

IN THE COURT OF APPEALS OF IOWA

No. 0-562 / 09-1898
Filed November 24, 2010

STATE OF IOWA,
Plaintiff-Appellant,

vs.

GLENN ALLEN SMITH,
Defendant-Appellee.

Appeal from the Iowa District Court for Story County, William J. Pattinson,
Judge.

The State appeals the decision of the district court granting a new trial to
Glenn Allen Smith after a jury convicted him of second-degree murder.

AFFIRMED.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney
General, Stephen Holmes, County Attorney, and Travis Johnson, Assistant
County Attorney, for appellant.

Mark C. Smith, State Appellate Defender, and David A. Adams, Assistant
Appellate Defender, for appellee.

Tomás Rodríguez, State Public Defender, and Aaron Hawbaker, Assistant
Public Defender, for appellee.

Heard by Eisenhauer, P.J., and Potterfield and Doyle, JJ. Tabor, J., takes
no part.

POTTERFIELD, J.**I. Background Facts and Proceedings**

Glenn Allen Smith, a forty-six-year-old drifter, arrived in Ames on Friday, May 16, 2008. Smith and another individual stopped near the campsite of Larry Fowler, who had set up residence in a wooded area on the periphery of a golf course in Ames. The other individual asked Fowler where Danny McGonigle was camped. Fowler directed them to McGonigle's camp not far from his, and they left.

The next day, Smith met Fowler on the pathway leading to Fowler's camp. Smith offered Fowler a beer, and the two men spent most of the day drinking together, along with another young man. That night, Fowler permitted Smith to sleep at his camp.

Fowler and Smith awoke the next morning and drank together until Fowler had to leave to go to work. Smith left Fowler's campsite and went to the Hy-Vee store. Smith met McGonigle for the first time outside the store. The two spent most of the day drinking together. Smith testified that McGonigle told him during the course of their conversations that he had been a United States Marine¹ and had a knife. Ultimately McGonigle and Smith went to Fowler's camp around midnight. Fowler was in his tent preparing for bed. Smith asked Fowler if he would like some beer. Fowler agreed and prepared to leave his tent.

McGonigle began to argue with Smith. He was upset that Smith had invited Fowler to drink with them. Smith told McGonigle to leave if he was going to cause problems. Smith testified that McGonigle then punched him in the face

¹ This was not true, but Smith testified that he believed it.

and threw two more punches that Smith was able to block. Smith testified that McGonigle then turned as though he was going to leave, but instead threatened to kick Smith in the head and charged at him.

Fowler testified that he heard McGonigle arguing with Smith and Smith asking McGonigle to leave. He did not witness the first attack described by Smith. Fowler testified that when he stepped outside the tent, he saw McGonigle walk toward his bike as though he was going to leave and then threaten to stomp on Smith's head. Fowler stated that McGonigle suddenly turned around and "went at" Smith. Fowler then turned to move the beer out of the way so the two men did not hit it during their fight. He testified that when he turned back, he saw McGonigle throw a punch at Smith. Fowler testified that Smith then pushed McGonigle back, and McGonigle threw another punch. Fowler stated that Smith then threw a punch, and the two men went to the ground.

Smith testified that when he saw McGonigle coming at him a second time, he pulled a knife out of his coat pocket to defend himself. Smith stated that McGonigle charged at him, hit him again, kicked him in the knee, tackled him to the ground, and said he was going to kill Smith. Smith testified that McGonigle knocked him to the ground with such force that the wind was knocked out of him and he defecated.²

Smith testified that as he and McGonigle wrestled on the ground, Smith's back was on the ground and McGonigle tried to choke him. Smith testified that he "went at" McGonigle with the knife to break McGonigle's chokehold. Smith testified that the men rolled around on the ground, but he never stabbed

² Investigating officers observed Smith's soiled pants the next day.

McGonigle during the points in the struggle in which McGonigle was on the ground under him. Smith testified that the fight ended with him on top of McGonigle. He repeatedly asked McGonigle to let his arms go and lay still. Smith stated that once McGonigle did so and he felt he had control of the situation, he got off of McGonigle and told Fowler to call an ambulance. He then left on foot out of fear that McGonigle may attack him again.

Fowler testified that when the men fell to the ground, he could not see them, but he heard sounds consistent with men wrestling, though neither man said anything aloud. When the men rolled to within about five feet of where Fowler was sitting, he saw McGonigle on his back with Smith sitting on top of him holding him down with his left hand. Fowler testified that he heard Smith tell McGonigle to quit struggling and then told Fowler to call an ambulance. Fowler stated that once McGonigle quit grabbing at Smith's arms, Smith got off of McGonigle. Fowler watched as Smith retrieved his backpack and took a few beers. Fowler testified, "[Smith] told me that I hadn't seen him, I better keep my mouth shut." According to Fowler, just before Smith left he said, "[I]f he lives, he lives; if he dies, roll him in the creek." Smith denies making this statement.

Fowler called an ambulance. When medics arrived, McGonigle was uncooperative and repeatedly stated he was going to kill Smith. McGonigle died in the ambulance en route to receiving treatment. The autopsy revealed that McGonigle had thirty-two stab wounds, concentrated primarily around his face, neck, and upper torso.

Story County deputies found Smith walking along Interstate 35 the day after his fight with McGonigle. They transported him to the Ames Police

Department for questioning. Smith admitted that he threw the knife used to kill McGonigle into the river. Smith's coat was analyzed and found to contain no blood. Smith's shirt had a transfer of blood on the chest area. Investigating officers testified that Smith had red marks on his back, cuts on his right hand, and a scrape on one of his knees.

On May 30, 2008, the State filed a trial information charging Smith with first-degree murder. On April 22, 2009, a jury convicted Smith of the lesser-included offense of second-degree murder. On August 13, 2009, Smith filed a motion for new trial asserting, among other claims, that the verdict was contrary to the weight of the evidence. On December 1, 2009, the district court granted Smith's motion for new trial.

The State now appeals, arguing the district court abused its discretion in granting Smith a new trial.

II. Standard of Review

The district court has broad discretion in ruling on a motion for new trial. We reverse where the district court has abused that discretion. To establish such abuse, the State must show that the district court exercised its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. We are slower to interfere with the grant of a new trial than with its denial.

On a weight-of-the-evidence claim, appellate review is limited to a review of the exercise of discretion by the trial court, not of the underlying question of whether the verdict is against the weight of the evidence.

State v. Reeves, 670 N.W.2d 199, 202-203 (Iowa 2003) (internal citations omitted).³ The standard we apply in determining whether the district court

³ The State asserts that the district court's ruling on a motion for new trial should not be reviewed on a standard of broad discretion but should be closely scrutinized, citing multiple cases from other jurisdictions and *State v. Ellis*, 578 N.W.2d 655 (Iowa 1997),

abused its discretion in granting a new trial on a weight-of-the evidence claim is as follows:

The discretion of the trial court should be exercised in all cases in the interest of justice, and, where it appears to the judge that the verdict is against the weight of the evidence, it is his imperative duty to set it aside. “We do not mean . . . that he is to substitute his own judgment in all cases for the judgment of the jury, for it is their province to settle questions of fact; and, when the evidence is nearly balanced, or is such that different minds would naturally and fairly come to different conclusions thereon, he has no right to disturb the findings of the jury, although his own judgment might incline him the other way. In other words, the finding of the jury is to be upheld by him as against any mere doubts of its correctness. But when his judgment tells him that it is wrong, that, whether from mistake, or prejudice, or other cause, the jury . . . erred, and found against the fair preponderance of the evidence, then no duty is more imperative than that of setting aside the verdict, and remanding the question to another jury.”

Id. at 203 (quoting *State v. Oasheim*, 353 N.W.2d 291, 294 (N.D. 1984)).

III. Motion for New Trial

Iowa Rule of Criminal Procedure 2.24(2)(b)(6) permits the trial court to grant a new trial “[w]hen the verdict is contrary to law or evidence.” The district court determined a new trial was warranted “because of the dearth of evidence on the ‘malice aforethought’ element of the crime charged.”

Malice aforethought is an essential element of second-degree murder and separates second-degree murder from other lesser-included offenses of first-degree murder. *Reeves*, 670 N.W.2d at 207. Malice aforethought is

a fixed purpose or design to do some physical harm to another existing prior to the act complained of; it need not be shown to have existed for any length of time before, . . . ; it is sufficient if such

for its cautionary language pertaining to granting motions for new trial. The State asks us to adopt a standard of review more akin to errors at law. We choose to follow Iowa rules and case law, which establish that the district court has broad discretion in ruling on a motion for new trial. See, e.g., Iowa R. App. P. 6.14(6)(c); *Reeves*, 670 N.W.2d at 202.

purpose was formed and continued to exist at the time of the injury
.....

Id.

“The law allows a presumption of malice aforethought from the use of a deadly weapon in the absence of evidence to the contrary.” *Id.* This presumption may be rebutted by evidence showing the killing was accidental, under provocation, or because of mental incapacity. *Id.* The district court determined this presumption, based on Smith’s admitted use of a knife, was overcome by evidence of provocation. The district court considered the following facts: McGonigle was the aggressor in this altercation; Smith tried to de-escalate the situation; McGonigle was significantly larger than Smith; McGonigle often became belligerent and confrontational when drunk; McGonigle led Smith to believe he had a knife and had previously served in the United States Marines; McGonigle had threatened to stomp on Smith’s head and to kill him; McGonigle knocked Smith to the ground with such force that Smith lost control of his bowels; within only a few seconds time, McGonigle charged Smith a second time; and Smith did not take his knife out of his pocket until McGonigle started to charge him for a second time. The district court expressly found Smith to be credible. Further, there was no contrary evidence in the record. *See id.* (considering the district court’s credibility findings and lack of contrary evidence in agreeing with the district court’s determination that the weight of the evidence preponderated heavily against a presumption of malice). The district court cited evidence that weighs heavily in support of its finding of provocation sufficient to overcome the presumption of malice.

Because the district court found the weight of the evidence rebutted the presumption of malice, the State had the burden to prove malice aforethought by credible evidence. The district court found the weight of the evidence failed to support the jury's finding of malice aforethought. In support of this conclusion, the district court considered individually all of the circumstantial evidence on the element of malice aforethought (in addition to Smith's use of a knife), namely: the location and number of stab wounds; the fact that Smith's coat had no blood on it; the fact that Smith's shirt had blood transfers but no droplets; the lack of visible injuries on Smith's body; Smith's alleged comments after the incident; and Smith's departure from the scene. The court found that no single piece of evidence was of sufficient weight to support the jury's verdict. The district court further found that each piece of evidence, when viewed "in the context with the whole of the State's case, likewise does not preponderate heavily in favor of the jury's verdict."

The district court concluded the evidence did not support a finding that Smith possessed the requisite malice aforethought. As in *Reeves*, this finding was supported by the lack of motive on the part of Smith. See *id.* ("Although motive for the killing is not a necessary element of second-degree murder, absence of such motive may be considered on the question whether the defendant acted with malice aforethought.").

The district court also noted, "[T]he above comments and conclusions regarding the evidence's worth should not be construed as an effort on my part to supplant the jury's assessment of the case with my own." The district court acknowledged its role under *Ellis*, and concluded that the jury's verdict was

contrary to the preponderance of the credible evidence. See *State v. Ellis*, 578 N.W.2d 655, 659–60 (Iowa 1997) (explaining how the district court is to apply the weight-of-the-evidence standard).

We conclude the district court acted within its discretion in granting Smith's motion for new trial. The court carefully weighed all of the evidence, made credibility determinations, and gave sound and detailed reasoning for its conclusion that the verdict was contrary to the weight of the evidence. We affirm.

AFFIRMED.