

IN THE COURT OF APPEALS OF IOWA

No. 7-057 / 06-0148
Filed February 28, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

AMBUS RAY DAVIS, III,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Gary D. McKenrick,
Judge.

Defendant appeals from the judgement and sentence entered upon his
conviction following a bench trial of first-degree murder, willful injury, and going
armed with intent. **AFFIRMED.**

Patricia Reynolds, Acting State Appellate Defender, and James G. Tomka,
Assistant Appellate Defender, for appellant.

Ambus Ray Davis, III, pro se.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney
General, William E. Davis, County Attorney, and Robert Cusack, Assistant
County Attorney, for appellee.

Considered by Sackett, C.J., and Huitink and Mahan, JJ.

SACKETT, C.J.

Defendant, Ambus Davis, appeals from the judgement and sentence entered upon his conviction following a bench trial of first-degree murder, in violation of Iowa Code sections 707.1, 707.2(1), and 707.2(2) (2005); willful injury, in violation of section 708.4(1); and going armed with intent, in violation of section 708.8 in the shooting death of Jalon Thomas. He claims the district court erred in denying (1) his motion for judgment of acquittal and (2) his motion for new trial. We affirm.

Background. On May 15, 2005, Thomas was shot and killed outside a home in Davenport, Iowa. The gun that shot Thomas was never found. The State sought to prove its case with the following evidence, which the district court found to be credible. The defendant and Thomas had argued over the telephone the day of the shooting about Thomas's missing dog. Thomas thought the defendant knew where the animal was. Just before the shooting, the defendant called Thomas from a blue car parked in front of the area where the shooting took place. Thomas came outside and talked to the defendant, who was in the driver's seat of the car. The two had a heated conversation. The defendant had a revolver that was either on his lap or on the seat next to him, and he picked it up and pointed it at Thomas. Thomas jumped back from the car. The defendant got out of the car. Thomas ran, and the defendant fired three shots, one of which hit Thomas and caused wounds that lead to Thomas's death. The defendant went into hiding and made a statement to a witness that he had shot somebody. The defendant does not contend there was not evidence to support these findings; rather, he appears to argue the witnesses were not credible and their

testimony conflicted with their earlier statements and was contrary to the testimony of other witnesses.

Motion for Judgement of Acquittal. The defendant first contends the district court erred by denying his motion for judgment of acquittal because there was insufficient evidence to establish guilt beyond a reasonable doubt. Specifically, he claims the testimony of the State's witnesses creates nothing more than speculation, suspicion, and conjecture. The State contends the district court did not err.

We review the district court's denial of a motion for judgment of acquittal based on sufficiency of the evidence. *State v. McPhillips*, 580 N.W.2d 748, 752 (Iowa 1998). We will uphold the denial of the motion "if there is substantial evidence in the record to support the defendant's convictions." *State v. Laffey*, 600 N.W.2d 57, 59 (Iowa 1999) (citing *McPhillips*, 580 N.W.2d at 752). We consider all evidence in the record. *Id.* We view the evidence in a light most favorable to the verdict. *State v. Gay*, 526 N.W.2d 294, 295 (Iowa 1995). "Evidence is substantial if it would convince a rational factfinder that the defendant is guilty beyond a reasonable doubt." *State v. Mitchell*, 568 N.W.2d 493, 502 (Iowa 1997).

Substantial evidence may exist to uphold a verdict even if substantial evidence to the contrary also exists. *State v. Frake*, 450 N.W.2d 817, 818-19 (Iowa 1990). There was substantial evidence, though contradicted, to support the verdict.

Motion for New Trial. The defendant also contends the district court abused its discretion in denying his motion for new trial based on the weight of

the evidence. The defendant contends the State's witnesses were not credible. He also contends the State failed to prove malice aforethought and premeditation. The State asserts the district court fulfilled its duty in weighing of the credibility of the witnesses.

We review the district court's denial of a motion for new trial for abuse of discretion. *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998). On a weight of the evidence claim regarding a new trial, the district court may weigh the evidence and consider the credibility of witnesses. *Id.* at 658. "[A]ppellate review is limited to a review of the exercise of discretion . . . not the underlying question of whether the verdict is against the weight of the evidence." *State v. Reeves*, 670 N.W.2d 199, 203 (Iowa 2003) (citations omitted).

In denying the motion for new trial the district court stated it considered the credibility of the witnesses and found, and continued to find, the greater weight of the credible evidence supported the verdicts, and the State proved beyond a reasonable doubt all the elements of each of the offenses charged. We affirm on this issue.

In his pro se brief defendant claims there is no evidence to prove either malice aforethought or deliberation or premeditation.

Malice aforethought is a fixed purpose or design to do some physical harm to another which exists prior to the act being committed. *See State v Artzer*, 609 N.W.2d 526, 529 (Iowa 2000). It does not need to exist for any specific time before the act occurs, and it can be inferred from the use of a weapon. *Id.* at 530. Furthermore, the use of a deadly weapon, coupled with an opportunity to deliberate, even for a short time, may give rise to an inference of deliberation and

premeditation. *State v. Khouri*, 503 N.W.2d 393, 395 (Iowa 1993). There is no basis to the defendant's argument on this issue.

AFFIRMED.