IN THE COURT OF APPEALS OF IOWA

No. 9-830 / 07-2074
Filed January 22, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOSEPH LEO JOHNSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, James C. Bauch, Judge.

A defendant appeals his judgment and sentence for first-degree murder, contending (1) there was insufficient evidence to submit the issue of his guilt to a jury, (2) the verdict was contrary to the weight of the evidence, (3) the district court erroneously admitted several hearsay statements, and (4) trial counsel was ineffective in failing to request certain jury instructions. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Stephan Japuntich, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bridget Chambers, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Linda Fangman, Assistant County Attorney, for appellee.

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

VAITHESWARAN, J.

Joseph Johnson appeals his judgment and sentence for first-degree murder. He contends (1) there was insufficient evidence to submit the issue of his guilt to a jury, (2) the verdict was contrary to the weight of the evidence, (3) the district court erroneously admitted several hearsay statements, and (4) trial counsel was ineffective in failing to request certain jury instructions.

I. Background Facts and Proceedings

Joseph Johnson and his friends attended a birthday party. As they were leaving, Johnson heard someone shout a racially derogatory term. Johnson confronted the individual, then left. A short time later, Johnson and his friends returned to the party with knives. A fight broke out. Treye Blythe, who was attending the party, but was not the person who used the racially-charged slur, fell to the ground. He subsequently died of a stab wound to the chest.

Johnson left the scene. He gave a knife to a friend, who disposed of it in a storm sewer. Several people observed a substantial amount of blood on Johnson's clothes.

The State charged Johnson with first-degree murder and the case proceeded to a jury trial. After the prosecution rested, Johnson moved for a judgment of acquittal. The district court denied the motion.

Johnson testified in his own defense. He admitted he had a knife in his possession. The jury found Johnson guilty as charged.

Johnson moved for new trial, contending in part that the verdict was contrary to the weight of the evidence. The district court denied the motion and imposed sentence. Johnson appealed.

II. Sufficiency of the Evidence

The jury was instructed that the State would have to prove the following elements of first-degree murder:

> 1. On or about the 19th day of August, 2006, the defendant stabbed Treye Blythe.
> 2. Treye Blythe died as a result of being stabbed.
> 3. The defendant acted with malice aforethought.
> 4. The defendant acted willfully, deliberately, premeditatedly and with the specific intent to kill Treye Blythe.

Johnson takes issue with the third and fourth elements, contending the State "failed to prove malice, specific intent, and that defendant acted willfully, deliberately or premeditatedly."

As a preliminary matter, the State argues that error was not preserved. We agree. Johnson's attorney did not challenge the specific elements he now raises. He simply stated:

> Viewed in the light most favorable to the State, looking at the elements of the offense under which he is charged, there simply is insufficient evidence to carry this matter any further, and we'd ask that the Court dismiss the charge as a matter of law.

This was insufficient to preserve error. *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."); *State v. Crone*, 545 N.W.2d 267, 270 (Iowa 1996) ("The record reveals Crone's attorney did not mention the 'threat' or 'anything of value' elements of the extortion charge in his motion. Accordingly, Crone's motion for judgment of acquittal did not preserve the specific arguments he is now making for the first time on appeal."). Accordingly, we will review this issue under an ineffective-

assistance-of-counsel rubric. *See Crone*, 545 N.W.2d at 270. Johnson must establish that counsel breached an essential duty in failing to challenge the third and fourth elements of the crime and prejudice resulted. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). Our review is de novo. *State v. Martin*, 704 N.W.2d 665, 668 (Iowa 2005).

The record reveals that Johnson was "[v]ery upset" at the use of a racial slur and confronted the person he thought had used the slur. He then left the party. According to a friend, Johnson was still "pretty mad" and "he wanted to confront them about [the racial slur] and possibly fight them."

Johnson arrived at his friend's house, went in for a minute or two, and returned to his friend's car with knives. He convinced his friends to return to the party. They agreed, but, on discovering the knives, advised him to leave them in the car. Johnson did so, but retained a pocket knife.

A reasonable juror could have found that this evidence evinced premeditation and deliberation. *See, e.g., State v. Buenaventura*, 660 N.W.2d 38, 48 (Iowa 2003) (defining premeditate as "to think or ponder upon the matter before acting"); *State v. Wilkens*, 346 N.W.2d 16, 20 (Iowa 1984) (noting premeditation and deliberation could be shown by evidence of planning activity, motive and nature of killing).

At this point, Johnson got into an argument with two individuals. Blythe, who was in the vicinity, attempted to break up the confrontation. Johnson took a step back from Blythe, reached into his pocket in an apparent attempt to retrieve

something, and made a punching motion towards Blythe's chest. Blythe fell to the ground immediately.

A reasonable juror could have found that this evidence was sufficient to establish "malice aforethought." *See State v. Reeves*, 636 N.W.2d 22, 25 (Iowa 2001) (noting malice may be inferred from the use of a deadly weapon with an opportunity to deliberate); *see also* Iowa Code § 702.7 (2007) (defining dangerous weapon in part as "any instrument or device of any sort whatsoever which is actually used in such a manner as to indicate that the defendant intends to inflict death or serious injury upon the other, and which, when so used, is capable of inflicting death upon a human being"). The same evidence supported a finding of specific intent. *See Wilkens*, 346 N.W.2d at 20 ("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.").

After the stabbing, Johnson had a friend dispose of this knife. This was additional evidence supporting a finding that Johnson acted with premeditation. *See Buenaventura*, 660 N.W.2d at 49 (stating that evidence of what defendant does after a crime can show premeditation).

In the face of this evidence, Johnson's trial attorney was not ineffective in failing to challenge the evidence supporting the third and fourth elements of the charge. *See Crone*, 545 N.W.2d at 270.

III. Weight of the Evidence

Johnson next argues that the jury's finding of guilt was against the weight of the evidence. *See State v. Ellis*, 578 N.W.2d 655, 658–59 (Iowa 1998). The

State again responds that Johnson did not preserve error on this argument. We disagree.

At the hearing on his new trial motion, counsel argued that the verdict was contrary to the weight of the evidence and pointed to the absence of reliable evidence such as DNA test results or fingerprints. These statements were sufficient to preserve error and, accordingly, we will not review this argument under an ineffective-assistance-of-counsel rubric. Our review is for an abuse of discretion. *Id.* at 659.

The district court filed a detailed written ruling in which the court cited the appropriate standard for reviewing this type of issue, acknowledged that there were differences in the witnesses' testimony, pointed to admissions made by the defendant, and concluded "that the credible evidence presented in this case supports the jury's verdict finding the defendant guilty of Murder in the First Degree." We discern no abuse of discretion in the court's ruling.

IV. Hearsay

Johnson next argues that the district court erred in admitting certain out-of-court statements at trial. The only objections to these statements Johnson raised were hearsay objections. The district court's rulings on hearsay objections are reviewed for errors at law. *State v. Newell*, 710 N.W.2d 6, 18 (Iowa 2006).

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Iowa R. Evid. 5.801(*c*). Hearsay is not admissible unless it falls within one of a number of enumerated exceptions or exclusions. *Newell*, 710 N.W.2d at 18. Where hearsay evidence is improperly admitted, prejudice is

presumed unless established otherwise. *Id.* at 19. "[N]otwithstanding the presumption of prejudice from the admission of such evidence, the erroneously admitted hearsay will not be considered prejudicial if substantially the same evidence is properly in the record." *Id.*

Johnson takes issue with seven statements. We will assume without deciding that all the challenged statements were hearsay and were improperly admitted.

The first statement came from a witness who overheard the host of the party say, "I don't want you to start a fight at my party." The host testified to essentially the same thing, stating he told Johnson and another person that "nothing was going to happen at the party" and he "just wanted everybody to leave." Therefore the challenged statement was cumulative and non-prejudicial.

The second statement came from a witness who heard partygoer Josh Randall deny he called Johnson the "N-word." Again, this statement was essentially cumulative of Randall's testimony that it was another individual, Dylan Buls, who "said the N-word."

The third statement came from a witness who overheard Blythe tell Johnson, "All right hit me," in response to Johnson's assertion that he would hit him. This statement was essentially cumulative of testimony from witness Aaron Ungs that Johnson and another individual started pushing and yelling and Blythe attempted to intervene and stop the other individual. It was also cumulative of the testimony of witness Sean Adams who said he saw Blythe involved with fighting Johnson and Johnson was the last person he saw fighting with Blythe.

The fourth challenged statement was that of an unidentified woman who yelled out "Joe" as Johnson was leaving the party the first time. This statement was cumulative of other evidence indicating that Johnson was a part of the group that left the party.

The fifth challenged statement was testimony that a witness overheard someone shout, "He got stabbed." This statement was cumulative of Johnson's own testimony that he heard "someone say somebody got stabbed."

The sixth challenged statement was a police officer's testimony that people were telling him the defendant stabbed Blythe. The challenged testimony is as follows:

> Q. From the people at the party, nobody told you that Josh Shane stabbed Treye Blythe, did they?
> MR. HOFFEY: Objection, Your Honor. Hearsay.
> THE COURT: Overruled.
> Q. (By Ms. Fangman) People weren't telling you it was Josh Shane, were they? A. No, no one has told me that it was Josh Shane.
> Q. *People were telling you it was the defendant, weren't they? A. Yes.*

(Emphasis added). This evidence was cumulative of the testimony of witness David O'Connell, who stated that Johnson retrieved something from his pocket and made a punching motion toward Blythe's chest. It was also cumulative of witness Brandon Kistner's testimony that Johnson told him he had stabbed a kid.

The seventh challenged statement was the following testimony attributed to the host of the party and directed to Johnson: "If you want to stab somebody, stab me." The defense interposed an objection, which the court sustained, and the court further instructed the jury to disregard the comment. Accordingly, we find no error.

In summary, we conclude any error in admitting the first six statements was harmless, as the challenged statements were cumulative of other evidence in the record. We find no error with respect to the seventh statement.

V. Ineffective Assistance of Counsel

Johnson claims that trial counsel was ineffective in (1) failing to request a corroboration instruction, and (2) failing to request a self-defense instruction. Ineffective-assistance-of-counsel claims are generally preserved for postconviction relief proceedings for more complete development of the record. *State v. Bumpus*, 459 N.W.2d 619, 627 (Iowa 1990). We preserve these claims for postconviction relief proceedings.

AFFIRMED.