IN THE COURT OF APPEALS OF IOWA

No. 6-626 / 05-1917
Filed December 28, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DENNIS EUGENE STONEROOK,
Defendant-Appellant.

Appeal from the Iowa District Court for Mills County, James S. Heckerman, Judge.

Dennis Stonerook appeals from his conviction for first-degree murder. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and David Arthur Adams, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, and Marci L. Prier, County Attorney, for appellee.

Heard by Huitink, P.J., and Miller, J., and Nelson, S.J.,*

Considered by Huitink P.J., Vogel and Miller, JJ., and Nelson, S.J.

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2005).

PER CURIAM.

Dennis Stonerook appeals from his conviction for first-degree murder, in violation of Iowa Code sections 707.1 and 707.2 (2003). We affirm.

Background Facts and Proceedings.

In the early evening hours of February 13, 2005, Dennis Stonerook entered the Glenwood Bowling Alley carrying a Ruger semi-automatic rifle. Among others at the bowling alley were his estranged wife, Lynda, and her paramour, Donald Mayberry. Lynda had separated from Stonerook in October of 2004 and she and their two daughters had recently moved into Mayberry's house.

As Stonerook stopped inside the bowling alley's front door, a bystander overhead him say "I'm going to get you, mother f***r." He then took aim at Mayberry and shot him in the chest. After a short pause, Stonerook fired three more shots at the downed man. Bystanders tackled Stonerook and wrestled the rifle away. Mayberry later died from the bullet wound to the chest.

After he was arrested, blood was withdrawn from Stonerook, revealing a blood-alcohol concentration of .162. Also, while at the sheriff's office, Stonerook phoned a friend. An officer who overheard the conversation reported that Stonerook said "He shouldn't have touched my kids. He can touch my wife, but when he touched my kid, that's it."

The State charged Stonerook with first-degree murder and Stonerook later filed notice of his intent to rely on the defenses of insanity, intoxication, and justification. Following a trial, the jury found Stonerook guilty as charged and the court sentenced him to imprisonment for life. Stonerook appeals, contending his

trial counsel was ineffective in failing to object to the marshalling instruction for first-degree murder.

Ineffective Assistance of Counsel.

We review ineffective-assistance-of-counsel claims de novo. *State v. Williams*, 574 N.W.2d 293, 300 (Iowa 1998). To support his claim of ineffective assistance of counsel, Stonerook has the burden to prove that "(1) his trial counsel failed in an essential duty, and (2) prejudice resulted from counsel's error." *State v. Arne*, 579 N.W.2d 326, 328-29 (Iowa 1998). We can affirm on appeal if either element is absent. *See State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996). Although ineffective-assistance-of-counsel claims are usually preserved for postconviction relief proceedings, we will consider them on direct appeal if the record is sufficient. *See State v. Spurgeon*, 533 N.W.2d 218, 220 (Iowa 1995). We find the record adequate here.

To prove the first prong of an ineffective-assistance-of-counsel claim, Stonerook must prove "his attorney's performance was not within the normal range of competence." *Id*. at 219. In determining whether this element of the claim has been proved, we start with a presumption that counsel was competent. *See id*. Trial counsel is not ineffective in failing to urge an issue that has no merit. *See State v. Crone*, 545 N.W.2d 267, 270-71 (Iowa 1996).

The Marshalling Instruction.

Stonerook maintains counsel was ineffective in failing to object to the marshalling instruction for first-degree murder. In particular, he argues he was denied his right to due process because this instruction allowed the jury to

convict him without addressing or considering his affirmative defense of insanity. Jury Instruction number fourteen, the marshalling instruction, read as follows:

> The State must prove all of the following elements of Murder in the First Degree:
>
> 1. On or about the 13th Day of February, 2005, the defendant, Dennis Eugene Stonerook, shot Donald Mark Mayberry.
> 2. Donald Mark Mayberry died as a result of being shot.
> 3. The defendant, Dennis Eugene Stonerook, acted with malice aforethought.
> 4. (a) the defendant, Dennis Eugene Stonerook, acted willfully, deliberately, premeditatedly and with the specific intent to kill Donald Mark Mayberry; or
> (b) the defendant was participating in the offense of Willful Injury.
>
> If the State has proved all the elements, the defendant is guilty of Murder in the First Degree. If the State has failed to prove any one of the elements, the defendant is not guilty of Murder in the First Degree and you will then consider the charge of Murder in the Second Degree explained in Instruction No. 27.

Stonerook's insanity defense was later laid out in instructions forty-one through forty-eight. Instruction forty-one stated:

> The defendant claims he is not guilty by reason of insanity. You must first determine if the State has proved all of the elements of the crime charged beyond a reasonable doubt. If you find the State has proved all of the elements, then you must consider the issue of the defendant's insanity.

Stonerook asserts the marshalling instruction should have contained some reference to his affirmative defense of insanity. He further posits that this error was "magnified" due to the fact that the murder marshalling instruction was contained in instruction fourteen while the affirmative defense instructions did not start until instruction forty-one. With some reservations, we reject both of these contentions.

We first note that instruction fourteen, the marshalling instruction for first-degree murder, is based on Uniform Jury Instructions 700.1 and 700.2. We are reluctant to disapprove uniform jury instructions. *State v. Beets*, 528 N.W.2d 521, 523 (Iowa 1995). Moreover, our supreme court has stated that "[w]here an instruction marshals the essential elements of a crime and authorizes conviction if the elements listed have been proved beyond a reasonable doubt, all of the essential elements must be included in the marshalling instruction." *State v. Straw*, 185 N.W.2d 812, 816 (Iowa 1971). It is not disputed here that all of the essential elements of first-degree murder were included in the marshalling instruction. We therefore find no fault in the marshalling instruction for failing to mention Stonerook's insanity defense. *See Sillick v. Ault*, 358 F. Supp. 2d 738, 761-62 (N.D. Iowa 2005) (rejecting identical claim).

Having concluded that the instruction is legally adequate, we note that it would have been appropriate and perhaps preferable to explicitly refer to the submissible insanity defense within the marshalling instruction. Such an instruction could have mentioned, for example, that if the jury finds the state has proved all the elements of first-degree murder, it still must consider Stonerook's insanity defense as set forth in later instructions. However, without legal error, thus necessitating an objection by counsel, we cannot conclude counsel breached an essential duty with regard to the marshalling instruction.

The remaining issue is whether the relative distance between the murder marshalling instruction and the insanity instructions could have confused the jury or caused them to ignore this affirmative defense. Again, there is no argument that the insanity instructions, in and of themselves, were in any manner

deficient—merely that they should have been closer to or incorporated in the murder instruction.

First, as the State appropriately notes, juries are instructed to "consider all of the instructions together" and that "[n]o one instruction includes all of the applicable law." Generally, a jury is presumed to follow its instructions. *State v. Frank*, 298 N.W.2d 324, 327 (Iowa 1980). We must therefore presume that the jury here did not read solely the first-degree murder marshalling instruction and ignore or overlook the subsequent insanity instructions. In the final analysis, the jury was instructed as to the elements the State needed to establish in order for the jury to find Stonerook guilty of first-degree murder. It was further accurately instructed as to his insanity defense. The jury was not allowed to find Stonerook guilty of murder if it further found he was insane, as Stonerook seems to suggest. In fact, the jury was specifically instructed that "[i]f you find the State has proved all of the elements, then you *must* consider the issue of the defendant's insanity." (Emphasis added.) The number of additional instructions that fall between the murder and insanity instructions do not alter our conclusion.

Accordingly, we conclude counsel did not breach an essential duty in failing to object to either the first degree-murder marshalling instruction or the relative placement of the insanity instructions as the instructions were accurate to the law and appropriate to the facts of this case. We therefore affirm Stonerook's conviction for first-degree murder.

AFFIRMED.