IN THE COURT OF APPEALS OF IOWA

No. 9-842 / 08-2065
Filed December 30, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CHARLES HENRY ARMSTRONG, JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Pottawattamie County, Charles L. Smith III, Judge.

Defendant appeals his conviction for murder in the second degree. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Mary E. Tabor, Assistant Attorney General, Matthew D. Wilber, County Attorney, and Jon Jacobmeier, Assistant County Attorney, for appellee.

Heard by Eisenhauer, P.J., and Potterfield, J., and Huitink, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

HUITINK, S.J.

I. Background Facts & Proceedings

On July 18, 2008, Jeff Harriman and Terry Vance, two homeless men in Council Bluffs, were behind the No Frills Redemption Center drinking beer, when Charles Armstrong, another homeless man, showed up. Armstrong was very angry with Harriman because Harriman had told Armstrong's girlfriend the previous day that Armstrong was cheating on her. Armstrong started fighting with Harriman, and Harriman got Armstrong down on the ground, when Armstrong picked up a broken piece of railroad tie and hit Harriman in the head. Harriman tried to back off, but Armstrong hit him in the back with the railroad tie. The two men then both sat down. Harriman was bleeding from the nose.

After "a little bit," Armstrong "got fired up again" and wanted to fight. Harriman lunged over and took Armstrong to the ground and started trying to gouge his eyes out with his thumbs. Armstrong said, "I give up." Harriman stopped the fight and laid down for a nap.

About an hour later Mark Foster and Hubert Garrett came by and noticed Armstrong had been beat up. They asked Armstrong if he wanted them to take care of it, and he agreed. Foster then walked over and kicked Harriman in the head about a dozen times. Garrett started beating Harriman in the ribs and stomach. After Foster and Garrett quit beating Harriman, Armstrong took over and "just kept beating on him and beating him and beating him in the head." Harriman was not fighting back and was bleeding "like a water faucet." Armstrong pulled out a knife and sliced the bridge of Harriman's nose.

After this, Vance, who had been present and had witnessed the assaults against Harriman, left to go get help at a soup kitchen for homeless people. In the meantime, Christopher Milledge had gone behind the No Frills at about 2:30 p.m. that day and found Harriman all alone. Harriman was still breathing, but was not responsive and was covered in blood. Milledge called 911 and waited until an ambulance arrived. Harriman was taken to the hospital. He later died as a result of blunt force injuries to his head and chest.

Roy Brown saw Armstrong while he was picking up cans on July 18, 2008, and Armstrong told him "I just beat the livin' 'F' out of Jeff Harriman." Armstrong was found by police officers later that day passed out on the railroad tracks. Armstrong had a blood alcohol content of .244. He had blood on his jeans and on a knife in his pocket that matched Harriman's DNA. Armstrong called his girlfriend and left a message, "I'm gonna' be in prison for a while because I killed a man a couple nights ago."

Armstrong was charged with murder in the first degree on theories that he acted with premeditation and with specific intent to kill another person, or he killed Harriman while participating in a forcible felony. He raised defenses of self-defense, diminished responsibility, and intoxication. Armstrong presented the testimony of Dr. Robert Bender on the subject of dementia caused by alcohol abuse. Dr. Bender testified that years of alcohol abuse had caused Armstrong to develop Korsakoff's dementia, which results in poor short term memory, and poor insight and knowledge. He testified Armstrong's "brain was not capable of assimilating information, reflecting on it and carrying out a premeditated activity."

The jury found Armstrong guilty of second-degree murder, in violation of Iowa Code section 707.3 (2007). The district court overruled Armstrong's post-trial motions. Armstrong was sentenced to a term of imprisonment not to exceed fifty years. He now appeals, claiming he received ineffective assistance of counsel at his criminal trial.

II. Standard of Review

We review claims of ineffective assistance of counsel de novo. *State v. Bergmann*, 600 N.W.2d 311, 313 (Iowa 1999). To establish a claim of ineffective assistance of counsel, a defendant must show (1) the attorney failed to perform an essential duty, and (2) prejudice resulted to the extent it denied defendant a fair trial. *State v. Shanahan*, 712 N.W.2d 121, 136 (Iowa 2006). Absent evidence to the contrary, we assume that the attorney's conduct falls within the wide range of reasonable professional assistance. *State v. Hepperle*, 530 N.W.2d 735, 739 (Iowa 1995).

III. Ineffective Assistance

Armstrong contends he received ineffective assistance because his defense counsel failed to argue that diminished responsibility and intoxication are defenses to second-degree murder when that charge is based upon assault as a specific intent crime. He claims defense counsel breached an essential duty by not objecting to the jury instructions on second-degree murder, diminished responsibility, and intoxication. He also claims he was prejudiced by counsel's performance because he was relying on the defenses of diminished responsibility and intoxication.

The jury was instructed "Murder in the Second Degree does not require a specific intent to kill another person." Another instructed provided, "Evidence of 'diminished responsibility' is permitted only as it bears on his capacity to form specific intent." The jury was also instructed, "Intoxication is a defense only when it causes a mental disability which makes the person incapable of forming the specific intent," and "No amount of intoxicants or drugs taken voluntarily can reduce second-degree murder to manslaughter."

These are all correct statements of the law. "Second-degree murder, on the other hand, does not require deliberation or premeditation; it requires only proof of malice aforethought." *State v. Reeves*, 636 N.W.2d 22, 25 (Iowa 2001). The Iowa Supreme Court has stated:

> The defenses of intoxication and diminished capacity are not available to a defendant charged with second-degree murder. This is because voluntary intoxication and diminished capacity are only defenses to the specific intent element of a crime. Second-degree murder has no specific intent element.

State v. Artzer, 609 N.W.2d 526, 531 (Iowa 2000) (citations omitted). Also, "the trial court was clearly correct in informing the jury that 'no amount of voluntary use of intoxicants can reduce murder to manslaughter.'" *State v. Caldwell*, 385 N.W.2d 553, 557 (Iowa 1986) (citation omitted).

Armstrong argues that despite specific judicial pronouncements that second-degree murder is a general intent crime, *see e.g., State v. Klindt*, 542 N.W.2d 553, 555 (Iowa 1996) ("The difference between first-degree murder and second-degree murder is that the former requires specific intent to kill, whereas the latter requires only a general criminal intent."), defense counsel should have

argued that second-degree murder is a specific intent crime because the underlying assault is a specific intent crime. He states that if second-degree murder was found to be a specific intent crime, then the defenses of diminished responsibility and intoxication would have been available to negate the intent element of the crime.

Armstrong's arguments are based on recent cases discussing whether assault is a general intent or specific intent crime. He states that the Iowa Supreme Court has described assault as a specific intent crime. *See State v. Bedard*, 668 N.W.2d 598, 601 (Iowa 2003). The court has stated that instead of considering whether assault is a general intent or specific intent crime, the parties should look to the elements of the crime. *State v. Keeton*, 710 N.W.2d 531, 534 (Iowa 2006); *State v. Taylor*, 689 N.W.2d 116, 132 (Iowa 2004). This approach was again followed in *Wyatt v. Iowa Department of Human Services*, 744 N.W.2d 89, 94 (Iowa 2008), where the court stated, "We, therefore, hold that the elements of assault as described in *Bedard* and *Keeton* are applicable to this case."[1] Armstrong argues that these Iowa Supreme Court decisions change the prior analysis that second-degree murder has no specific intent element.

Armstrong's criminal trial was held on November 4, 5, 6, and 7, 2008. Shortly before this, on October 17, 2008, the Iowa Supreme Court had reiterated its previous position that for second-degree murder, the State was not required to prove the defendant acted with a specific intent. *Anfinson v. State*, 758 N.W.2d

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[1] In discussing *Keeton*, 710 N.W.2d at 534, the *Wyatt* decision stated, "In order to prove assault, we held that the State must demonstrate not only that the defendant intended to make physical contact, but that the defendant intended that physical contact to be insulting or offensive." *Wyatt*, 744 N.W.2d at 94.

496, 503 (Iowa 2008). The court quoted this statement from *Artzer*, 609 N.W.2d at 531, "'The defense[ ] of . . . diminished capacity [is] not available to a defendant charged with second-degree murder. This is because . . . diminished capacity [is] only [a] defense[ ] to the specific intent element of a crime.'" *Anfinson*, 758 N.W.2d at 503-04.

Armstrong is essentially arguing he received ineffective assistance because defense counsel did not challenge recent precedent. Counsel must exercise reasonable diligence in determining whether an issue is worth raising. *State v. Dudley*, 766 N.W.2d 606, 620 (Iowa 2009). "[T]he test 'is whether a normally competent attorney would have concluded that the question . . . was not worth raising.'" *Millam v. State*, 745 N.W.2d 719, 722 (Iowa 2008) (citation omitted).

We conclude Armstrong has not shown he received ineffective assistance of counsel due to counsel's failure to argue that second-degree murder was a specific intent crime, allowing diminished capacity and intoxication to negate that specific intent. Only eighteen days before the start of Armstrong's criminal trial the Iowa Supreme Court had ruled that the defense of diminished capacity was not available in a charge of second-degree murder. *See Anfinson*, 758 N.W.2d at 503-04.

We affirm defendant's conviction for second-degree murder.

AFFIRMED.