

IN THE COURT OF APPEALS OF IOWA

No. 0-564 / 09-1934
Filed November 24, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KYLE GENE DEEMER,
Defendant-Appellant.

Appeal from the Iowa District Court for Marshall County, Carl D. Baker,
Judge.

Defendant appeals his convictions on two counts of first-degree murder.

AFFIRMED.

Mark C. Smith, State Appellate Defender, and Dennis D. Hendrickson,
Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson and Becky S. Goettsch,
Assistant Attorneys General, and Jennifer Miller, County Attorney, for appellee.

Heard by Vogel, P.J., Vaitheswaran, J., and Huitink, S.J.* Tabor, J., takes
no part.

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

HUITINK, S.J.**I. Background Facts & Proceedings**

Kyle Deemer (Deemer) was married to Jessica Deemer, and they had a son together. In June 2008, Jessica and the child moved out of their home due to marital problems and moved in with Deemer's first cousin, Bernie Deemer, and his wife, Salowa Deemer.

While Jessica was living at their house, Bernie and Salowa heard Deemer threaten her. Deemer said something bad would happen to Jessica, such as that her brakes would fail. He stated he could not handle it if Jessica starting seeing somebody else and he said that if Jessica dated somebody else he would take that person out with a baseball bat. Salowa also heard Deemer say he would not allow the child to have any other father, and the child would be better off in foster care than with Jessica.

Deemer made similar remarks to his coworkers. He stated he was going to kill Jessica or wanted to kill her. Deemer told Trevor Kent he wanted to get back together with Jessica and "if he ever caught her with somebody else, he would kill her." Jestin Larrington, who had been the best man when Deemer and Jessica got married, was at Deemer's house one day when Deemer said, "there's the gun I'm gonna shoot Jess with."

On Friday, October 17, 2008, Jessica made arrangements to have Salowa watch her child for the weekend, stating she was going to Omaha, Nebraska, with a girlfriend. Actually, Jessica had been seeing a coworker, Bryce Mercer, and was going with him to Gladbrook, Iowa, to meet his parents. Deemer texted

Jessica several times during the day of October 17, and found out she was not going to be around that weekend, but she would not tell him what she was doing.

Deemer talked to Kent at about 5:00 p.m. on October 17, stating he was following Jessica and there was a guy in the car with her. Deemer stated he had first seen them in the parking lot for Principal Financial, where Jessica and Mercer both worked. Jessica called Salowa at 5:26 p.m. and stated Deemer was swerving at them. Salowa testified Jessica stated, "He hit us; we're in the ditch," and she screamed at the top of her lungs. Salowa lost Jessica's call at that time.

Kevin Zimple was driving southbound on Highway 14 with his fiancé and two small children when he saw a car go into the ditch and a pickup go around it to block the vehicle. Zimple saw a person run through the ditch and then fall. Another passing motorist who had stopped to see if there had been an accident saw a male with a shotgun shoot the first male after he fell down. Zimple asked a woman at the scene, who was jumping up and down, screaming, what had happened. The woman stated, "My ex-husband just shot him." A second or two later he heard a male voice say, "And you're next, bitch." The woman ran in front of the Zimple's van, and then down the other side, and the man followed holding a shotgun. As soon as they were no longer in front of the van, Zimple moved ahead a short distance and heard a "pop." He looked back and saw "the female crouched down on the southbound shoulder not moving." The gunman got into his pickup and drove away.

At about 5:30 p.m., Deemer called Kent and told him he ran Jessica and a guy off the road. Kent testified Deemer stated he told the man "he was a dead

mother f***er,” and then shot him in the head. Deemer told Kent, “after that he walked over to Jessica and shot her in the head.” Deemer stated he was running away in his pickup, but was getting low on gas.

Deemer was picked up by police officers that same evening. Jessica and Mercer both died of gunshot wounds to the head. The shotgun was found in the ditch near where the shootings had taken place. Deemer was charged with two counts of murder in the first degree, in violation of Iowa Code sections 701.1 and 707.2 (2007).

The jury received the following instruction on reasonable doubt:

The burden is on the State to prove Kyle Gene Deemer guilty beyond a reasonable doubt.

A reasonable doubt is one that fairly and naturally arises from the evidence of the case, or from the lack or failure of evidence produced by the State.

A reasonable doubt is a doubt based upon reason and common sense, and not the mere possibility of innocence. A reasonable doubt is the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

If, after full and fair consideration of all the evidence in the case, or from the lack or failure of evidence produced by the State, you are not fully convinced of the defendant’s guilt, then you have a reasonable doubt and you should find the defendant not guilty.

During closing arguments the State presented a PowerPoint presentation that included a slide that stated, “If, after a full and fair consideration of all the evidence, you are firmly convinced of the Defendant’s guilt, then you have no reasonable doubt and you should find the Defendant guilty.” The words “firmly convinced” were underlined. Defense counsel objected because this statement

was not in the jury instructions. The court told the jury that it should follow the jury instructions. After closing arguments defendant sought a mistrial, claiming the State has misstated the law. The district court denied the motion for mistrial, finding the jury had clearly been instructed to follow the instructions they had been given.

The jury entered verdicts finding Deemer guilty of both counts of first-degree murder. Defendant filed a motion for new trial on the ground that during closing arguments the State had given an inaccurate statement of the law related to reasonable doubt. The court denied the motion, stating the State's argument "was appropriate and did not distort or inaccurately state the law in Iowa with respect to reasonable doubt, and I think the appropriate instruction on reasonable doubt was submitted to the jury." Deemer was given a life sentence on each conviction, to be served consecutively. He appeals, claiming he received ineffective assistance of counsel.

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. Merits

Deemer contends he received ineffective assistance because his defense counsel did not object to the district court giving the jury a non-uniform instruction on reasonable doubt. The uniform instruction on reasonable doubt includes the provision, “If, after a full and fair consideration of all the evidence, you are firmly convinced of the Defendant’s guilt, then you have no reasonable doubt and you should find the Defendant guilty.”¹ Deemer argues the prosecutor’s statement concerning this provision was confusing because the language was not in the instructions given to the jury. He asserts it was also confusing for the court to tell the jury to follow the instructions, because this language was not in those instructions. Deemer asserts it would have been better to use the uniform instruction and defense counsel should have objected on this ground.

“[A]n understanding of reasonable doubt is crucial to the deliberations of the jury in nearly every criminal case.” *State v. McGranahan*, 206 N.W.2d 88, 92 (Iowa 1973). Also, in general, courts should adhere to the uniform instructions. *State v. Mitchell*, 568 N.W.2d 493, 501 (Iowa 1997). We note that language very similar to that in question here was approved by the Iowa Supreme Court in *State v. McFarland*, 287 N.W.2d 162, 163 (Iowa 1980), which held, “This instruction is adequate.”²

¹ This is the same statement that was in the PowerPoint presentation given by the prosecutor that defense counsel objected to on the ground that it was not part of the jury instructions. On appeal, Deemer is claiming defense counsel should have objected because this provision was not included in the jury instructions.

² The instruction approved in *McFarland*, 287 N.W.2d at 163, provided:

A reasonable doubt is one that fairly and naturally arises from the evidence or lack of State’s evidence in the case.

The Iowa Supreme Court went on to state, however, “No particular model or form is required in advising the jury concerning the meaning of reasonable doubt as long as a suitable standard is given.” *McFarland*, 287 N.W.2d at 163 (quoting *State v. Finnegan*, 237 N.W.2d 459, 460 (Iowa 1976)); see also *McGranahan*, 206 N.W.2d at 92 (“We do not wish to be understood as holding or intimating trial courts are bound by any model or form in formulating instructions.”). Generally, a court may phrase instructions in its own words as long as the instruction given fully and fairly advises the jury of the issues and the applicable law. *State v. Scalise*, 660 N.W.2d 58, 64 (Iowa 2003).

While it may have been better for the district court to give the jury the uniform instruction on reasonable doubt, the instruction given was adequate. The jury instruction included the statement:

If, after full and fair consideration of all the evidence in the case, or from the lack or failure of evidence produced by the State, you are not fully convinced of the defendant’s guilt, then you have a reasonable doubt and you should find the defendant not guilty.

The language omitted contains the similar but reverse statement, “If, after a full and fair consideration of all the evidence, you are firmly convinced of the Defendant’s guilt, then you have no reasonable doubt and you should find the Defendant guilty.” We conclude the instruction was adequate because it set out

If, after a full and fair consideration of all the evidence in the case, you are firmly and abidingly convinced of the defendant’s guilt, then you may be said to have no reasonable doubt, and in such case, you should convict the defendant.

But if, after a full and fair consideration of all the evidence or lack of the State’s evidence in the case, you are not abidingly and firmly convinced of the defendant’s guilt, then you may be said to have a reasonable doubt, and in such case, you should acquit the defendant.

a standard for measuring the reasonableness of juror's doubts. See *McFarland*, 287 N.W.2d at 163. We conclude Deemer has not shown defense counsel breached an essential duty by failing to object on this ground.

Furthermore, even if we found defense counsel should have objected to the instruction, Deemer has failed to show he was prejudiced by his counsel's performance. A defendant must show more than a breach of duty by defense counsel. *State v. Carey*, 709 N.W.2d 547, 559 (Iowa 2006). A defendant must establish that counsel's errors had an adverse impact on the defense. *State v. Tate*, 710 N.W.2d 237, 240 (Iowa 2006). On the issue of prejudice, a defendant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Carey*, 709 N.W.2d at 559 (quoting *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984)).

"The most important factor under the test for prejudice is the strength of the State's case." *Id.* Put another way, it is easier to doubt the fundamental fairness of a trial when the State's evidence is not overwhelming and defense counsel has made significant errors. *Millam v. State*, 745 N.W.2d 719, 723-24 (Iowa 2008). There was overwhelming evidence of Deemer's guilt in this case. Several witnesses testified to Deemer's threats against Jessica and anyone she was dating. On October 17, 2008, when Deemer could not get information about what Jessica was doing that weekend, he went to her work and followed her and Mercer as they left. He pushed their vehicle off the road, and then shot them in

front of passing motorists. Immediately after the shooting, Deemer called his friend Kent and admitted he had shot Jessica and Mercer in the head.

Deemer has not presented anything that would raise a reasonable probability the result of the trial would have been different if the uniform instruction on reasonable doubt had been given. We conclude Deemer has not shown he received ineffective assistance of counsel at his criminal trial.

We affirm Deemer's convictions for first-degree murder.

AFFIRMED.