IN THE COURT OF APPEALS OF IOWA

No. 1-745 / 10-1843
Filed January 19, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MICHAEL LOTHAR MAYTON,
Defendant-Appellant.

Appeal from the Iowa District Court for Dubuque County, Lawrence H. Fautsch, Judge.

The defendant appeals his judgment and sentences for second-degree murder and assault causing serious injury. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Shellie L. Knipfer, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Ralph Potter, County Attorney, and Christine O. Corken and Timothy Gallagher, Assistant County Attorneys, and Tyler J. Buller, Legal Student Intern, for appellee.

Considered by Vaitheswaran, P.J., Tabor, J., and Sackett, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

VAITHESWARAN, P.J.

One summer evening in Dubuque, an alcohol-fueled gathering turned violent. Two people were stabbed and one died as a result. The State charged Michael Mayton with several crimes arising from the incident and, following jury findings of guilt, the district court entered judgment and sentences for second-degree murder and assault causing serious injury.

On appeal, Mayton asserts (1) there was insufficient evidence he acted with the malice aforethought necessary to support the finding of guilt for second-degree murder; (2) the district court erred in admitting statements under the present sense impression hearsay exception; and (3) his trial attorney was ineffective in failing to object to the hearsay statements as irrelevant, prejudicial, and inadmissible prior bad acts evidence.

I. Sufficiency of the Evidence—Second-Degree Murder

The jury was instructed that in order to find Mayton guilty of second-degree murder, the State would have to prove the following:

> 1. On or about August 15, 2009, the Defendant stabbed David Tate.
> 2. David Tate died as a result of being stabbed.
> 3. The Defendant acted with malice aforethought.
> 4. The Defendant did not act with justification. . . .

Mayton challenges the sufficiency of the evidence on the third element—malice aforethought. With respect to this element, the jury was instructed:

> "Malice" is a state of mind which leads one to intentionally do a wrongful act to the injury of another, out of actual hatred, or with an evil or unlawful purpose. It may be established by evidence of actual hatred, or by proof of a deliberate or fixed intent to do injury. It may be found from the acts and conduct of the Defendant, and the means used in doing the wrongful and injurious act. Malice requires only such deliberation that would make a person

> appreciate and understand the nature of the act and its consequences, as distinguished from an act done in the heat of passion.
>
> "Malice aforethought" is a fixed purpose or design to do some physical harm to another which exists before the act is committed. It does not have to exist for any particular length of time.

The jury was further instructed that "[m]alice aforethought may be inferred from the Defendant's use of a dangerous weapon."

Mayton acknowledges that he "used a knife" to stab his friend, David Tate, and he essentially concedes the knife was a "dangerous weapon." He argues, however, that the presumption of malice created by his use of the knife was rebutted by evidence that Mayton stabbed Tate only after being provoked by bystanders. *See State v. Reeves*, 670 N.W.2d 199, 207 (Iowa 2003) (noting presumption may be rebutted by "evidence showing the killing was accidental, under provocation, or because of mental incapacity"). A reasonable juror could have found otherwise. *See State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993) ("The jury is free to believe or disbelieve any testimony as it chooses and to give weight to the evidence as in its judgment such evidence should receive.").

The record reflects that a group of individuals, including a man named Richard Schramm, walked up the hill toward Mayton and a group surrounding him. Schramm and Mayton did not get along. On the evening of this incident, both had been drinking heavily. They exchanged words. According to some witnesses, Schramm then punched Mayton. Mayton went to his apartment, retrieved a knife, and returned to the street, where he first stabbed Schramm and then stabbed his friend Tate, who later died.

There is no evidence that Tate provoked Mayton. To the contrary, several witnesses testified Tate approached Mayton with concern, stating "Mike, what the fuck are you doing?" Before Tate had even finished the question, Mayton turned around and stabbed him.

As for the claimed provocation by bystanders, a reasonable juror could have found that Mayton had several opportunities to regain control of his emotions before he stabbed Tate. *Cf. State v. Inger*, 292 N.W.2d 119, 122 (Iowa 1980) (stating with respect to crime of voluntary manslaughter that jury could have found no "interval between the provocation and the killing in which a person of ordinary reason and temperament would regain his or her control and suppress the impulse to kill"). He could have walked away after the verbal exchange with Schramm. *See State v. Rutledge*, 243 Iowa 179, 192, 47 N.W.2d 251, 259 (1951) (approving instruction which stated, "No mere words, however abusive or insulting, can in themselves constitute the adequate provocation. . . ."); *State v. Brown*, 589 N.W.2d 69, 75 (Iowa Ct. App. 1998) (stating defendant could have chosen to retreat at several points), *overruled on other grounds by State v. Reeves*, 636 N.W.2d 22, 26 (Iowa 2001). And, if he was indeed punched by Schramm, he could have resisted the urge to walk up to his apartment, search for and retrieve a knife, and carry it downstairs and outside into the middle of an already tense environment. *See State v. Holder*, 237 Iowa 72, 81, 20 N.W.2d 909, 914 (1945) (stating that "if the homicide was effected with a deadly weapon 'the provocation must be great, indeed, to lower the offense from murder to manslaughter'" (citation omitted)). These actions amounted to substantial evidence of "a fixed purpose or design to do some physical harm," as

the jury was instructed. *State v. Truesdell*, 679 N.W.2d 611, 615 (Iowa 2004) (setting forth standard of review).

We recognize Mayton's "purpose or design to do some physical harm" was not directed at Tate but at Schramm, who survived the stabbing. This fact does not require a different result. *See State v. Alford*, 260 Iowa 939, 942, 151 N.W.2d 573, 574 (1967) (stating with respect to crime of assault with intent to commit murder that the "malice aforethought necessary to make a homicide murder need not be directed at the one actually killed"), *overruled on other grounds by State v. Bester*, 167 N.W.2d 705 (Iowa 1969). In *Alford*, there was evidence the defendant intended to murder a person other than the person who was hit by a bullet and the court found this evidence sufficient to create a jury question on the charged crime. 260 Iowa at 943, 151 N.W.2d at 575. Similarly, the jury in this case could have found that even though Mayton's original purpose in getting a knife was to harm Schramm, that purpose ultimately resulted in harm to Tate.

II. Hearsay

At trial, the State questioned Richard Schramm about the catalyst for the fight. The prosecutor specifically asked Schramm about a comment made by a woman at the scene. Mayton's attorney objected on the ground the question called for hearsay. The State responded, "This is a description of the events as they occurred. Not using them for the purpose of the truth of the matter asserted what she said, just that she said things to people." The district court overruled the objection, and Schramm was allowed to testify that the woman "said to my girlfriend, 'Leave [Mayton] alone, he's having a bad crack trip.'" Three other

State witnesses were allowed to corroborate this woman's statement about Mayton.

Mayton now reiterates that the statement was inadmissible hearsay. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Iowa R. Evid. 5.801(*c*). Hearsay must be excluded unless admitted under an exception or exclusion to the hearsay rule or for some other provision. *State v. Dullard*, 668 N.W.2d 585, 589 (Iowa 2003).

The State introduced the statement that Mayton was on a "bad crack trip" early and often in its case in chief. There is no question in our minds that the statement was offered to prove the truth of the matter asserted rather than "to show the responses and reactions of the persons hearing the statements" or to "provide context," as the State now asserts. *See State v. Mitchell*, 450 N.W.2d 828, 832 (Iowa 1990) (noting when an out-of-court statement is offered, not to show the truth of the matter asserted but instead to explain responsive conduct, it is not regarded as hearsay). The responses and reactions of individuals at the scene, as well as the context, were fleshed out in great detail over the course of the two-week trial and this single statement did nothing to enlighten the jury about the unfolding events. *Id.* ("In essence, the court must determine whether the statement is truly relevant to the purpose for which it is being offered, or whether the statement is merely an attempt to put before the fact finder inadmissible evidence."). The statement did, however, cast an unwarranted aspersion on Mayton because, as the prosecutor himself conceded, Schramm had no information to suggest Mayton actually used crack cocaine on that

evening. As the statement was offered for the truth of the matter asserted, it was hearsay.

Anticipating this conclusion, the State argues the statement nonetheless was admissible under the "present sense impression" exception to the hearsay rule. *See* Iowa R. Evid. 5.803(1). We need not address the applicability of this exception, as we are persuaded by the State's alternate argument that the statement was not prejudicial. *See State v. Sullivan*, 679 N.W.2d 19, 29 (Iowa 2004); *see also* Iowa R. Evid. 5.103(*a*) ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected. . . .").

Where hearsay evidence is improperly admitted, prejudice is presumed unless established otherwise. *State v. Newell*, 710 N.W.2d 6, 19 (Iowa 2006). The presumption of prejudice is most often overcome where the evidence in support of the defendant's guilt is overwhelming. *See id.* That is the case here. The pre-teen son of Mayton's girlfriend testified that Mayton "[r]ansacked the drawers and took a knife and went back downstairs." The adult daughter of Mayton's girlfriend testified that she saw Tate "laying on my porch bleeding." She said Mayton was with Tate, and a knife was nearby. The daughter took the knife and hid it in her bedroom "[s]o no one else got hurt."

Schramm testified Mayton was "chasing people with a knife." He heard someone swearing and when he turned around, a knife went into his chest. A woman similarly testified Mayton was "standing in the middle of the street swinging the knife around." She stated Mayton stabbed Schramm and a man, later identified as Tate.

Most compellingly, Mayton testified that he attempted to "grab the biggest knife" from his kitchen drawer "to scare the hell out of these guys"; he "ended up stabbing" Tate; when confronted by police, he attempted to pin the blame for Tate's stabbing on Schramm; and he was aware someone else was stabbed. There was no evidence that anyone else had or used a knife,[1] and there was no evidence that anyone else involved in the fracas injured Schramm or Tate.

We conclude this amounted to overwhelming evidence in support of the findings of guilt on the two crimes on which judgment was entered, and the admission of the "bad crack trip" evidence does not require reversal.

III. Ineffective Assistance of Counsel

Mayton finally asserts his trial attorney was ineffective in failing to object to the statements that he was on "a bad crack trip" as irrelevant and inadmissible prior bad acts evidence. *See* Iowa R. Evid. 5.403. To prevail, he must show that counsel (1) breached 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). The claim may be resolved on either ground. *Id.* at 697, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699. We elect to resolve it on the prejudice prong.

To establish *Strickland* prejudice, Mayton must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. This standard, like the prejudice standard applicable to the admission of hearsay evidence, is satisfied if there is overwhelming evidence of

[1] Mayton testified that Schramm had a "sickle" and there was also testimony that someone had a shovel.

guilt. *See Strickland*, 466 U.S. at 696, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699 ("[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support."); *see also Newell*, 710 N.W.2d at 19 (finding the record affirmatively established a lack of prejudice and therefore the admission of improper evidence was not reversible error); *State v. Bayles*, 551 N.W.2d 600, 610 (Iowa 1996) (finding no *Strickland* prejudice resulted from counsel's alleged deficient performance because evidence of defendant's guilt was overwhelming). We have already concluded the record contains this quantum of evidence. For that reason, we conclude Mayton cannot succeed on his ineffective-assistance-of-counsel claim.

AFFIRMED.