IN THE COURT OF APPEALS OF IOWA

No. 9-634 / 08-1567
Filed November 25, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

WILLIAM JACOB SHEKEY,
Defendant-Appellant.

Appeal from the Iowa District Court for Humboldt County, Bryan H. McKinley, Judge.

Defendant appeals his conviction for murder in the second degree. **REVERSED AND REMANDED.**

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

Thomas J. Miller, Attorney General, Cristen Douglass and Douglas Hammerand, Assistant Attorneys General, and Jennifer A. Benson, County Attorney, for appellee.

Heard by Potterfield, P.J., Mansfield, J., and Mahan, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

MAHAN, S.J.

I. Background Facts & Proceedings

When the Prowler, a bar in Humboldt, Iowa, closed in the early morning hours of April 5, 2008, Colby Marchant invited some people over to the home he shared with Alissa Wagner for an after-hours party. William Shekey, who lived with his parents next door to Marchant and Wagner, came to the party, as well as Michael Ruberg, a friend of Marchant's. Shekey was about five feet nine or ten inches tall and weighed about 158 pounds. Ruberg was almost six feet three inches tall and weighed about 240 pounds. All of the people at the party were drinking alcohol.

As the party progressed, Ruberg and Shekey had a disagreement while they were standing in the kitchen. Shekey testified Ruberg said, "wow, you must really think you're tough or something like that." Shekey responded, "yeah, I guess so." Shekey walked away into the living room. He told Lucinda Boge and Cody Mayall that Ruberg was harassing him. Boge stated Shekey acted like he was mad, and his legs were shaking. Mayall testified, "he was shaking and, you know, you could tell he was real angry, like he was mad."

Shekey returned to the kitchen to get another beer. Shekey testified Ruberg "stated he was pretty tough, and I said, well, so am I." The men continued back and forth in this manner, until Marchant told them if they were going to fight to go outside. Shekey walked outside and Ruberg followed him. Shekey admitted that their purpose in going outside was to see who was toughest, although he stated he did not know for sure they were going to fight.

After a few minutes, Marchant and Wagner went outside to take their dog to its kennel. They saw Shekey and Ruberg standing in the street. Wagner testified she heard one of the men, probably Ruberg, say, "come on."

Shekey testified that after he and Ruberg went outside, Ruberg urinated in the street. He stated Ruberg threw a couple of punches at him, and Shekey retaliated with a couple. He stated they each landed two or three punches. Shekey testified he then said, "are we done? Have you had enough?" Ruberg said, "Let's do this." Shekey said the men circled each other, and Ruberg threw a punch. Shekey hit Ruberg with his left fist, and Ruberg went down. Shekey grabbed Ruberg by the collar, but saw he was unconscious.

As Marchant and Wagner were coming back into the house from taking their dog out, Shekey walked up and went into the house with them. He stated Ruberg needed help. Wagner and Boge went outside and saw Ruberg lying in the street. Wagner went inside and called 911. Marchant and Boge's husband moved Ruberg off the street. Shekey told the group he only hit Ruberg once or twice. Shekey was visibly distraught and was crying.

Ruberg died as a result of blunt force injury to the head and neck. Dr. Michele Catellier testified there was at least one blow, but there could have been two or more blows. Ruberg suffered a torn vertebral artery, and a person who suffers this type of injury becomes unconscious immediately and does not recover.[1]

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[1] Dr. Catellier testified that this was the first time as a pathologist she had ever seen a torn vertebral artery.

Shekey was charged with murder in the second degree, in violation of Iowa Code section 707.3 (2007). He waived his right to a jury trial. Shekey raised a defense of justification, or self-defense.

The district court found Shekey guilty of second-degree murder. The court found Shekey struck Ruberg, and Ruberg died as a result of being struck. The court found Shekey acted with malice aforethought because Shekey had a fixed purpose or design to do some physical harm to Ruberg. The court found Shekey had an unlawful purpose to commit the crimes of disorderly conduct and assault. The court also found his conduct was based upon dislike and bad feelings. On the issue of self-defense, the court found Shekey's testimony that he tried to stop the fight by asking if Ruberg had enough to be "self-serving, opportunistic, and lacking in believability." Additionally, the court found Shekey's statement was not sufficient to show that he desired to terminate the conflict. The court noted Shekey had several opportunities to avoid the conflict.

Shekey filed a motion seeking a new trial, or in the alternative to vacate the judgment or for the court to make new findings and conclusions. The district court denied the motion. Shekey was sentenced to a term of imprisonment not to exceed fifty years. He now appeals his conviction, claiming the verdict was not supported by substantial evidence.

II. Standard of Review

We review challenges to the sufficiency of the evidence in a criminal case for the correction of errors at law. *State v. Heuser*, 661 N.W.2d 157, 165 (Iowa 2003). The district court's fact finding is binding on an appeal from a bench trial,

unless it is unsupported by substantial evidence. *State v. Tovar*, 580 N.W.2d 768, 770 (Iowa 1998). Substantial evidence means evidence that could convince a rational fact-finder that the defendant is guilty beyond a reasonable doubt. *State v. Shortridge*, 589 N.W.2d 76, 80 (Iowa Ct. App. 1998). We view the evidence in the light most favorable to the State. *State v. Padavich*, 536 N.W.2d 743, 751 (Iowa 1995).

III. Malice Aforethought

Malice aforethought is an element of either first or second degree murder. *State v. Heemstra*, 721 N.W.2d 549, 555 (Iowa 2006). It is the element that separates second-degree murder from other lesser included offenses. *State v. Reeves*, 670 N.W.2d 38, 49 (Iowa 2003). "Malice aforethought is a fixed purpose or design to do physical harm to another that exists before the act is committed." *State v. Myers*, 653 N.W.2d 574, 579 (Iowa 2002). It does not need to exist for any particular length of time. *State v. Reeves*, 636 N.W.2d 22, 25 (Iowa 2001).

The term "malice" has been defined as follows:

> [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.

State v. Shanahan, 712 N.W.2d 121, 134 (Iowa 2006) (citations omitted). The element of malice aforethought refers to a state of mind, and is often proven by circumstantial evidence. *State v. Buenaventura*, 660 N.W.2d 38, 49 (Iowa 2003).

Shekey contends there is not sufficient evidence in the record to show that he acted with malice aforethought. He claims he did not act with an unlawful purpose because he and Ruberg mutually agreed to engage in a sporting contest, similar to a boxing match. Shekey states he did not intend to seriously injure Ruberg. He asserts there is no evidence of actual hatred or an evil purpose.

Shekey raises an additional argument that the act of committing assault or disorderly conduct is not sufficient proof of malice aforethought. He points out that in *Heemstra*, 721 N.W.2d at 558, the Iowa Supreme Court changed previous law to conclude that if the act causing willful injury is the same act that causes the victim's death, the act of willful injury cannot serve as the predicate felony for a felony-murder charge. Shekey argues that prior to the holding in *Heemstra*, the element of malice could be inferred from the underlying felony, such as assault. He argues that due to the change in *Heemstra*, the element of malice aforethought should not be inferred from the commission of assault or disorderly conduct.

The State argues that Shekey reads the malice element too narrowly. The State asks this court to reject Shekey's claim that proof of disorderly conduct or assault somehow relieved the State from proving malice aforethought. The State agrees that proof of these offenses does not prove malice per se and the court cannot find malice solely on evidence Shekey committed these crimes. The State then argues that the district court did not find malice solely for this reason and, instead, considered many factors in reaching its conclusion. We agree.

We determine the district court did not find the element of malice aforethought was established alone by commission of assault or disorderly conduct. The court considered all of the facts and circumstances surrounding the crime in making its determination of malice. However, our review of these factors leads us to a different conclusion. We conclude the finding of malice made by the district court is unsupported by substantial evidence. The evidence is insufficient to establish malice aforethought beyond a reasonable doubt. We therefore reverse the defendant's conviction for murder in the second degree.

IV. Involuntary Manslaughter

Malice aforethought is the element that separates second-degree murder from other lesser included offenses. *Reeves*, 670 N.W.2d at 49. Having found insufficient proof of the element of malice aforethought, we now turn to a discussion of the lesser included offense of involuntary manslaughter.[2] The crime of involuntary manslaughter is found in section 707.5, as follows:

> 1. A person commits a class "D" felony when the person unintentionally causes the death of another person by the commission of a public offense other than a forcible felony or escape.
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> 2. A person commits an aggravated misdemeanor when the person unintentionally causes the death of another person by the commission of an act in a manner likely to cause death or serious injury.
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> Involuntary manslaughter as defined in this section is an included offense under an indictment for murder in the first or second degree or voluntary manslaughter.

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[2] We do not discuss the crime of voluntary manslaughter because the State did not contend there was evidence of "sudden, violent, and irresistible passion resulting from serious provocation." *See* Iowa Code § 707.4.

In his Post-Trial Brief, Shekey argues that this case clearly falls within the definition of involuntary manslaughter under either section 707.5(1) or section 707.5(2).[3] The legislature has made involuntary manslaughter a lesser-included offense of second-degree murder. *See* Iowa Code § 707.5; *State v. Inger*, 292 N.W.2d 119, 123 (Iowa 1980).

Section 707.5(1) requires the commission of a public offense other than a forcible felony or escape. *State v. Boley*, 456 N.W.2d 674, 680 (Iowa 1990). Assault may be used to prove the public offense element of an involuntary manslaughter charge under section 707.5(1). *State v. Webb*, 313 N.W.2d 550, 552-53 (Iowa 1981). Shekey admitted he struck Ruberg, which would meet the definition of an assault under section 708.1. The district court found Shekey committed the public offenses of assault and disorderly conduct.[4] We conclude there is sufficient evidence to show Shekey unintentionally caused the death of another by the commission of a public offense other than a forcible felony or escape.

Furthermore, by finding Shekey had committed second-degree murder, the district court necessarily found the State had established all of the elements of the lesser-included offense of involuntary manslaughter. *See State v. Morris*, 677 N.W.2d 787, 788 (Iowa 2004) ("[T]he jury necessarily found that the State had established all elements of the included offense."). We found insufficient evidence of malice aforethought, and have reversed the conviction for second-

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[3] This brief was submitted prior to appeal and is set forth on pages 250 to 262 of the appendix.

[4] The evidence shows Shekey engaged in disorderly conduct, a simple misdemeanor, by engaging in fighting or violent behavior in a public place. *See* Iowa Code § 723.4(1).

degree murder. We conclude there is evidence beyond a reasonable doubt to enter a judgment of conviction on the charge of involuntary manslaughter under section 707.5(1).

V. Justification

Shekey claims the district court erred by finding the State proved beyond a reasonable doubt that he did not act with justification. "A person is justified in the use of reasonable force when the person reasonably believes that such force is necessary to defend oneself or another from any imminent use of unlawful force." Iowa Code § 704.3. When the defense of justification is raised, the State must prove the lack of justification by proof beyond a reasonable doubt. *State v. Begey*, 672 N.W.2d 747, 752 (Iowa 2003).

The State may meet its burden to show a lack of justification by proving any one of the following elements:

> 1. The defendant started or continued the incident which resulted in injury.
> 2. An alternative course of action was available to the defendant.
> 3. The defendant did not believe [he] was in imminent danger of death or injury and the use of force was not necessary to save [him].
> 4. The defendant did not have reasonable grounds for the belief.
> 5. The force used by the defendant was unreasonable.

Shanahan, 712 N.W.2d at 134.

Shekey contends he attempted to withdraw from the conflict, and his statement, "are we done? Have you had enough?," to Ruberg reflects his intent to withdraw. The defense of justification may be available to a person who "withdraws from physical contact with the other and indicates clearly to the other that the person desires to terminate the conflict but the other continues or

resumes the use of force." Iowa Code § 704.6(3)(b). The district court found Shekey's testimony that he attempted to withdraw from the conflict not credible. The court found his statement to be "self-serving, opportunistic, and lacking in believability." The credibility of witnesses was a matter for the court, as the fact finder, to determine. *See State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993). Based on the court's credibility finding, the evidence does not show Shekey attempted to withdraw from the conflict.

Furthermore, the district court found Shekey started or continued the fight which resulted in Ruberg's death. Shekey walked outside with Ruberg, knowing they were probably going to fight to see who was the toughest. Also, even if we accepted that at one point Shekey asked, "are we done? Have you had enough?," he continued to punch Ruberg, including the punch that caused his death.

In addition, Shekey had alternative courses of action open to him. Of course, he simply could have refused to go outside with the intent to fight Ruberg. Shekey lived right next door to the home where the party was held, and could have gone home at any time. The district court additionally noted that Shekey could have expressed more clearly his intent to terminate the conflict, if that was indeed his intent. As the court found, assuming Shekey made the statement, it could be taken to say Shekey was done fighting only if Ruberg was done fighting, otherwise he would continue.

We conclude there is substantial evidence in the record to support the district court's conclusion that the State proved a lack of justification. The State

was only required to prove one element to show a lack of justification. *See State v. Rubino*, 602 N.W.2d 558, 565 (Iowa 1999). The State proved Shekey initiated or continued the conflict, and an alternative course was open to him.

We reverse the conviction for second-degree murder. We remand to the district court to enter a judgment on the lesser included offense of involuntary manslaughter, and for resentencing. *See State v. Pace*, 602 N.W.2d 764, 774 (Iowa 1999); *Morris*, 677 N.W.2d at 789.

REVERSED AND REMANDED.