

IN THE COURT OF APPEALS OF IOWA

No. 7-675 / 96-2289

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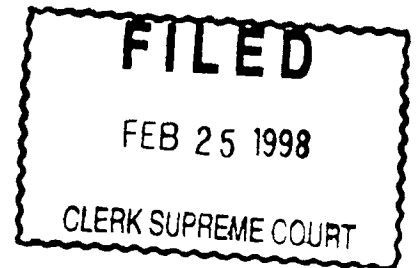
STATE OF IOWA,

Appellee,

vs.

DEREK LEE SMITH,

Appellant.



Appeal from the Iowa District Court for Marshall County, Carl D. Baker,
Judge.

Derek Lee Smith appeals from the judgment and sentence entered on his
conviction of first-degree murder and first-degree robbery. **AFFIRMED.**

Jeanne K. Johnson, Des Moines, for appellant.

Thomas J. Miller, Attorney General, and Ann E. Brenden and Thomas H.
Miller, Assistant Attorney Generals, for appellee.

Heard by Cady, C.J., and Sackett, and Vogel, JJ.

CADY, C.J.

Derek Smith appeals the judgement and sentence following his convictions of first-degree murder and first-degree robbery. We affirm.

The events giving rise to this tragic case began after four Missouri juveniles decided to run away. Derek Smith (Smith), his twin brother Burt, Blake Privitt, and Jayson Speaks stole a vehicle in order to facilitate their plans. Upon experiencing engine problems, the four boys decided to stop a passing car using the light bar on top of their vehicle. Ultimately, the boys were able to stop Rebecca Hauser. After stopping Hauser, the juveniles proceeded to rob and murder her. Burt Smith instigated the carnage by shooting at Hauser and then breaking her car window in order to stab her. While Burt repeatedly stabbed Hauser, Smith approached the car and picked up the gun. Smith then used the end of the gun to repeatedly strike Hauser with enough force to break a tooth and her ribs. Smith also ordered Hauser to give up her purse. After obtaining Hauser's purse, the juveniles left the scene.

On appeal Smith raises a number of issues. He asserts: (1) insufficient evidence existed to support the convictions; (2) he received ineffective assistance of counsel; (3) the district court abused its discretion by admitting color autopsy photos of the victim into evidence and allowing evidence of Smith's demeanor the day after the homicide; (4) the district court erred by overruling his motion for a jury consultant at State expense; (5) the felony-murder rule violated his constitutional right against double jeopardy; (6) the district court abused its discretion by failing to grant a deferred judgment pursuant to Iowa Code section 232.8; (7) the trial court erred by

denying Smith's suppression motion; and (8) the juvenile court erred in waiving its jurisdiction.

I. Sufficiency of Evidence

Our standard of review for claims of insufficient evidence is well established. We review such claims for errors at law. Iowa R. App. P. 4. A verdict of guilty is binding on appeal when substantial evidence in the record exists to support it. *State v. Schrier*, 300 N.W.2d 305, 306 (Iowa 1981); *State v. Forsyth*, 547 N.W.2d 833, 834 (Iowa App. 1996). 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; *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).

In determining the sufficiency of the evidence, we view the record in a light most favorable to the State. *State v. Robinson*, 288 N.W.2d 337, 340 (Iowa 1980); *see also State v. McGrew*, 515 N.W.2d 36, 37 (Iowa 1994); *State v. Zahner*, 545 N.W.2d 337, 339 (Iowa App. 1996). All evidence is considered, not merely the evidence supporting the verdict. *Robinson*, 288 N.W.2d at 340; *see also State v. Walker*, 538 N.W.2d 316, 319 (Iowa App. 1995). We give the State the benefit of all legitimate inferences and presumptions which can fairly and reasonably be deduced from the evidence. *State v. Conyers*, 506 N.W.2d 442, 444 (Iowa 1993). Direct and circumstantial evidence is equally probative. Iowa R. App. P. 14(f)(16). Although a jury verdict can rest on circumstantial evidence, the evidence must raise a fair inference of guilt as to each element of the crimes. *State v. Casady*, 491 N.W.2d 782,

787 (Iowa 1992). Additionally, discrepancies in testimony do not, in and of themselves, preclude proof beyond a reasonable doubt. *See generally State v. Phanhsouvanh*, 494 N.W.2d 219, 223 (Iowa 1992) (jury could adopt evidence it found credible); *Forsyth*, 547 N.W.2d at 836 (jury's function to determine credibility and resolve conflicts in evidence).

The jury convicted Smith as an aider and abettor in the first-degree murder of Hauser. He now asserts insufficient evidence existed to establish he aided and abetted his brother in killing Hauser. First, he claims the aiding and abetting instructions were defective because they failed to explain to the jury that if the crime contained a specific intent element, the jury could not find him guilty of a specific intent crime if the State failed to prove: (1) he participated in the crime with specific intent; or (2) he participated in the crime knowing the principal possessed specific intent. He also argues the instructions failed to include necessary language defining knowledge as a conscious awareness by the alleged aider and abettor that the person who directly committed the crime of first-degree murder possessed the requisite intent. Second, he argues insufficient evidence existed to support his convictions.

Smith did not challenge the jury instructions during trial or in his motion for directed verdict and judgment for acquittal. Consequently, he has not preserved error regarding the jury instructions. *See State v. Crone*, 545 N.W.2d 267, 270 (Iowa 1996) (defendant's motion for judgment of acquittal did not preserve the specific arguments he made for the first time on appeal). Additionally, the instructions, right

or wrong, became the law of the case. *See State v. Taggart*, 430 N.W.2d 423, 425 (Iowa 1988).

Smith claims insufficient evidence existed to prove he had the specific intent to kill Hauser or commit robbery. The record reveals Smith struck Hauser with the butt of a gun hard enough to knock out a tooth, lacerate her lip, and break three of her ribs. Smith claimed he was trying to push Hauser away from Burt as Burt stabbed her. We find the evidence presented by the State could have convinced a rational trier of fact Smith had the specific intent to kill Hauser. We also find the jury could have inferred Smith's explanation was inconsistent with the serious injuries suffered by Hauser. Further, the jury could have reasonably determined Smith had the requisite intent to rob Hauser. During the attack, Smith ordered Hauser to give him her purse. Consequently, we find sufficient evidence existed to support Smith's convictions.

II. Ineffective Assistance of Counsel

Smith's ineffective assistance of counsel claim involves a constitutional challenge. Therefore, our scope of review is *de novo*. *State v. Cook*, 565 N.W.2d 611, 613 (Iowa 1997).

Ordinarily, ineffective assistance of counsel proceedings are preserved 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 issues. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994). Moreover, a claim of ineffectiveness of counsel is an exception to the general rule

that an issue must be raised timely and adequately in order to preserve error for appeal. *Earnest v. State*, 508 N.W.2d 630, 632 (Iowa 1993).

To prevail on an ineffective assistance of counsel claim, Smith must prove by a preponderance of the evidence that: (1) counsel failed to perform an essential duty; and (2) prejudice resulted. *State v. Allen*, 565 N.W.2d 333, 336 (Iowa 1997). Smith must therefore overcome the strong presumption of counsel's competence and that counsel's error worked to his actual and substantial disadvantage, creating a probability that, but for the error, the trial's result would have been different. *Ray*, 516 N.W.2d at 865 (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).

Smith claims he received ineffective assistance of counsel by counsel's failure to object to omissions and errors in the jury instructions. Specifically, he alleges counsel should have objected to the omission in the first-degree murder instruction which would have told the jury they could not find the Smith guilty if the State failed to prove: (1) Smith participated in the killing of Hauser with specific intent; or (2) Smith knowingly encouraged the killing with the knowledge his brother possessed the specific intent to commit first-degree murder.

To support a theory of aiding and abetting, the State must produce substantial evidence the defendant assented to or lent countenance and approval to the criminal act either by active participation in it or by some manner encouraging it prior to or at the time of its commission. *Heick v. Bacon*, 561 N.W.2d 45, 54 (Iowa 1997). Although the instructions did not include the definitions Smith argues are necessary, Smith suffered no prejudice by their omission. On the contrary, and to Smith's advantage, the omissions effectively omitted the vicarious liability theory on the specific intent elements. Liability for an aider and abettor will be imposed if the aider and abettor participates in the crime with the requisite intent or with the knowledge the principal possesses the requisite intent. *See id.* In the latter context, the aider and abettor is held vicariously liable for the intent of the principal. By leaving out the specific intent instruction, the vicarious liability theory of guilt is omitted. Smith, therefore, benefited from the omissions. We do not find ineffective assistance of counsel occurred by counsel's failure to object to an omission that benefitted Smith.

Smith also claims the inclusion of the joint criminal conduct instruction was erroneous because no facts existed warranting the instruction and trial counsel should have included a marshaling instruction setting out the elements of the theory. Additionally, Smith complains the lack of a marshaling instruction explaining that joint criminal conduct was an alternate theory of liability, as distinguished from aiding and abetting, was potentially confusing to the jury and the jury could have mistaken it as a clarification of the aiding and abetting instruction.

Joint criminal conduct occurs:

“[w]hen two or more persons, acting in concert, knowingly participate in a public offense, each is responsible for the acts of the other done in furtherance of the commission of the offense or escape therefrom, and each person’s guilt will be the same as that of the other person acting, unless the act was one which the person could not reasonably expect to be done in the furtherance of the commission of the offense.

Iowa Code § 703.2 (1995). Joint criminal conduct clearly applies to the facts of Smith’s case. Smith knew of the plan to steal Hauser’s car and he further assisted in her murder during the theft. He would have been vulnerable to liability under a theory of joint criminal conduct even if he had never left the car. Again, trial counsel’s failure to object to the omission of the marshaling instruction did not prejudice Smith, and in fact, likely benefitted him. Trial counsel was therefore not ineffective for failing to highlight an additional theory of criminal liability by requesting a specific marshaling instruction.

III. Autopsy Photos and Rebuttal Witnesses

Admissibility of photographs rests within the trial court’s sound discretion. *See State v. Watts*, 441 N.W.2d 395, 397 (Iowa App. 1989). On appeal, we will overturn the trial court’s ruling on admissibility only upon a showing of a clear abuse of discretion. *Id.* We also review claims involving the admission of rebuttal evidence for abuse of discretion. *See State v. Nicholson*, 402 N.W.2d 463, 466 (Iowa App. 1987).

Autopsy photographs are admissible to illustrate medical testimony and demonstrate viciousness in connection with the State’s claim of malice. *State v. Fetters*, 562 N.W.2d 770, 778 (Iowa App. 1997). The test for admission of

photographs requires: "(1) the evidence must be relevant and (2) if the evidence is relevant the trial court must determine whether the probative value of the exhibits outweighs the prejudice which would be caused by their admission into evidence." *Id.* (citing *State v. Brown*, 397 N.W.2d 689, 700 (Iowa 1986)). Although autopsy photographs can be somewhat gruesome, that factor alone does not render them inadmissible. *Id.* Murder frequently gives rise to gruesome evidence because it is often a gruesome affair. *Id.* Additionally, the State has the right to present relevant evidence of the crime committed. *See State v. Moore*, 276 N.W.2d 437, 441 (Iowa 1979).

Smith claims the trial court erred in admitting color autopsy photos depicting the gun shot wound, stab wounds, and blunt trauma injuries. He asserts the prejudicial effect outweighed the probative value of the photos.

The photographs were relevant because they illustrated the medical testimony and made it comprehensible for the jury. The photos also depicted the viciousness of the crime in support of the State's malice claim. In fact, the photos were necessary to refute Smith's assertion that he only "pushed" Hauser. We therefore conclude the probative value of the photographs outweighed any prejudicial effect. We find the trial court did not abuse its discretion in admitting the color autopsy photographs.

Smith also claims the trial court abused its discretion by allowing rebuttal evidence concerning his demeanor the day after Hauser's murder. In the defense case-in-chief, Smith testified the night of the murder he had been unable to sleep, that he hoped someone would come along and help Hauser, and hoped she had not died.

The State's witnesses on rebuttal testified to observing all of the boys after the murder. The juveniles were described as laughing, joking, and none appeared tired or withdrawn.

Rebuttal evidence explains or disproves evidence produced by the other side. *State v. Agent*, 443 N.W.2d 701, 703 (Iowa 1989). In Smith's case-in-chief, Smith asked his own expert witness to explain the significance of his laughing and joking after the murder. Moreover, Smith testified to feelings of remorse and concern after the killing. Because Smith introduced the evidence of his demeanor and feelings, the State was entitled to rebut his assertions. Additionally, because the witnesses described *all* of the boys as laughing and joking, Smith's argument that the witnesses could not distinguish him from the others lacks merit. We find the trial court did not abuse its discretion in admitting the State's rebuttal evidence concerning the demeanor of Smith the day after Hauser's murder.

IV. Jury Selection Consultant

We review Smith's claim the State should have provided him a jury consultant for abuse of discretion. *See State v. Barker*, 564 N.W.2d 447, 450 (Iowa App. 1997). We recognize an indigent criminal defendant is not entitled to the appointment of an investigator or other expert service at State expense unless a finding exists that such services are necessary in the interest of justice. *See id.* An indigent defendant is not entitled to everything a wealthy one could purchase. *See State v. Walters*, 426 N.W.2d 136, 140 (Iowa 1988).

Smith claims the trial court should have appointed a jury consultant at State expense because of extensive pretrial publicity, changes of venue, his status as a minor, multiple prosecution theories, and multiple defendants with several trials. He also asserts his request was a reasonable expenditure of public funds.

The district court properly considered the standard established in *Walters*. *See id.* Because Smith had two attorneys, was only charged with two offenses, and the State did not utilize a jury selection expert, the trial court determined Smith's need for a jury selection expert even less compelling than in *Walters*. We find the trial court did not abuse its discretion by failing to appoint a jury consultant at State expense.

V. Felony Murder

To the extent Smith raises constitutional claims, our review is de novo. *See State v. Cook*, 565 N.W.2d 611, 613 (Iowa 1997).

Smith asserts the verdicts were based upon the felony-murder rule, and the felony-murder rule violated his constitutional rights to due process and against double jeopardy. We decline to overturn the well established felony-murder doctrine and find Smith's arguments to be without merit. *See State v. Rhode*, 503 N.W.2d 27, 40-41 (Iowa App. 1993); *State v. Bennett*, 503 N.W.2d 42, 45 (Iowa App. 1993).

VI. Deferred Judgment

We review the district court's decision regarding sentencing for abuse of discretion or for defects in the sentencing procedure. *State v. Millsap*, 547 N.W.2d 8, 10 (Iowa App. 1996); *State v. Greiman*, 344 N.W.2d 249, 252-53 (Iowa 1984). No

abuse of discretion will be found unless the defendant shows that such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *Millsap*, 547 N.W.2d at 10. The trial court has the authority to enter a deferred judgment to a juvenile, even though the juvenile has been convicted of a crime carrying a mandatory prison sentence in adult court. *Greiman*, 344 N.W.2d at 253; Iowa Code § 232.8(3).

Smith contends the district court erred by sentencing him to life in prison instead of granting him a deferred judgment pursuant to Iowa Code section 232.8(3).

The record indicates the district court carefully weighed the sentencing options, including the deferred judgment alternative. The district court was certainly under no obligation to grant a deferred judgment and we find nothing in the record indicating the district court abused its discretion.

VII. Suppression Motion

Smith next asserts the district court erred by failing to grant his motion to suppress evidence of his confession and of the gun involved in the murder. The Iowa Supreme Court, however, has already ruled the confession and rifle evidence admissible. *See State v. Smith*, 546 N.W.2d 916 (Iowa 1996). Consequently, issue preclusion and res judicata prevent consideration of the same issues. *Cf. Jones v. Scurr*, 316 N.W.2d 905, 911 (Iowa 1982) (when an issue is resolved on direct appeal, relitigation of the same issue on postconviction relief is barred); *State v. Schiernbeck*, 215 N.W.2d 261, 262 (Iowa 1974) (relitigation of previously adjudicated issues is barred).

VIII. Waiver

We review the determination of whether the juvenile court abused its discretion in ordering the waiver from juvenile court to district court de novo. *State v. Coffman*, 562 N.W.2d 766, 767 (Iowa App. 1997). Iowa Code section 232.45(6) states the applicable factors in determining whether waiver to adult court is warranted. *See* Iowa Code § 232.45(6).

Smith asserts the juvenile court erred in ordering his waiver to adult court. We have considered Smith's claim and find the juvenile court considered the factors enumerated in section 232.45(6) and properly waived jurisdiction to adult court.

IX. Conclusion

We have considered all of Smith's claims. We affirm the district court.

AFFIRMED.