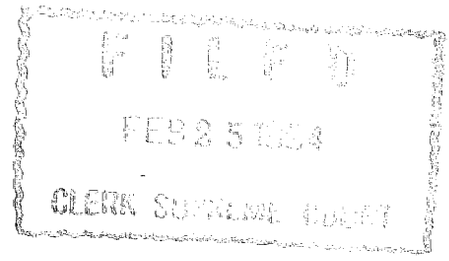
IN THE COURT OF APPEALS OF IOWA

No. 4-012 / 93-0082



STATE OF IOWA,

Plaintiff-Appellee,

vs.

RANDY ALLEN GILLASPIE,

Defendant-Appellant.

Appeal from the Iowa District Court for Woodbury County, Michael S. Walsh, Judge.

The defendant challenges his conviction of second-degree murder. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Ahmet S. Gonlubol, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Bridget Chambers, Assistant Attorney General.

Heard by Oxberger, C.J., and Sackett and Habhab, JJ.

HABHAB, J.

The defendant, Randy Allen Gillaspie, appeals his conviction for murder in the second degree, in violation of Iowa Code sections 707.1 and 707.3 (1991). He claims his conviction was not supported by sufficient evidence. He also claims his trial counsel was ineffective. We affirm.

The State charged Randy Allen Gillaspie with murder in the second degree. The minutes indicated Gillaspie strangled his girlfriend, Lisa Green. Gillaspie subsequently filed a notice stating he would be relying upon the defenses of justification and intoxication. The matter proceeded to a jury trial.

The State introduced the testimony of Gillaspie's brother, Rodney. Rodney testified Gillaspie phoned him stating he had just killed Green. Rodney and his girlfriend drove to Gillaspie's home where they found Green lying dead on the floor of the kitchen.

Gillaspie did not deny strangling Green. He stated the two had spent approximately seven hours drinking at a bar before the incident. He claimed that after the two returned home Green became abusive and aggressive. He testified that while he was in the doorway of the kitchen, he saw what he believed was Green reaching for a knife with her right hand. He stated that at that time, Green was three to four feet from the knives. Gillaspie then grabbed Green's arm and pushed her back away from the sink. Green then reached for the phone and struck Gillaspie two or

three times with the receiver. The next thing Gillaspie remembered was taking his hands off Green's neck.

In a videotaped interview between Gillaspie and Officer Young, Gillaspie told the officer he could not remember many of the details of the strangulation. However, he did recall Green was on the floor at the time he grabbed her neck. Officer Young expressly asked the defendant whether Green "had a knife or come at [the defendant]." Gillaspie told the officer that Green did not. Gillaspie stated he "just wanted her to be quiet" and that she was "not going to knock me around." He also stated that Green "just antagonized me" and added she had been "antagonizing me for four or five months."

Dr. Thomas Bennett, the state's medical examiner, testified that from the pressure applied to Green's throat until she was rendered unconscious would have been fifteen to thirty seconds. An additional two to five minutes of continuous pressure would have been required to kill her.

The court instructed the jury on second-degree murder, intoxication and justification. The jury found Gillaspie guilty of second-degree murder and the court entered judgment on the jury's verdict. The court denied Gillaspie's motion for new trial, as well as his prior motions for judgment of acquittal. Gillaspie appeals.

Our scope of review is on assigned error only. Iowa R. App. P. 4 The standard of review in challenging the sufficiency of the evidence is well established. State v.

Lampman, 342 N.W.2d 77, 81 (Iowa App. 1982). We will uphold a verdict where there is substantial evidence in the record tending to support the charge. State v. Aldape, 307 N.W.2d 32, 39 (Iowa 1981).

When reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the state, including legitimate inferences and presumptions that fairly and reasonably may be deduced from the evidence in the record. State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984); State v. Hall, 371 N.W.2d 187, 188 (Iowa App. 1985). Direct and circumstantial evidence are equally probative so long as the evidence raises "a fair inference of guilt and [does] more than create speculation, suspicion, or conjecture." State v. Hamilton, 309 N.W.2d 471, 479 (Iowa 1981). It is necessary to consider all the evidence in the record, and not just the evidence supporting the verdict, to determine whether there is substantial evidence to support the charge. Bass, 349 N.W.2d at 500; Hall, 371 N.W.2d at 188. Substantial evidence means evidence which would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984); Hall, 371 N.W.2d at 188.

The trial court instructed the jury on the elements of murder in the second degree as follows:

> The State must prove all of the following elements of murder in the Second Degree:
>
> 1. On or about the 9th day of July, 1992, the defendant strangled Lisa Renee Green.

> 2. Lisa Renee Green died as a result of being strangled.
>
> 3. The defendant acted with malice aforethought.
>
> 4. That the defendant did not act with justification.

The jury was also instructed on the lesser-included offenses of voluntary manslaughter, involuntary manslaughter, assault causing bodily injury, and assault. In addition, the jury was instructed on the defenses of justification and intoxication.

The defendant claims there was insufficient evidence at trial to show his actions were not justified in light of Green's "assaultive" and abusive character. We disagree.

In order to establish a lack of justification, the State need to prove one of the following:

> (1) the defendant was the provocator in initiating or continuing the difficulty which resulted in the [strangling]; or
>
> (2) the defendant did not believe he was in imminent danger of death or injury and that use of force was not necessary to save him; or
>
> (3) he did not have reasonable grounds for such belief; or
>
> (4) the force used was unreasonable.

State v. Elam, 328 N.W.2d 314, 319 (Iowa 1982) (citation omitted); see also State v. Nunn, 356 N.W.2d 601, 604 (Iowa App. 1984). Fear of an ordinary battery, no matter how severe, does not justify the killing of an assailant. State v. Cruse, 228 N.W.2d 28, 31 (Iowa 1975).

Gillaspie admits Green never had the knife in her hand. He acknowledged that at the time Green allegedly

reached for the knife, she was not blocking his path to the front door of the house. He also admits that Lisa was lying on the floor at the time he strangled her.

We find substantial evidence to support the jury's verdict that the killing was not justified.

Gillaspie also claims there was insufficient evidence at trial to show he killed Green with malice aforethought.

"Malice aforethought has been defined as 'a fixed purpose or design to do some physical harm to another which exists prior to the act committed.'" State v. Nunn, 356 N.W.2d 601, 603 (Iowa App. 1984) (quoting State v. Sharp, 304 N.W.2d 220, 226 (Iowa), cert. denied, 454 U.S. 834 (1981)). The fixed purpose to do harm need not exist for any given length of time. Nunn, 356 N.W.2d at 601. It is sufficient if it exists any time before the killing. Id. Malice aforethought can be implied from prior relations between the accused and the victim. Id. Malice aforethought does not require a specific intent to kill the victim, but only to do harm of some sort. State v. Reese, 259 N.W.2d 771, 778 (Iowa 1977).

We find there was substantial evidence to support the jury's finding that the defendant acted with malice aforethought. Among the evidence supporting the jury's finding was the manner in which Gillaspie killed the victim and the defendant's statements regarding the killing.

Gillaspie relies on the expert testimony of Dr. Taylor, who testified Gillaspie's intoxication played a significant part of explaining his actions.

> Voluntary intoxication may not, however, reduce a charge when the crime does not require specific intent. 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.

State v. Caldwell, 385 N.W.2d 553, 557 (Iowa 1986) (citations omitted); see also Caldwell v. State, 494 N.W.2d 213, 214-15 (Iowa 1992).

We affirm Gillaspie's conviction.

Gillaspie requests that his ineffective assistance of counsel claims be preserved for a postconviction relief action. He claims his counsel failed to call additional witnesses to testify about the victim's violent temper and failed to make an offer of proof on Dana Hartman's testimony about her knowledge of a previous stabbing the victim had committed on her husband or ex-husband.

Where the record on direct appeal is not adequate to permit us to resolve the issue, we preserve the defendant's claim for postconviction proceedings so the facts may be so developed. State v. Koenighain, 356 N.W.2d 237, 238 (Iowa App. 1984). This also gives the allegedly-ineffective attorney the opportunity to explain his or her conduct. State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978). We conclude there is an inadequate record for us to adjudicate defendant's claim. We therefore preserve defendant's ineffective assistance of counsel claim for a later proceeding.

AFFIRMED.