IN THE COURT OF APPEALS OF IOWA

No. 9-633 / 08-1559
Filed September 2, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ROBERT ALAN MACLAIRD,
Defendant-Appellant.

Appeal from the Iowa District Court for Warren County, Paul R. Huscher, Judge.

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

Mark C. Smith, State Appellate Defender, and David Adams, Assistant State Appellate Defendant, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, Bryan Tingle, County Attorney, and Tiffany Koening, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Potterfield, J., and Miller, S.J.*

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

MILLER, S.J.

I. Background Facts & Proceedings

On August 7, 2007, while his wife, Cheryl MacLaird, was at work, Robert MacLaird (MacLaird) and his girlfriend, Diana Graham, went to the home of MacLaird's friend Dennis Holt in Beech, Iowa. Although Holt lived only a few houses away from MacLaird, they drove to Holt's house. MacLaird and Graham assisted Holt in counting cans to take to the redemption center. The three then left in Holt's vehicle to drive to Indianola, where they redeemed the cans, and then bought beer at a Hy-Vee Store. MacLaird, Graham, and Holt all drank the beer as they drove through Warren County.

After they returned to Holt's house, Holt suggested they go swimming at a nearby pond. MacLaird returned to his house to get some shorts. The three then drove to Pleasantville to get more beer, before going to the swimming pond. They agreed to go swimming in their underwear. After Holt made a comment noticing that Graham's panties were transparent when wet, Graham and MacLaird exchanged underwear. They spent several hours swimming and drinking.

Eventually a thunderstorm broke out. MacLaird became impatient because Graham waited for Holt before getting out of the water. Graham stated MacLaird threw her clothes at her, and a bottle that was in them hit her on the head. MacLaird was unable to find his shorts before they left. As they stopped at Holt's house, MacLaird got out of the car and walked home, wearing only Graham's panties. Graham went into Holt's home.

Cheryl let MacLaird into their home. He changed into dry clothes and told Cheryl "they wouldn't let him have his belongings" and stated he wanted to call the state patrol. MacLaird asked Cheryl to drive him to Holt's house so he could get his keys, cell phone, and car. Cheryl testified, "It could be assumed he was angry, yes." She described MacLaird as "Frustrated. Agitated." Cheryl told an officer she took MacLaird to Holt's home because she did not want to get beat. MacLaird took a black powder revolver, a modern replica of an antique gun, with him.

MacLaird knocked on Holt's door, and Holt answered the door carrying an eight-inch survival knife. MacLaird repeatedly asked for his car keys and cell phone, and Holt kept telling him to go home. Cheryl got out of the car and came up to Holt's porch as Holt came out of the door. Holt raised up the knife, and told Cheryl "get your old man out of here." Cheryl said, "I'll get Bob out of here," and began trying to reason with him. In the meantime, MacLaird had obtained the revolver from Cheryl's car. MacLaird shot the revolver.[1]

Holt said, "I can't believe you just did that." MacLaird replied that he would not shoot Holt. Holt came up to MacLaird and put the knife to his throat. MacLaird struck Holt on the head with the heavy revolver about three to five times. Cheryl told MacLaird to stop, and he did. Holt fell to the ground, bleeding

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[1] The percussion cap, used to ignite the powder used in the revolver, "went off," but the powder did not ignite and discharge the bullet that was in the cylinder. According to MacLaird's testimony, he had in the past regularly used the black-powder revolver for recreational shooting. He further testified, however, that when shooting the revolver in 1994 the percussion cap on the one cylinder that remained loaded with powder and a bullet "went off" but the revolver did not fire, he replaced the cap, and he had not subsequently shot the revolver.

profusely from the head. Graham came out of Holt's house as he lay on the ground. Graham attempted to assist Holt. MacLaird came over and said, "Get away from him. He's my friend." Graham yelled at MacLaird. Cheryl told him his keys were in his car. MacLaird got in his car and drove home. Cheryl called 911.

After law enforcement officials and paramedics arrived, MacLaird returned from his home to turn himself in. MacLaird told a deputy sheriff he had gone to Holt's house "to confront Diana and Dennis about what they were doing, about how it wasn't right, and he wanted to run away with Diana and make a new life." Officers found MacLaird's cell phone in his car. Holt died of blunt-force injuries to the head.

MacLaird was charged with murder in the first degree, willful injury resulting in serious injury, and burglary in the first degree. MacLaird filed notice of his intent to rely on the defense of self-defense, or justification, at trial. MacLaird testified that he shot the revolver at the ground, and he was hoping to scare Holt off. He said Holt threatened to slit his gullet like a fish, and that he pushed the knife at his throat. MacLaird stated he thought Holt was killing him, and he hit Holt with the revolver. MacLaird sustained no injuries in the incident.

MacLaird moved for judgment of acquittal on all counts. The district court granted the motion on the charge of first-degree burglary. The court also ruled that willful injury could not be submitted as a separate charge because it was a lesser included offense of first-degree murder. The court denied the motion as to first-degree murder.

The jury returned a verdict finding MacLaird guilty of second-degree murder, in violation of Iowa Code section 707.3 (2007). MacLaird was sentenced to a term of imprisonment not to exceed fifty years. He appeals his conviction, claiming he received ineffective assistance of counsel.

II. Standard of Review

We review claims of ineffective assistance of counsel de novo. *State v. Bergmann*, 600 N.W.2d 311, 313 (Iowa 1999). To establish a claim of ineffective assistance of counsel, a defendant must show (1) the attorney failed to perform an essential duty, and (2) prejudice resulted to the extent it denied defendant a fair trial. *State v. Carroll*, 767 N.W.2d 638, 641 (Iowa 2008). To show prejudice, a defendant must demonstrate there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Reynolds*, 746 N.W.2d 837, 845 (Iowa 2008). Absent evidence to the contrary, we assume that the attorney's conduct falls within the wide range of reasonable professional assistance. *State v. Hepperle*, 530 N.W.2d 735, 739 (Iowa 1995).

III. Ineffective Assistance

A. MacLaird asserts he received ineffective assistance because his defense counsel did not argue in the motion for judgment of acquittal that there was insufficient evidence to establish that he had acted without 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.

Once a defendant raises this defense and presents substantial evidence in support of it, the State has the burden to prove that the defendant acted without justification. *State v. Ceaser*, 585 N.W.2d 192, 193-94 (Iowa 1998). The State must prove beyond a reasonable doubt that the alleged justification did not exist. *State v. Rubino*, 602 N.W.2d 558, 565 (Iowa 1999). The State may meet its burden 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 or] she was in imminent danger of death or injury and the use of force was not necessary to save [the defendant].
> 4. The defendant did not have reasonable grounds for the belief.
> 5. The force used by the defendant was unreasonable.

State v. Shanahan, 712 N.W.2d 121, 134 (Iowa 2006).

MacLaird urges us to view the evidence as involving two separate disputes—one a verbal dispute, and the second a physical confrontation beginning when Holt threatened MacLaird with a knife. He asserts that he should not have been expected to retreat from a verbal argument. MacLaird claims Holt was the aggressor because he came down off of his porch carrying the knife. He also asserts that Holt escalated the threat of violence by thrusting the knife at his throat. MacLaird claims that at that point, he no longer had an opportunity to escape or retreat with safety.

We determine the State presented sufficient evidence to disprove MacLaird's claim of justification. We do not follow MacLaird's suggestion to treat

the event as two separate incidents. Generally, we consider the complete story of a crime. *See State v. Shortridge*, 589 N.W.2d 76, 83 (Iowa Ct. App. 1998).

MacLaird initiated the incident by going to Holt's home while he was angry and bringing a loaded revolver with him. He was asked multiple times to leave by Holt and Cheryl, but continued to demand the return of his car keys and cell phone. MacLaird had an alternative course of action available to him in that he could have retreated or left the area at any time during this discussion. Instead he continued the incident by returning to Cheryl's car to get the revolver he brought to Holt's home. MacLaird admitted that as he came forward with the revolver he pulled it up to show Holt, and Holt "went to head towards – in the house." Thus, as Holt was retreating, MacLaird further escalated the incident by shooting the revolver.

We conclude that even if defense counsel had argued in the motion for judgment of acquittal that there was insufficient evidence to establish that he had acted without justification, the district court would have denied the motion because the State presented sufficient evidence to show that the defendant acted without justification. *See State v. Lane*, 743 N.W.2d 178, 183 (Iowa 2007) (noting counsel is not ineffective based on grounds raised in a motion for judgment of acquittal, if the district court would have denied the motion based on evidence presented). Where a verdict is supported by sufficient evidence, a defendant is unable to show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *See State v. Leckington*, 713 N.W.2d 208, 218 (Iowa 2006). We

conclude MacLaird has failed to show he received ineffective assistance on this ground.

B. MacLaird also contends that he received ineffective assistance because defense counsel did not argue in the motion for judgment of acquittal that the evidence did not support a finding of "malice aforethought," but did support a finding of "serious provocation." He claims defense counsel should have argued that the evidence, at most, supported a guilty verdict on the lesser included offense of voluntary manslaughter.

A person commits murder, either first or second degree, when the person kills another with malice aforethought. *State v. Heemstra*, 721 N.W.2d 549, 555 (Iowa 2006). Malice aforethought "is a fixed purpose or design to do some physical harm to another that exists before the act is committed." *State v. Buenaventura*, 660 N.W.2d 38, 49 (Iowa 2003) (citation omitted). There is no requirement that this purpose exist for any specific length of time. *State v. O'Shea*, 634 N.W.2d 150, 157 (Iowa Ct. App. 2001).

There is a permissive presumption of malice aforethought from the use of a deadly weapon. *State v. Reeves*, 670 N.W.2d 199, 207 (Iowa 2003). "[T]he presumption may be rebutted by evidence showing the killing was accidental, under provocation, or because of mental incapacity." *Id.* Also, "[e]vidence of bad feelings or quarrels between the defendant and the victim are circumstances that may be used to support a finding of malice aforethought." *Buenaventura*, 660 N.W.2d at 49.

We conclude the State presented sufficient evidence to permit the jury to find MacLaird acted with malice aforethought. MacLaird brought a loaded revolver to Holt's home, which permits a presumption of malice aforethought. MacLaird asserts this presumption is rebutted because he was under provocation by Holt's use of the knife. Provocation is that which is sufficient to excite sudden, violent, and irresistible passion in a reasonable person. *See State v. Taylor*, 452 N.W.2d 605, 606 (Iowa 1990) (citing Iowa Code § 707.4).

Again, MacLaird ignores his own conduct prior to the time Holt placed a knife by his throat. We first note there was a prior violent incident between MacLaird and Holt, which arose several months previously when Holt believed MacLaird had not treated Graham right by pulling her out of a vehicle. MacLaird testified Holt beat him with a pick axe handle, resulting in broken ribs. MacLaird stated he apologized to Holt, and they continued to be friends. Evidence of a quarrel between the victim and the defendant may show malice aforethought. *Buenaventura*, 660 N.W.2d at 49.

MacLaird, who was "angry," "frustrated," and "agitated," demanded that his wife drive him to Holt's home, ostensibly to get his car keys and cell phone.[2] He found his black powder revolver, and brought it with him for "protection," although he claimed he and Holt remained friends. Holt repeatedly asked MacLaird to leave, and told Cheryl to take him home. Cheryl added her requests that MacLaird leave Holt's yard and come home. MacLaird instead walked over to

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[2] MacLaird's cell phone was found in his car. There was also evidence that MacLaird's car keys were in his car. After MacLaird bludgeoned Holt, Maclaird got in his car and drove home.

Cheryl's car and got out the revolver. He admitted that even though Holt was heading towards the house, he pulled the trigger. It was not until this point, when Holt could well have been in fear of his life, that Holt placed his knife at MacLaird's throat.

We determine that even if defense counsel had raised the issue of malice aforethought in the motion for judgment of acquittal, the district court would have denied the motion. There was evidence of "a fixed purpose or design to do some physical harm to another that exists before the act is committed." *See Reeves*, 670 N.W.2d at 207 (citation omitted). MacLaird is unable to show he received ineffective assistance due to defense counsel's failure to argue the issue of malice aforethought in the motion for judgment of acquittal.

We affirm MacLaird's conviction for murder in the second degree.

AFFIRMED.