IN THE COURT OF APPEALS OF IOWA

No. 2-124 / 11-0361 Filed March 14, 2012

STATE OF IOWA,

Plaintiff-Appellee,

VS.

TERRANCE JERRELL BURNETT,

Defendant-Appellant.

Appeal from the Iowa District Court for Pottawattamie County, Gregory W. Steensland, Judge.

Terrance Burnett appeals from his conviction for second-degree murder. **AFFIRMED.**

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

Terrance J. Burnett, Anamosa, appellant pro se.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Matthew D. Wilber, County Attorney, and Jon Jacobmeier, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Potterfield and Doyle, JJ.

POTTERFIELD, J.

Dustin Jones was stabbed at a party and died from his wound. Terrance Burnett was convicted of murder in the second degree. On appeal, Burnett claims the evidence was insufficient to prove he acted with malice and the weight of the evidence did not support the verdict. He also claims the district court erred in determining his counsel had not provided ineffective assistance when a juror revealed he had been acquainted with Jones during high school. We find the evidence supported the verdict and was sufficient to prove malice, even without the permissible inference of malice from use of a dangerous weapon. We further find the district court did not err in concluding counsel did not breach his duty to Burnett by failing to challenge the juror for cause.

I. Background Facts and Proceedings

During the late evening hours of December 11, 2009, Jeff Werklund invited friends to a party at the home of his mother, Elaine, where he lived. Terrance Burnett arrived at the party along with Brianna Zavitz, Nathan Malik, Jeremy Green, and Heather Anderson. There were several other guests at the party that were not close friends with Burnett. Guests testified that into the morning hours of December 12, 2009, everyone at the party was drinking alcohol, smoking marijuana, or both. Green, Anderson, and Burnett also took Xanax.

Guests of the party testified that other than a minor disagreement between Burnett and Dustin Jones early in the night, the party was fairly uneventful until a problem arose between Burnett and Jones that ended with Jones being fatally stabbed. According to several witnesses at the party, the dispute began when

Jones jokingly called Anderson a bitch. Anderson testified that she understood this to be a joke; however, Burnett was upset and asked Jones why he would call Anderson, Burnett's friend, a bitch. According to several witnesses, this started a verbal argument in which Jones also called Burnett a bitch. Witnesses consistently testified that Burnett and Jones stood arguing face to face with Burnett facing the door and Jones facing away from, but being closer to, the door. Witnesses also agreed the confrontation was not loud and did not draw everyone's attention at first. The eye witness accounts differ based on when each individual became aware of the situation that was developing.

At trial, Elaine testified she came out of the bathroom and her son, Jeff, told her Jones had been stabbed. She testified she saw Jones walk out of the house backward, holding his stomach, and then turn and run down the street. She stated everybody was leaving the house, but she saw Burnett on the front porch with a knife. She testified she saw Jeff and Green try to get Burnett off the porch, and Burnett was saying "[Burnett] needs to find [Jones], finish the job and get rid of the knife." She testified that after she heard Burnett say this, he ran away.

Jeff's girlfriend, MeKayla Keene, was also at the party and testified at Burnett's trial. She stated she saw people looking in the direction of Jones and Burnett and then suddenly everyone was running to get out of the house. She testified she saw Jones leave the house and then she saw Burnett holding what appeared to be a steak knife up over his head. She heard Burnett say something along the lines of "I got a knife . . . I'll stab him. I got a knife. Made it very clear,"

but she did not know Jones had been stabbed until later. She stated Burnett ran outside the house, and she never saw anyone restraining him.

Jeff testified he heard a commotion and saw Burnett holding a knife. He stated he did not see the stabbing, but he saw Burnett pull the knife out of Jones. Jeff described the knife as a serrated fishing knife with a three-inch blade. Jeff stated that Jones ran out of the house holding his stomach immediately after he saw Burnett pull the knife out of Jones. Green then stepped in, attempting to get Burnett to leave the house. Jeff testified it took approximately five minutes to get Burnett to leave because Burnett was talking and told them "you guys are witnesses." Eventually Burnett said "I have to ditch this knife" and ran away.

In an interview with police the day of the incident, Anderson said she was in the bathroom using her phone when she heard the fight begin, but she hung up her phone and came out of the bathroom to break up the fight. She also initially told police that she never saw a knife in Burnett's hand, though she admitted to them within an hour that she actually had seen Burnett holding a knife. At trial, Anderson, a friend of both Burnett and Jones, testified that the verbal argument escalated and Burnett and Jones began pushing each other. She stated that "right away," she and Green tried to stand between them to prevent a fight. As she was trying to get between them, she saw a knife in Burnett's hand. She stated that when she saw the knife, she panicked and left immediately. She testified she never saw a weapon in Jones's hands. She did not remember whether Jones or Burnett had left the house when she did, and she did not know Jones had been stabbed.

Zavitz testified she was in the bathroom during the incident and did not see anything. She stated when she came out of the bathroom, Jones had already left the house. She testified everyone was arguing and Anderson and Green were trying to get a knife away from Burnett and prevent him from leaving the house. She said she saw Burnett with a knife at his side saying, "[L]et me go get him."

Malik, a friend of Burnett, testified Burnett got mad when Jones called Anderson a bitch, and name calling ensued. Malik testified he then heard Jones ask, "What are you going to do, stab me?" to which Burnett replied, "No, I took a knife out of your hand, you dumbass." When he heard this statement, Malik looked and saw Burnett was holding a knife in his hand down low. He testified he then heard Jones say to Burnett, "You going to stab me, you bitch?" Burnett replied, "I ain't no bitch" Malik testified Burnett then stepped back and Jones stepped forward and he saw Burnett's "hand coming in a forward motion and stabbing." Malik, however, did not see the knife go into Jones's body because Jones had his back to Malik. Malik testified Jones left, stunned. Malik stated he and Green then tried to take the knife from Burnett, but Burnett refused to turn over the knife, saying he needed to get rid of it. Malik testified that after an altercation between Jeff and Burnett, Burnett ran down the street.

Green, a friend of Burnett who did not know Jones, testified that although he was in the middle of the argument between Burnett and Jones, he did not remember the stabbing because he was drinking heavily and had taken Xanax. Green only remembered pushing Burnett off the stairs after Jones left and Jeff saying, "[Y]ou stabbed my friend."

Jones died in the early morning hours of December 12, 2009, as a result of the stab wound. On December 23, 2009, the State charged Burnett with first-degree murder. Burnett gave notice of a defense of justification.

Police interviewed Burnett on the evening of December 12, 2009. Burnett stated he had a small argument with Jones and afterward he heard people were saying he tried to stab Jones. He told police Jones called him a bitch and he pushed him lightly to get Jones out of his face. Burnett said that after he pushed Jones, he "was like fuck this, blah, blah, blah" and that he, Burnett, walked away to the bathroom. He stated that by the time he came out of the bathroom, Jones was gone. Burnett said he left shortly thereafter and heard later that people were saying he had killed Jones. He said he had no idea who stabbed Jones or why anyone would say he had committed the crime.

Burnett testified at trial that he got into an altercation with Jones after Jones called Anderson a bitch and then called Burnett a bitch. He testified Jones wanted to take it outside, but he did not want to fight Jones. He stated he decided to leave, but when he turned to walk away, he "felt a presence" behind him and knew someone was following him. He testified he turned around and saw Jones with a knife in his hand. He told Jones to put the knife down and asked him to hand over the knife, but Jones did not comply. Burnett stated he stepped back and Jones stepped forward, so he grabbed Jones's wrist to try to get the knife, at which point "[a] struggle occurred." He stated, "The next thing I know the knife fell on the ground and [Jones is] walkin' out the door." Burnett stated he did not know Jones had been stabbed. Burnett grabbed the knife off the ground and held it up in the air. According to Burnett, at that point everyone

started grabbing him and trying to get the knife. Burnett stated he was confused because he had been trying to get the knife from Jones, so he told them they were all witnesses. He denied ever threatening Jones. Burnett stated Jeff followed him to the porch, punched him in the face, and accused him of stabbing Jeff's friend. Burnett stated he threw the knife down in the area of the porch and left on foot.

Burnett testified he was never angry or upset with Jones and never wanted to hurt Jones. He testified he was scared when he saw the knife. When asked whether he felt violent, he responded, "No. I was scared." At trial, Burnett admitted he did not go into the bathroom after his argument with Jones as he initially told police. Burnett testified he did not know how or when Jones was stabbed, though he admitted Jones did not appear to have been stabbed before their confrontation and that he must have been stabbed before he left the house because his blood was on the door handle.

The court instructed the jury on the definition of malice aforethought and on the permissible inference of malice based on use of a dangerous weapon. The jury returned a verdict of guilty of the lesser-included offense of second-degree murder.

Burnett appeals, asserting: (1) the evidence was insufficient to establish beyond a reasonable doubt that he acted with malice aforethought; (2) the district court erred in failing to find the verdict was against the weight of the evidence; and (3) the district court erred in failing to grant his motion for new trial based on ineffective assistance of counsel related to juror impartiality.

II. Sufficiency of the Evidence

Burnett's trial counsel moved for a judgment of acquittal at trial on the grounds that there was insufficient evidence to prove he acted with malice aforethought. The district court overruled the motion.

We review Burnett's challenge to the sufficiency of the evidence for correction of errors at law, and we will uphold the jury's verdict if it is supported by substantial evidence. *State v. Nitcher*, 720 N.W.2d 547, 556 (Iowa 2006). Evidence is considered substantial if a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. *State v. Casady*, 597 N.W.2d 801, 804 (Iowa 1999). We consider all the evidence in the light most favorable to the State, drawing all reasonable inferences. *State v. Milom*, 744 N.W.2d 117, 120 (Iowa Ct. App. 2007). The evidence must "raise a fair inference of guilt as to each essential element of the crime," and must not raise only suspicion, speculation, or conjecture. *State v. Speicher*, 625 N.W.2d 738, 741 (Iowa 2001) (citing *Casady*, 597 N.W.2d at 787).

We first address Burnett's claim that the evidence was insufficient to establish he acted with malice. Malice aforethought is an essential element of second-degree murder and separates second-degree murder from other lesser-included offenses of first-degree murder. *State v. Reeves*, 670 N.W.2d 199, 207 (lowa 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 (lowa 2002). It does not need to exist for any particular length of time; it is sufficient if the purpose was formed and continued to exist at the time the act was committed. *Reeves*, 670 N.W.2d at 207. "Because this element

is a state of mind, circumstantial evidence is generally used to prove malice." State v. Buenaventura, 660 N.W.2d 38, 49 (Iowa 2003). The relationship between the state of mind, malice aforethought, and the homicidal act "is more accurately characterized as a causal relationship than as a temporal relationship." State v. Bentley, 757 N.W.2d 257, 265 (Iowa 2008). "In other words, the malice must result in the homicidal act." Id. "The law allows a presumption of malice aforethought from the use of a deadly weapon in the absence of evidence to the contrary." Id. This presumption may be rebutted by evidence showing the killing was accidental, under provocation, or because of mental incapacity. Id.

Burnett asserts there had "not been any evidence to establish anything more than there was a fast scuffle." We find there is sufficient evidence from which a jury could conclude Burnett acted with malice aforethought. Several witnesses testified as to the argument between Burnett and Jones that preceded the stabbing. Multiple witnesses testified that during the argument, both Burnett and Jones called each other names. In addition, several witnesses testified that Burnett and Jones had a disagreement earlier in the evening in which Jones yelled at Burnett. "Evidence 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.

Anderson testified she put herself between Burnett and Jones attempting to break up the fight but was ultimately unable to stop them from fighting. Anderson also testified that she and Green stepped in to break up the fight "right away." Based on this testimony, the jury could have found that Burnett stabbed

Jones in spite of his friends' efforts to prevent a fight, evidence supporting the State's assertion that Burnett had a fixed purpose to do physical harm to Jones.

Anderson further testified that at the time she stepped in to break up the fight, Burnett was holding a knife. In addition, several witnesses testified they saw Burnett with a knife, but no one testified to seeing Jones with a knife. Malik, Burnett's friend, testified that he heard Burnett say that he had taken the knife away from Jones, but then saw Burnett with the knife in his hand. Malik testified that immediately prior to the stabbing, he heard Jones ask, "You going to stab me, you bitch," to which Burnett replied, "I ain't no bitch" and stabbed Jones. Although Burnett argues that the witnesses gave inconsistent and confusing testimony, the record reflects the witnesses saw that Burnett had the knife in his hand for some period of time while he and Jones traded insults before Burnett stabbed Jones. This evidence supports the jury's finding that Burnett acted with malice in stabbing Jones.

Additionally, several witnesses testified that after Jones had left the house, Burnett expressed a desire to find Jones to "kill him" or "finish the job." Multiple witnesses also testified that after Jones left, several people tried, and were unable, to get the knife from Burnett. Though these statements and actions occurred after the homicidal act, we believe their temporal proximity to the act renders them relevant in determining Burnett's mental state at the time he stabbed Jones. While Burnett testified and denied having any knowledge as to how and when Jones was stabbed, the jurors were free to accept or reject any part of each witness's testimony and to give the testimony the weight they thought it should receive. *State v. Shanahan*, 712 N.W.2d 121, 135 (lowa 2006).

We conclude this evidence could convince a rational trier of fact beyond a reasonable doubt that Burnett acted with malice when he stabbed Jones. Therefore, we find sufficient evidence supports the jury's finding that Burnett acted with malice.¹

III. Motion for New Trial

After the jury returned its second-degree murder verdict, Burnett again raised the issue of insufficient evidence of malice in his motion for new trial, claiming the verdict was contrary to the weight of the evidence. He also raised the juror impartiality issue discussed below. The court overruled the motion for new trial.

We review the district court's ruling on Burnett's motion for new trial for an abuse of discretion. *Id.* The district court should grant the motion only if the jury's verdict is contrary to the weight of the evidence. *Id.* at 134–35. "A verdict is contrary to the weight of the evidence where a greater amount of credible evidence supports one side of an issue or cause than the other." *Id.* at 135 (internal quotation marks omitted). The district court has considerable discretion when determining a motion for new trial under the weight-of-the-evidence test. *Id.* "Except in the extraordinary case where the evidence preponderates heavily against the verdict, trial courts should not lessen the jury's role as the primary trier of facts and invoke their power to grant a new trial." *Id.* "A trial court should

¹ Burnett argues in his pro se brief that because the marshaling instruction allowed conviction based on two theories—a finding of malice aforethought or an inference of malice based on the use of a dangerous weapon—and the jury returned a general verdict, he should receive a new trial since the evidence was insufficient to support the first alternative. Because we find there was sufficient evidence of malice aforethought, we conclude Burnett cannot succeed on this ground.

not disturb the jury's findings where the evidence they considered is nearly balanced or is such that different minds could fairly arrive at different conclusions." *Id.*

For the same reasons we conclude the evidence was sufficient to support the jury's verdict, we cannot say the evidence preponderates heavily against the jury's finding that Burnett acted with malice when he stabbed Jones. Therefore, the district court did not abuse its discretion in overruling Burnett's motion for new trial based on the weight of the evidence.

IV. Juror Impartiality

On the second day of trial, one of the jurors informed the court he knew Jones from junior high and high school. He stated he did not have a friendship with him but had talked to him a few times. When asked whether anything would prevent him from being fair and impartial, he replied, "Yes and no. I mean, I don't think it would. I positively don't think it would I mean because I didn't really know him." Ultimately, the juror stated he would have no problem being fair and impartial, had not formed an opinion, and would have to "hear both sides of the story just like anybody else." After this in-chambers discussion with the juror, Burnett's attorney stated, "Well, Your Honor, there's no challenge for cause there"

After the verdict, Burnett filed a motion for new trial, asserting in part that his attorney was ineffective in allowing this juror to remain on the jury. Burnett asserted he had demanded that his attorney request a new trial after the inchambers discussion regarding the juror, but his attorney had refused. Burnett

asserts on appeal that the district court erred in not granting his motion for new trial based on juror impartiality.

"The district court has broad discretion in ruling on a motion for new trial, and thus our review in such cases is for abuse of discretion." *Nitcher*, 720 N.W.2d at 559. We conclude the district court did not abuse its discretion in overruling Burnett's motion for new trial based on his counsel's ineffectiveness in failing to object to juror impartiality. In order to prove his counsel was ineffective, Burnett was required to show that: (1) counsel failed to perform an essential duty; and (2) prejudice resulted from that failure. *State v. Stewart*, 691 N.W.2d 747, 751 (Iowa 2004).

"[T]he test to be applied in ruling on challenges for cause . . . is whether the juror holds such a fixed opinion on the merits of the case that he or she cannot judge impartially the guilt or innocence of the defendant." *State v. Neuendorf*, 509 N.W.2d 743, 746 (Iowa 1993) (internal quotation marks omitted). The juror repeatedly stated he could and would be fair and did not have a close relationship with the victim. After reviewing the transcript of the in-chambers discussion with the juror in question, we conclude the district court did not abuse its discretion in overruling Burnett's motion for new trial, concluding counsel was not ineffective.

AFFIRMED.