

**IN THE SUPREME COURT FOR THE STATE OF IOWA
NO. 19-0214**

**STATE OF IOWA,
Plaintiff-Appellee**

vs.

**GREGORY MICHAEL DAVIS,
Defendant-Appellant.**

**APPEAL FROM THE IOWA DISTRICT COURT
FOR LINN COUNTY,
HONORABLE SEAN McPARTLAND**

DEFENDANT/APPELLANT'S FINAL REPLY BRIEF

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STATEMENT OF REPLY ISSUES

I. The Erroneous First-Degree Murder Instruction can be Addressed on this Appeal.

A. Error was preserved by the New Trial Motion and the appeal of the New Trial Motion.

State v. Jackson, 223 N.W.2d 229 (Iowa 1974)

State v. Ondayog, 722 N.W.2d 778 (Iowa 2006)

Iowa R. Crim. P. 2.24

B. Amended Iowa Code § 814.7 does not apply to cases pending on direct appeal on the effective date of the amendment.

State v. Macke, ___ N.W.2d ___, No. 18-0839, 2019 WL 4382985 (Iowa Sept. 13, 2019)

Iowa Code § 814.7

II. The Error in Instruction No. 22 was not a “Minor Ambiguity.”

State v. Ondayog, 722 N.W.2d 778 (Iowa 2006)

State v. Stonerook, No. 05-1917, 2006 WL 3799546 (Iowa Ct. App. Dec. 28, 2006)

III. The Failure to Object to Instruction No. 22 was Prejudicial.

State v. Throndike, 860 N.W.2d 316 (Iowa 2015)

IV. Davis has Established both Breach of Duty and Prejudice for his IAC Claim regarding Dr. Andersen’s Testimony.

State v. Moses, 320 N.W.2d 581 (Iowa 1982)

State v. Ninmo, 247 N.W.2d 228 (Iowa 1976)

REPLY ARGUMENTS

I. The Erroneous First-Degree Murder Instruction can be Addressed on this Appeal.

The State argues that error was not preserved as to the erroneous first-degree murder instruction because Davis failed to object to the instruction at trial, and because recent amendments to Iowa Code § 814.7 strip this court of jurisdiction to consider the ineffective assistance of counsel (IAC) claim on direct appeal. Both arguments are flawed.

A. Error was preserved by the New Trial Motion, and the appeal of the New Trial Motion.

Davis preserved this issue by inviting the Court to fix the error in his motion for new trial. Mot. for New Tr. Jan. 11, 2019, at 2. Davis now appeals the denial of his motion for new trial. Not. of Appeal, Feb. 5, 2019, at 1.

Iowa Rule of Criminal Procedure 2.24(2)(b)(5) provides that “[t]he court may grant a new trial . . . [w]hen the court has misdirected the jury in a material matter of law, or has erred in the decision of any question of law during the course of the trial.” A defendant is *not* required to object to jury instructions prior to a new trial motion under R. 2.24(2)(b)(5), although such an objection is certainly preferred, provided that the defendant did not expressly waive or disclaim any objections. *See State v. Jackson*, 223 N.W.2d 229, 231-32 (Iowa 1974) (“The general rule is that the failure of a defendant in a criminal case to make objections to instructions . . . does

not preclude defendant from making objections thereto in a motion for new trial . . .”).

Davis’s proposed instructions in this case (App. 12) included the requested marshaling instruction, “If you find the State has proved all the elements [for Murder in the First Degree], then you must consider the issue of the Defendant’s sanity.” The State’s proposed instructions did not include the requested marshaling instruction. Joint Prop. Inst. No. 22A. This was error given that the remainder of the relevant joint proposed instructions included the requested marshaling instruction. *See, e.g.*, Joint Prop. Inst. Nos. 30, 32, 34, 36, 38, 40, 42-44. Davis never expressly waived or disclaimed any objections to Jury Instruction 22. *See* Trial Tr. Vol. 5 at 13:1-17:2, 22:23-22:25. Thus, the issue was properly raised and considered in the New Trial Motion and is now properly before this Court.

B. Amended Iowa Code § 814.7 does not apply retroactively to cases pending on direct appeal on the effective date of the amendment.

The State is incorrect in stating that the Court cannot review the claim as an IAC claim. On May 16, 2019, Governor Kim Reynolds signed Senate File 589 (the Omnibus Crime Bill) into law. The Omnibus Crime Bill amended Iowa Code § 814.7 to require IAC claims to be brought in postconviction proceedings. *See* Iowa Code § 814.7, *as amended*. The amendment to § 814.7 had an effective date of July 1, 2019, which passed while Davis’ claim was pending on direct appeal. However, on September 13, 2019, the Iowa Supreme Court issued a decision in *State v. Macke*,

__ N.W.2d __, No. 18-0839, 2019 WL 4382985 (Iowa Sept. 13, 2019), holding that the amendments to § 814.7 do not apply to cases that were pending on direct appeal on July 1, 2019. *Id.* at *4-8. Instead, the law in effect at the time of the conviction controls. *Id.* at *4 (“Macke had a right of direct appeal of her ineffective-assistance claim at the time of her guilty-plea based sentence from which she appeals, and her pending appeal is governed by the preamendment version of Iowa Code section[] . . . 814.7.”). Thus, like the defendant in *Macke*, Davis has a right of direct appeal of his IAC claim based on the law in effect at the time of his conviction and sentencing.

II. The Error in Instruction No. 22 was not a “Minor Ambiguity.”

The State argues that the error in Instruction No. 22 was not prejudicial and that Davis’ trial counsel did not breach an essential duty because the omission of the instruction for the jury to consider Davis’ insanity defense was a “minor ambiguit[y] that [was] clarified and resolved by other jury instructions.” Appellee’s Br. at 28. This is not the case. The “failure to recognize an erroneous jury instruction and preserve error breaches an essential duty.” *Ondayog*, 722 N.W.2d at 787.

Ondayog clearly demonstrates the cascading failure that can result from a single erroneous jury instruction, as happened in this case. In *Ondayog*:

The jury instructions set forth a cascade of criminal offenses, beginning with the crime of kidnapping in the first degree. The last sentence of the kidnapping in the first degree instruction states:

If the State has failed to prove any one of the elements [of this charge], the defendant is not guilty of Kidnapping in

the First Degree and you will then consider the charge of Kidnapping in the Third Degree explained in [a subsequent instruction].

The instruction pertaining to kidnapping in the third degree contains a similar statement referring the jury to the charge of sexual abuse in the third degree. The instruction pertaining to sexual abuse in the third degree contains a similar statement referring the jury to the charge of assault with intent to commit sexual abuse causing bodily injury. This instruction directs the jury to the next lower offense, assault with the intent to commit sexual abuse not causing bodily injury. Presumably, the jury crossed off each instruction one at a time, in order, until it settled upon a crime for which all members agreed the elements were satisfied.

722 N.W.2d at 784. In *Ondayog*, the court presumed the jury read the instructions in order. The inclusion of an erroneous instruction presumably effected the outcome of the case, because the jury worked through the instructions in order until it reached a conviction, and then it stopped. The Court held that this was “clear proof” of prejudice to the defendant – has his attorney objected to the error in the jury instructions, the result of the proceeding would have been different. *Id.* at 785.

Similarly, in *Davis*’ case, the marshaling instruction in Jury Instruction No. 22 skipped a significant step. Regardless of what may have come before Instruction No. 22, at that point, the jury was presumably reading and following the instructions in the order in which they were written. Without the direction to stop and consider the insanity defense, Instruction No. 22 implied that the jury was done working and the insanity defense was not applicable to Murder in the First Degree, and that it could turn in its verdict form and go home. This ambiguity was anything but minor;

it was a structural defect in the instructions that resulted in the jury quitting before it was done. The jury found Mr. Davis guilty of first-degree murder and, following Instruction No. 22, it submitted its verdict form.

Davis case is also distinguishable from *State v. Stonerook*, No. 05-1917, 2006 WL 3799546, at *2-*3 (Iowa Ct. App. Dec. 28, 2006), which the State relies on in holding that there was no duty to object. *See* Appellee's Br. at 30 . In *Stonerook*, the instruction was based on and consistent with the Uniform Jury Instructions as they existed at the time of Stonerook's conviction, thus there was no legal error in the first-degree murder instruction. Here, Instruction No. 22 left out an important element of the marshaling instruction as required by Iowa Model Criminal Jury Inst. No. 200.9: "If the insanity defense is submitted, then the marshaling instruction should be modified accordingly." Thus, trial counsel had a duty to observe and object to this error to protect Davis' rights.

III. The Failure to Object to Instruction No. 22 was Prejudicial.

The State relies on *State v. Thorndike*, 860 N.W.2d 316 (Iowa 2015) to argue that Davis was not prejudiced by the omission of the insanity defense from the marshaling instructions in Instruction No. 22 because counsel for both sides argued the relevant issues in closing argument, allegedly curing any confusion that could have arisen from Instruction No. 22. *See* Appellee's Br. at 34-36.

First, *Thorndike* is distinguishable because the court in *Thorndike* found that there was no legal error in the instruction as given. 860 N.W.2d at 322 (“In this case, the alternative offered in the lascivious-acts jury instruction 1(a) did not contradict another instruction given to the jury or misstate the law. . . . It was a correct statement of law.”). Given the lack of error in the jury instruction itself, trial counsel’s failure to object and correct or preserve the error correctly prevented the court from “conclude[ing] that Thorndike’s conviction resulted from a breakdown in the adversary process that renders the result unreliable.” *Id.* Here, by contrast, the erroneous jury instruction told the jury to stop deliberating after if it found Davis guilty of first-degree murder. Unlike in *Thorndike*, it cannot be presumed that the jury fully considered all the issues raised in the trial, because the jury was given instructions that did not fully address the need to consider Davis’ insanity defense. This undoubtedly raises questions about the reliability of the adversary process in Davis’ case.

Second, as discussed in prior briefing, the failure to consider the insanity defense was presumptively prejudicial. Both experts in Davis’ trial testified that he was experiencing psychosis at the time of the victim’s death, raising serious questions as to Davis’ capacity to form the necessary intent. Davis was entitled to have the jury consider the issue of his sanity as to Murder in the First Degree. The jury did not.

IV. Davis has Established both Breach of Duty and Prejudice for his IAC Claim regarding Dr. Andersen's Testimony.

The State argues that Davis can establish neither breach of duty nor prejudice to support his IAC claim regarding Dr. Andersen's testimony because the testimony was, ultimately, admissible. It does this by blurring the line between testimony of Davis' mental capacity and testimony as to whether he had the specific intent to kill. But the rule is simple: it has only two parts.

First, experts may testify as to their opinion regarding the defendant's sanity. *See, e.g. State v. Moses*, 320 N.W.2d 581, 587 (Iowa 1982) (collecting cases). Second, experts may not testify as to an element of guilt, including whether a defendant possessed specific intent to commit an unlawful act. *See State v. Ninmo*, 247 N.W.2d 228, 230 (Iowa 1976) (witness not permitted to testify that quantity of marijuana possessed by defendant would exceed personal use); *State v. Ogg*, 243 N.W.2d 620, 621 (Iowa 1976) (witness not permitted to testify that quantity of large LSD tablets was not possessed for personal use).

The testimony of Dr. Andersen fell directly into the second part of the rule. His statement that "[Davis] has a specific intent of killing [Carrie]," Trial Tr. Vol. 4 52:7-8, went directly towards the elements of guilt for first degree murder and was not an expression of Davis' sanity. It was a breach of duty to illicit such inadmissible testimony. It confused the jury as to Davis' defense theory and contributed to the conviction for first degree murder.

CONCLUSION

For the reasons set out above, and in initial briefing, Davis requests this matter be reversed and remanded for a new trial.

ORAL ARGUMENT NOTICE

Counsel requests oral argument.

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CERTIFICATE OF COMPLIANCE **WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS,** **AND TYPE STYLE REQUIREMENTS**

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) (no more than 7,000 words) because this brief contains 1893 words, excluding the parts of the brief exempted by Rule 6.903(1)(g)(1), which are the Table of Contents, Table of Authorities, Statement of the Issues, and Certificates.

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because

this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 MSO in font size 14, Times New Roman.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I e-filed the Defendant/Appellant's Final Reply Brief with the Electronic Document Management System with the Appellate Court on Monday, October 14, 2019. The following counsel will be served by EDMS:

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I hereby certify that on Monday, October 14, 2019, I did serve the Defendant/Appellant's Final Reply Brief on Appellant, listed below, by mailing one copy thereof to the following Defendant/Appellant:

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