IN THE COURT OF APPEALS OF IOWA

No. 3-245 / 12-0170
Filed May 15, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

AMANDA KAYE PORTER,
Defendant-Appellant.

Appeal from the Iowa District Court for Story County, Timothy J. Finn, Judge.

Amanda Porter appeals from the judgment and sentence following her convictions of first-degree murder and child endangerment resulting in death. **CONVICTIONS AFFIRMED; SENTENCE VACATED IN PART.**

Mark C. Smith, State Appellate Defender, and Shellie Knipfer, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, and Thomas Tauber, Douglas Hammerand, and Denise Timmins, Assistant Attorneys General, for appellee.

Heard by Eisenhauer, C.J., and Potterfield and Tabor, JJ.

EISENHAUER, C.J.

Amanda Porter appeals from the judgment and sentence following her convictions of first-degree murder and child endangerment resulting in death. She contends there was insufficient evidence to prove she caused the child's death, and her trial attorney was ineffective in not challenging the sufficiency of the evidence of malice aforethought and not objecting to the lack of a jury instruction defining "extreme indifference to human life." She also contends the court erred in sentencing her on both offenses when there was only one homicide. We affirm her convictions and vacate the sentence for child endangerment resulting in death.

I. Background

Considering all the record evidence in the light most favorable to the State, a reasonable jury could find the following facts. *See State v. Sanford*, 814 N.W.2d 611, 615 (Iowa 2012). Porter has a daughter from a previous relationship, who was three years old in 2008. Porter's paramour (Corson) had a son from a previous relationship who was born in 2005. Corson's child had several congenital abnormalities, had difficulty eating until doctors implanted a gastrostomy feeding tube, and was delayed in his motor and intellectual skills. After Corson and the mother separated, the mother cared for the child until September 2007, when she placed the child with Corson. Porter and Corson met in August 2007 and started living together a few months later. Porter stayed home and cared for the children; Corson worked 11:00 p.m. to 7:00 a.m. Twice before the date the child died, he received medical care for suspicious injuries. On April 16, Porter sent a text message to Corson at work, telling him to come

home because something was wrong with his son. When Corson arrived Porter told him she thought the child fell off the couch but she could not be certain because she was not in the room at the time. The child was screaming, his body was stiff, and his eyes were fluttering. They took the child to the emergency room, which transferred the child to Blank Children's Hospital in Des Moines because the child had intracranial bleeding, was neurologically unstable, and was having seizures. The local treating pediatrician believed the child's injury was non-accidental.

On May 28, Porter took the child to a pediatrician. Porter said he was bruised all over and he would cry out in pain when touched. The child was admitted to the hospital because he was not growing as expected, the doctors were concerned he might be developing seizures from his previous head trauma, and there were concerns of a possible bleeding problem.

On June 23, Porter, who was then eight months pregnant, had been up much of the preceding night caring for the children and was up again around 9:30 a.m. with the children. Corson had stayed out with friends until around 4:00 a.m. He spent much of the day sleeping on the couch. Around 5:00 or 6:00 p.m. Porter took the children to her mother's air conditioned trailer because it was so hot in their trailer. Porter put the child down to sleep after they arrived. She fed him around 6:30. During the evening, Porter's mother and daughter went out for pizza, leaving Porter home with the child for about half an hour. They also went for a walk, leaving Porter home with the child for about forty-five minutes. Porter's mother and daughter went to bed around 9:00.

About 9:30 Porter came into her mother's bedroom carrying the child, saying something was wrong and he was not breathing. Porter's mother called 911. The 911 operator dispatched EMTs and instructed Porter and her mother on CPR. When EMT Gibson arrived, she found the child unresponsive, with no pulse, and not breathing. She observed bruises on the child's chest and below his armpits apparently made by thumbs. She also observed bruises on both sides of the child's neck, which she reported to the police. When police asked Porter about the bruises, she said her daughter caused the bruise on the left side of the child's neck. Later, she suggested the bruises on the child's chest might have been caused when the child scratched insect bites. After the child was flown to Blank Children's Hospital, doctors found no brain activity. The child died at the hospital.

An autopsy revealed the child had a fresh subdural hemorrhage caused by movement of the brain within the skull tearing blood vessels, torn axons in the corpus callosum caused by the two hemispheres of the brain moving back-and-forth unevenly, injury to the neck in the upper cervical region caused by back-and-forth motion of his head, detached retinas in both eyes from violent movement of the eyes, and hemorrhages in both eyes and along the optic nerves. The medical examiner testified the child's death "was due to trauma to his brain and probably trauma to his upper cervical spinal cord." He said the injuries and bruises were consistent with someone holding the child and shaking him. A simple fall or impact to the head "would not be expected to cause the kinds of injuries" sustained by the child. The medical examiner also ruled out congenital abnormalities, fetal alcohol syndrome, gastrointestinal inflammation,

resuscitation efforts, and use of a ventilator as causes of the brain injuries and the child's death. He opined the child died of abusive head trauma at the hands of another person.

Dr. Spencer, a pediatric ophthalmologist, examined the child after he arrived at Blank Hospital. She testified the injuries to the child's eyes did not result from seizures, brain swelling, resuscitation efforts, or an accident such as falling off a couch or bumping into a table. The injuries were consistent with abuse and "in the absence of any medical explanation, . . . then it in my opinion was abusive head trauma."

Dr. Shah, medical director of the Regional Child Protection Center at Blank Hospital, was called to consult on the child's case. She examined the child at Blank Hospital shortly before the child died and had a case conference with several other doctors and staff from the hospital. Dr. Shah opined the child died as a result of "abusive head injury of the recent onset." Dr. Shah specified the injury was probably within six hours of when the child came to the hospital. Dr. Shah ruled out bumping into a wall or table, fetal alcohol syndrome, a bleeding disorder, seizures, the April head injury, or resuscitation efforts as possible causes of the deep brain injuries and eye injuries suffered by the child. The injury was a "severe and acute event."

The court instructed the jury on the elements of first-degree murder and child endangerment resulting in death. One of the instructions contained the phrase "extreme indifference to human life." The jury sent out a question, asking for a definition of the phrase and an example. After consulting with both

attorneys, the court told the jury to reread the instructions. The jury convicted Porter of first-degree murder and child endangerment resulting in death.

II. Scope and Standards of Review

We review challenges to the sufficiency of the evidence for correction of errors at law. *State v. Sanford*, 814 N.W.2d 611, 615 (Iowa 2012). We "consider all of the record evidence viewed 'in the light most favorable to the State, including all reasonable inferences that may be fairly drawn from the evidence.'" *Id.* (citation omitted). "[W]e will uphold a verdict if substantial record evidence supports it." *State v. Nitcher*, 720 N.W.2d 547, 556 (Iowa 2006). It is the State's "burden to prove every fact necessary to constitute the crime with which the defendant is charged, and the evidence presented must raise a fair inference of guilt and do more than create speculation, suspicion, or conjecture." *State v. Brubaker*, 805 N.W.2d 164, 171 (Iowa 2011). "Inherent in our standard of review of jury verdicts in criminal cases is the recognition that the jury was free to reject certain evidence, and credit other evidence." *Nitcher*, 720 N.W.2d at 556.

We review claims a defendant's trial attorney was ineffective de novo. *State v. Clark*, 814 N.W.2d 551, 560 (Iowa 2012). To succeed on an ineffective-assistance claim, a defendant must show by a preponderance of the evidence that trial counsel failed to perform an essential duty, and prejudice resulted. *State v. Rodriguez*, 804 N.W.2d 844, 848 (Iowa 2011). We can affirm if either element is absent. *Id.* Ordinarily, we do not decide ineffective-assistance-of-counsel claims on direct appeal. *State v. Tate*, 710 N.W.2d 237, 240 (Iowa 2006). We prefer to reserve such questions for postconviction proceedings so the defendant's trial counsel can defend against the charge and a more complete

record may be developed. *Clark*, 814 N.W.2d at 560. However, we depart from this preference in cases where the record is adequate to evaluate the claim. *Id.*

III. Merits

A. Sufficiency of the Evidence. Porter contends there was insufficient evidence to prove she caused the child's death. To find Porter guilty of first-degree murder, the State had to prove Porter inflicted the injuries on the child, the child died as a result, the child was under age fourteen, Porter acted with malice aforethought, Porter was committing the crime of assault, and the child's death occurred under circumstances showing an extreme indifference to human life. To find Porter guilty of child endangerment causing death, the State had to prove Porter had custody or control of the child, the child was under age fourteen, Porter knowingly acted in a manner creating a substantial risk to the child's health, and Porter's acts resulted in the child's death.

Both offenses require proof Porter committed the act resulting in injury to the child, and the child died as a result. Porter argues the evidence does not prove beyond a reasonable doubt she inflicted the injury causing the child's death. She claims the jury could only speculate what or who caused the child's death.

A reasonable jury could find the child's death was the result of a non-accidental traumatic injury occurring within about six hours before his admission to the hospital, the traumatic injury involved shaking violent enough to cause injury deep within the brain and to rupture blood vessels in and around the brain, and Porter was the only person alone with the child during that time. A jury could reasonably infer Porter was the person who caused the injuries to the child.

A jury also could consider the similar, but less severe injuries the child sustained in April while in Porter's care, and Porter's explanation of the cause, which was contradicted by the medical evidence, as supporting its finding she was the person who caused the later, fatal injuries. The evidence was sufficient to prove Porter caused the child's death.

B. Ineffective Assistance. Porter claims her trial attorney provided ineffective assistance in two respects. The attorney failed to challenge the sufficiency of the evidence Porter acted with "malice aforethought" and failed to object to the trial court's refusal to define the phrase "extreme indifference to human life" after the jury sent a question asking for a definition and an example. We need not defer these questions for postconviction proceedings as we find the record adequate to evaluate these claims. *Clark*, 814 N.W.2d at 560.

1. Malice Aforethought. Porter's attorney did not move for judgment of acquittal based on lack of proof of malice aforethought. The jury was instructed the State had to prove Porter acted with malice aforethought. Porter contends there was no evidence she acted with malice, no witnesses to the alleged assault, and no admissions or testimony she acted in any manner from which the jury could infer malice. She also contends the jury should not have been allowed to infer malice from the commission of the child endangerment offense when both offenses were based on the same act. *See State v. Heemstra*, 721 N.W.2d 549, 558 (Iowa 2006) (precluding use of another felony based on the same act as the predicate offense for felony murder).

Malice is "that condition of mind [that] prompts one to do a wrongful act intentionally, without legal justification or excuse." *State v. Love*, 302 N.W.2d

115, 119 (Iowa 1981), *overruled on other grounds by State v. Reeves*, 636 N.W.2d 22, 25 (Iowa 1986). Because malice is a state of mind, it is often proved by, and may be inferred from, circumstantial evidence. *State v. Buenaventura*, 660 N.W.2d 38, 49 (Iowa 2003); *State v. Rhode*, 503 N.W.2d 27, 39 (Iowa Ct. App. 1993) (inferring malice from a defendant intentionally slamming a child's head against a hard surface causing severe head injuries).

The jury could find Porter caused the fatal injuries by grabbing the child around his torso under the arms and shaking him violently. The jury could also find the child sustained non-accidental injuries while in Porter's care in April. The jury was instructed malice "may be established . . . by proof of a fixed or deliberate attempt to do injury. It may be found from the acts and conduct of the defendant, and the means used in doing the wrongful and injurious act." We conclude substantial evidence supports the jury's finding of malice aforethought.

The jury also was instructed it could infer malice "from the commission of child endangerment resulting in serious injury or death." Porter was charged with first-degree murder under the alternative in Iowa Code section 707.2(5) (2005), killing a child "while committing child endangerment . . . or while committing assault . . . upon the child, and the death occurs under circumstances manifesting an extreme indifference to human life." The concerns about felony murder discussed in *Heemstra* are not presented in section 707.2(5). In *State v. Thompson*, 570 N.W.2d 765, 767 (Iowa 1997), the court noted "[o]ur legislature passed this child homicide statute in 1994 as part of a comprehensive act targeting juvenile justice and the protection of children."

> [B]y enacting section 707.2(5), the legislature has not merely elevated recklessness-based manslaughter to recklessness-based murder. Premised on murder, not recklessness, the statute identifies additional elements distinguishing it from second-degree murder: (1) a child victim, (2) the killing occurs during an assault, and (3) the death occurs under circumstances manifesting an extreme indifference to human life. *The crime fits logically into the continuum of homicide offenses which reveals "a gradation of culpability commensurate with the gradation of punishment."* The "extreme indifference" element stands apart from, and in addition to, the element of malice.

Thompson, 570 N.W.2d at 769 (emphasis added). The argument Porter makes is inapposite because, as noted in *Thompson*, section 707.2(5) requires not only a showing that the child was killed during an assault, but also with malice (the definition of murder under section 707.1) and "under circumstances manifesting an extreme indifference to human life." *Id.* We conclude it was not improper for the jury to be allowed to infer malice from a finding Porter was guilty of child endangerment resulting in serious injury or death.

Substantial evidence supports an inference of malice from the nature and cause of the injuries to the child. An inference of malice also was proper based on a finding of guilt on the child endangerment charge. Consequently, Porter's attorney had no duty to move for judgment of acquittal on that basis. This claim of ineffective assistance of counsel fails.

2. Defining "Extreme Indifference to Human Life." Porter contends her trial attorney was ineffective for failing to challenge the trial court's response to the question from the jury asking for a definition of the phrase and an example. When the jury asked for a definition, the court, after discussion with both attorneys, directed the jury to reread the instructions in their entirety.

Porter argues the jury was confused by the phrase and "was left to flounder as to the meaning of a term that was an essential element of first-degree murder." She asserts *Thompson*, 570 N.W.2d at 767-69, "is not contrary" to her argument the court had a duty to supplement the instruction, and her attorney was ineffective in not objecting to the court's refusal to do so. We conclude the supreme court resolved the issue in *Thompson* and it controls our disposition of this ineffective-assistance claim.

In *Thompson*, the supreme court considered the phrase "manifesting an extreme indifference to human life," which was "new to our criminal law" and occurred exclusively in Iowa Code section 707.2(5). 570 N.W.2d at 767. Although the "import of the phrase" was a question of first impression in Iowa, the court noted "it has been the subject of wide discussion in other jurisdictions." *Id.* The court started its analysis of the phrase with the premise "words used in a jury instruction need not be defined 'if they are of ordinary usage and are generally understood.'" *Id.* at 768 (quoting *State v. Weiss*, 528 N.W.2d 519, 520 (Iowa 1995)). "Other courts addressing the precise question . . . have found no need to elaborate on the definition of 'extreme indifference to the value of human life.'" *Id.*; *see, e.g.*, *State v. Dominguez*, 512 A.2d 1112, 1113 (N.H. 1986) ("Although a trial judge has a comprehensive obligation to instruct a jury on the law, the judge has no duty to explain non-technical terms or phrases that are readily comprehended. 'Extreme indifference to the value of human life' is such a phrase."); *State v. Dow*, 489 A.2d 650, 652 (N.H. 1985) (holding the phrase is "easily understood"); *State v. Tweed*, 491 N.W.2d 412, 419 (N.D. 1992) (noting the phrase "is an understandable and distinct definition of what circumstances

are necessary to bring the act within the felony offense" (citation omitted)). Our supreme court "agree[d] that the phrase 'manifesting an extreme indifference to human life,' when considered in the context of a killing of a child with malice, sufficiently describes the aggravating circumstance elevating the act from second-degree to first-degree murder *so as to need no further or other explanation.*" *Thompson*, 570 N.W.2d at 768 (emphasis added). The court concluded the trial court's further definition of some of the words in the phrase "was at worst unnecessary." *Id.* at 769.

In the case before us, the trial court did not err in directing the jury to reread the instructions in their entirety instead of elaborating on the definition of the phrase. *See id.* at 768. Consequently, Porter's trial attorney had no duty to object to the court's response to the jury.

C. Sentencing. Porter contends, and the State acknowledges, the trial court erred in sentencing her on both convictions when there was only one homicide. *See State v. Wissing*, 528 N.W.2d 561, 567 (Iowa 1995) (holding when two "offenses arise from one homicide, we permit sentencing on only one of the homicide offenses"); *see also State v. Gilroy*, 199 N.W.2d 63, 68 (Iowa 1972) (concluding two sentences imposed as the result of one homicide "is double punishment" and "cannot be allowed to stand"). Accordingly, we vacate the sentence imposed for Porter's conviction of child endangerment resulting in death.

CONVICTIONS AFFIRMED; SENTENCE VACATED IN PART.