IN THE COURT OF APPEALS OF IOWA

No. 8-687 / 97-1135
Filed February 24, 1999

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CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

ROGER SCOTT SELLERS,

Appellant.

Appeal from the Iowa District Court for Polk County, Jack D. Levin, Judge.

On appeal from his conviction for first-degree murder Roger Sellers argues there was insufficient evidence to support the conviction and the district court erred in admitting certain evidence. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, John P. Sarcone, County Attorney, and Steven Foritano, Assistant County Attorney, for appellee.

Heard by Huitink, P.J., and Mahan, and Zimmer, JJ.

ZIMMER, J.

The defendant Roger Scott Sellers appeals his conviction for first-degree murder. He contends there was insufficient evidence to support his conviction and challenges evidentiary rulings made by the trial court. We affirm the conviction.

I. Background Facts and Proceedings

Sellers was found guilty of first-degree murder on May 12, 1997, following a jury trial. The defendant admits he shot and killed Gina Ginn, but contends the shooting was an accident.

On January 14, 1997, the defendant was spending the day at his father's home in Des Moines, Iowa. Sellers had been living with his father for a short time after moving to Des Moines. In the middle of the afternoon, the defendant's brother, Kevin, stopped by for a visit. Kevin was accompanied by his girlfriend, Gina Ginn. The brothers talked, drank beer, and played video games for half an hour to forty-five minutes. After awhile, Gina told Kevin she wanted to go home because she did not want to watch Kevin and Roger get drunk and play Nintendo all day. Kevin eventually agreed to leave. At trial Kevin described what happened next:

> A. We were going to leave. I was sitting on the floor playing Nintendo and got up to go the bathroom. We was going to leave, and while I was in the bathroom — I don't know what the rest of the conversation was in detail, other than he just wanted — asking her to stay there and drink with him, you know.
>
> I heard him say — I don't know what she said. He said, "I dare you to say that again." She asked me to "come out here, please," and then I heard a shot.
>
> Q. So you heard your brother say, "I dare you to say that again"?

A. That's right.

Q. And then you heard Gina say something.

A. She asked me to help her after she was shot.

Kevin left the bathroom immediately after he heard the shot. As he exited the bathroom, he observed Gina running toward him. Kevin held Gina briefly after they met in the hall and then she slid to the floor.

Kevin asked Roger what he had done and Roger admitted he shot Gina. After the shooting, Kevin tried to call 911 for help but Roger would not let him. Roger also threatened to kill himself. Roger hindered Kevin's efforts to carry Gina to his car so he could drive her to the hospital. Eventually Kevin was able to get Gina into the car. Roger initially got into the car with Kevin and Gina, but got out of the car before it arrived at the hospital. Roger went back home after exiting Kevin's vehicle.

Efforts to save Gina's life at the hospital were not successful. An autopsy revealed a single .22 caliber bullet passed through Gina's right forearm, entered her chest, and pierced both her lungs and her heart. A forensic pathologist testified Gina's forearm must have been slightly raised in front of her at the time she was shot.

After the defendant returned home, Roger telephoned a former girlfriend, Christina Bennett, in Omaha. According to Bennett, Roger told her he had shot and killed someone. At trial, Bennett described her conversation with Roger:

Q. What else did Roger Sellers say about the shooting?

A. I asked him what happened. He said they were playing Nintendo, that there wasn't any fighting, that he basically said — I said, "Well,

> why did you shoot her, or why did you even have a gun in the — loaded gun?" And he just said, "Well, she kept ragging and bitching and ragging and bitching. The bitch just wouldn't shut up, so I dropped the clip in the .22 and shot her," and he said, "Oh my God, oh my God, I didn't mean to kill her."
>
> Q. But he said the reason why he shot her was because she kept ragging and bitching at him.
>
> A. Right. "You shot her because she just kept bitching," I said. And he said, "She just wouldn't shut up." I said, "She wanted to go home? You shot her because she wanted to go home?" "Well, Kevin and I were playing Nintendo."

Sellers was arrested at his home a short time after his conversation with Bennett. When arrested, he told officers the shooting was an accident. Kevin Sellers and Christina Bennett both testified Roger Sellers was very interested in guns and very knowledgeable of them. Gina Ginn was shot with a .22 caliber semi-automatic Ruger assault rifle with a pistol grip and a 30 round "banana" clip. The assault rifle belonged to Roger.

The defendant took the stand at trial. He testified the shooting was accidental. According to his version of the events, he was talking to Gina when he tried to lift his rifle with one hand to aim it at some pictures on the wall and the weapon accidentally fired. He called an expert witness to explain how this could happen. Sellers claimed he was unaware the rifle was loaded and testified Kevin might have loaded it a few days earlier without Roger's knowledge.

The State charged Sellers with murder in the first degree. The State advanced two alternative theories for first-degree murder: (1) the defendant acted wilfully, deliberately, premeditatedly, and with the specific intent to kill; and/or (2) the

defendant killed Gina while participating in the forcible felony of willful injury. Sellers contends there was insufficient evidence to support his conviction for first-degree murder under either of the State's theories.

II. Sufficiency of Evidence

In reviewing a denial of a motion for judgment of acquittal based on insufficiency of the evidence, we consider the evidence in the light most favorable to the State. *See State v. Walker*, 574 N.W.2d 280, 284 (Iowa 1998). A finding of guilt is binding on the court "unless there is not substantial evidence in the record to support it or such finding is clearly against the weight of the evidence." *State v. LaPointe*, 418 N.W.2d 49, 51 (Iowa 1988). "Evidence is substantial if it could convince a rational fact finder that the defendant is guilty beyond a reasonable doubt." *State v. Bayles*, 551 N.W.2d 600, 608 (Iowa 1996). The evidence "must do more than raise suspicion, speculation, or conjecture;" it must raise a fair inference of guilt as to each essential element of the crime. *LaPointe*, 418 N.W.2d at 51.

We conclude the evidence was sufficient to convince a reasonable trier of fact that Sellers was guilty under either theory advanced by the state.

A. "Premeditation" Theory

To convict a defendant of premeditated murder, the State is required to show the defendant willfully, deliberately, and with premeditation killed another person. *See* Iowa Code § 707.2(1) (1995). This is a specific intent crime requiring the State to prove the defendant acted with malice aforethought. *See* Iowa Code § 707.1 (1995).

Deliberation and pre-meditation may be shown by circumstantial evidence in any one of three ways: (1) evidence of planning activity of the defendant which was directed toward the victim; (2) evidence of malice which might be inferred from prior relationships between defendant and the victim; and (3) evidence regarding the nature of the killing. *See State v. Freie*, 335 N.W.2d 169, 172 (Iowa 1993) (quoting *State v. Harrington*, 284 N.W.2d 244, 247–48 (Iowa 1979)). Premeditation and deliberation need not exist for any particular length of time. *See State v. Poyner*, 306 N.W.2d 716, 718 (Iowa 1981).

There is evidence in the record that Sellers must have loaded the murder weapon by inserting the clip and pulling back the bolt. The gun was pointed directly at Gina Ginn when Sellers pulled the trigger. Ginn apparently raised her forearm as a startled response before being shot. In addition, evidence of Sellers' familiarity with guns and their operation contradicts his testimony that the shooting was accidental.

Acting with malice aforethought encompasses the intentional doing of a wrongful act or the injury of another, and acting with a fixed purpose or design in contrast to an act done in the heat of passion. *See State v. Lee*, 494 N.W.2d 706, 707 (Iowa 1993). The use of a deadly weapon accompanied by the opportunity to deliberate is evidence of malice. *See State v. Blair*, 347 N.W.2d 416, 421 (Iowa 1984). Malice aforethought can also be inferred from prior relations between the accused and the victim. *See State v. Wheeler*, 403 N.W.2d 58, 62 (Iowa App. 1987).

We determine there is substantial evidence the defendant killed Gina Ginn

with malice aforethought. Sellers' admissions to Christina Bennett indicate he shot Gina Ginn because he was upset with her for "ragging and bitching" at him. Just before the shooting, it is reasonable to conclude Gina said something which irritated Sellers, causing him to say, "I dare you to say that again." Shortly after the shooting, Sellers referred to the victim as a "bitch." In addition, the jury could have concluded from the evidence that the defendant interfered with efforts to get Gina Ginn immediate medical attention.

The final element of intent is generally proved by circumstantial evidence. *See State v. Clark*, 475 N.W.2d 193, 197 (Iowa 1991) (circumstantial evidence sufficiently proved the defendant's intent to seriously injure and kill the victim). Like malice and pre-meditation, a specific intent to kill may be inferred from the use of a dangerous weapon. Sellers' intent to kill is also inferable from the fact he did not mention to his brother that the shooting was an accident.

For the foregoing reasons, as well as the jury's apparent rejection of most of the defendant's testimony, we conclude there is sufficient evidence to support Seller's murder conviction on a "premeditation" theory.

B. Felony Murder

The State also argued defendant was guilty of first degree murder under the "felony murder" theory. This occurs when a person murders another during the commission of a forcible felony. *See* Iowa Code § 707.2(2) (1995). Because all murder requires malice aforethought, felony murder likewise requires not only proof

of participation in a forcible felony but proof of malice aforethought. *Id.*; *see also State v. Ragland*, 420 N.W.2d 791, 794 (Iowa 1988).

Willful injury is a forcible felony and can be used to support a conviction for felony murder. *See State v. Beeman*, 315 N.W.2d 770, 776 (Iowa 1992). Willful injury is an assault committed with the specific intent to cause serious injury. *See* Iowa Code § 708.4 (1995). When willful injury is the underlying felony in a felony murder charge, the evidence to establish the specific intent to cause serious injury will often be the same for proving malice aforethought required for murder. *Ragland*, 420 N.W.2d at 794. Nevertheless, intent to cause serious injury and malice aforethought remain distinct elements, and the presence of one does not establish the other. *Id.* The State must prove both. *Id.*

The record discloses ample evidence for a jury to conclude Sellers intended to seriously injure Gina Ginn by shooting her. Furthermore, because it resulted in death, malice aforethought may be implied from the commission of the underlying felony of willful injury. *See State v. Taylor*, 287 N.W.2d 576, 578 (Iowa 1990); *see also* Iowa Code § 707.1 (1995); *State v. Ververka*, 271 N.W.2d 744, 747 (Iowa 1978). We conclude there is sufficient evidence to sustain Seller's conviction on a felony murder theory.

II. Evidentiary Rulings

The defendant objected at trial to the admission into evidence of a photograph, State's exhibit 24, showing a weapons magazine and admission into evidence of a will pamphlet which the defendant managed to have mailed to his former girlfriend, and

witness against him, Christina. Our standard of review is for abuse of discretion. *State v. Chadwick*, 328 N.W.2d 913, 917 (Iowa 1993).

Among numerous photographic exhibits offered by the State was a photograph of the defendant's bedroom taken shortly after the shooting. It depicts the floor of the defendant's bedroom, with guns, scope, ammunition, and other items strewn about. One of the items shown is a "Combat Arms" magazine.

The test for admission of such evidence is two-fold: (1) the evidence must be relevant; and (2) if the evidence is relevant the trial court must determine whether the probative value of the exhibit outweighs the prejudice which would be caused by its admission into evidence. *See State v. Fuhrmann*, 257 N.W.2d 619, 624–25 (Iowa 1997). Evidence which is not relevant or is unduly prejudicial is not admissible. *See* Iowa R. Evid. 402, 403. Determining admissibility of evidence is a matter placed in the trial court's discretion. *See State v. Clark*, 325 N.W.2d 381, 384 (Iowa 1992).

The test of relevancy is whether the evidence offered would render the desired inference more probable than it would be without such evidence. Irrelevant evidence is evidence having no logical tendency to establish any proposition. *See State v. Mark*, 286 N.W.2d 396, 410–11 (Iowa 1979) (citations omitted). We determine the trial court did not abuse it's discretion in admitting Exhibit 24. The defense in this case was that defendant accidentally shot Gina Ginn. The photograph was relevant to show the defendant's knowledge and ability to use firearms. The photograph supported the State's position that Sellers was well versed in the use of firearms, had

a lot of weapons of his own, read extensively about them, and was not the type of person who would accidentally wave a firearm at someone and pull the trigger.

Sellers also contends the photograph was unduly prejudicial. We find this argument to be without merit.

Defendant also challenges the trial court's admission of a will pamphlet over his relevancy objections. In the trial information filed by the State on February 24, 1997, Christina Bennett was listed as a witness. On February 28, the defendant filed a notice that her deposition would be taken on March 24. Several days after the deposition, Christina received a pamphlet from the Billy Graham Evangelistic Association. The pamphlet was entitled "Your Will: Taking Steps For Those You Love." The accompanying cover letter, dated March 27, indicated the pamphlet was being sent in response to a request. Defendant admitted at trial he was the person who requested the pamphlet be sent to Bennet. Bennet testified she felt threatened by this course of events.

Evidence a defendant has threatened a witness is generally relevant and admissible because it indicates a consciousness of guilt. *See State v. Elam*, 328 N.W.2d 314, 318–19 (Iowa 1992); *State v. Leonard*, 243 N.W.2d 887, 890 (Iowa 1976). Although the record does not reveal the precise date when Sellers requested the will pamphlet be sent to Bennett, it is clear he did so with knowledge the State intended to call her as a witness. Furthermore, the date of the cover letter intimates the request was made around the time of her deposition. We conclude the will pamphlet could reasonably be construed as a threat intended to intimidate the witness

Christina Bennett. The trial court did not abuse its discretion in admitting this evidence.

We have considered all issues presented and find no basis for a reversal of the defendant's conviction.

AFFIRMED.