IN THE COURT OF APPEALS OF IOWA

No. 2-466 / 11-1308
Filed October 17, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BRIAN KEITH AMOS,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Paul L. Macek, Judge.

Defendant appeals his conviction for murder in the second degree. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Vidhya K. Reddy, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, Michael J. Walton, County Attorney, and Jerald Beuerbach and Will Ripley, Assistant County Attorneys, for appellee.

Heard by Vaitheswaran, P.J., and Bower, J., and Miller, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

MILLER, S.J.

I. Background Facts & Proceedings

Brian Amos was charged with murder in the first degree, in violation of Iowa Code section 707.2 (2009), and willful injury causing serious injury, in violation of section 708.4(1). He served notice that he intended to rely upon the defenses of intoxication and self-defense. The State alleged that Amos had killed Paul Deuel on or about August 27, 2010.

The jury trial commenced on June 27, 2011. The State presented evidence that Amos and Deuel were both homeless men in Davenport, Iowa, and they were good friends. On the morning of August 27, 2010, they went to St. Anthony's Catholic Church for a meal. At about 5:30 p.m., Robert Dunker observed Amos and Deuel sitting on some benches near the church, drinking whiskey. Randy Younge testified that soon after 5:30 p.m. he also saw Amos and Deuel sitting on the benches drinking whiskey. Younge testified he asked them for a drink of the whiskey, and Deuel gave him some. When Younge asked for a second drink, Amos got mad and grabbed the bottle out of his hand. Younge testified Amos "threatened to kick my ass," so he left.

Dunker returned to the churchyard at about 10:25 p.m. He observed Amos standing near the benches. Amos did not speak to Dunker. Dunker asked where Deuel was and got no response. Dunker testified Amos "wasn't wearing his hat, and his hair was all flustered, and just—just looked—just standing there staring." Dunker stated he believed Amos was "whiskey drunk."

At about 5:00 or 6:00 in the morning on August 28, 2010, John Fifer went to the churchyard looking for Deuel to have a drink with him. He found Deuel's body wrapped in a blanket near a dumpster. A Slim Jim, still in its wrapper, was in Deuel's mouth. Fifer called the police. Deuel had been killed by blunt force trauma to the head. A landscaping rock near the church was found to have blood on it, and this was believed to be the murder weapon. Due to physical evidence, officers believed Deuel had been killed near the church, and his body dragged to where it was found near the dumpster.

Later that morning, an officer saw Amos walking in the area and stopped to talk to him. The officer saw Amos had blood on his left hand. Amos was taken to the police station where his clothing was confiscated and swabs were taken of the blood on his hand and under his fingernails. Later testing showed Deuel's DNA present in the blood on Amos's left hand, under a fingernail on his right hand, and in two places on his shirt. Additionally, Amos had some Slim Jims in his backpack.

Officers questioned Amos about what had happened. Amos gave several different accounts of his interactions with Deuel on the evening of August 27, 2010: (1) Deuel was fine when he left, and Amos got blood on him from some meat that was in the dumpster; (2) he and Deuel had an argument over whether to buy more alcohol; (3) Amos was leaving, and he heard somebody jump Deuel; (4) Deuel came after him and was going to hit him, so he pushed Deuel; (5) he could not remember what happened due to his alcohol consumption; and (6) he

pushed Deuel, Deuel fell down, he helped prop up Deuel, and Deuel refused his offer to get medical assistance.

Amos did not testify at the criminal trial; but presented evidence that he had a part-time job cleaning and doing odd jobs at the church. He presented testimony from people that knew him through the church that he was a kind and gentle person and that he and Deuel were good friends. During closing argument defense counsel argued that a person or persons unknown had committed the crime. He argued it was not surprising Amos had Deuel's DNA on him because they were best friends.

The jury entered verdicts finding Amos guilty of murder in the second degree and assault causing serious injury. The district court determined the conviction for assault causing serious injury merged into the conviction for second-degree murder. The court sentenced Amos to a term of confinement of no more than fifty years. He now appeals his conviction, claiming he received ineffective assistance of counsel.

II. Standard of Review

We review of 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). 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. Merits

The jury was given the following instruction on the defense of intoxication:

> There is evidence that Brian K. Amos was under the influence of an intoxicant at the time of the alleged crime. The fact that a person is under the influence of an intoxicant does not excuse nor aggravate his guilt.
>
> Even if a person is under the influence of an intoxicant, he is responsible for his act if he had sufficient mental capacity to form the specific intent necessary for the crime charged or had the specific intent before he fell under the influence of the intoxicant and then committed the act. Intoxication is a defense only when it causes a mental disability which makes the person incapable of forming the specific intent.
>
> No amount of intoxicants or drugs taken voluntarily can reduce second degree murder to manslaughter.

This instruction is based on Iowa Criminal Jury Instruction 200.14.

Amos contends he received ineffective assistance because defense counsel did not object to the last sentence of the instruction, "[n]o amount of intoxicants or drugs taken voluntarily can reduce second degree murder to manslaughter."

A. The crime of murder in the second degree contains two elements—a person kills another person, and does so with malice aforethought. *State v. Lyman*, 776 N.W.2d 865, 877 (Iowa 2010). Second-degree murder is a general intent crime. *Id.*

The crime of second-degree murder requires proof of malice aforethought. *Id.*; *State v. Kraus*, 397 N.W.2d 671, 673 (Iowa 1986). The jury was instructed as follows on the element of malice aforethought:

> "Malice" is 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.
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> "Malice aforethought" is a fixed purpose or design to do some physical harm to another which exists before the act is committed. It does not have to exist for any particular length of time.

This instruction is based on Iowa Criminal Jury Instruction 700.7.

The elements of malice aforethought and specific intent are based on two separate concepts. *State v. Smith*, 242 N.W.2d 320, 326 (Iowa 1976) ("[M]alice aforethought is not to be equated with specific intent to kill."). "While malice aforethought is the specific state of mind necessary to convict of murder, it is far different from the specific intent which is a necessary element of murder in the first degree." *Anfinson v. State*, 758 N.W.2d 496, 503 (Iowa 2008) (quoting *State v. Gramenz*, 126 N.W.2d 285, 290 (Iowa 1964)). Thus, proof of specific intent is not required for a conviction for second-degree murder. *Id.*; *Smith*, 242 N.W.2d at 326; *c.f. State v. Serrato*, 787 N.W.2d 462, 469 (Iowa 2010) (noting that for first-degree murder there must be a specific intent to kill and malice aforethought); *State v. Klindt*, 542 N.W.2d 553, 555 (Iowa 1996) ("The difference between first-degree murder and second-degree murder is that the former requires specific intent to kill, whereas the latter requires only a general criminal intent.").

Iowa Code section 701.5 provides:

> The fact that a person is under the influence of intoxicants or drugs neither excuses the person's act nor aggravates the person's guilt, but may be shown where it is relevant in proving the person's specific intent or recklessness at the time of the person's alleged criminal act or in proving any element of the public offense with which the person is charged.

The Iowa Supreme Court has determined this code section did not change prior law that held evidence of intoxication would only negate specific intent, if such intent was an element of the crime charged. *State v. Caldwell*, 385 N.W.2d 553, 557 (Iowa 1986). "Voluntary intoxication may not, however, reduce a charge when the crime does not require a specific intent." *Id.*

A defense of intoxication is not available to a person charged with second-degree murder because intoxication is only a defense to the specific intent element of a crime, and there is no specific intent element to second-degree murder. *State v. Artzer*, 609 N.W.2d 526, 531 (Iowa 2000); *see also Caldwell*, 385 N.W.2d at 557 ("Thus, where the defendant has been charged with second-degree murder, a general intent crime, the defendant's voluntary intoxication cannot negate malice aforethought and reduce the crime to manslaughter.").

Amos claims a defense of intoxication is legally relevant to the element of malice aforethought and may act to negate some aspects of malice aforethought. He points out that "malice" may be established by: (1) "evidence of actual hatred," or (2) "proof of a deliberate or fixed intent to do injury." Iowa Crim. Jury Instruction 700.7. He argues that the second alternative requires proof of a specific intent to injure another. He also points out that "malice aforethought" is a "fixed purpose or design to do some physical harm," and he argues this also requires specific intent to do injury or physical harm. He claims intoxication could

negate these "specific intent alternatives of the malice aforethought element," and therefore a defense of intoxication could act to reduce second-degree murder to manslaughter. He believes the jury instruction was an incorrect statement of the law. He also asserts that this specific argument was not addressed in previous cases.

We will not find defense counsel breached an essential duty for failing to pursue a meritless issue. *State v. Brubaker*, 805 N.W.2d 164, 171 (Iowa 2011). Under existing precedent at the time of Amos's criminal trial, it was clear that intoxication was not an available defense to the crime of second-degree murder. *Artzer*, 609 N.W.2d at 531 ("The defenses of intoxication and diminished capacity are not available to a defendant charged with second-degree murder."); *Caldwell*, 385 N.W.2d at 557 ("Thus, where the defendant has been charged with second-degree murder, a general intent crime, the defendant's voluntary intoxication cannot negate malice aforethought and reduce the crime to manslaughter.").

Furthermore, it is not clear that a normally competent attorney would have concluded the issue was worth raising. *See State v. Graves*, 668 N.W.2d 860, 881 (Iowa 2003). The Iowa Supreme Court had stated in 2008 in *Anfinson*, 758 N.W.2d at 503, that second-degree murder did not contain a specific intent element. Also, in 2010 in *Lyman*, 776 N.W.2d at 877, the Iowa Supreme Court stated:

> The second element required for a person to commit second-degree murder is that the act of killing another person is done with malice aforethought. Malice aforethought requires the actor to have "a fixed purpose or design to do physical harm to

> another that exists before the act is committed." "'It does not mean mere spite, hatred, or ill will, but does signify that state of disposition which shows a heart regardless of human life.'" It is well-settled law that murder in the second degree is a general intent crime only requiring proof of malice aforethought.

(Citations omitted.)

Thus, at the time of Amos's criminal trial in June 2011, the Iowa Supreme Court had recently reiterated that second-degree murder was a general intent crime, and specific intent was not an element of that crime. Defense counsel had no basis to believe the law in this area would change. We conclude defense counsel did not breach an essential duty by failing to object to jury instructions that were based upon clear and relevant legal authority.

B. Amos also contends defense counsel should have objected to the jury instruction that, "[n]o amount of intoxicants or drugs taken voluntarily can reduce second degree murder to manslaughter," because intoxication could bear on the issue of provocation. He asserts that provocation could reduce second-degree murder to manslaughter by negating the element of malice aforethought. He claims that because intoxication is relevant to provocation, the jury was improperly instructed that intoxication could not reduce second-degree murder to manslaughter.

Voluntary manslaughter is a lesser included offense of first- or second-degree murder. Iowa Code § 707.4. Voluntary manslaughter does not contain the element of malice aforethought. *State v. Taylor*, 452 N.W.2d 605, 606 (Iowa 1990). It does, however, contain the element of provocation—there must be a showing "the person causing the death act[ed] solely as the result of sudden,

violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a person." Iowa Code § 707.4. Also, there must not be an interval of time between the provocation and the killing "in which a person of ordinary reason and temperament would regain control and suppress the impulse to kill." *Id.* The jury was so instructed in a marshaling instruction and a definitional instruction.

Provocation contains a subjective standard and two objective standards. *State v. Inger*, 292 N.W.2d 119, 122 (Iowa 1980). The subjective standard is whether the defendant has acted solely as a result of sudden, violent, and irresistible passion. *Id.* The objective standards are (1) that the provocation was sufficient to excite such passion in a reasonable person, and (2) there was not an interval between the provocation and the killing in which a person of ordinary reason and temperament would have regained control and suppressed the impulse to kill. *Id.*

In *State v. Wilson*, 147 N.W. 739, 740 (Iowa 1914),[1] the Iowa Supreme Court stated:

> It needs hardly be said that if a drunken man take the life of another, unaccompanied by circumstances of provocation or justification, the jury will be warranted in finding the existence of malice, though express malice has not been proven. But if there is evidence of provocation which, if acted upon immediately by a sober man, would be regarded as sufficient to reduce the offense to manslaughter, and the inquiry is whether the accused actually acted thereon, it is held by the weight of authority that evidence of intoxication may be considered in deciding whether the fatal act is to be attributed to malice, or to the passion or anger, excited by the previous provocation; such passion or anger being more easily excitable in an intoxicated person than in one who is sober.

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[1] This case is a supplement to *State v. Wilson*, 144 N.W. 47 (Iowa 1913).

Thus, evidence of intoxication is relevant to the question of "whether the killing was from a provocation given at the time, or from previous malice." *Wilson*, 147 N.W. at 740.

The *Wilson* case was quoted with approval in *State v. Hall*, 214 N.W.2d 205, 209 (Iowa 1974). In *Hall*, 214 N.W.2d at 210, the court stated:

> In those cases in which an accused claims that sudden provocation reduces the homicide to manslaughter, [*Wilson*] does permit intoxication to be considered on whether the defendant did in fact kill in the passion of anger brought on by provocation which would be sufficient if acted on by a sober man.

The parties agree that evidence of intoxication would relate only to the subjective standard of provocation, that is, whether the defendant acted solely as the result of sudden, violent, and irresistible passion. *See Inger*, 292 N.W.2d at 122.

We believe *Hall*, 214 N.W.2d at 210, and *Wilson*, 147 N.W. at 740, stand for the proposition that while evidence of provocation might in some cases negate the element of malice, evidence of intoxication does not negate malice. The case of *Wilson*, 147 N.W. at 740, as quoted with approval in *Hall*, 214 N.W.2d at 210, provides that if there is evidence of provocation which would be sufficient to reduce the crime to voluntary manslaughter if a sober man acted on that provocation, and there is a question as to whether the defendant actually acted on that provocation (rather than acting due to malice), then evidence of intoxication may be considered on the issue of whether the defendant's actions were due to provocation or malice.[2] It is clear that intoxication does not negate

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[2] This is due to an assumption that passion or anger would be more easily excitable in an intoxicated person than in one who was sober. *Wilson*, 147 N.W. at 740.

malice; instead, intoxication is something the jury may consider in determining whether a defendant's actions were caused by malice or by provocation. *Hall*, 214 N.W.2d at 210; *Wilson*, 147 N.W. at 740.

In fact, *Hall* includes the following statement, "[v]oluntary intoxication does not of itself negative the malice required to constitute murder in the second degree and thereby reduce murder in the second degree to voluntary manslaughter." 214 N.W.2d at 209 (citation omitted).

We conclude that the jury instruction in question, "[n]o amount of intoxicants or drugs taken voluntarily can reduce second degree murder to manslaughter," remains a correct statement of the law. *See Caldwell*, 385 N.W.2d at 557 (approving jury instruction, "You are instructed that no amount of voluntary use of intoxicants can excuse a murder and reduce a murder to manslaughter"). We find defense counsel did not breach an essential duty by failing to object to this instruction on the grounds raised here. As noted above, counsel does not have a duty to pursue a meritless issue. *See Brubaker*, 805 N.W.2d at 171.

C. Finally, Amos claims he was prejudiced by counsel's performance. A defendant must show two elements—(1) defense counsel failed to perform an essential duty, and (2) the failure resulted in prejudice. *State v. Madsen*, 813 N.W.2d 714, 723 (Iowa 2012). We have already determined defense counsel did not fail to perform an essential duty. A defendant's claim of ineffective assistance fails if either of these two elements is lacking. *State v. Braggs*, 784

N.W.2d 31, 34 (Iowa 2010). For this reason we do not further address the issue of prejudice.

We conclude Amos has failed to show he received ineffective assistance of counsel. We affirm his conviction for murder in the second degree.

AFFIRMED.