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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Appellee,	)	Filed September 20, 1979
vs.	)	
LYLE C. HANER, JR.,	)	86/61968
Appellant.	)	

Appeal from Mills District Court - J. L. Larson, Judge.

Defendant appeals from judgment and sentence entered following his conviction of the offense of attempted arson. AFFIRMED.

Ronald L. Comes, Council Bluffs, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General; Ann Fitzgibbons, Assistant Attorney General; and H. Walter Green, Mills County Attorney; for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

CARTER, J.

Defendant appeals from judgment and sentence entered following his conviction of the offense of attempted arson.[1] The offense was allegedly committed while the defendant was confined in a cell in the Mills County jail following his arrest for the offense of operating a motor vehicle while under the influence of an intoxicating beverage. We consider each of his several assignments of error and affirm the trial court.

I. Defendant's first claim is that the state's evidence failed to show that defendant was capable of forming the necessary criminal intent to be guilty of the offense charged as a result of his intoxicated condition. We disagree. Intoxication alone does not excuse the commission of a crime and becomes material only when the mental incapacity produced thereby is such as to make the defendant incapable of forming a criminal intent. State v. Watts, 223 N.W.2d 234, 239 (Iowa 1974).

Defendant relies on the testimony of two psychiatrists, neither of which conclusively supports his contention. Indeed there was room in the testimony of both of these witnesses for the jury to conclude that defendant could form the requisite intent. In addition, there was testimony from arresting police officers that defendant knew exactly where he was, that he knew a police officer by name, that he knew exactly how much money he had, and that subsequent to being booked, his condition had much improved.

II. While defendant claims that the state's evidence failed to show his sanity as a matter of law, such is not the case. The same evidence which supports defendant's capacity to form a criminal intent also serves to generate a jury issue as to his sanity.

III. Defendant urges error was committed in giving instruction number eight (8), defining a malicious act. The objection taken to this instruction at trial urged in part that the trial court erred in not using the word "wicked" in defining a malicious intention on the part of the party committing a criminal offense. Other than the deletion of this word, the bulk of the instruction comports with what was then Uniform Jury Instruction 502.5. We cannot conclude that this omission constituted reversible error. A reading of the Uniform Instruction suggests that the word "wicked" adds little to the definition contained therein. The instruction is not invalid for the reason given.

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[1] Section 707.5, The Code 1977.

Defendant failed to apprise the trial court in what manner the instruction which was given otherwise failed to properly define a malicious act. On appeal, he attempts to urge that the instruction given failed to adequately distinguish between willful acts and malicious acts. We doubt that the instruction is susceptible of this complaint. But we do not reach this point because of defendant's failure to raise this issue in the trial court. See, e.g., State v. Williams, 256 N.W.2d 207, 209 (Iowa 1977).

Finally, as to instruction number eight (8), defendant contends that the trial court erred in not including a paragraph following the definition of malicious act which stated that malice must "in fact exist in the mind of the defendant." When such request was made in the court below, the trial court concluded that this requirement was adequately conveyed to the jury by the marshalling instruction. We agree. No error results from mere failure to submit an issue in the form requested. State v. Robinette, 216 N.W.2d 317, 318 (Iowa 1974).

IV. Defendant's next contention is that six jurors improperly served in his case. The record reflects that these jurors were selected for defendant's trial, that defendant's trial was recessed, and that the six jurors served in the trial of another case before defendant's trial resumed. Defendant's only challenge to this procedure is that it precludes him from raising a legitimate challenge for cause under section 779.5(17), The Code 1977. Defendant's reliance on this statute is misplaced. Section 779.5(17) is not a ban on members of a jury panel serving on more than one case after the panel is drawn and before it is discharged. The statutes recognize that this may occur. See, e.g., section 609.19, The Code, ("after a juror has served in two or more trials, the court shall on the juror's request, discharge him from the panel"). Section 779.5(17) is designed to implement section 609.16, The Code, which is designed to preclude service as a juror on a panel in one calendar year if that person has served on a panel in the preceding calendar year. As such, it has no application to the present case.

V. Next defendant contends that the failure of the state to provide discovery and the trial court's failure to impose sanctions, denied him a chance to adequately prepare for trial. We have reviewed those instances of which complaint is made and conclude that the state acted to reasonably comply with defendant's discovery demands. The trial court did not have a basis for imposing sanctions.

VI. Lastly, we consider defendant's claim that he was prejudiced by an improper question posed to his expert witness by the attorney for the state. That question was:

> If it comes to pass that Mr. Haner would become acquitted of this particular offense and be free and on the streets, if he had some drinks, would you say . . . because of his sociopathic personality, he would not be criminally culpable if he killed somebody or raped somebody?

Objection was made to this question by defendant and was sustained by the trial court. No motion for mistrial was made by defendant, nor did he assert this occurrence as a ground for his motion for a new trial. Based upon this state of the record, we cannot conclude that defendant has preserved this issue for review. See, e.g., State v. Emery, 230 N.W.2d 521, 525 (Iowa 1975). Nonetheless, we consider the matter and in light of the entire record, we cannot conclude that this occurrence served to deny defendant a fair trial. Absent such showing, we do not reverse. State v. Webb, 244 N.W.2d 332 (Iowa 1976).

We have considered all issues presented and find no grounds for reversal.

AFFIRMED.

Donielson and Johnson, JJ., concur; Oxberger, C.J., and Snell, J., dissent.

OXBERGER, C.J. (dissenting)

I dissent. The majority states the defendant failed to preserve error on instruction No. 8. I disagree. The defendant objected when the trial court deleted the word "wicked" from the uniform instruction. I believe the objection was sufficient to determine whether the word "wicked" was needed in the instruction and preserved the issue for appeal.

Reaching the merits of the challenge, I would hold the trial court erred by its deletion of the word "wicked" from the uniform instruction. In State v. Willing, 129 Iowa 72, 73, 105 N.W. 355, 356 (1905), the court said: "(A) 'malicious' act involves all that is usually understood by the term 'willful', and is further marked by either hatred or ill will toward the party injured, or by such utter recklessness and disregard of the rights of others as denotes a corrupt or malevolent disposition." Thus, under the term malicious, the defendant could be found guilty if his act showed hatred to the property owner or if his acts showed a corrupt or malevolent disposition to persons in general. The key to both types of conduct is hatred, corrupt or malevolent disposition. "Wicked" connotes this type of disposition. The instruction given, however, did not convey to the jury that it had to find the defendant possessed the state of mind that showed hatred to the property owner or a corrupt or malevolent disposition to persons in general. I would reverse and remand for a new trial with instruction No. 8 corrected as stated herein.

SNELL, J., joins this dissent.