IN THE COURT OF APPEALS OF IOWA

No. 2-360 / 11-0858
Filed August 22, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DONTE GILMORE,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Robert A. Hutchison, Judge.

Donte Gilmore challenges his conviction for murder in the first degree, arguing the verdict was contrary to the weight of the evidence and that he received ineffective assistance of counsel. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Theresa R. Wilson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, John Sarcone, County Attorney, and Jaki Livingston, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Tabor and Bower, JJ.

TABOR, J.

Donte Gilmore shot and killed his wife Randi. At trial, he relied on insanity and diminished responsibility defenses. The jury convicted him of first-degree murder. On appeal, Donte asks us to reverse the district court's denial of his motion for a new trial. He also alleges trial counsel was ineffective for failing to object to jury instructions relating to his insanity defense.

The State and the defense presented conflicting evidence relevant to Donte's state of mind. Because the evidence did not preponderate heavily against the guilty verdict, the district court did not abuse its discretion by denying the new trial motion. Because the jury instructions accurately conveyed the law on insanity, trial counsel had no duty to object, and therefore did not render ineffective assistance.

I. Background Facts and Procedures

Randi Gilmore was twenty-one years old at the time of her death. She had been married to Donte for six years and they had three daughters together.

Donte worked as a carpenter, and following a layoff from his construction job began doing informational protests for the local carpenters' union. Around 7:00 a.m. on April 5, 2010, the Gilmores left their girls with Donte's mother, Christine Hilterbrand, before joining a union protest at the corner of Fleur Drive and George Flagg Parkway in Des Moines. Between 7:30 and 8:00 a.m., other union workers arriving at the protest saw Randi about twenty feet from Donte and the protest banner. An hour later, she went to sit in the couple's car.

Between noon and 1:00 p.m., the couple went to pick up their daughters—then ages five, four, and two. Christine saw that Randi had Donte's phone. Donte's stepfather, Brent Hilterbrand,[1] noticed the couple was quietly arguing before Donte left the house on foot, alone.[2] Shortly after, Randi also left, taking the three girls with her.

According to a later interview with Donte, he and Randi were arguing because Randi had suspicions about a woman she saw on their shared Facebook page. The argument began that morning, and escalated when they returned home with their daughters. During the fight Randi handed Donte her wedding ring, and he pretended to smash it with a hammer. He recalled that Randi threatened to hit him with the hammer. Donte said he turned on the television, hoping the distraction "might sort of cool things off." Randi left the house for the public library.

Surveillance footage at the library showed Randi entering at 2:33 p.m. and walking directly to a computer station where she remained until leaving at 3:12 p.m. According to Donte's interview, while his wife was away, he retrieved a .45 caliber semiautomatic pistol from their bedroom because he was concerned about her threats.

Meanwhile, the Hilterbrands were out shopping and missed a couple of telephone calls from Donte. According to Christine's testimony, when she called her son back at 3:05 p.m., Donte told her "he couldn't take it no more and that he

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[1] Donte's biological father lives in Minnesota. Brent married Christine when Donte was seven months old.

[2] The Gilmore residence was roughly nine blocks from the Hilterbrands.

was going to leave, go up to his family in Minnesota" and asked Christine to store some of his belongings. Christine said she heard Randi's frustrated voice in the background; this testimony from Donte's mother conflicted with the surveillance footage showing Randi at the library from 2:33 to 3:12 p.m.

In interviews with law enforcement and psychiatrists, Donte offered his account of what transpired next. Randi returned from the library very upset because she saw "something on [Facebook] about a woman named Amber." Randi allegedly hit and kicked Donte, repeatedly questioned him, and said she would "smack" him in the face with a hammer. Donte claimed Randi went into their bedroom to search for the gun that he had moved into the kitchen. While she searched the bedroom, he placed the gun in the waistband of his sweatpants. Donte said he grabbed the weapon "to scare her." Donte told Dr. Taylor: "I was angry. I pulled out the gun, and she was running, and I was running and I was shooting." Donte said he did not remember the sound of the gunshots.

At 3:29 p.m., now back at her home, Christine received a frantic call from Donte. Because she could not understand what he was saying through his crying, Christine and Brent decided to drive to the Gilmore house. As they approached, the Hilterbrands spotted Donte standing in a park across the street from his house. They saw Donte drop to his knees and start vomiting. Christine ran to Donte, who repeatedly asked: "What am I going to do?" and "Am I going to go to hell?" He also told his mother he thought he killed Randi. Christine walked with Donte back to the Gilmore house as Brent drove behind them.

As Brent approached the Gilmore house, he met the three little girls coming out of the enclosed front porch. He "corralled them" and placed them in the back seat of the car. Brent then stayed on the front lawn with Donte and called 911. Christine went inside to check on Randi, finding her daughter-in-law's lifeless body at the foot of the basement stairs. When his mother came back outside and confirmed what she had seen, Donte started to shake, and his eyes fluttered and rolled back into his head, as if he was having a seizure. He fell backwards to the ground. Brent described Donte as "incoherent" and "almost hysterical."

When police officers arrived, they found Donte "rolling around on the front yard." They handcuffed him and placed him in the back of a squad car. The vehicle's interior camera focused on a sobbing and distraught Donte who struggled to speak and respond to officer's questions. He was "very excited" and stuttered as he tried to tell police what happened in the house. At various points he lamented to the patrol officer: "Why did this happen to me?" "I know this is bad, I do know that." "I'm not no criminal." and "This is not real." In a recorded interview with detectives later that day, Donte recalled the earlier events and admitted shooting Randi as she ran from him. He was not sure where their children were during the shooting. He told them he intended to save a bullet to shoot himself, but ran out. Donte also told the police he was "frustrated" with Randi because he was doing all the work to keep their marriage together, but he understood that "it didn't make it right for what he did."

Police found the murder weapon, a .45 caliber semi-automatic pistol, on the kitchen counter with the magazine released. Des Moines Police Department Evidence Technician Rex Sparks concluded Randi was shot as she ran through the kitchen, tumbled down the stairs, and came to rest on the basement staircase landing. Of the eight shots that Donte fired, seven struck Randi and four of those were potentially fatal.

On May 13, 2010, the State filed its trial information charging Donte with first-degree murder, a class "A" felony, in violation of Iowa Code sections 707.1 and 707.2 (2009). On February 17, 2011, he filed a notice of his intent to rely on the defense of diminished responsibility. Donte later expanded this notice to include an insanity defense.

While he was incarcerated in the Polk County Jail awaiting trial, Donte regularly talked about religion with his cellmate, Elijah Campbell. Donte attended an Apostolic Christian church, which encouraged specific beliefs that women should dress modestly, including wearing long skirts.[3] Campbell testified that in September or October 2010, Donte told him he believed Randi "was living a sinful life, and she was out using [drugs]—and cheating and stuff like that." Donte said he would "fight constantly" with his wife and pull guns on her "to scare her" and "to calm her down." Campbell also testified regarding Donte's version of the day he shot Randi:

> [Donte] said when she fell to the left, he knew—he knew she was going to hell. It was like—because demons come from the left when you die, and angels come from the right. And he said that he

[3] Donte's co-workers testified that Randi consistently wore a long skirt.

> knew God was using him to—because he said his wife turned her back on God, and you turn your back on God, it's the ultimate sin. So he said God was using him to carry that out, he said. So he knew he was doing the right thing . . . .

Trial commenced on May 2, 2011. The jury heard testimony from police officers, evidence technicians, Donte's parents, and psychiatrists for both the defense and the State. The jurors also viewed the recordings of Donte in the squad car after the shooting and during the subsequent police interview. After five days of trial and two days of deliberation, the jury returned a guilty verdict of murder in the first degree. The district court denied Donte's motion for new trial, and on June 2, it sentenced Donte to life in prison without parole and ordered him to pay $150,000 in restitution to the victim's estate. That same day, Donte filed this appeal.

II. Scope & Standards of Review

A district court enjoys broad discretion to rule on motions for a new trial alleging the verdict is contrary to the weight of the evidence. *State v. Nichter*, 720 N.W.2d 547, 559 (Iowa 2006). We will reverse only when the court abuses its discretion. *Id*. To prove such abuse, the challenger must show the court "exercised its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *State v. Reeves*, 670 N.W.2d 199, 202 (Iowa 2003). Our supreme court has cautioned trial courts that a failure to use this discretion "carefully and sparingly" will "lessen the role of the jury as the principal trier of the facts and would enable the trial court to disregard at will the jury's verdict." *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998).

We review ineffective-assistance-of-counsel claims de novo. *State v. Madsen*, 813 N.W.2d 714, 721 (Iowa 2012). This review involves an independent evaluation of the totality of the circumstances. *State v. Lane*, 743 N.W.2d 178, 181 (Iowa 2007).

III. Did the District Court Abuse its Discretion in Denying a New Trial?

Iowa Rule of Criminal Procedure 2.24(2)(b)(6) permits a district court to grant a new trial "[w]hen the verdict is contrary to law or evidence." A verdict that is contrary to evidence means it is "contrary to the weight of the evidence." *Nguyen v. State*, 707 N.W.2d 317, 327 (Iowa 2005). The "weight of the evidence" involves "a determination by the trier of fact that a greater amount of credible evidence supports one side of an issue or cause than the other." *Id.*

As a threshold matter, we address Donte's claim that the district court did not apply the proper standard in ruling on his new trial motion. Before sentencing Donte, the court stated:

> With regard to the argument that the verdict is contrary to the evidence, I think that the jury's decision is not contrary to the evidence. There was certainly disputed evidence at trial between the experts, but I think the jury was free to choose which expert to believe. And the evidence supports the verdict that was reached.

We decline Donte's invitation to remand this case for the district court to apply a different standard. The district court used the contrary-to-the-evidence language of Rule 2.24(2)(b)(6) and did not refer to the sufficiency-of-evidence standard. *Cf. State v. Scalise*, 660 N.W.2d 58, 66 (Iowa 2003) (remanding for application of correct standard where district court referred to "the bulk of the evidence" and viewed the evidence in the light most favorable to the verdict). By

using the correct terminology, the court here did away with any "lingering ambiguity" that it was applying the wrong standard. *See State v. Root*, 801 N.W.2d 29, 31 (Iowa Ct. App. 2011) (remanding case when district court said the verdict was supported by "competent" evidence).

Donte complains on appeal that the court did not independently evaluate the credibility of the witnesses. "When making a ruling on a motion for new trial, the trial court should state the reasons for its ruling." *State v. Maxwell*, 743 N.W.2d 185, 192 (Iowa 2008). But a trial court's failure to do so will not result in automatic reversal. *Id*. at 193 (upholding district court's rejection of the defendant's claim the verdict was against the weight of the evidence despite court's failure to state reasons). We are obliged to affirm where a proper basis appears in the record for the district court's action. *Id*. at 192.

Here, the district court had adequate reason to conclude that (1) Donte acted willfully, deliberately, and with premeditation when he took the gun from the bedroom, tucked it in his waistband, and then fired multiple shots at his wife as she ran away from him following an argument and her threats to leave the marriage; and (2) Donte's mental condition did not leave him unable to understand the nature and quality of his acts when he was shooting his wife, and that he could distinguish right from wrong in relation to the shooting. The district court alluded to the battle of experts at trial and concluded the evidence supported the verdict.

Both sides offered expert testimony on Donte's state of mind at the time of the shootings. Donte called psychiatrist William Logan, who opined Donte was

either insane or functioning under a diminished responsibility when he killed his wife. After evaluating Donte and reviewing the squad car video and witness statements, Dr. Logan diagnosed Donte as having borderline personality disorder and depression, and concluded he had only a partial memory of the events. At trial, Dr. Logan described what disassociation means:

> when the active thinking part of your brain becomes somewhat disconnected from your actions, and there may be some disconnection from things that you perceive. You may not hear certain sounds or remember all details when an accident occurs. It usually occurs in a state of high emotional arousal. Things may seem to slow down or happen in slow motion. Tend to see your own actions as if someone else is performing. You're somewhat disconnected from what you're physically doing. And the experience has a feeling of unreality.

The defense expert believed Donte experienced some of these symptoms because he did not remember the sound of gun, nor was he sure he shot Randi until he saw her body at the bottom of the stairs.

Dr. Logan found it significant that Donte was deeply religious and held a rigid belief system. Because Randi did not grow up in the same church, Donte's expectations caused strife in the relationship. Donte told the doctor that Randi had been unfaithful to him, prompting them to separate for a time. Dr. Logan believed this event triggered feelings of abandonment and increased Donte's stress. Donte told Dr. Logan that he remembered taking the gun from the bedroom. In previous arguments, Donte had used a gun to threaten Randi and to get her to "calm down."

Dr. Logan concluded Donte's temporary insanity was caused by a dissociative reaction, triggered by "feeling emotionally overwhelmed by what was

happening, the heat of the emotion of the moment." Dr. Logan opined that because of this disassociative episode, Donte was unable to understand the nature of his actions or distinguish between right and wrong. Dr. Logan told the jurors that Donte was unable to form specific intent, deliberate, or premeditate at the time of the shootings.

The State countered Dr. Logan with the testimony of psychiatrist Michael Taylor. Dr. Taylor reviewed the same background material as Dr. Logan, except for the squad car footage. He also read Dr. Logan's report and interviewed Donte.

Donte told Dr. Taylor he had never received any mental health treatment and had never taken psychotropic medications. Dr. Taylor testified the only mental disorder that Donte was suffering from was anger. He also offered his opinion that Donte was "fully capable of deliberating, premeditating, and forming the specific intent to kill in the hours leading up to the shooting." Dr. Taylor reasoned: "[i]f he could form the intent to scare his wife, he can form the intent—he's capable of forming the intent to kill her." The State's expert also believed Donte was capable of understanding the nature and quality of his acts, and that they were wrong at the time he was shooting his wife.

Dr. Taylor was skeptical of Dr. Logan's theory that Donte was insane for roughly one minute. Dr. Taylor called disassociative disorder "the UFO of psychiatry. Some psychiatrists believe it exists, some people don't." Dr. Taylor said even if Donte experienced the effects of the disorder, the disassociation refers only to memory and would not implicate his cognitive abilities.

On appeal, Donte attempts to discredit Dr. Taylor's testimony, specifically pointing out he did not see how Donte acted in the squad car and spent less time interviewing him than did Dr. Logan. These marginal differences in Dr. Taylor's method of preparation do not leave his testimony so lacking in credibility that it cannot support a guilty verdict.

In addition to Dr. Taylor's expert opinion, the State presented lay witness testimony and physical evidence that strongly supported Donte's ability to form the requisite mens rea for first-degree murder. For example, the testimony of Donte's cellmate highlighted Donte's history of threatening Randi with guns, bespeaking a pattern of domestic violence. The forensic evidence, including the number and placement of the gunshot wounds, also bolstered the State's position that Donte intended to kill Randi.

This is not a case where the evidence supporting the verdict was so scanty and the evidence opposing it was so compelling that the verdict must be considered contrary to the weight of the evidence. *See State v. Adney*, 639 N.W.2d 246, 253 (Iowa Ct. App. 2001). The record contains conflicting evidence regarding Donte's state of mind at the time of the killing. The district court implicitly found the State's evidence more credible than the defense witnesses. Although the court's denial of the new trial motion was summary in nature, we cannot conclude the denial of the motion for new trial amounted to an abuse of discretion.

IV. Did Trial Counsel Render Ineffective Assistance?

Donte alleges trial counsel was ineffective for not objecting to jury instructions on the insanity defense. To prevail on his claim, Donte must prove by a preponderance of the evidence that (1) his trial attorney breached an essential duty, and (2) prejudice resulted. *State v. Adams*, 810 N.W.2d 365, 372 (Iowa 2012). If the defendant fails to prove either prong, the claim will fail. *State v. Kehoe*, 804 N.W.2d 302, 305 (Iowa Ct. App. 2011). Although we normally preserve claims of ineffective assistance for postconviction relief proceedings, if the appellate record shows the defendant cannot prevail on a claim as a matter of law, we will affirm the conviction on direct appeal. *State v. See*, 805 N.W.2d 605, 607 (Iowa Ct. App. 2011). We find the instant record is adequate to address Donte's claim.

Donte objects to the jury instructions relating to his insanity defense. The defense is codified at Iowa Code section 701.4.[4] To be found not guilty by reason of insanity, a defendant must show:

> he was either (1) incapable of knowing the nature and quality of the act he is committing, or (2) incapable of distinguishing between right and wrong in relation to the act. The defendant must also

[4] Section 701.4 reads:

> A person shall not be convicted of a crime if at the time the crime is committed the person suffers from such a disease 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 the act. Insanity need not exist for any specific length of time before or after the commission of the alleged 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.

> show that a diseased or deranged condition of the mind rendered him incapable of having the relevant knowledge for making the relevant distinction.

State v. Becker, ___ N.W.2d ___, 2012 WL 2945740, at *8 (Iowa 2012).

Following the presentation of evidence at Donte's trial, the district court offered the jury the following instructions on his insanity defense.

INSTRUCTION NO. 21

> 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 sanity.

INSTRUCTION NO. 22

> 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 his act(s).
>
> 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 act(s) 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 decide the defendant's knowledge of wrongness so far as the act(s) charged is/are concerned. This means mental capacity to know the act(s) was/were wrong when he committed them.
>
> The defendant must prove by a "preponderance of the evidence" that he was insane at the time of the commission of the crime. Preponderance of the Evidence is evidence that is more convincing that opposing evidence. Preponderance of the evidence does not depend upon the number of witnesses testifying on one side or the other.

Insanity need not exist for any specific length of time.

INSTRUCTION NO. 23

If the State has proved all of the elements of a crime, you should then determine if the defendant has proved he was insane.

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 act(s) 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 act(s) he is accused of.

If the defendant has proved either of these elements by a preponderance of the evidence, then the defendant is not guilty by reason of insanity.

If the defendant has failed to prove either of the elements by a preponderance of the evidence, then the defendant is guilty.

These instructions on the insanity defense had the approval of the Iowa State Bar Association's Committee on Uniform Instructions. *See* Iowa Crim. Jury Instructions 200.09-.11 (2009). Our supreme court has suggested "trial courts should generally adhere to the uniform instructions." *State v. Mitchell*, 568 N.W.2d 493, 501 (Iowa 1997). Accordingly, it would be rare to find counsel breached a duty by not challenging uniform instructions.

Nevertheless Donte argues his counsel should have objected to three inaccuracies in the insanity instructions; he alleges (1) the last two sentences of Instruction 23 contradict one another, (2) Instructions 22 and 23 improperly substitute "mental capacity" for the statutory phrase "diseased or deranged condition of the mind," and (3) Instruction 23 omits the statutory language

connecting the mental illness to the inability to understand the nature and quality of the acts or to distinguish right from wrong.

We turn to Donte's first claim concerning the closing sentences of Instruction 23. He argues they "pose a paradox" for the jurors:

> On the one hand, jurors are told that if the defendant proves one of the elements of insanity, they are to find him not guilty. On the other hand, jurors are told that if the defendant fails to prove one of the elements of insanity, they are to find him guilty.

Donte asserts the last sentence of Instruction 23 reads as though he must prove both elements to satisfy the insanity defense.

Donte's argument paraphrases the instruction by substituting the word "one" for "either." The words have distinct meanings. "One" means "being a single entity, unit, object, or being." The American Heritage Dictionary 868 (2nd College Ed. 1985). "Either" means "one or the other; any one of two." *Id.* at 441. The instruction first presents the jury with two elements that could potentially satisfy the defense of insanity. Because they are separated by the word "or," the court has informed the jurors that the defendant is not required to prove both elements; one or the other alternative would satisfy the defense. Next the instruction explains that if Donte has proved either—that is "one or the other"—of those two alternatives, he is not guilty by reason of insanity.[5] Last, the instruction

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[5] In *Becker*, the court noted that this penultimate sentence of the uniform instruction was "an incorrect statement of the law because the law requires more than simply proving one of the two alternatives listed in section 701.4." 2012 WL 2945740, at *7, n.4. The court explained the additional statutory burden: "A defendant must also show that a diseased or deranged condition of the mind rendered him incapable of knowing the nature and quality of the act or that it was wrong." *Id*.

conveys if Donte has failed to prove either—again "one or the other"—of these two elements, he has failed to prove he was insane and is guilty of murder.

By replacing "one" with the definition of "either" the claimed contradiction disappears, and it is clear the instruction reflects an accurate statement of the law concerning the defense of insanity.[6] *See* Iowa Code § 701.4. Trial counsel had no duty to lodge a meritless objection. *See State v. Brubaker*, 805 N.W.2d 164, 171 (Iowa 2011).

Donte next argues the instructions improperly replaced the statutory language "diseased or deranged condition of the mind" with the term "mental capacity." "Mental capacity" is not defined in the jury instructions, and Donte lists several varying meanings for the term found in our case law, including "intellectual functioning, based on I.Q. or age, level of functioning or impairment due to alcohol or drug use, physical injury, or mental illness."

After the parties submitted their briefs, our supreme court decided *Becker*, which rejects contentions similar to those raised by Donte. *Becker* held the uniform instruction setting out the two elements of an insanity defense was accurate, albeit incomplete:

> Instead of making diseased or deranged condition of the mind synonymous with mental capacity, instruction 35[7] omits the diseased or deranged condition of the mind element of section 701.4 completely. However, this omission means the instruction, if

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[6] Defense counsel also established her competence during closing arguments by explaining to the jurors that the insanity defense could be established by proving either element: "But what it basically boils down to is that a person at the time they commit a crime is either unable to distinguish between right and wrong or to understand the nature and consequences of their actions."

[7] *Becker's* Instruction 34 corresponds to Instruction 22 in this case; and *Becker's* Instruction 35 was substantially similar to Donte's Instruction 23.

> read by itself, is incomplete, not that it is incorrect. The instruction tells the jury that regardless of whether the defendant has shown that he has a diseased or deranged condition of the mind, which was not disputed in this case, the defendant must still prove by a preponderance of the evidence that he either did not have "sufficient mental capacity," which as noted above has substantially the same meaning as "incapable," to know and understand the nature and quality of the acts he is accused of, *or* to tell the difference between right and wrong as to the acts he is accused of. If the defendant has failed to prove either of these elements by a preponderance of the evidence, then he is guilty.

2012 WL 2945740, at *10.

The *Becker* decision explained the third paragraph in Instruction 22 rephrases the preceding paragraph, which properly reflects the definition of insanity from Iowa Code section 701.4. *See id.* at *8. The third paragraph describes a person as "sane" if he "had sufficient mental capacity" to know and understand the nature and quality of his act and to distinguish right from wrong. That language correlates with the statute's point that a person is insane if he is "incapable" of knowing the nature and quality of his acts or distinguishing between right and wrong. "A person who is 'incapable' of knowing or distinguishing would, by definition, 'lack capacity' to know or distinguish." *Id.* at *9 (applying meaning of "incapable" defined in Merriam-Webster's Collegiate Dictionary 628 (11th ed. 2004) as "lacking capacity, ability, or qualification for the purpose or end in view"). Accordingly, both paragraphs asked the jury to determine Donte's mental capacity to (1) "know and understand the nature and quality of the act," or (2) "distinguish right from wrong." *See id*.

Becker also forecloses Donte's third claim of error, that instruction 23 incorrectly omitted language connecting the "diseased or deranged" element of

insanity to the alternative definitions of the defense. Instruction 23 does not stand alone as the entire recitation of what a defendant claiming insanity must prove. Instead, it "tells the jury when the defense of insanity must fail for want of an element of the defense." *Id.* at *10. When we evaluate whether a particular instruction correctly states the law, we do not consider it in isolation, but rather in the context of all the jury instructions. *State v. Newell*, 710 N.W.2d 6, 29 (Iowa 2006). When read together, instructions 22 and 23 fairly and accurately state the applicable law for the defense of insanity. *See Becker*, 2012 WL 2945740, at *11. Because these instructions were accurate statements of the law, trial counsel had no duty to object, and accordingly was not ineffective. *See State v. Kehoe*, 804 N.W.2d 302, 313 (Iowa Ct. App. 2011).[8]

AFFIRMED.

[8] Because trial counsel did not breach an essential duty, we need not address the prejudice element of the ineffective-assistance test. *State v. Cook*, 565 N.W.2d 611, 615 (Iowa 1997).