

**IN THE COURT OF APPEALS OF IOWA**

No. 8-478 / 07-1913  
Filed July 16, 2008

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

**vs.**

**GUSTAVO SIERRA,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Louisa County, Michael J. Schilling,  
Judge.

Gustavo Sierra appeals his conviction for murder in the second degree.

**AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Dennis D. Hendrickson,  
Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas Tauber, Assistant Attorney  
General, David L. Matthews, County Attorney, for appellee.

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

**MAHAN, J.**

Gustavo Sierra appeals the judgment entered on his guilty plea to murder in the second degree. We affirm.

**I. Background Facts and Proceedings.**

On July 4, 2006, Gustavo Sierra got a .357 caliber hand gun revolver from a friend and drove to the home of his estranged wife, Maria Sierra.<sup>1</sup> Sierra broke in through the window and followed her in the home. He shot her the first time inside the home. After the first shot, Maria managed to get outside through the front door. Sierra shot her the second time outside. After the second shot, Sierra went back inside the home. He then went outside again and shot her two more times in the head. Maria died as a result of the gunshots.

Sierra entered a plea to the charge of second-degree murder as part of a plea agreement involving several other charges. During Sierra's plea to the murder charge, the following colloquy took place:

THE COURT: The shot that you fired inside the house, were you shooting at somebody, and if so, whom?

DEFENDANT: It was to my wife, Maria.

THE COURT: Did you point the gun at Maria, pull the trigger, and shoot her inside the house?

DEFENDANT: Yes.

THE COURT: Did she—did you hit her with the first shot?

DEFENDANT: Yes.

THE COURT: Did Maria then after the first shot hit her, did she go outside the residence?

DEFENDANT: She was able to manage to get through the front door and she was leaning down, and as she leaned down, that's when I shot again and I got back in the house and then I went out again and I shot her again in the head.

THE COURT: So the second time you shot her was outside the front door when she was leaning over; is that right?

DEFENDANT: Yes.

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<sup>1</sup> Prior to this time, the couple had a history of domestic abuse and had separated.

THE COURT: And then after shooting her a second time, you went back inside the house? Is that right?

DEFENDANT: Yes.

THE COURT: And after being in the house, you came outside again in front of the doorway; is that right?

DEFENDANT: Yes.

THE COURT: And how many shots did you fire at Maria at that time?

DEFENDANT: Two.

THE COURT: And where did you shoot her with those two shots?

DEFENDANT: In the head.

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THE COURT: Before you shot your wife, did you have a fixed purpose or design to do some physical harm to her?

DEFENDANT: No. I just simply came from the place I was before. I got in, and then I knocked at the door. I got in, and then she answered me, and then I just started shooting.

THE COURT: Well, at the moment before you started shooting her, did you design—was it your purpose and design to do physical harm to her?

DEFENDANT: The last two, yes.

THE COURT: By the last two, do you mean the last two shots?

DEFENDANT: Yes.

Additional colloquy took place in the course of Sierra's plea to the burglary of Maria's home. Sierra answered that when he broke into Maria's home with the gun he had the specific intent to commit assault upon her:

THE COURT: On July 4, 2006, in Louisa County, Iowa, did you enter the home of Maria Sierra?

DEFENDANT: Yes.

THE COURT: Did you do so without her permission or authority?

DEFENDANT: Yes.

THE COURT: And at the time that you entered, did you do so with the specific inten[t] to commit assault upon her?

DEFENDANT: Yes.

THE COURT: And at the time that entered did you—and after you entered, both, did you possess a dangerous weapon, to wit, a .357 caliber hand gun revolver?

DEFENDANT: Yes.

Sierra was originally charged with first-degree murder, first-degree burglary and going armed with intent. Per his plea agreement, Sierra was convicted of second-degree murder and first-degree burglary. He was sentenced to prison terms of fifty years and twenty-five years to be served consecutively.

Sierra argues he did not have the requisite malice aforethought to commit second-degree murder because he did not specifically intend to cause physical harm to Maria when he shot her the first two times. He therefore appeals from his conviction and sentence, contending he received ineffective assistance of counsel when he pleaded guilty to an offense that was not supported by a factual basis.

## **II. Scope and Standard of Review.**

Our review of ineffective assistance of counsel claims is de novo. *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008). Ordinarily, we preserve ineffective assistance of counsel claims for postconviction proceedings. *Id.* Where the record is adequate to address the issue, however, such claims will be considered on direct appeal. *Id.*; *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999). In this case, the record is sufficient to permit a ruling. We review counsel's conduct considering the totality of the circumstances. *State v. Lane*, 743 N.W.2d 178, 181 (Iowa 2007).

## **III. Merits.**

To establish a claim of ineffective assistance of counsel, a defendant must prove (1) counsel failed to perform an essential duty, and (2) prejudice resulted. *Maxwell*, 743 N.W.2d at 196. A defendant's failure to prove either element by a

preponderance of the evidence is fatal to a claim of ineffective assistance. *State v. Polly*, 657 N.W.2d 462, 465 (Iowa 2003).

Counsel fails to perform an essential duty by allowing the defendant to plead guilty to a charge for which no factual basis exists and thereafter failing to file a motion in arrest of judgment challenging the plea. *Schminkey*, 597 N.W.2d at 788; *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996). Therefore, the issue before us is whether a factual basis existed for Gustavo's guilty plea to second-degree murder. In determining whether a factual basis for the guilty plea exists, we consider the entire record before the district court, including any plea colloquy. *Brooks*, 555 N.W.2d at 448-49.

The offense of second-degree murder is defined in Iowa Code sections 707.1, 707.3 (2007), which state that a person commits second-degree murder when he "kills another person with malice aforethought either express or implied" and the crime is not classified as first-degree murder. Sierra challenges the factual basis for the intent element of this crime.

The essential intent element of second-degree murder is malice aforethought. Malice aforethought is defined as "a fixed purpose or design to do some physical harm to another that exists before the act is committed." *State v. Newell*, 710 N.W.2d 6, 21 (Iowa 2006) (internal citation omitted). Malice aforethought does not need to exist for any particular length of time before the act occurs. *State v. Buenaventura*, 660 N.W.2d 38, 48 (Iowa 2003). Circumstantial evidence is generally used to prove this element because it is a state of mind. *Newell*, 710 N.W.2d at 21. The prior relationship between the defendant and the victim, including bad feelings, quarrels, and physical acts, is a

circumstance that may be shown to prove the defendant's state of mind at the time of the crime. *Id.* Furthermore, in the absence of evidence to the contrary, the law allows a presumption of malice aforethought from the use of a deadly weapon. *State v. Reeves*, 670 N.W.2d 199, 207 (Iowa 2003).

We find the acts to which Sierra confessed and testified reflect malice aforethought. The acrimonious relationship between the parties and history of domestic abuse is highly probative of Sierra's intent in this situation. Sierra got a gun from a friend and drove to Maria's home intending to harm her. He broke in through a window with the gun, found his wife, pointed the gun at her, and shot her. He followed her outside and continued to shoot her three more times.

Although Sierra contends he only had a purpose and design to do physical harm to Maria when he shot her the last two times, we find the circumstantial evidence in this case overwhelmingly proves Sierra acted with malice aforethought sufficient for a charge of second-degree murder. Upon our review of the record, we conclude a factual basis existed to support Sierra's plea. Therefore, Sierra's counsel was not ineffective for failing to challenge the plea. We affirm Sierra's conviction and sentence.

**AFFIRMED.**