

IN THE COURT OF APPEALS OF IOWA

No. 0-176 / 09-1067
Filed April 8, 2010

JIMMY GORDON,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Arthur E. Gamble,
Judge.

The applicant appeals from the district court's order dismissing his
application for postconviction relief. **AFFIRMED.**

Joey T. Hoover of Kragnes & Associates, P.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney
General, John P. Sarcone, County Attorney, and Mark Sandon, Assistant County
Attorney, for appellee.

Considered by Vogel, P.J., Eisenhauer, J., and Miller, S.J.*

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

VOGEL, P.J.

Jimmy Gordon appeals the district court's denial of his application for postconviction relief. He argues his trial counsel was ineffective for failing to call an expert witness to form a defense of diminished responsibility¹ and for failing to strike a juror from the panel who had some prior contact with a victim.

We review ineffective-assistance-of-counsel claims de novo. *Anfinson v. State*, 758 N.W.2d 496, 499 (Iowa 2008). In order to prevail on an ineffective-assistance-of-counsel claim, a defendant must show that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). We may resolve the claim on either prong. *Id.* at 697, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699.

In July 2001, Gordon was convicted of five counts of kidnapping in the second degree and one count of burglary in the first degree. The charges stemmed from Gordon's breaking into the home of Dorothy Clark, where Gordon's wife, Shirley, was temporarily residing. Gordon was upset with Shirley for having left him, and drove approximately two and one-half hours from

¹ The parties use the term "diminished capacity" and not "diminished responsibility." Our supreme court has discussed the interchangeable use of these terms.

We recently noted that at times the court has "alternatively described the common law concept of decreasing a legally sane individual's criminal liability on the basis of a mental defect as a defense of 'diminished capacity' and 'diminished responsibility.'" Because our rules of procedure refer to the defense as one of "diminished responsibility," we adopted the term "diminished responsibility" in *Anfinson* for consistency and clarification purposes. As such, we will use the term "diminished responsibility" in this opinion.

State v. Jordan, ___ N.W.2d ___, ___ n.2 (Iowa 2010) (quoting *Anfinson*, 758 N.W.2d at 502 n.6). We will use the term "diminished responsibility" in this opinion.

northern Iowa to Des Moines to talk with her. When he was refused entry into the Clark home, Gordon, armed with a shotgun, kicked in the locked front door. Clark's brother called 911 summoning a host of law enforcement and a SWAT team who surrounded the house. Clark managed to slip out the back door. Unbeknownst to Gordon, Shirley was hiding under the basement stairs. Waiting for Shirley to return to the home, Gordon held everyone in the house hostage for the next eight hours. The five children in the home were confined to the basement. The testimony reflects that the children were extremely frightened during the ordeal, as Gordon controlled their movements within the house, including limiting their access to the bathroom.

Prior to trial, Gordon's trial counsel, Efrain Rivera, suspected Gordon had some psychological or psychiatric problems. Rivera arranged to have Gordon evaluated by James L. Gallagher, M.D. to determine if he was competent to stand trial and to consider whether a defense of diminished responsibility could be successfully asserted. In his January 2001 report, Gallagher detailed Gordon's history of mental illness and current impressions, which included the strong theme of still not having an understanding why his wife left him and maintaining hope for reconciliation. Recapping the July 15th incident, Gallagher concluded:

[Gordon's] intent was to gain the attention of his wife and he wasn't particularly interested in harming anyone. However, guns have been a way of life for him and apparently it seemed natural for him to use a weapon as a means of "getting his way" if the Clarks would not listen to him. . . . He appears to have been driven primarily by an impulse to seek out his wife, almost regardless of the consequences. Nonetheless, he knew that using a shotgun in a threatening manner was a wrong thing to do. It does not seem as if his true intent was to harm anyone.

From studying the report and conferring with Dr. Gallagher, Rivera determined Gordon was competent to stand trial and Rivera could not present a diminished responsibility defense.

Gordon argued before the postconviction court, and again in this appeal, that Rivera used the wrong test to determine diminished responsibility. “[D]iminished responsibility may be offered as a defense where an accused, because of a limited responsibility to think, is unable to form a necessary criminal intent.” *State v. Collins*, 305 N.W.2d 434, 436 (Iowa 1981). Because all the charges against Gordon, six counts of second-degree kidnapping and one count of first-degree burglary, were specific intent crimes, the defense of diminished responsibility was available to him, should there be evidence to support it.² See *Anfinson*, 758 N.W.2d at 502 (“The diminished responsibility defense allows a defendant to negate the specific intent element of a crime by demonstrating due to some mental defect [he] did not have the capacity to form that specific intent.”). The jury was charged with making the findings to support each and every element, including whether Gordon had the specific intent to commit the offenses.

² In order to find Gordon guilty of second-degree kidnapping, the State was required to prove that on July 15, 2000, Gordon: (1) confined the six individuals, (2) did so with the specific intent to use the six individuals as a shield or hostage, (3) did not have the consent of the six individuals to do so, and (4) was armed with a dangerous weapon at the time he confined the six individuals. See Iowa Code §§ 710.1(2), 710.3 (2000).

In order to find Gordon guilty of first-degree burglary, the State was required to prove that on July 15, 2000, (1) Gordon entered the residence, (2) the residence was an occupied structure, (3) persons were present in the occupied structure, (4) Gordon did not have permission or authority to enter the residence, (5) Gordon did so with the specific intent to commit an assault, and (6) during the incident the defendant possessed a dangerous weapon. See Iowa Code §§ 713.1, 713.3(1)(b).

The evidence introduced at the postconviction hearing included Rivera's deposition testimony. Rivera testified:

Jimmy's main problem was he had certain obsessions with his gun and his wife, but he knew fully well what happened on that date Dr. Gallagher clearly indicated that Jimmy knew what he was doing and that what he was doing was wrong, and Jimmy himself admitted that.

Q. And so you didn't believe that he met the qualifications for diminished [responsibility] defense? A. Yes, I did not believe that.

In his deposition testimony, Dr. Gallagher expanded on his 2001 report, admitting it could have been better worded. He testified,

I thought [Gordon's] capacity to form intent, *I didn't state it clearly here*, but I thought his capacity to form intent was probably mitigated at least by his psychiatric disturbance.

Q. When you say that his intent—where he could develop intent, it was mitigated, what do you mean by that? A. It means I think his thinking was fairly skewed by this desperate search for his wife. He seemed to be obsessed with her and she was divorcing him, I guess. And he couldn't seem to help himself from trying to find her, trying to reconnect with her.

(Emphasis added.) The postconviction court rejected Gordon's argument that his trial counsel confused the defense of diminished responsibility with the defense of insanity. See Iowa Code § 701.4 (providing that a person is insane and "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"). It found:

Rivera asked Dr. Gallagher for an opinion as to whether or not Gordon's mental health problems supported a defense of diminished responsibility. Rivera relied upon what Dr. Gallagher told him in his January 2, 2001 report. After discussing the matter with Dr. Gallagher, Rivera exercised professional judgment in

deciding not to present the defense of diminished [responsibility]. Instead, Rivera elected to cross-examine the State's witnesses in an effort to negate all of the elements of the charges including specific intent. Rivera was successful in obtaining an acquittal on one count. Dr. Gallagher's deposition testimony in these post-conviction relief proceedings was somewhat different and more clearly stated than the opinion he stated in his report. In his deposition at page 10, Dr. Gallagher testified "so I thought his capacity to form intent, I didn't state it clearly here [in the January 2, 2001 report], but I thought his capacity to form intent was probably mitigated at least by his psychiatric disturbance." There is no evidence in this record that Dr. Gallagher expressed his opinion in those terms to Frank Rivera at the time of trial. In fact, Dr. Gallagher's report does not state an opinion that Gordon's capacity to form intent was probably mitigated at least by his psychiatric disturbance. Rivera was justified in relying on the opinions that Dr. Gallagher gave him at the time rather than the more clearly stated opinion expressed by the doctor several years later in post-conviction proceedings.

Our task is not to assess whether Gordon was unable to form the specific intent to commit the crimes he was charged with, but whether the postconviction court was correct in concluding Gordon's trial counsel did not breach an essential duty by not pursuing a defense of diminished responsibility. We agree with the postconviction court that Dr. Gallagher's reformulated opinion of Gordon's intent, expressed more than seven years after his initial evaluation of Gordon, cannot result in a conclusion that Rivera did not provide Gordon effective assistance of counsel.

Gordon next asserts his trial counsel was ineffective in failing to strike a juror who had a prior relationship with the victim, his wife. In his deposition testimony, Rivera testified:

Q. Were you ever informed by Mr. Gordon that one of the females on the jury had taken a nursing test with his wife? A. There might be something to that. I think that that was expressed to me, but if I recall correctly, we did an individual voir dire of that juror to make sure that she could be fair and impartial.

Rivera further testified that if the juror would have had any social interaction with Gordon's wife, he would have moved to strike her, as securing a fair and impartial jury was his goal. He recalled there were others from the jury pool, who he determined would be more dangerous to the defense, and used his strikes accordingly. The postconviction court found, and we agree, Gordon failed to prove Rivera rendered ineffective assistance of counsel in not striking this juror.

We affirm the postconviction court.

AFFIRMED.