 49, 51 (Iowa 1988)). Substantial evidence means evidence which could convince a rational trier of fact that the defendant is guilty of the crime charged beyond a reasonable doubt. Clarke, 475 N.W.2d at 197.

In determining whether substantial evidence exists in the record to support the defendant's conviction, we must examine the evidence in the light most favorable to the verdict. Id. at 197. We examine the entire record and accept all legitimate inferences permitted by the evidence to support the verdict. State v. Newmann, 326 N.W.2d 788, 790-91 (Iowa 1982). We conclude substantial evidence exists in the record to support the defendant's conviction.

Having concluded the district court did not abuse its discretion, we affirm Mackey's conviction of first-degree robbery.

**AFFIRMED.**