IN THE COURT OF APPEALS OF IOWA

No. 2-480 / 91-1562

FILED
DEC 29 1992
CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

ROBERT EUGENE BENN,

Appellant.

Appeal from the Iowa District Court for Clarke County, Thomas S. Bown, Judge.

Defendant appeals from his judgment and sentence, following a jury trial, of first-degree murder. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Shari Barron, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Bruce Kempkes, Assistant Attorney General, Gary G. Kimes, County Attorney, and Thomas H. Miller, Special Prosecutor, for appellee.

Heard by Donielson, P.J., and Habhab, J., and Keefe, S.J.* Schlegel, J., takes no part.

*Senior Judge from the 1st Judicial District serving on this court by order of the Iowa Supreme Court.

KEEFE, S.J.

Defendant Robert Benn was charged with murder in the first degree, in violation of Iowa Code section 707.1 and 707.2 (1991). A jury found him guilty of that crime. The district court entered judgment and sentenced him to life imprisonment. Benn appealed his conviction and sentence. *We affirm.*

Benn was a farmer in Batavia, Iowa. He also performed as a steel guitar player. Benn began to date Janet Brown in the summer of 1987 when they were both performing as musicians in Missouri. They continued their relationship after that time. Generally, Benn went to visit Brown once a week at her home in Missouri.

In May 1990 Benn found a Christian singles' magazine in Brown's home. He confronted her with it and the two had a discussion about their relationship. Brown then informed Benn she was thinking about going as a singer on an Alaskan cruise her former boyfriend, Timothy Peterson, was organizing. Brown testified she became frightened because Benn became so angry. He stated he would like to find Peterson and beat his face in. Benn also stated, "There are ways to deal with people like this," and made a gesture as if he were holding a gun.

In July 1990 Benn felt he had not received satisfactory answers from Brown about whether she was going on the Alaskan cruise with Peterson. Benn was concerned that

Brown and Peterson might have resumed a relationship and he decided to meet with Peterson. He telephoned Peterson and told him he was a promoter named Jack Stewart from Texas. Peterson agreed to meet him in Osceola on August 17, 1990.

On August 10, Brown and Peterson sang together in Omaha. Peterson told her that he was going to meet a promoter from Texas on August 17. On the same day, August 10, Benn went to Osceola and reserved a room at the Super 8 Motel for August 17. Benn used the name Bill Gaston to reserve the room.

On August 17, 1990, Benn drove to Osceola and registered at the motel, again using the name Bill Gaston. He then realized Peterson did not know how to find him in Osceola. Benn drove to Russell, where Peterson was performing, and left him a note. He then returned to the motel.

Peterson arrived at the motel at about 10:30 p.m. The two talked for a few minutes before Benn revealed his true identity. Peterson stated he recognized Benn. Benn then concluded Peterson had seen his picture in Brown's bedroom, and that Brown and Peterson were having a sexual relationship. Benn asked Peterson to quit seeing Brown. According to Benn, Peterson became angry and hit him. A fight ensued. Benn claimed Peterson took out a sap and tried to hit him with it. Benn took out his pocketknife. Eventually Benn gained control of the sap. Benn testified

he could not remember the rest of the fight. Peterson died as a result of blows to the head with a blunt instrument.

After the fight, Benn washed off in the bathroom sink and got a clean set of clothes from his pickup. He took the bloody clothes and sap with him. He threw the clothes in a dumpster near the motel and threw the sap out the window as he drove home.

A maid found Peterson's body when she was cleaning rooms on August 18. The back of Peterson's head had been beaten in and there were splatters of blood around the room. Police officers found a pubic hair consistent with those belonging to Benn in the bathroom. Benn's fingerprints were found on a doorknob in the motel room and Peterson's shirt.

Police officers questioned Benn on August 25, 1990. At that time he denied ever being in Osceola or knowing Peterson.

At trial Benn testified that at first he could not remember anything about the crime. Later, he began to remember parts of it. He admitted to setting up a meeting with Peterson in Osceola and getting into a fight with him. He testified he could not remember killing Peterson. Benn relied upon a defense of insanity or diminished responsibility. Dr. Gaylord Nadine testified that Benn suffered from frontal lobe syndrome because of several head injuries he received in the past. The syndrome results in

a loss in inhibition. Dr. Nadine testified Benn could not control his actions on August 17, 1990.

The State presented rebuttal evidence to show Benn was not suffering from frontal lobe syndrome.

As noted above, a jury found Benn guilty of murder in the first degree. Benn was sentenced to imprisonment for the rest of his life. He has appealed.

Benn contends he was denied the right to effective assistance of counsel. In particular, he claims his counsel should have objected to a gruesome photograph and sought a mistrial after the prosecutor mentioned the words "murder" and "murder weapon". Benn claims he was prejudiced by his counsel's failure to properly object in these two instances.

Ineffective assistance claims are generally reserved for postconviction proceedings, but can be resolved on direct appeal when the record adequately presents them. State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987). In examining counsel's conduct, we review de novo the totality of the relevant circumstances, mindful of the presumption that counsel performed competently. Id.

To establish a claim of ineffective assistance of trial counsel, defendant must show: (1) counsel failed to perform an essential duty; and (2) prejudice resulted therefrom. State v. Breitbach, 488 N.W.2d 444, 446 (Iowa 1992). In determining whether defense counsel failed to

perform an essential duty, the ultimate test is whether under the entire record and totality of the circumstances, counsel's performance was within the range of normal competency. Id. In evaluating the second prong, we have required a showing that but for counsel's unprofessional errors, a reasonable probability of acquittal existed. Id.

Generally, counsel's failure to make an objection which would have been denied does not constitute incompetency. State v. Newman, 326 N.W.2d 788, 795 (Iowa 1982). Death pictures are not ordinarily excluded from evidence because they are gruesome, for murder is by nature a gruesome business. State v. Winemiller, 411 N.W.2d 719, 721 (Iowa App. 1987). A trial court does not abuse its discretion in admitting such photographs where their gruesome effect does not outweigh their evidentiary value. State v. Hickman, 337 N.W.2d 512, 516 (Iowa 1983).

We conclude Benn has not shown his counsel was ineffective because he failed to object to the admission of a photograph of Peterson taken at the morgue. We find the photograph was clearly admissible into evidence. Dr. Thomas Bennett, the State Medical Examiner, used the photograph to show livor mortis, which is the pooling of blood inside the body. Dr. Bennett testified that the degree of livor mortis in a body may help establish the time of death.

Also, during the trial the prosecutor asked Benn the following questions:

Q. Well, I'm suggesting to you, Mr. Benn, that its much more than a coincidence and much more than a tragedy. You deny that it's a murder?
A. That's what it ended up.
Q. As a murder?

At that point Benn's counsel objected on the ground that the question invaded the province of the jury. The court sustained the objection and struck the question and answer. Defense counsel did not make a motion for a mistrial.

Generally, cautionary instructions are sufficient in all but the most extreme cases. Breitbach, 488 N.W.2d at 448. We conclude the instruction here cured any error. Based on the facts in this case, we find Benn has failed to show ineffective assistance of counsel based upon the failure to file a motion for a mistrial.

Later, during cross-examination, the prosecutor asked Benn this question:

Q. Who took the murder weapon there, the man who was going to meet a promoter or the man going to meet the rival he was jealous of, Mr. Benn?
A. Well, as I said before, he had the billy stick and I had the pocketknife.

Defense counsel did not object to this question. Benn claims he received ineffective assistance of counsel because his attorney did not file a motion for a mistrial or object to the use of the term "murder weapon."

Rarely do we find failure to preserve error to be sufficiently egregious to deny defendant his right to the

effective assistance of counsel. State v. Halstead, 362 N.W.2d 504, 508-509 (Iowa 1985). A defendant is not entitled to perfect representation, but only to that which is within the range of normal competency. Id. at 508. After examining the record, we find counsel's failure to object to the term "murder weapon" did not breach an essential duty. The term was only used once in passing.

Furthermore, we conclude Benn has not shown any prejudice by the alleged errors of his trial counsel. He has not shown that but for these alleged errors the result of the case would be any different. Benn did not deny killing Peterson, but claimed that because of insanity or diminished responsibility he could not control his actions. Neither the gruesome photograph nor the prosecutor's mention of the terms "murder" or "murder weapon" go the question of his mental state.

After considering all of the arguments raised by defendant we affirm the district court.

AFFIRMED.