IN THE COURT OF APPEALS OF IOWA

No. 1-325 / 10-0631
Filed September 8, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MARK DARYL BECKER,
Defendant-Appellant.

Appeal from the Iowa District Court for Butler County, Stephen P. Carroll, Judge.

Appeal from conviction of murder in the first degree. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Martha J. Lucey, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Scott A. Brown and Andrew Prosser, Assistant Attorneys General, Gregory M. Lievens, County Attorney, for appellee.

Heard by Sackett, C.J., and Vogel and Vaitheswaran, JJ. Tabor, J., takes no part.

SACKETT, C.J.

Mark Becker was convicted by a jury of first-degree murder for shooting and killing his former football coach, Edward Thomas. Becker, diagnosed as having paranoid schizophrenia, raised an insanity defense, which the jury rejected. Becker contends here that the district court committed error in (1) instructing the jury on his defense of insanity and (2) in fixing restitution. We affirm.

On June 24, 2009, Becker entered the weight room at the Parkersburg school in Parkersburg, Iowa, pulled out a gun, and shot Thomas six times. Thomas fell to the ground, where Becker kicked him and stomped on his head while yelling, "Fuck you old man" and "You stupid son of a bitch." Becker walked out the door screaming, among other things, about Satan and how he wanted Satan to know about Thomas's body and Thomas is Satan and to go get his carcass. Becker then got in his parent's car and drove away.

Shortly thereafter, Butler County Sheriff Jason Scott Johnson stopped Becker after following him to his parents' yard. Becker, who had been holding a gun out of the car window while driving, was told to drop the gun. Becker did and he related to Johnson that Ed was done and he was done with Ed. He told Johnson he would work with the police and the FBI and that he had stomped Thomas for the cops. Becker was taken to the Butler County Sheriff's office where he continued to make similar bizarre statements and exhibit strange behaviors. Thomas died shortly after the shooting.

Becker was charged on June 24, 2009, by trial information with murder in the first degree, in violation of Iowa Code sections 707.1, 707.2(1) and 707.2(2) (2009). On July 13, 2009, Becker filed a notice he intended to rely on defenses of insanity and/or diminished responsibility.

Events Preceding the Murder. Becker was born on June 3, 1985. He is the middle child, having an older brother and a younger brother. At the time of trial he was twenty-six years old. Becker's mother was to testify that Becker was a happy active child, but after he entered high school and became engaged in sports he started to become distant from her and his father. Becker spent his first semester away from home at Wartburg College in Waverly. He called home frequently, indicating that he was depressed and he exhibited signs of deep depression. He left Wartburg after the first semester. Becker went to live with relatives in Orange City for a period of time. Becker next attended Hawkeye Community College. His parents were told by Becker's friends there that he quit eating and would not leave his apartment. His parents took him home. At some point in time he began using illegal drugs. He also went to South Dakota to stay with a brother for a period of time. His brother indicated there would be times when Becker would have an episode and become very agitated. He continued to show signs of mental illness or use of illegal drugs. In September of 2008, he was at his parents' house when he awoke in the night screaming and, among other things, hit doors in the house with a baseball bat. He said people in town, including Coach Thomas, were ruining people, as were leaders from the church

and his parents. He threatened to beat up Coach Thomas and said Thomas was raping him and he could not stand it anymore.[1]

Becker was committed, and at some time during the process he said to Butler County Sheriff Jason Johnson he had a "metaphysical ESP connection with Coach Thomas." Becker was in a psychiatric unit for seven days. Becker's diagnosis was "bipolar disorder." He told a nurse he was hearing his football coach's voice. He was discharged and prescribed medication, which he took sporadically.

In November of 2008, Becker was arrested for committing an assault. He turned on his mother and he was committed for a week and discharged with medication. He was diagnosed with psychotic disorder and found to be exhibiting more intense psychotic, hallucinatory, and paranoid delusional thinking and believed he was receiving "telepathic messages."

In April of 2009, Becker was approved for services, and with help he got an apartment and a job. On June 10, 2009, he went to a church camp. He talked to a distant relative there. The person testified, noting Becker was tense and said the Devil kept messing with him. On the same day, Becker went to the home of a person he had known. He threatened the man who opened the door with a baseball bat and later broke windows in the house with the bat. Becker accused the owner of the house of being Satan. He did not leave until he heard police sirens. Becker was taken to the sheriff's office where he made statements about working for God and going to Satan's house and being hypnotized by a man he called Satan.

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[1] It is not clear whether Thomas was ever warned that Becker had hostility towards him.

In mid-June of 2009, Becker was engaged in a high-speed chase. Apparently he was going seventy miles an hour in a thirty-five mile zone. He had increased his speed to some ninety miles an hour when he struck a deer. He disabled his vehicle. He was taken to a psychiatric unit on a forty-eight hour hold. Sheriff Johnson said the hospital was told when Becker was released he was to be returned to law enforcement. Becker was evaluated on June 21, 2009, and diagnosed with schizophrenia. Again he spoke of Satan and voices. On June 22, he was assigned an attending physician who confirmed the diagnosis of schizophrenia. He was given medication.

On June 23, Becker indicated he wished to stay in the hospital a few more days. Becker's attending physician was glad, as he had been concerned about discharging him, particularly after he learned that Becker had hostility for his parents, and the doctor was concerned about who would pick Becker up on discharge.[2] But later that day Becker asked to be discharged. A nurse who was supervising Becker indicated to Becker's doctor that she felt Becker was better. The doctor, learning that Becker had a community service worker who would pick him up, discharged him. The sheriff was not notified. Becker was to be on medication and apparently the doctor had a call made to an area pharmacy to fill a prescription. Becker's community service worker took Becker to his apartment, but because Becker's key to the apartment was on a keychain in his disabled automobile, the community service worker unlocked the door for Becker. The worker planned to take Becker to get his prescriptions the next morning. Becker

[2] For reasons not clear, the doctor was unaware that the sheriff had indicated he would pick Becker up on discharge.

said the medications were working. The next day Becker called his parents. Becker had shown considerable animosity towards his parents, and the community service worker had indicated it would be better for them not to have contact with Becker in the hospital or just after his release. Becker's parents attempted to contact the community service worker for instructions but were unable to make contact. Not knowing what to do, they picked up their son and took him to their home. He appeared better, happy, and at peace. However, the next morning he took a car belonging to his parents without their permission and drove to Aplington, Iowa. He asked for Thomas at a home in Aplington, although Thomas did not live in Aplington. Becker saw a person on the street and asked about Thomas and was told Thomas was probably at the elementary school in Parkersburg. Becker went to the Parkersburg school and was told Thomas was in the weight room. Shortly thereafter Becker killed Thomas.

INSANITY DEFENSE. Becker submitted jury instructions on his insanity defense that the district court did not give, and he objected to certain instructions on that issue given by the district court. Appellate review of challenges to jury instructions is for correction of errors at law. *State v. Heemstra*, 721 N.W.2d 549, 553 (Iowa 2006). The related claim that the district court should have given a defendant's requested instructions is reviewed for an abuse of discretion. *State v. Marin*, 788 N.W.2d 833, 836 (Iowa 2010). The district court is not required to give any particular form of an instruction, but the instructions given, when read together, must fairly state the law as applied to the facts of the case. *Id.* at 837-38. We review to determine whether a challenged instruction accurately states

the law and is supported by substantial evidence. *State v. Spates*, 779 N.W.2d 770, 775 (Iowa 2010). Error in a particular instruction does not warrant reversal unless the error was prejudicial. *Id.*

Becker was evaluated[3] by four mental health professionals, all of whom agreed Becker has paranoid schizophrenia. Phillip Resnick, a physician specializing in psychiatry of the University Hospitals of Cleveland in Cleveland, Ohio, testified and was asked if he had an opinion to a reasonable degree of medical certainty as to whether Becker was capable of knowing the nature and quality of the act of shooting Thomas. Resnick testified in part:

> A. . . . [I]t is my opinion that due to his diseased mind, Mark Becker was not capable of knowing the nature and quality of the act, the act being the shooting of Coach Thomas.
>
> Q. [E]xplain what you based your opinion on? A. . . . [T]here are four main pieces of evidence which caused me to reach the conclusion that he was not capable of understanding the nature and quality of what he was doing. And the first is that he believed that Coach Thomas was Satan. . . . The second is that he believed that Coach Thomas was not a human being. And if one . . . believes you're killing Satan and not a human being, you do not know the nature and quality of your act. . . . In addition, he did not understand the consequences of shooting him. And there are two aspects here. One is he believed that this would end the supernatural activity and the ESP activity of Coach Thomas . . . all the telepathy, all the suppression of children, all his inability to breathe, his being anally raped, all the things that he believed Coach Thomas was doing he believed would end by shooting Satan. . . . And then, finally, he believed that he would free children. . . . He believed that Coach Thomas was suppressing children and they would be free.

Dan Lorren Rogers, a licensed clinical psychologist in Fort Dodge, Iowa, testified. He was asked if he had an opinion within a reasonable degree of

[3] It appears that all professionals who testified spent considerable time investigating Becker's mental health.

psychological certainty whether Becker was capable of knowing the nature and quality of his actions. Roger testified:

> A. I do not believe that he was capable of knowing the rightness or wrongness of his behavior.
> Q. What is the basis for that opinion? A. Because of his delusions, he interpreted his behavior, his perceptions, the behavior of other people incorrectly within delusions and within his hallucinations, so he saw himself as accomplishing a good by trying to attack the devil and those people who were raping him. It's obviously crazy thinking, but that's the way his thinking was based. And because of those misperceptions and delusions, he couldn't appreciate what the outcome was going to be. . . .

Michael K. Spodak, M.D., a psychiatrist from Baltimore, Maryland, testified. Asked his opinion as to whether Becker possessed the capability or capacity to understand the nature and quality of his acts on June 24, Spodak testified: "My opinion is that he was capable of knowing and understanding the nature and quality of the acts on that day and for what he was accused of."

He reviewed Becker's actions on the 24th and said:

> A. . . . Each of these things in my assessment of his mental state and his fundamental capacity on that day represented someone who could make choices, who could be rational and reason things out, who could understand when he was going to be shooting this gun and discharging bullets from it, it was intended to kill somebody to stop them from being. . . . Becker had sufficient mental capacity to know and understand the nature and quality of his acts . . .—perhaps he had a moral—he felt, a morally justified reason, but again it is my understanding that's not the test off insanity, whether you felt morally justified. It was whether you're capable or not of knowing the nature and understanding the nature and quality of what you're doing. . . .

Michael Taylor, a medical doctor who specializes in psychiatry and lives in an area southwest of Des Moines, testified that Becker had sufficient mental capacity to know and understand the nature and quality of his acts. When asked whether Becker had the mental capacity to tell the difference between right and

wrong on June 24, 2009, Taylor testified: "[H]e did have sufficient mental capacity to know the difference between right and wrong as it pertained to the shooting of Coach Ed Thomas."

With this expert testimony, evidence concerning the event, and the jury instructions, the jury was left with the difficult task of determining Becker's degree of guilt.[4]

Iowa Code section 701.4 defines "insanity":

> A person shall not be convicted of a crime if at the time the crime is committed the person suffers from such a diseased or deranged condition of the mind as to render the person incapable of knowing the nature and quality of the act the person is committing or incapable of distinguishing between right and wrong in relation to that act. Insanity need not exist for any specific length of time before or after the commission of the alleged criminal act. *If the defense of insanity is raised, the defendant must prove by a preponderance of the evidence that the defendant at the time of the crime suffered from such a deranged condition of the mind as to render the defendant incapable of knowing the nature and quality of the act the defendant was committing or was incapable of distinguishing between right and wrong in relation to the act.*

Iowa Code § 701.4 (2009). (Emphasis added.)

Becker requested the following instruction, which mirrored the language of the statute:

> In order for the defendant to establish he was insane, he must prove by a preponderance of the evidence either of the following:
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> 1. At the time the crime was committed, the defendant suffered from such a deranged condition of the mind as to render him incapable of knowing the nature and quality of the acts he is accused of; or
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> 2. At the time the crime was committed, the defendant suffered from such a deranged condition of the mind as to render

[4] The doctrine of criminal responsibility is such that there can be no doubt of the complicated nature of the decision to be made—intertwining moral, legal, and medical judgments. *United States v. Brawner*, 471 F.2d 969, 982 (D.C. Cir. 1972).

> him incapable of distinguishing between right and wrong in relation to the act.

The court denied the defendant's request and submitted the following, numbered at trial as Instruction 35,[5] as to the elements of insanity defense:

> In order for the Defendant to establish he was insane, he must prove by a preponderance of the evidence either of the following:
>
> 1. At the time the crime was committed, the Defendant did not have sufficient mental capacity to know and understand the nature and quality of the acts he is accused of; or
>
> 2. At the time the crime was committed, the Defendant did not have the mental capacity to tell the difference between right and wrong as to the acts he is accused of.

In addition, the district court gave the following instruction at trial as Instruction 34:[6]

> The Defendant claims he is not criminally accountable for his conduct by reason of insanity. A person is presumed sane and responsible for his acts.
>
> Not every kind or degree of mental disease or mental disorder will excuse a criminal act. "Insane" or "insanity" means such a diseased or deranged condition of the mind as to make a person either incapable of knowing or understanding the nature and quality of his acts, or incapable of distinguishing right and wrong in relation to the acts.
>
> A person is "sane" if, at the time he committed the criminal act, he had sufficient mental capacity to know and understand the nature and quality of the act and had sufficient mental capacity and reason to distinguish right from wrong as to the particular act.
>
> To know and understand the nature and quality of one's acts means a person is mentally aware of the particular acts being done and the ordinary and probable consequences of them.
>
> Concerning the mental capacity of the Defendant to distinguish between right and wrong, you are not interested in his knowledge of moral judgments, as such, or the rightness or wrongness of things in general. Rather, you must determine the Defendant's knowledge of wrongness so far as the acts charged are concerned. This means mental capacity to know the acts were wrong when he committed them.

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[5] Iowa Criminal Jury Instruction 200.11.

[6] Iowa Criminal Jury Instruction 200.10.

> The Defendant must prove by a "preponderance of the evidence" that he was insane at the time of the commission of the crime.
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> Preponderance of evidence is evidence that is more convincing than opposing evidence.
>
> Insanity need not exist for any length of time.

Becker contends his requested instruction mirrors Iowa Code section 704.1, while the district court's instructions do not. He points out that the instruction given, Instruction 35, does not include the statutory language "diseased or deranged condition of the mind." Rather, the district court's instruction says the defendant must prove he did not have sufficient "mental capacity." Becker argues the phrases "diseased or deranged condition of the mind" and "mental capacity" are not synonymous. Becker also notes that "mental capacity" was not defined in the jury instructions. Becker points to *State v. Collins*, 305 N.W.2d 434, 437 (Iowa 1981), where the court noted that diminished responsibility may be offered as a defense where an accused, because of a limited capacity to think, is unable to form the necessary criminal intent. But the court pointed out that a defense of diminished responsibility differs from the usual insanity situation where illness confuses or distorts the thinking process. The court noted in its opinion that the distinction between insanity and diminished responsibility was pointed out in 4 J. Yeager and R. Carlson, *Iowa Practice* § 7, at 4 (1979), where it is says:

> It must be recognized that diminished capacity is not a subdivision of the general subject, insanity, but is a different type of mental condition, a defect which affects (the accused's) capacity for thinking, rather than an illness which distorts his thought processes. Diminished capacity is not an absolute defense as is insanity, but is a fact which must be considered by the court or jury in its deliberations as to whether a particular mens rea has been proved.

> Nothing in . . . section (701.4) should affect the diminished capacity defense one way or another.

Collins, 305 N.W.2d 436-37.

Becker contends the language linking the diseased or deranged condition of the mind to the inability to know and understand the nature and quality of the acts or to distinguish right from wrong in relation to the acts allowed the jury to use an incorrect standard in assessing his defense. Becker also argues the instruction given paved the way for the prosecutor to argue that if you have sufficient mental capacity to do many things, then how can you not have sufficient mental capacity to understand the nature and quality of your acts, to understand the difference between right and wrong. He points out that the prosecutor expanded the argument to contend Becker had sufficient mental capacity, among other things, to find keys to his parents' car, break into a gun cabinet, load a gun, drive the car, ask for Thomas instead of Satan, and follow the directions to Thomas's location.

The State argues that the instructions, read together, convey what section 701.4 requires. It argues that the section is about sufficient mental capacity, and the insanity definition tests for mental incapacity. The State argues this is in accord with the central holding of *M'Naghten*.[7] The State also contends that the

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[7] The language of section 701.4 "is a codification of the rule articulated in Britain in *M'Naghten's* case," known as the *M'Naghten* rule, which has been adopted in certain other jurisdictions as the legal standard where insanity is alleged as a defense. *See* 4A B. John Burns, *Iowa Practice Series: Criminal Procedure* § 11:2, at 173 (2006) (citing *M'Naghten's Case*, (1843) 8 Eng. Rep. 718, 10 Cl. & F. 200); *see also State v. Craney*, 347 N.W.2d 668, 679 (Iowa 1984).

The Iowa Supreme Court first adopted the *M'Naghten* rule as a common-law rule in *State v. Harkness*, 160 N.W.2d 324, 330 (Iowa 1968), and the court continued to follow the rule. *See, e.g.*, *State v. Lass*, 228 N.W.2d 758, 768-69 (Iowa 1975).

instructions given by the district court contain a common encapsulation of the *M'Naghten* test and are similar to instructions used in *Alexander v. United States*, 380 F.2d 33, 39 (8th Cir. 1967), and *Pope v. United States*, 370 F2d 710, 732 n.6 (8th Cir. 1967).

Becker, in his reply brief, tells us that the *M'Naghten* case does not mention mental capacity. Becker says that Lord Chief Justice Tindall in *M'Naghten* said

> that the jurors ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong. . . . If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course therefore has been to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong: and this course we think is correct, accompanied with such observations and explanations as the circumstances of each particular case may require.

M'Naghten's Case, (1843) 8 Eng. Rep. 718, 722-23, 10 Cl. & F. 200, 210-11.

While other courts' discussions of the *M'Naghten* rule are instructive, our first responsibility is to determine what the Iowa Legislature said in 1976 when it enacted Iowa Code section 701.4. In doing so, the only conclusion we can reach is that the test to prove insanity required a showing the person "suffers from such a diseased or deranged condition of the mind as to render the person incapable

of knowing . . . ." Instruction 35 did not use this language.[8] We recognize that a jury instruction need not contain precisely the language of the statute, but the instruction must be a correct statement of the law. *State v. Beets*, 528 N.W.2d 521, 523 (Iowa 1995); *State v. Monk*, 514 N.W.2d 448, 450 (Iowa 1994). We agree with Becker that "diseased mind" and "mental capacity" are not synonymous. The instruction given was a uniform instruction and we are instructed to be reluctant to disapprove of uniform jury instructions. *State v. Weaver*, 405 N.W.2d 852, 855 (Iowa 1987). However, if an instruction is faulty we should do so. *See Monk*, 514 N.W.2d at 450; *State v. McMullin*, 421 N.W.2d 517, 518-19 (Iowa 1988). We cannot say Instruction 35 comported with the statute and the failure to use the words of the statute in Instruction 35 may have prejudiced Becker's defense. There was evidence from Dr. Resnick that due to his diseased mind Becker was not capable of knowing the nature and quality of the act of shooting Thomas. Indeed, he believed shooting was the right thing to do, to aid the community. Furthermore, the State was able to utilize Instruction 35 in arguing that Becker had the capacity to complete a number of acts and that he did not lack capacity. Furthermore, Becker's requested instruction should have been given as it correctly stated the law.

Having said this, we need to address the State's argument we should not look at Instruction 35 in isolation, but should consider it with other instructions given—most particularly Instruction 34, which contains the language that "insane" means "a diseased or deranged condition of the mind that robs him of the ability to know what he is doing is wrong or the nature and quality of his acts." We

[8] Becker's counsel tells us no Iowa cases have addressed this uniform instruction.

believe that in considering the two instructions together, the jury was properly instructed and was given the opportunity to address whether Becker had a diseased or deranged condition that robbed him of the ability to know what he was doing was wrong. We affirm on this issue.

CONSQUENCES OF AN INSANITY VERDICT. Becker contends the district court erred in failing to give his requested instructions on the consequences of a not-guilty-by-reason-of-insanity verdict. Becker requested the instruction twice. He initially offered it as a requested instruction. He asked the court to instruct the jury that:

> Punishment is not for the jury. The duty of the jury is to determine if the defendant is guilty or not guilty.
>
> In the event of a guilty verdict, you have nothing to do with the punishment.
>
> If you find a verdict of not guilty by reason of insanity, the defendant shall be immediately ordered committed to a state mental health institution or other appropriate facility for complete psychiatric evaluation.

The district court rejected Becker's requested instruction. The court did instruct the jury that the duty of the jury is to determine if the defendant is guilty or not guilty and, in the event of a guilty verdict, the jury has nothing to do with punishment.

The issue was raised a second time. After the jury began their deliberations at 11:55 a.m. on February 26, 2009,[9] they sent the following

[9] The jury began deliberations at 12:25 p.m. on February 24, 2010. On February 25, at about 10:00 a.m. the jury sent a note to the judge requesting to hear certain audio and video excerpts of Becker's interview with Chris Calloway. At 3:00 p.m. February 25, the jury sent a note to the judge stating, "We are at a stalemate at the present with much discussion. Can we go home and sleep on our decision? Start fresh tomorrow a.m.?" This note was stamped filed at 3:26 p.m. The jury was excused for the night. On February 26, at 11:55 a.m. the jury sent a note to the judge asking "What would happen

question to the judge: "Judge, what would happen to Becker if we find him insane?" The district court answered:

> You need not concern yourself with the potential consequences of a verdict of not guilty by reason of insanity.
>
> Please refer to instruction 10.[10] You must decide whether he is guilty or not guilty, and if you decide he is guilty, you must then decide the issue of insanity. In the event of a guilty verdict or a verdict of not guilty by reason of insanity, you have nothing to do with the consequences. Those are issues for the court not the jury.

Becker contends again at this point his requested instruction should have been given.[11] Becker contends the instruction was required by due process and the right to a fair trial guaranteed by Article I, Section 9 of the Iowa Constitution. This section guarantees that "no person shall be deprived of life, liberty, or property without due process of law."

The State contends that the Iowa Supreme Court continues to hold that the jury has nothing to do with punishment and their one function is to seek the truth. The State notes as recently as the case of *State v. Hanes*, 790 N.W.2d. 545, 549 (Iowa 2010), the court has reaffirmed this view.

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to Mark Becker if we find him insane?" At 12:35 p.m. the judge had a conference with the attorneys and Becker. Jury was instructed that they would have nothing to do with the punishment at 12:38 p.m. The question was stamped filed at 12:28 p.m. On February 26, at 3:20 p.m. the jury sent a note to the judge that states "We have voted four times today and are still deadlocked. (Same vote ratio). How shall we proceed?" At 3:45 p.m. a conference was held on this question and the jury was told to separate for the weekend and reconvene on Monday morning at 10 a.m. when the judge would answer their question. The jury was adjourned at 4:10 p.m. The question was stamped filed at 3:41 p.m. On March 1, at 10:34 a.m. the jury was instructed to reread Instruction 36 and continue with deliberations. The jury was adjourned at 4:30 p.m. On March 2, the jury reconvened at 9:00 a.m. At 10:48 the jury verdict was read in court. It is unclear whether the verdict was reached the night before or the morning of March 2.

[10] This instruction provided: "[T]he duty of the jury is to determine if the defendant is guilty or not guilty. In the event of a guilty verdict, you have nothing to do with the punishment."

[11] Becker contends if his trial attorney did not correctly preserve error on this issue that the attorney was ineffective.

Becker seeks support for his position in Justice Stevens's dissent[12] to *Shannon v. United States*, 512 U.S. 573, 588, 114 S. Ct. 2419, 2422, 129 L. Ed. 2d 459, 472 (1994). In *Shannon* the majority of the court emphasized the principle that within the judicial system there is a basic division of labor between judge and jury that discourages jurors from considering the consequences of their verdict. *Id.* at 579, 114 S. Ct. at 2424, 129 L. Ed. 2d at 466. The jurors are the finders of fact; the judge, on the other hand, is a finder of the law and imposes the sentence upon the defendant after the jury returns a guilty verdict. *Id.* The court in *Shannon* feared that providing the jurors with information concerning the consequences of the verdict would invite them to ponder matters that were not within their province, distracting them from fact-finding responsibilities and creating a strong possibility of confusion. *Id.* at 579, 114 S. Ct. at 2424, 129 L. Ed. 2d at 466-67.

Justice Stevens's dissent takes the position there is no reason to keep this information from the jury and every reason to make them aware of it. *Id.* at 593, 114 S. Ct. at 2431, 129 L. Ed. 2d at 475. He maintained that the instruction should be given whenever requested by the defendant. *Id.* at 590-91, 114 S. Ct. at 2430, 129 L. Ed. 2d at 473-74. Stevens suggested the court should not simply focus on the traditional rules against informing the jury as to the consequences of not-guilty-by-reason-of-insanity verdict, but instead should consider the seriousness of the harm to the defendant that might result from a refusal to give such an instruction, especially in the absence of any countervailing harm that would result from giving the instruction. *Id.* at 591-92, 114 S. Ct. at 2430, 129

[12] Blackman joined the dissent.

L. Ed. 2d at 474. Stevens noted that at the time his dissent was written an increasing number of states that had considered the question endorsed use of the instruction, as had the American Bar Association.[13] *Id.* at 592, 114 S. Ct. at 2431, 129 L. Ed. 2d at 474-75.

Becker notes that numerous studies on juror behavior indicate that in cases where an insanity defense is raised jurors are extremely interested in the consequences of an insanity acquittal in support of this position. Marcia Bach, *The Not Guilty by Reason of Insanity Verdict: Should Juries Be informed of Its Consequences?*, 16 Whittier L. Rev. 645, 647 (1995). He further points out that the Bach article noted the researchers indicated that not a single jury studied refrained from considering what would happen to the defendant as a precondition for arriving at a decision concerning his guilt or innocence, sanity, or insanity; and more importantly, the study revealed that in the absence of a not-guilty-by-reason-of-insanity instruction, juries did speculate, and sometimes erred, in their conclusion to the detriment of the defendant. *Id.* at 674-75.

The State acknowledges that critics (including law students and commentators) of the holding in *Shannon* are not hard to find, noting that LaFave finds its reasons "questionable." 1 LaFave *Substantive Criminal Law* § 8.3(d) at 607. But the State argues this does not raise a constitutional right to require Becker's instruction.

Justice Stevens's dissent has appeal, particularly here where the jury asked the specific question after lengthy deliberations, the focal issue in the case was whether or not Becker proved his insanity defense, and there was

[13] ABA Criminal Justice Mental Health Standards § 7-6.8 (1989).

substantial evidence which, if believed, would support a finding that Becker was not guilty by reason of insanity.

However, Iowa cases have held generally that when the defendant requests such an instruction to be given to the jury before they begin deliberation, it is generally inappropriate and unnecessary. *See State v. Oppelt*, 329 N.W.2d 17, 21 (1983); *State v. Hamann*, 285 N.W.2d 180, 185-96 (1979); *State v. Fetters*, 562 N.W.2d 770, 775 (Iowa Ct. App. 1997). We find these decisions controlling. We affirm on this issue.

LEGAL ASSISTANCE FEES. The defendant contends the court erred in the amount of restitution ordered for reimbursement of legal assistance. The court ordered defendant to pay $16,600 for attorney fees, $53,709.82 for expert fees, and $824.80 for miscellaneous expenses, for a total of $71,734.62. Defendant contends this exceeds the allowable fee for a Class A felony, which the State Public Defender has set at $18,000. *See* Iowa Code § 13B.4(4)(a); Iowa Admin. Code r. 493-12.6(1). He contends he cannot be required to reimburse the State for legal assistance in amount exceeding the fee limitation. Iowa Code § 815.4 (providing "the expense of the public defender shall not exceed the fee limitations established in section 13B.4"). He argues section 815.14 "caps the total expense of the public defender, not only the attorney fees."

The State contends the court did not err in the restitution ordered because the Iowa Code separates attorney fees and expert fees. Section 910.2 provides for restitution according to section 815.9. Section 815.9 lumps together all of the costs of "legal assistance" to include "not only an appointed attorney, but also

transcripts, witness fees, expenses, and any other goods or services required by law to be provided to an indigent person." Iowa Code § 815.9(3).

The fee limitations set by the State Public Defender in Iowa Administrative Code rule 493-12.6 are for "for combined attorney time and paralegal time." Section 815.14, entitled "fee for public defender" provides that the "expense of the public defender" is to be calculated at the "same hourly rate" as paid attorneys in 815.7, but not to exceed the fee limitations from section 13B.4. Section 815.7 sets the hourly rate for court-appointed attorneys. Sections 815.3-6 provide for compensation to various types of witnesses. It is clear the statutory scheme in chapter 815 separates hourly attorney fees, whether for public defenders or court-appointed private attorneys, from costs for witnesses. In *State v. Dudley*, 766 N.W.2d 606, 621-22 (Iowa 2009), the supreme court considered whether a defendant could be required to reimburse the cost of a court-appointed private attorney that exceeded the fee limitations set by the State Public Defender. The court concluded it was a violation of equal protection of the law to do so. *Dudley*, 766 N.W.2d at 622. In *Dudley*, however, the court was concerned with attorney fees as described in chapter 815 and the fee limitations from section 13B.3 and the administrative code. The issue of costs for witnesses was not addressed.

In the case before us, the court assessed attorney fees that did not exceed the fee limitations. *See* Iowa Admin. Code r. 493-12.6. In addition, the court assessed certain witness costs. None of the sections dealing with witness costs, section 815.3-6, set any limitation on those costs. Those costs are

reimbursed under Iowa Administrative Code rule 493-12.7 and are separate from the attorney fee limitations in rule 493-12.6. We affirm the district court's order for restitution.

AFFIRMED.