

IN THE COURT OF APPEALS OF IOWA

No. 8-231 / 07-0842
Filed June 25, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LARRY ALAN BABCOCK,
Defendant-Appellant.

Appeal from the Iowa District Court for Johnson County, Denver D.
Dillard, Judge.

Larry A. Babcock appeals his conviction, following jury trial, for murder in
the second degree. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and David Arthur Adams,
Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant
Attorney General, Janet M. Lyness, County Attorney, and Rachel Zimmerman,
Assistant County Attorney, for appellee.

Heard by Miller, P.J., and Vaitheswaran and Eisenhauer, JJ.

MILLER, P.J.

Larry A. Babcock appeals his conviction, following jury trial, for murder in the second degree. He contends his trial counsel was ineffective for failing to request a jury instruction requiring the jury to find sufficient corroboration of his confession, in accordance with Iowa Rule of Criminal Procedure 2.21(4), and for failing to object to the district court's omission of such an instruction from the final jury instructions. We affirm his conviction and preserve his ineffective assistance of counsel claim for a possible postconviction proceeding.

From the evidence presented at trial the jury could find the following facts. Tim Becker died of multiple blows to his head in his trailer home on June 30, 2001. The defendant, Babcock, was one of Becker's neighbors. Babcock and his son, Bryan Babcock, were the ones who found Becker dead in his home and called the police. Babcock and his wife moved to Arizona less than two months after the murder. They returned a few months later. Then in the summer of 2003 Babcock unexpectedly appeared at the home of his brother, Tom Babcock (Tom), and asked to go for a ride with him so they could talk. Babcock did not want to talk in the house in front of others. Babcock parked the car at the end of a dead-end road, patted Tom to make sure he was not wearing a "wire," and then told Tom he had killed Becker. Specifically, he told Tom he "beat [Becker], and I beat him bad", and that afterward he "covered his tracks really well" and "cleaned it with a fine tooth comb." Babcock also asked Tom if he should go to his interview with law enforcement in Cedar Rapids or "just take off."

The brothers had subsequent conversations in which Babcock told Tom he was going to Missouri and told him not to talk to the police about what he had done. However, in approximately October 2003, Tom was interviewed by law enforcement personnel. He told them that Babcock had admitted to him he had killed Becker. Tom agreed to tape record any telephone conversations he had with Babcock. Babcock apparently only called Tom a couple times after that, and Tom recorded those conversations. During the phone calls Babcock discussed being interviewed by law enforcement and not wanting his son to be implicated in the murder.

The State charged Babcock, by trial information, with murder in the first degree, in violation of Iowa Code sections 707.1 and 707.2 (2001), for the June 2001 murder of Tim Becker. The case proceeded to jury trial, and the jury found Babcock guilty of the lesser included offense of murder in the second degree, in violation of Iowa Code sections 707.1 and 707.3. Babcock was sentenced to a term of incarceration of no more than fifty years.

On appeal, Babcock claims his summer of 2003 statement to his brother Tom qualifies as a confession, and the State does not disagree.¹ He contends his trial counsel was ineffective for failing to request a jury instruction requiring the jury to find sufficient corroboration of this confession to warrant conviction, in accordance with Iowa Rule of Criminal Procedure 2.21(4),² and for failing to object to the district court's omission of such an instruction from the final jury

¹ For the purpose of the limited issue presented in this appeal we will therefore assume that this statement in fact constituted a confession.

² Rule of criminal procedure 2.21(4) provides "The confession of the defendant, unless made in open court, will not warrant a conviction, unless accompanied by other proof that the defendant committed the offense."

instructions. He claims counsel breached an essential duty by failing to request this instruction and this breach prejudiced him because the jury was not informed of the proper legal requirement of corroboration of a confession by a defendant.

When there is an alleged denial of constitutional rights, such as ineffective assistance of counsel, we evaluate the totality of the circumstances in a de novo review. *Osborn v. State*, 573 N.W.2d 917, 920 (Iowa 1998). In order to succeed on a claim of ineffective assistance of counsel, a defendant must prove (1) counsel failed to perform an essential duty and (2) prejudice resulted. *State v. Artzer*, 609 N.W.2d 526, 531 (Iowa 2000).

Generally, we do not resolve claims of ineffective assistance of counsel on direct appeal. *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002) (citing *State v. Kinkead*, 570 N.W.2d 97, 103 (Iowa 1997)). We prefer to leave ineffective-assistance-of-counsel claims for postconviction relief proceedings. *State v. Lopez*, 633 N.W.2d 774, 784 (Iowa 2001); *State v. Ceron*, 573 N.W.2d 587, 590 (Iowa 1997). “[W]e preserve such claims for postconviction relief proceedings, where an adequate record of the claim can be developed and the attorney charged with providing ineffective assistance may have an opportunity to respond to defendant’s claims.” *Biddle*, 652 N.W.2d at 203.

We conclude the record before us is inadequate to address Babcock’s claim of ineffective assistance on direct appeal. Under these circumstances, we pass on the issue of ineffective assistance in this direct appeal and preserve it for a possible postconviction proceeding. See *State v. Bass*, 385 N.W.2d

243, 245 (Iowa 1986). Accordingly, we affirm the conviction and preserve Babcock's specified claim of ineffective assistance of counsel for a possible postconviction proceeding.

AFFIRMED.