IN THE COURT OF APPEALS OF IOWA

No. 6-603 / 04-1441
Filed November 30, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

SOKLAY LAI LOEUM,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Robert B. Hanson, Judge.

Soklay Lai Loeum appeals his conviction for second-degree murder. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Linda Del Gallo, State Appellate Defender, and Martha Lucey, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, John P. Sarcone, County Attorney, and Bob Diblassi and George Karnas, Assistant County Attorneys, for appellee.

Heard by Huitink, P.J., Vogel, J., and Robinson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2005).

HUITINK, P.J.

Soklay Lai Loeum appeals his second-degree murder conviction. We affirm in part, reverse in part, and remand for further proceedings.

I. Background Facts and Proceedings.

On March 9, 2004, Loeum was charged with first-degree murder for the shooting death of his brother, Roeutana Loeum. According to the State's version of events, Loeum shot Roeutana Loeum in the head with a nine millimeter pistol during a heated argument. Loeum claimed he only intended to "pistol whip" Roeutana but the pistol accidentally discharged when he struck Roeutana on the head with it. Following a jury trial, Loeum was convicted of the lesser offense of murder in the second degree and sentenced accordingly.

On appeal, Loeum argues:

I. The State presented insufficient evidence to convict Soklay Loeum of murder in the second degree.
II. Trial counsel provided ineffective assistance of counsel by failing to object to jury instruction twenty-seven.
III. The district court erred in denying the motion for a new trial.

II. Sufficiency of the Evidence.

We review a sufficiency of the evidence challenge for correction of errors at law. *State v. Thomas*, 561 N.W.2d 37, 39 (Iowa 1997). A jury's finding of guilt is binding upon us unless there is not substantial evidence in the record to support the verdict. *State v. Sutton*, 636 N.W.2d 107, 110 (Iowa 2001). Substantial evidence is evidence that could convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt. *State v. Robinson*, 288 N.W.2d 337, 339 (Iowa 1980). We view the evidence in the light most favorable to the State, but consider all the evidence, not just the evidence supporting the

verdict. *Thomas*, 561 N.W.2d at 39. "Direct and circumstantial evidence is equally probative." *State v. Shortridge*, 589 N.W.2d 76, 80 (Iowa Ct. App. 1998). The evidence must raise a fair inference of guilt as to each essential element of the crime and must do more than raise suspicion, speculation, or conjecture. *State v. Webb*, 648 N.W.2d 72, 76 (Iowa 2000).

Iowa Code section 707.1 (2003) states "[a] person who kills another person with malice aforethought either express or implied commits murder." "Malice aforethought is therefore 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, . . . ; it is sufficient if such purpose was formed before and continued to exist at the time of the injury.

State v. Hofer, 238 Iowa 820, 833, 28 N.W.2d 475, 482 (1947). In other words, "it is sufficient if malice existed prior to the act—the length of time it existed is not material." *Id.* at 834, 28 N.W.2d at 482. "The law allows a presumption of malice aforethought from the use of a deadly weapon in the absence of evidence to the contrary." *Reeves*, 670 N.W.2d at 207 (citing *State v. Woodmansee*, 212 Iowa 596, 620, 233 N.W. 725, 736 (1930)). "[T]he presumption is only permissive." *Reeves*, 670 N.W.2d at 207 (citing *State v. Elam*, 328 N.W.2d 314, 318 (Iowa 1982)). "[T]he presumption may be rebutted by evidence showing the killing was accidental, under provocation, or because of mental incapacity." *Reeves*, 670 N.W.2d at 207.

Contrary to Loeum's claims, we find the record contains sufficient evidence supporting his second-degree murder conviction. Eyewitness testimony indicates Loeum and Roeutana engaged in a heated argument that escalated into a violent confrontation. The record also indicates Loeum struck Roeutana in the head with a handgun with sufficient force to cause it to discharge and kill Roeutana. Moreover, Loeum's statement to investigators indicates he knew the handgun would discharge upon sufficient contact with the barrel end of the handgun. Although the record contains additional conflicting evidence concerning Loeum's accidental homicide defense, we find the foregoing sufficient to convince a rational trier of fact that Loeum killed Roeutana with malice aforethought. We therefore affirm on this issue.

III. Ineffective Assistance of Counsel/Jury Instruction No. 27.

We review claims of ineffective assistance of counsel de novo. *Wemark v. State*, 602 N.W.2d 810, 814 (Iowa 1999). To establish ineffective assistance of trial counsel, Loeum must prove both that his attorneys' performance fell below "an objective standard of reasonableness" and that "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). To establish a breach of duty, he must overcome the presumption that his trial attorneys were competent and prove that their performance was not within the range of normal competency. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). To establish prejudice, he must show a reasonable probability that, but for counsels' errors, the result of the proceeding would have been different. *State v. Atwood*, 602 N.W.2d 775, 784 (Iowa 1999). If Loeum fails to prove either element, his ineffective assistance

claim cannot succeed. *State v. Query*, 594 N.W.2d 438, 445 (Iowa Ct. App. 1999).

Loeum argues that Jury Instruction No. 27 is incomplete and not a correct statement of the law and his trial counsel had a duty to object to it. We disagree.

Instruction No. 27 and Iowa Uniform Criminal Jury Instruction 700.10 are identical. Both state "[m]alice aforethought may be inferred from the Defendant's use of a dangerous weapon." Iowa Code section 702.7 classifies a dangerous weapon as any instrument capable of inflicting death or serious injury by its design or actual use and including a pistol or revolver. "[M]alice aforethought may be inferred from defendant's use of a pistol or revolver, i.e., a deadly weapon." *State v. Smith*, 242 N.W.2d 320, 326 (Iowa 1976). The instruction must correctly state the law and be supported by substantial evidence. *State v. Predka*, 555 N.W.2d 202, 204 (Iowa 1996). Instructions derived from the Uniform Jury Instructions are presumptively valid; the supreme court on review is reluctant to disapprove them. *State v. Weaver*, 405 N.W.2d 852, 855 (Iowa 1987). Because Instruction No. 27 correctly states the law on this issue and substantial evidence supported its submission, trial counsel had no duty to make a meritless objection to it. We also affirm on this issue.

IV. Motion for New Trial.

Rulings on motions for a new trial are reviewed for abuse of discretion. *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998). Loeum argues the district court applied the incorrect legal standard in ruling on his motion for new trial. Trial courts have broad discretion in deciding motions for new trial. *State v. Atley*, 564 N.W.2d 817, 821 (Iowa 1997). A trial court may grant a new trial "[w]hen the

verdict is contrary to law or evidence." Iowa R. Crim. P. 2.24(2)(*b*)(6). "Contrary to the evidence" means "contrary to the weight of the evidence." *Ellis*, 578 N.W.2d at 659. Weight of the evidence refers to a determination by the trier of fact "that a greater amount of credible evidence supports one side of an issue or cause than the other." *Id.* at 658 (quoting *Tibbs v. Florida*, 457 U.S. 31, 37-38, 102 S. Ct. 2211, 2216, 72 L. Ed. 2d 652, 658 (1982)). In ruling on the motion for a new trial, the district court stated:

> Well, it's been sometime since the trial of the case. And I can't tell you in all candor that I have perfect recall, but to the extent that our discussion here is focusing on the question on whether the jury could have found – correctly found malice aforethought as one of the elements as required for a conviction of second degree murder, I would note, Mr. Moss has already noted some of these things, but malice aforethought I note from the standard jury instructions can be found from the acts and the conduct of the defendant, can be found from the means used in doing the wrongful and injurious act, requires only such deliberation that would make a person appreciate and understand the nature of the act and its consequences. It does not have to exist for any particular length of time. That is all from stock jury instruction 700.7, which I believe was given in this matter.
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> And I would also note that, as Mr. Moss has noted, that malice aforethought may be inferred from the defendant's use of a dangerous weapon. I know that this is a hotly contested matter and there was a lot of evidence on both sides, but I'm confident that there was sufficient evidence on the record to support the jury's findings of all of the elements of murder in the second degree, including but not limited to malice aforethought. And so the motion for new trial and the motion in arrest of judgment will be overruled.

The State concedes that the matter should be remanded because the trial court applied the wrong legal standard in ruling on Loeum's motion for new trial. The trial court should have applied a contrary-to-the-weight-of-the-evidence standard instead of a sufficiency-of-the-evidence standard. *See Ellis*, 578 N.W.2d at 659.

Accordingly, we reverse the trial court's ruling on Loeum's motion for new trial and remand to the district court for a new ruling on that motion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.