

**IN THE COURT OF APPEALS OF IOWA**

No. 7-598 / 06-1606  
Filed September 19, 2007

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**ROBERT STANLEY DAVIS,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Linn County, Amanda Potterfield,  
Judge.

Defendant appeals his conviction for second-degree murder. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and James Tomka, Assistant  
Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney  
General, Harold Denton, County Attorney, and Susan Nehring and Nicholas  
Maybanks, Assistant County Attorneys, for appellee.

Considered by Mahan, P.J., and Miller and Vaitheswaran, JJ.

**MAHAN, P.J.****I. Facts and Prior Proceedings**

On June 23, 2005, Robert Stanley Davis was charged with murder in the first degree. His case proceeded to a bench trial on May 16, 2006. Neither party disputes the following findings of fact set forth by the district court:

The State's evidence showed that, in April 2005, Wendy Barnes lived in . . . Linn County, Iowa. Ms. Barnes lived there with her friend, Defendant, Robert Stanley Davis. They previously lived together in Tipton, Iowa. Neither Mr. Davis nor Ms. Barnes had a car. Both spent much of their time at home. There was some difficulty in their relationship, and they had separated for a period of time earlier in 2005.

Mr. Davis is 27 years old. He previously was married to Kim Davis, and they had a daughter together. Mr. Davis was not employed in 2005 and apparently was dependent upon Ms. Barnes for his support. He was known to wear a dark hooded sweatshirt and dark sweatpants.

Ms. Barnes was 22 years old. She was employed by L Enterprises as a dispatcher for telephone sex customers. She worked nights from her apartment, dispatching calls through her computer and her telephone. On the evening of April 14, 2005, Ms. Barnes began her shift at about 8:00 p.m.

During the first hour or so of her shift on the evening of April 14, 2005, Ms. Barnes was in contact with her supervisor, Dawn Durning. Ms. Durning was working from her home in Brooklyn, New York. The two women were chatting by instant messages. Ms. Durning thought Ms. Barnes was her usual, talkative self. At about 9:46 p.m., Ms. Durning logged off her computer to watch a movie.

At about 9:52 p.m., Mr. Davis and Ms. Barnes communicated by instant message about some changes to their computer systems that Mr. Davis wanted to arrange. Ms. Barnes was working at her computer in her room. Mr. Davis was using his computer in the room next door. Mr. Davis wrote in his screen name Sean Virgoz:

for now u need to run something I will come in there  
and give u the cd, it can run in the background when  
u work it won't affect anything and also if u can call  
aol and ask why they froze equinOx1111 I'd  
appreciate it cuz I get mail there.

Ms. Barnes responded in her screen name tabithadispatch: "Since you aint helping me you can f\*\*\*ing call aol on your own and use your credit card."

Mr. Davis replied in capital letters: "YOUR MESSAGE WAS IGNORED."

At about 9:54 p.m. the power to both computers went off. The State contends that this was the result of Mr. Davis leaving his room and going through the kitchen to the utility room and pulling the fuses partially out of the fuse box.

The power was restored at 10:01 p.m. The computers re-booted automatically, without user input. The power was shut off again at 10:06 p.m.

Ms. Durning received a phone call at her apartment in Brooklyn, informing her that Ms. Barnes was not responding to contacts and was off-line. Ms. Durning attempted unsuccessfully to contact Ms. Barnes and took her shift for her.

. . . .

The following morning, on April 15, 2006, Ms. Durning called the Cedar Rapids Police Department to request help in ascertaining Ms. Barnes' well-being. Police officers went to the apartment that afternoon but saw nothing amiss. They did not enter the apartment.

Ms. Durning called the police again at about 7:00 p.m. that night to say that she still had been unable to contact Ms. Barnes and that she was worried about her. The Cedar Rapids Police Department sent two patrol officers to do a welfare check at the apartment.

Officers Havlicek and White gained entry . . . with the help of the building manager, who provided a key. They entered to find the lights off. The apartment was dark and quiet. They discovered the body of Wendy Barnes seated in her recliner in front of her computer, with her legs still underneath the computer table. She had been stabbed multiple times.

The officers called for help, and investigators and identification officers arrived to process the scene. A search warrant was obtained. The investigators saw evidence that the perpetrator had tossed the murder weapon in the open closet near Ms. Barnes' chair. A trail of blood led to the fuse box in the utility room, to the bathroom, and to the kitchen. The fuses, or at least one of them, had blood on it. The fuses had been loosened in the box, leaving the power off.

There was vomit in the toilet and paper towels and cloth towels with blood drops. There were drops of blood on the floor and blood smears on the walls and cabinets. The blood smears and drops contained the DNA of Mr. Davis. Blood smears on the walls and on the handle of the knife contained a mixture of Ms. Barnes' and Mr. Davis's DNA.

Pathologist Dr. Keith Krewer conducted the autopsy. He has been a pathologist for 21 years. Although he was interested in forensic pathology, and had completed some continuing education in that field, he is not a board certified forensic pathologist. Dr. Krewer counted 53 stab wounds on the body of Wendy Barnes. Ms. Barnes bled to death.

The district court found Davis guilty of the lesser charge of second-degree murder. The court found that there was no reasonable doubt that:

1. Robert Stanley Davis stabbed Wendy Barnes on April 14, 2006.
2. Wendy Barnes died as a result of being stabbed by Robert Stanley Davis.
3. The knife used by Robert Stanley Davis was a dangerous weapon . . . because it was capable of inflicting death when used in the manner Mr. Davis used it.
4. Mr. Davis's use of a dangerous weapon demonstrated that he acted with malice aforethought.
5. Mr. Davis did not act accidentally, with justification or as a result of sudden, violent and irresistible passion resulting from serious provocation.

On appeal, Davis's sole claim is that there was insufficient evidence to convict him of second-degree murder because there was no malice aforethought. Specifically, he argues the evidence "is insufficient to establish guilt beyond a reasonable doubt due to the fact that the testimony establishes that [his] conduct was caused by a serious provocation and not malice aforethought."

## **II. Standard of Review**

We review sufficiency-of-the-evidence claims for errors at law. *State v. Leckington*, 713 N.W.2d 218, 221 (Iowa 2006). The standards governing our review of claims of insufficient evidence are well established:

In a sufficiency-of-the-evidence challenge we review all the evidence to determine whether a rational trier of fact could have found the defendant guilty beyond a reasonable doubt. We view the evidence in the light most favorable to the State and draw all fair and reasonable inferences from all the evidence. We do not uphold a verdict on evidence that merely raises suspicion, speculation, or conjecture regarding guilt.

*State v. Brown*, 569 N.W.2d 113, 115 (Iowa 1997) (citations omitted).

### III. Merits

Malice aforethought is an essential element of second-degree murder and is the element that distinguishes second-degree murder from other lesser-included offenses. *State v. Reeves*, 670 N.W.2d 199, 207 (Iowa 2003). Malice aforethought 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, but only requires such deliberation as makes a person appreciate and understand at the time the act is committed its nature and probable consequences as distinguished from an act done in the heat of passion; it is sufficient if such purpose was formed before and continued to exist at the time of the injury; malice includes not only hatred and ill will but also any other unlawful or unjustifiable motive which inspires one to injure another and it may be inferred from the willful doing of an unlawful act, without just provocation or excuse, with intent to injure the person of another; it may mean simply a vicious and wanton disregard of another's rights.

*State v. Hofer*, 238 Iowa 820, 833, 28 N.W.2d 475, 482 (1947). In the absence of evidence to the contrary, the law allows a presumption of malice aforethought from the use of a deadly weapon. *Reeves*, 670 N.W.2d at 207. The presumption may be rebutted by evidence showing the killing was accidental, under provocation, or because of mental incapacity. *Id.*

A person commits voluntary manslaughter when that person causes the death of another person, under circumstances which would otherwise be murder, if the person causing the death acts solely as the result of sudden, violent, and irresistible passion resulting from *serious provocation sufficient to excite such passion in a person and there is not an interval between the provocation and the killing in which a person of ordinary reason and temperament would regain control and suppress the impulse to kill.*

Iowa Code § 707.4 (2005) (emphasis added).

Davis claims that Barnes's words—"Since you aint helping me you can f\*\*\*ing call [America On-Line] on your own and use your credit card"—along with evidence that Barnes wanted Davis out of the apartment and had threatened to call the police on him, supplied the factual basis for manslaughter, not second-degree murder, because he was provoked into a rage that led to the stabbing.<sup>1</sup>

We disagree. We find the foregoing does not constitute serious provocation. As noted by our supreme court:

[N]o precise line can be drawn by which to distinguish between provocations which will and will not mitigate the offense from murder to manslaughter. . . . Manifestly the provocation calculated to lead to this result must be something more than ordinary. It must be great or extraordinary . . . .

*State v. Watkins*, 147 Iowa 566, 569-70, 126 N.W. 691, 692 (1910). Davis's instant message immediately before the incident indicated he was angered by Barnes's statement; however we do not find her statement, even when combined with previous threats to call the police or kick him out of the apartment, was so extraordinary or so great as to incite the impulse to kill. Accordingly, we find there was not sufficient evidence to establish voluntary manslaughter because there was no serious provocation in this case.

#### **IV. Conclusion**

We find there was sufficient evidence to support a finding of malice aforethought; therefore we affirm Davis's conviction.

**AFFIRMED.**

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<sup>1</sup> We will assume, *arguendo*, that Davis preserved error on this claim.