IN THE COURT OF APPEALS OF IOWA

No. 8-822 / 07-1942
Filed February 4, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MARTIN SINCLAIR DUFFY,
Defendant-Appellant.

Appeal from the Iowa District Court for Jasper County, Dale B. Hagen, Judge.

Martin Duffy appeals his judgment and sentence for first-degree murder, contending (1) the taking of a DNA sample violated his constitutional rights, (2) there was insufficient evidence to support the jury's finding of guilt, and (3) a $150,000 restitution order violated the ex post facto clause of the United States Constitution. **JUDGMENT AFFIRMED, SENTENCE PARTIALLY VACATED AND REMANDED FOR RESENTENCING.**

Mark C. Smith, State Appellate Defender, and Robert Ranschau, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, Steve Johnson, County Attorney, and Michael K. Jacobsen and Scott W. Nicholson, Assistant County Attorneys, for appellee.

Heard by Sackett, C.J., and Vaitheswaran and Potterfield, JJ.

VAITHESWARAN, J.

Martin Duffy appeals his judgment and sentence for first-degree murder. He contends (1) the taking of a DNA sample violated his constitutional rights, (2) there was insufficient evidence to support the jury's finding of guilt, and (3) a $150,000 restitution order violated the ex post facto clause of the United States Constitution.

I. Background Facts and Proceedings

In 1986, Karen Weber's partially clothed body was found on the side of a gravel road. She had three stab wounds to the neck and one defensive wound to the arm. Weber's murder went unsolved for over twenty years.

In 2006, Martin Duffy was on probation for operating a motor vehicle while intoxicated. His probation officer determined that, pursuant to a 2005 law, Duffy would have to provide a saliva sample for DNA testing prior to being released from probation. A sample was taken, sent to the Department of Criminal Investigations crime lab, analyzed, and entered into the Combined DNA Index System (CODIS). Duffy's DNA profile matched the DNA found on cigarette butts present at the Weber crime scene.

Duffy was taken into police custody and questioned about the death of Karen Weber. He eventually confessed to killing Weber with a knife.

The State charged Duffy with first-degree murder. Duffy filed a motion to suppress his confession, the fruits of that confession, the DNA sample taken by his probation officer, and the fruits of that sample. He asserted that he was under the influence of controlled substances at the time of his confession, he did not fall within the purview of the 2005 law authorizing the submission of DNA

samples, and the evidence was obtained in violation of the United States and Iowa Constitutions. The district court denied the motion and the case proceeded to trial. A jury found Duffy guilty as charged and the district court imposed sentence, which included an order to pay restitution of $150,000.

II. Constitutionality of DNA Extraction

The DNA statute, passed in 2005, provides as follows:

> A person convicted, adjudicated a delinquent, civilly committed as a sexually violent predator, or found not guilty by reason of insanity, prior to the effective date of this Act, [June 14, 2005,] who would otherwise be required to submit a DNA sample under this Act, and who is under the custody, control, or jurisdiction of a supervising agency, shall submit a DNA sample prior to being released from the supervising agency's custody, control, or jurisdiction.

2005 Iowa Acts ch. 158, § 18.

Duffy first contends the probation officer's extraction of a saliva sample for DNA testing pursuant to that statute violated the United States and Iowa constitutions' provisions on unreasonable searches and seizures. U.S. Const. amend. IV ("The right of the people to be secure in their persons . . . against unreasonable searches and seizures . . . shall not be violated . . . ."); Iowa Const. art. I, § 8. As Duffy raised this constitutional challenge in his motion to suppress, we conclude he preserved error. *See State v. Breuer*, 577 N.W.2d 41, 44 (Iowa 1998). Our review is de novo. *State v. Seering*, 701 N.W.2d 655, 661 (Iowa 2005).

As a preliminary matter, the State concedes that the probation officer's collection of the sample constituted a search. Therefore, the only question is whether the search was reasonable. *See Bousman v. Iowa Dist. Ct.*, 630

N.W.2d 789, 797 (Iowa 2001).[1] "Reasonableness 'depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.'" *Id.* (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 95 S. Ct. 2574, 2579, 45 L. Ed. 2d 607, 614–15 (1975)). In *Bousman*, the court characterized the process of swabbing a citizen's mouth for a saliva sample as a "short" procedure that did not "invade the person's private life or thoughts," did not involve "a significant intrusion into a person's bodily security," and was "a valid and useful crime-solving tool." *Id.* at 798.

The probation officer who extracted the DNA sample from Duffy used the identical procedure used in *Bousman*. An employee of the Iowa Division of Criminal Investigation testified the procedure "is a very powerful tool and very applicable to investigations that are old as long as there is biological evidence available." We conclude that the probation officer's collection of Duffy's saliva sample for DNA testing pursuant to the authority of the DNA statute cited above did not amount to an unreasonable search and seizure in violation of the Fourth Amendment to the United States Constitution or article 1, section 8 of the Iowa Constitution.

Duffy next contends the DNA statute does not afford him the equal protection of the laws. *See Wright v. Iowa Dep't of Corrs.*, 747 N.W.2d 213, 216 (Iowa 2008) ("The Fourteenth Amendment to the United States Constitution and article I, section 6 of the Iowa Constitution provide individuals equal protection

[1] We find it unnecessary to decide whether the court should use a "special needs" analytical approach adopted by some federal courts. *See United States v. Kraklio*, 451 F.3d 922, 924 (8th Cir. 2006).

under the law."). Specifically, he asserts that "[t]he statute treats probation[ers] with prior felony convictions differently than felons who are not on probation." In his view, "[t]here is no rational reason to treat these classes of people differently."

Our highest court addressed a virtually identical challenge in *Wright.* Wright, who was a sex offender on probation, asserted that a statute treated him differently than sex offenders who were not on probation. The Iowa Supreme Court rejected this assertion. The court concluded:

> [T]hese two groups are not similarly situated. The first group, which includes Wright, is currently on probation and subject to state monitoring, and the second group is not currently on probation and not subject to monitoring. We agree with the district court that Wright is not similarly situated to sex offenders not currently on probation. Thus, an equal-protection challenge is not viable.

Id. at 217.

We reach the same conclusion here. Duffy, as a felon on probation, was not similarly situated to felons who were not on probation. Therefore, his equal protection challenge to the DNA statute fails.

III. Sufficiency of the Evidence

Duffy next contends the record contains insufficient evidence to support the jury's finding of guilt. Our review is for substantial evidence. *State v. Bass*, 349 N.W.2d 498, 500 (Iowa 1984).

The jury was instructed that the State would have to prove the following elements:

1. On or about the 20th day of April, 1986, the defendant cut and stabbed Karen Weber.
2. Karen Weber died as a result of being cut and stabbed about the neck and head.
3. The defendant acted with malice aforethought.

> 4. The defendant acted willfully, deliberately, premeditatedly and with a specific intent to kill Karen Weber.

Duffy takes issue with the evidence supporting the malice aforethought, deliberation, and premeditation elements.

The State preliminarily responds that Duffy did not preserve error on the malice aforethought element. *See State v. Truesdell*, 679 N.W.2d 611, 615 (Iowa 2004) ("To preserve error on a claim of insufficient evidence for appellate review in a criminal case, the defendant must make a motion for judgment of acquittal at trial that identifies the specific grounds raised on appeal."). The State also suggests that if Duffy is additionally challenging the specific intent element, he did not raise that challenge before the district court. *See State v. Crone*, 545 N.W.2d 267, 270 (Iowa 1996) (concluding error not preserved where defense counsel did not mention anything regarding specific elements of a criminal charge).

We agree that Duffy's motion for judgment of acquittal did not specifically mention malice aforethought. However, that element was sufficiently related to the elements of premeditation and deliberation that we elect to address it. As for the specific intent element, Duffy does not expressly challenge that requirement. Therefore, we need not address it.[2]

---

[2] We note, however, the following language in *State v. Wilkens*, 346 N.W.2d 16, 20–21 (Iowa 1984):

> When a person intentionally uses a deadly weapon in killing a victim, the jury may infer that he had formed the specific intent to kill. The effect of defendant's heavy drinking on formation of the requisite specific intent to kill was for the jury to determine.

(citations omitted).

A. Premeditation and Deliberation

Premeditation was defined for the jury as "to think or ponder upon the matter before acting." Deliberation was defined as "to weigh in one's mind, to consider, to contemplate, or to reflect." When accompanied by an opportunity to deliberate, the use of a deadly weapon supports an inference of deliberation and premeditation. *State v. Reeves*, 636 N.W.2d 22, 25 (Iowa 2001).

A reasonable juror could have found that Duffy drove Weber to a secluded spot on a gravel road, efficiently administered three deep stab wounds to her neck, and left her there to die. This amounted to substantial evidence of premeditation and deliberation.

B. Malice Aforethought

"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) (quoting *State v. Myers*, 653 N.W.2d 574, 579 (Iowa 2002)). While deliberation and premeditation require an opportunity to deliberate, malice requires no such opportunity and may be inferred by the use of a deadly weapon. *Reeves*, 636 N.W.2d at 25.

As it is undisputed that Duffy used a knife to cut Weber's throat and an expert testified to the absence of any indication that the cuts were accidental, a reasonable juror could have found that this element was satisfied.

IV. Restitution

Duffy contends that the $150,000 restitution award violates the ex post facto clause of the United States Constitution. The State responds that Duffy did

not preserve error but, if he did, the restitution order does indeed violate the ex post facto clause. *See State v. Corwin*, 616 N.W.2d 600, 602 (Iowa 2000).

Finding no error preservation concern, we vacate the $150,000 restitution order and remand for a determination of the restitution award pursuant to the procedures in place in 1986. *State v. Piper*, 663 N.W.2d 894, 916–17 (Iowa 2003).

JUDGMENT AFFIRMED, SENTENCE PARTIALLY VACATED AND REMANDED FOR RESENTENCING.