IN THE COURT OF APPEALS OF IOWA

No. 2-1149 / 11-0479
Filed January 24, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JAMES DEAN BLUM,
Defendant-Appellant.

Appeal from the Iowa District Court for Washington County, Joel D. Yates, Judge.

A defendant appeals his conviction and sentence for murder in the second degree. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Nan Jennisch and David A. Adams, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Larry Brock, County Attorney, and Andrew Prosser and Denise Timmins, Assistant Attorneys General, for appellee.

Considered by Eisenhauer, C.J., and Vogel and Vaitheswaran, JJ.

VOGEL, J.

A defendant, James Dean Blum, appeals from the judgment and sentence entered following a jury trial and verdict of guilty of murder in the second degree in violation of Iowa Code sections 707.1 and 707.3 (2009). He claims his trial counsel was ineffective for making an inadequate motion for judgment of acquittal, particularly counsel failed to identify how or where the State's evidence was insufficient. Because counsel was not ineffective, we affirm.

I. Background Facts and Proceedings

A reasonable juror could have found the following as true: Blum met and married his wife, Patricia, in 2004. The couple was in a difficult financial position and also had conflicts with members of Patricia's family leading to legal involvement. On January 11, 2010, Patricia and Blum had an argument. At one point, Patricia suggested they leave the house, and as Blum was getting his coat, Patricia went to the garage. She returned shortly and told Blum she forgot to open the garage door and backed into the door while trying to leave. Blum admitted this made him "madder than hell." The arguing continued. At this point, Patricia was standing in the living room next to the davenport. Blum testified he pushed Patricia down on to the davenport and held her head, face down, against the cushion to get her to stop screaming. Patricia yelled that she could not breathe and ordered him to let her up. At trial, Blum claimed he held her head down for only a few seconds, but he told a police officer on January 11 he held her head down for "two or three minutes, maybe five."

Blum claims he spoke with Patricia after he released her head. Blum also testified he left the living room, returned, and then noticed Patricia was not

breathing. Blum called 911, and told the 911 operator, "I just killed my wife." Police arrived at the house, and part of a conversation between Blum and Officer Huschka was recorded. Patricia's body was found sitting on the floor between the davenport and the coffee table. Attempts to revive Patricia were futile and Patricia was pronounced dead at the hospital. Blum was taken to the police station and interviewed. During the interview, Blum admitted he pushed and held Patricia's head against the davenport cushions until she stopped kicking. An autopsy was performed the next day and the medical examiner determined Patricia died as a result of asphyxiation.

On February 22, the Stated filed a trial information charging Blum with murder in the second degree in violation of Iowa Code section 707.1 and 707.3, a class B felony. After a trial, a jury returned a verdict of guilty on January 7, 2011. On February 21, the district court sentenced Blum to prison for a term not to exceed fifty years with a mandatory minimum sentence of seventy percent. Blum appeals.

II. Ineffective Assistance

On appeal, Blum claims he was denied effective assistance of counsel because his trial counsel failed to make an appropriate motion for judgment of acquittal specifically identifying the element or elements of the crime for which the evidence was lacking.

Claims that counsel did not provide effective assistance find their basis in the Sixth Amendment to the United States Constitution, and article 1, section 10 of the Iowa Constitution; we therefore review them de novo. *State v*. *Madsen*, 813 N.W.2d 714, 722-23 (Iowa 2012). To prove a constitutional violation, Blum

must show his trial counsel breached an essential duty and the breach resulted in prejudice. *See Strickland v*. *Washington*, 466 U.S. 668, 687–88 (1984). To satisfy the first prong, Blum must establish "counsel's representation fell below an objective standard of reasonableness." *See id.* at 688. In evaluating the objective reasonableness of counsel's conduct, we examine "whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.* at 690. To satisfy the second prong, Blum must exhibit "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See id.* at 694. "A 'reasonable probability' means a 'substantial,' not 'just conceivable,' likelihood of a different result." *Madsen*, 813 N.W.2d at 727 (citation omitted). Although we often preserve claims of ineffective assistance of counsel for postconviction relief proceedings, we will consider such claims on direct appeal if the record is adequate to resolve them. *State v*. *Henderson*, 804 N.W.2d 723, 725 (Iowa Ct. App. 2011). We find the record adequate in this case to resolve Blum's ineffective-assistance claims.

After referring the district court to two cases dealing with the burden of proof and the examination of State's evidence, the remainder of Blum's motion for judgment of acquittal reads as follows:

> Under all of that authority, defense argues that the State has failed to prove—carry its burden of proof as to each and every offense of the crime of murder in the second degree; also lesser offenses. I would particularly also point out that the State has failed to corroborate what all the testimony tends to show is a case resting solely on the statements made by Mr. Blum, the defendant, which could be characterized as confessions, which I raised out as part of my argument for directed verdict but as a separate legal

> issue, but it obviously is logically applicable to the sufficiency of the evidence in this case.

We agree with Blum his trial counsel's motion for judgment of acquittal would be inadequate to preserve error as it does not specifically mention the contested element—malice aforethought—which he asserts on appeal was not proven. *See State v*. *Truesdell*, 679 N.W.2d 611, 616 (Iowa 2004) ("To preserve error on a claim of insufficient evidence for appellate review in a criminal case, the defendant must make a motion for judgment of acquittal at trial that identifies the specific grounds raised on appeal.")

Blum claims his trial counsel was ineffective in failing to argue the sufficiency of the evidence to establish the necessary element of malice aforethought. A conviction is supported by sufficient evidence "if substantial record evidence supports it." *State v*. *Sanford*, 814 N.W.2d 611, 615 (Iowa 2012). "Evidence is considered substantial if, when viewed in the light most favorable to the State, it can convince a rational jury that the defendant is guilty beyond a reasonable doubt." *Id*. Thus, the question before us is whether the evidence could have convinced a rational jury Blum acted with malice. If not, Blum's claim fails because he cannot be denied effective assistance of counsel by his attorney's failure to raise a meritless challenge to the sufficiency of the evidence. *See Truesdell*, 679 N.W.2d at 616.

It is well-settled law murder in the second degree is a general intent crime only requiring proof of malice aforethought rather than a specific intent to kill. *State v*. *Lyman*, 776 N.W.2d 865, 877 (Iowa 2010). Malice aforethought, an essential element of second-degree murder separating it from other lesser

included offenses, is defined as: "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 purpose was formed and continued to exist at the time of the injury. . . ." *State v*. *Reeves*, 670 N.W.2d 199, 207 (Iowa 2003).

We believe there is sufficient evidence a reasonable jury could find Blum acted with malice aforethought in killing Patricia. Blum made statements to the police, which were played to the jury, including, "Yeah I killed her to shut her up," and, "She was hollering. I should have let her up, but I didn't because I was so angry and upset." When the interviewing officer briefly left the room, Blum said to himself, "I hope she's dead because I ain't going to put up with any more of it. I hope she's dead."

The evidence in the record of the history of arguments between Blum and Patricia could also prove to a reasonable juror Blum had malice aforethought when he suffocated Patricia.[1] *See State v*. *Buenaventura*, 660 N.W.2d 38, 49 (Iowa 2003) ("Evidence of bad feelings or quarrels between the defendant and the victim are circumstances that may be used to support a finding of malice aforethought.").

Blum's assertion his act was done in a heat of passion must fail as a reasonable juror could have taken Blum's statements to show he had a fixed purpose of "[s]hutting [Patricia] up" rather than acting solely as a result of sudden, violent and irresistible passion. *See State v*. *Inger*, 292 N.W.2d 119,

[1] The record detailed the couple's discord, and in particular how they had argued for over a week, as their rhetoric and actions escalated.

122 (Iowa 1980) (providing the mental state for voluntary manslaughter as a lesser included offense in second-degree murder). Notably, Blum told the interviewing officer the argument between Patricia and himself had been going on for days: "[I]t just keeps getting worse and worse all the time and finally today I guess I just–I just lost it."

III. Conclusion

Because there was sufficient evidence to convince rational jurors Blum acted with malice aforethought, Blum's counsel did not have a duty to raise a meritless motion to attack the sufficiency of the evidence. His counsel was therefore not ineffective and his conviction and sentence is affirmed.

AFFIRMED.