IN THE COURT OF APPEALS OF IOWA

No. 7-944 / 07-0068
Filed January 16, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

STEVEN HOWARD DEITZ,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, David H. Sivright, Jr., Judge.

Steven Deitz appeals from the district court's judgment and sentence for the offenses of first-degree murder, first-degree robbery, and willful injury. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Stephan Japuntich, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, and William E. Davis, County Attorney, for appellee.

Considered by Sackett, C.J., and Vaitheswaran and Baker, JJ.

VAITHESWARAN, J.

Steven Deitz appeals from the district court's judgment and sentence for the offenses of first-degree murder, first-degree robbery, and willful injury. *See* Iowa Code §§ 707.1, .2, 711.1, .2 and 708.4(1) (2005). He argues the court erred in failing to instruct the jury on (1) prior inconsistent statements by a witness and (2) diminished responsibility.

I. Background Facts and Proceedings

Deitz was a longtime acquaintance of George Lawton. Deitz asked Lawton if he and companion William Smith could stay with him for a few days. Lawton, who was living with Chris Nixon, agreed.

Two days after Deitz and Smith moved in, Lawton returned from work to find Nixon's car gone and his bed soaked in blood. Deitz was at home. He told Lawton that a friend of Nixon came to the house injured and bleeding, lay down on the bed, and then left.

Lawton contacted the police. The State subsequently charged Deitz and Smith with first-degree murder, first-degree robbery, and willful injury. Iowa Code §§ 707.1, .2, 711.1, .2 and 708.4(1). Smith pled guilty to lesser crimes and promised to testify against Deitz.

According to Smith, Deitz decided he wanted to leave Iowa. Nixon had a suitable vehicle. Smith and Deitz plotted to drug Nixon so they could leave in his vehicle. However, Nixon would not drink the drug-infused milkshake they had prepared for him. When Nixon went to lie down, Deitz determined that the "only option" was to hit Nixon with something to "knock him out." Deitz found a combination sledgehammer/axe in the house. Smith watched as Deitz went into

the bedroom and bludgeoned Nixon to death. He and Deitz put Nixon's body into a sleeping bag and placed it in Nixon's car. They disposed of the body in a ditch in rural Illinois. Deitz attempted to dislodge Nixon's teeth with a hammer. He also poured gasoline on Nixon's body and in his mouth and set the body on fire.

Deitz also testified at trial. The only significant difference between his version and Smith's version of events was his stated reason for committing the crimes. Deitz said he returned home from purchasing cigarettes to discover Nixon attempting to sodomize Smith. He stated he hit, killed, and disfigured Nixon to vent his "[r]age."

A jury found Deitz guilty on all three counts. The district court sentenced him, merging the willful injury conviction with the first-degree murder conviction.

II. Jury Instruction on Prior Inconsistent Statements

In a pre-trial statement to police, Smith stated Deitz "started talking about knocking Chris out with a hammer." At trial, Smith reiterated this statement but also testified that Deitz told him he "was going to kill [Nixon] to get his car." The prosecutor immediately asked Smith why he had not previously mentioned Deitz's intent to kill Nixon. Smith answered "I'm not sure."

On appeal, Deitz maintains the district court erred in not instructing the jury on the effect of prior inconsistent statements made by a non-party witness. *See* Iowa Crim. Jury Instr. Nos. 200.42, 200.43. He argues Deitz was prejudiced by this omission "as the jury was not required to take into consideration the prior inconsistent statement in question in determining [Smith's] credibility."

As a preliminary matter, the State asserts that Deitz's trial attorney was given the opportunity to request these instructions and declined to do so.

Therefore, the State argues, he did not preserve error. We agree with the State that error was not preserved. However, because Deitz alternately raises this issue as an ineffective-assistance-of-counsel claim, we will review the issue under that rubric. *State v. Callender*, 444 N.W.2d 768, 770-71 (Iowa Ct. App. 1989).

"Ineffective assistance claims are generally reserved for postconviction hearings, but may be determined on direct appeal when the record adequately presents them." *State v. Glaus*, 455 N.W.2d 274, 276 (Iowa Ct. App. 1990). We conclude the record is adequate to decide the issue. *State v. Maxwell*, ___ N.W.2d ___ (Iowa 2008).

Deitz had to prove (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). With respect to the second prong, Deitz needed to establish a reasonable probability that but for counsel's error the result of the proceeding would have been different. *Id.* at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. On our de novo review, we are convinced he did not do so.

First, as noted, the prosecutor made the jury aware of Smith's prior inconsistent statement. On direct examination, he pointedly asked Smith why he had not previously mentioned Deitz's discussion of his intent to kill Nixon.

Second, jury members received a general instruction advising them to "accept the evidence you find more believable." That instruction also included a specific admonition to consider whether the witness "made inconsistent statements." As Smith's prior statement was in the record and, indeed, was

reaffirmed in his trial testimony, the jury had what it needed to assess Smith's credibility. The proposed instructions would, in large part, have been cumulative.

Finally, there is no reasonable probability that, had defense counsel requested the uniform jury instructions on prior inconsistent statements, and had the request been granted,[1] the trial outcome would have changed. That is because Deitz essentially admitted the key elements of the State's charges.

On the first-degree murder count, the jury was instructed that the State would have to prove (1) Deitz struck Nixon, (2) Nixon died as a result, (3) Deitz acted with malice aforethought, and (4) Deitz acted "willfully, deliberately, premeditatedly and with a specific intent to kill Charles Nixon." Although Deitz did not directly state he intended to kill Nixon, he testified he retrieved the axe/sledgehammer from the bathroom where he had seen it earlier, returned to the bedroom, and began hitting Nixon. When Nixon tried to get up, Deitz stated he "picked up the maul and hit him in the face on the forehead." He also "hit him in the throat" and "a couple of more times," after which Nixon "laid still." He admitted to stuffing Nixon's body into a sleeping bag, dragging the bag to Nixon's car, "pack[ing] some things" and "wip[ing] some blood up," putting the bloodied bedding into the washing machine "with a lot of bleach," putting the axe/sledgehammer in the basement, hitting Nixon's face with a claw hammer, leaving in Nixon's car, dumping Nixon's body into a ditch, and pouring gasoline into his mouth. This testimony alone, which was virtually identical to Smith's testimony, amounts to overwhelming evidence of guilt on the first-degree murder count.

[1] The district court stated it was unlikely to grant a request, if made.

With respect to the first-degree robbery count, the jury was instructed that the State would have to prove (1) Deitz had the specific intent to commit theft, (2) to carry out his intention or to assist him in escaping from the scene Deitz committed an assault, and (3) Deitz purposely inflicted a serious injury or was armed with a dangerous weapon. Smith testified to Deitz's theft plan. Although Deitz did not mention this plan in his testimony, he admitted to taking Nixon's car. As noted, he also admitted to assaulting Nixon and inflicting serious injury. Given this overwhelming evidence, there is no reasonable probability that jury instructions on Smith's prior inconsistent statements would have changed the outcome.[2]

III. Diminished Responsibility Instruction

Deitz sought to have the jury instructed on the defense of diminished responsibility. Iowa Crim. Jury Instr. Nos. 200.12, 200.13. Instruction number 200.12, applicable only to first-degree murder, defines "diminished responsibility" as "a mental condition which does not allow the person to form a premeditated, deliberate, specific intent to kill." Instruction 200.13, applicable to other specific intent crimes, defines diminished responsibility as "[t]he lack of mental capacity to form a specific intent."

The district court denied Deitz's request for these instructions. On appeal, Deitz contends that "had the jury been instructed on his theory of diminished responsibility, the jury could have determined that he did not have the mental capacity to form the specific intent necessary to all of the charges at issue in this

[2] As the willful injury count merged with the first-degree murder count, we find it unnecessary to address the evidence supporting the finding of guilt on that count.

matter." Our review of this issue is for errors of law. *State v. Martinez*, 679 N.W.2d 620, 623 (Iowa 2004).

Deitz's defense is predicated on his assertion that rage caused him to assault and kill Nixon. As the State rightly points out, this is essentially an argument for an "extreme emotional disturbance" defense. That defense is not "recognized under Iowa law." *See State v. Khouri*, 503 N.W.2d 393, 395 (Iowa 1993). Accordingly, the district court did not err in declining to submit the proffered instructions.

AFFIRMED.