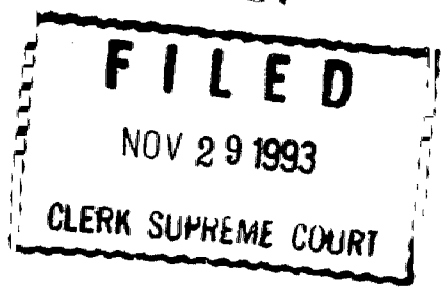
000187



IN THE COURT OF APPEALS OF IOWA

No. 3-307 / 92-1262

JAMES MICHAEL GREEN,

Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.

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

Green appeals the district court's dismissal of his application for postconviction relief. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and B. John Burns, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Thomas G. Fisher, Jr., Assistant Attorney General, John P. Sarcone, County Attorney, and Nan M. Horvat, Assistant County Attorney, for appellee.

Heard by Oxberger, C.J., and Hayden and Sackett, JJ, but decided en banc. Donielson, J., takes no part.

000198

OXBERGER C.J.

James Michael Green and Gary Titus met Franklin Eaton in a Des Moines parking lot. Eaton brought the two men to his apartment where the three of them drank, sniffed amyl nitrate, and watched a pornographic videotape. When the two men refused Eaton's sexual invitation, a fight ensued between Titus and Eaton. Green stabbed Eaton to death with a knife he had taken from Eaton's kitchen. After the stabbing, Green and Titus removed items from the apartment.

Green and Titus were charged with murder in the first degree and robbery in the first degree. Green admitted he stabbed Eaton, but asserted an intoxication defense. The marshaling instruction for murder in the first degree allowed the jury to convict Green either as a principal or as an aider or abettor. All the lesser-included offenses were submitted on a theory of aiding and abetting only. Green did not object to the instructions.

Green was convicted of murder in the first degree and robbery in the first degree. His convictions were affirmed on appeal. State v. Green, 457 N.W.2d 20 (Iowa App. 1990).

Green filed an application for postconviction relief challenging his conviction. His chief complaint was his trial counsel's failure to challenge the murder instructions given the jury. The case was submitted to the district court on a stipulated record, including the deposition of Green's trial counsel, Chris Odell. She said she had not realized murder in the second degree, voluntary

000189

manslaughter, and involuntary manslaughter were only being submitted under the aiding and abetting theory. The district court dismissed Green's application.

Green appeals.

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.

In order to prevail on such a claim, appellant must show by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. See State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987); Edman v. State, 444 N.W.2d 99, 101 (Iowa App. 1989). In evaluating counsel's performance, we presume counsel acted competently. See Risdal, 404 N.W.2d at 131. When reviewing these claims, we may begin our analysis with either query; failure to perform an essential duty or prejudice. Id. at 132. We may reject a claim of ineffective assistance of counsel without even addressing counsel's performance if there has been no prejudice. Taylor v. State, 352 N.W.2d 683, 685 (Iowa 1984).

000190

In our inquiry regarding Green, we turn to the question of prejudice. Prejudice is defined as "a reasonable probability that but for the alleged breach of duty, the outcome would have been different." Kane v. State, 436 N.W.2d 624, 627 (Iowa 1989). In other words, the defendant must establish that but for counsel's actions, a reasonable possibility of acquittal existed. Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984). In this case, Green would have to show that different instructions would likely have resulted in his conviction for a lesser included offense.

Green admits he stabbed Eaton to death. He claims because he was intoxicated he should not have been convicted of first-degree murder. Instead, he claims he committed second-degree murder or some lesser offense. The evidence of his intoxication was very questionable. He claimed an enormous tolerance for alcohol, claiming he could consume eighteen to twenty-four cans of beer before he even began to feel its effects. He testified that on the night of the murder, he consumed twenty to twenty-five cans of beer, which is what he previously testified he would barely notice. He testified he consumed several shots of tequila and Jim Beam. He also testified he sniffed amyl or butyl nitrate which made him feel dizzy and sick. In spite of Green's alleged intoxication he was able to recite the facts surrounding the murder with extreme clarity. There were no events immediately surrounding the

000191

murder which Green did not remember or reported being uncertain or confused about. In addition, in spite of a lengthy conversation with police officers, Green never mentioned his alcohol consumption.

Based on the evidence, we conclude Green failed to establish prejudice; that is, he failed to show any likelihood that he would have been acquitted or convicted of a lesser offense had the jury been instructed differently. We affirm the district court's denial of Green's postconviction relief application.

AFFIRMED.

All judges concur except Sackett and Schlegel, JJ., who dissent.

SACKETT, J. (dissenting)

Applicant-appellant James Michael Green appeals from a ruling dismissing his application for postconviction relief. Green was convicted of first-degree murder and his conviction was affirmed on direct appeal. State v. Green, 457 N.W.2d 20 (Iowa App. 1990). His claims of ineffective assistance of trial counsel raised in the direct appeal were reserved for a postconviction proceeding. Green, 457 N.W.2d at 25. I would reverse and remand for a new trial.

Green and Gary Titus were charged with first-degree murder following the death from stab wounds of Franklin Eaton. The substantially undisputed evidence was Green and Titus met Eaton at the gay loop in Des Moines and went to Eaton's apartment in West Des Moines where they drank and ingested drugs. When Eaton wanted the men to join him in bed, a scuffle ensued between Eaton, Green and Titus. Green stabbed Eaton to death and then Green and Titus took property from Green's apartment. See Green, 457 N.W.2d at 22.

There was evidence Green, in addition to drinking and ingesting amyl nitrate at Eaton's apartment, had done substantial drinking before meeting Eaton and going to his apartment.

Green's defense at trial was he was not able to form the intent necessary for first-degree murder. Shahe Zenian, a psychologist, testified in Green's defense and said Green was an alcoholic and in ingesting amyl nitrate

000193

at Eaton's apartment, among other factors, Green "was sufficiently intoxicated that he could not formulate the intent to commit a murder in the first degree."

Green contends his trial attorney should have objected to the marshalling instructions given on the lesser-included offenses of first-degree murder.

The marshalling instruction for the offense of murder in the first degree allowed the jury to convict Green either as a principal or as an aider and abettor. All of the lesser offenses of murder in the first degree were submitted to the jury on a theory of aiding and abetting only.

The majority has elected not to specially address the issue as raised by the defendant. They have instead looked at the facts and made their own determination from the facts that the defendant would fail on a diminished responsibility defense based on intoxication.

At the postconviction hearing, Green's trial attorney advanced no strategy for the instruction but, rather, indicated it was an oversight. It appears what happened is the instructions used were the same as were used in Titus' earlier trial with Green's name just exchanged for Titus. Green's trial attorney said she did not recognize the murder in the second degree, voluntary manslaughter and involuntary manslaughter marshalling instruction failed to talk about Green as a principal.

000194

The trial court, in dismissing the case, relied on a finding that there was sufficient evidence to convict Green as an aider or abettor even if the jury did not find him to be a principal. Green advances the post-conviction court misapprehended the error. I am of the opinion that both the postconviction court and this court have misapprehended the error Green asks be addressed.

The bulk of the evidence Green offered at trial went to show he was guilty of an offense less than the class "A" felony of murder in the first degree. There was evidence Green had consumed twenty-five cans of beer, had several shots of tequila and Jim Beam and sniffed amyl and butyl nitrate near the time of the stabbing. Green introduced expert testimony he was unable to form the specific intent necessary for first-degree murder. Green's seasoned trial attorney defended the case on a diminished responsibility theory.

The instructions as given told the jury the law was the lesser offenses could be considered if Green was found an aider and abettor. The uncontroverted evidence was Green had done the stabbing. Under the instructions as given, a reasonable juror could assume the lesser offenses were available to Green only if he did not actually do the stabbing and, if he had done the stabbing, they were not.

The State contends the challenged instructions were not prejudicial because the jury was given a definition of "aiding and abetting." The definition given talked of

000195

"aiding and abetting" as including active participation and participation. The State contends, therefore, if the defendant did the stabbing, the jury still would, under the instruction, be able to find him guilty of the lesser offense. The State also advances the jury could have found the stabbing was done jointly.

These arguments skirt the problem. The judge instructed on the major crime as a principal and as an aider and abettor and on the lessor crimes as only an aider and abettor. The court's first instruction conveyed to the jury one could act as an aider and abettor or as a principal. This would convey to the jury that principal and aider and abettor were not the same. It would be reasonable for a juror to think that if Green did the actual stabbing rather than just participating, he could not have the benefit of the lesser offenses. Lawyers and judges can look at the omissions in the marshalling instruction and say they are corrected by the definition of aiding and abetting. But under the unique facts of this case, it is reasonable for a jury to think they had to reject the lesser offenses if they found Green the one who wielded the knife.

Clearly, there was no reason for only submitting the lesser-included offenses on aiding and abetting theories. Green's trial attorney did an excellent job of setting up an intoxication defense both through evidence of his consumption and through the testimony of the expert as to

000196

the effects of his consumption. She does not defend the instructions as given. The instructions as written limited the jury's consideration to the lesser-included offenses only on a finding Green aided and abetted Titus. Such a scenario is not supported by the evidence. The omission of trial counsel undermined Green's defense. See State v. Broughton, 450 N.W.2d 874, 875-76 (Iowa 1990); State v. Blackford, 335 N.W.2d 173, 177-78 (Iowa 1983).

Green has proved the necessary prejudice and should have a new trial. Green was entitled to have second-degree murder, manslaughter, and involuntary manslaughter submitted as lesser-included offenses in a clear and understandable manner. See State v. Jeffries, 430 N.W.2d 728, 737-41 (Iowa 1988). That did not happen in this case. Green's seasoned trial attorney set up a strong case for Green to be convicted of less than first-degree murder. The instruction given did not clearly define the law for the jurors.

Whether or not on the evidence submitted Green should be found guilty of a lesser charge should have been a fact issue for the jury. The decision on this issue should be made by a jury not by this court. I would reverse and remand for a new trial.

Schlegel, J., joins this dissent.