IN THE COURT OF APPEALS OF IOWA

No. 1-97 / 00-558
Filed March 28, 2001

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ARCHIE ROBERT BEAR,
Defendant-Appellant.

FILED
MAR 28 2001
CLERK SUPREME COURT

Appeal from the Iowa District Court for Poweshiek County, Richard J. Vogel, Judge.

Archie Bear appeals from his conviction and sentence for second-degree murder. **AFFIRMED.**

James P. Piazza, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Cristen C. Odell and James Kivi, Assistant Attorneys General, and Michael W. Mahaffey, County Attorney, for appellee.

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

HUITINK, P.J.

Archie "Bob" Bear appeals from the judgment and sentence entered, following a jury trial, for second-degree murder. He argues there was insufficient evidence to support the malice aforethought element of the crime of second-degree murder. We affirm.

I. Background Facts and Proceedings.

Bear was charged with first-degree murder in the death of Max Purk on February 6, 1999. The State alleged Purk died of a knife wound sustained in an altercation initiated by Bear. Bear filed a notice of and relied on the defense of justification at trial.

The trial record indicates Bear, Purk, and two companions were traveling in a car driven by Bear when Purk and Bear began arguing. According to Bear's version, Purk became upset with the way Bear was driving and began beating him with his fist, breaking his nose and pinning him against the steering wheel. After stopping the car, Bear claimed Purk dragged him from the car and continued to pummel him with his fist. Bear claimed he drew his knife and slashed at Purk to protect himself from further injury.

Under the State's version, Bear initiated the altercation by swinging at Purk. Bear then stopped the car and hit Purk again. After both exited the car, the State claims Bear ran at Purk and slashed Purk's throat with a knife.

The jury returned a guilty verdict to the lesser-included offense of second-degree murder. The district court denied Bear's posttrial motions and sentenced him to an indeterminate fifty-year term of incarceration.

On appeal Bear challenges the sufficiency of the evidence supporting his conviction. He also argues the State's evidence was only sufficient to support a conviction for voluntary manslaughter.

II. Standard of Review.

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, 80-81 (Iowa Ct. App. 1983). 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 Ct. 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, 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 that 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.

III. Sufficiency of the Evidence.

Second-degree murder is a killing of another person with malice aforethought, but without specific intent to kill. *See* Iowa Code §§ 707.1-707.3 (1999); *State v. Miller*, 359 N.W.2d 508, 511 (Iowa Ct. App. 1984). Malice aforethought is a fixed purpose or design to do some physical harm to another which exists prior to the act committed. *State v. Walker,* 538 N.W.2d 316, 319 (Iowa Ct. App. 1995). The fixed purpose to do harm need not exist for any given length of time. *State v. Nunn*, 356 N.W.2d 601, 603 (Iowa Ct. App. 1984). It is sufficient if it exists at any time before the killing. *Id.* Malice aforethought can be implied from use of a deadly weapon accompanied by an opportunity to deliberate. *Id.*

At trial Jeremy Purk, the other passenger in the back seat of Bear's car, provided the following account of the altercation resulting in Max Purk's death:

> A. Well, Daryl [the other passenger in the front seat] was steering and I told Daryl we got to pull over because we can't be going down the road like this. Daryl had turned us into a parking spot on Fifth Street and then the car was put in park, and Max still had Bob pushed down in the seat. And Daryl hopped out and come around towards the front of the car, and I was still in the backseat. And Max asked him, he says, knock it off, Bob, you know, we've been friends a long time, just knock it off. Can't we just get along, you know, can't we just be friends? And Bob said, yes, you know.
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> Max asked him, are we done, you know, and Bob said, yes. And then he asked him again, he says, are we done? And Bob said, yes. He let go of Bob. The passenger's side door was still open, and Bob was leaned over toward the passenger's side door so he just proceeded out the passenger's side door. The driver's seat was flipped forward and the passenger's seat was still in the back position. Max was in that V so I just pushed him through, and he got out the passenger's side door.
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> . . .

> Q. What happened when he got out the door? A. He got out of the car and like turned to go to the back. Well, before he got out of the car, Bob was like up here on the sidewalk, you know. It would be the north side of the door. And Max had turned and got out and just stood up and took maybe two steps and Bob come down, and that was when Bob cut him.
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> . . .
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> Q. From where you were sitting, could you actually see the defendant cut Max? A. I didn't see the actual cut, but I seen him like run into Max. I don't know what you want to call it. It was like run up and grabbed him when it happened, and I did see that, yes.

When this evidence is viewed in the light most favorable to the State, it provides sufficient evidence of malice aforethought to convict Bear of second-degree murder. As indicated earlier, the jury could infer malice aforethought from the use of a deadly weapon. Additionally, the jury could find, based on this evidence, that Bear initiated or continued the altercation resulting in Max Purk's death. *See* Iowa Code § 704.6 (defense of justification unavailable if defendant provokes or continues the event resulting in death or injury).

We have considered all of the arguments Bear raises on appeal and find they have no merit or are effectively resolved by the foregoing. The judgment of the district court is affirmed.

AFFIRMED.