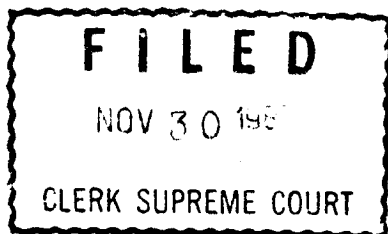


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

DONNY MIKE CAMERON,)

Defendant-Appellant.)

Filed November 30, 1987

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7-429
87-181

Appeal from the Iowa District Court for Polk County (32083), Richard Strickler, Judge.

Defendant appeals his conviction of second-degree murder asserting there was insufficient evidence to support a finding of malice aforethought, an element of second-degree murder. **AFFIRMED.**

Charles Harrington, Chief Appellate Defender, and James F. Whalen, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Mark J. Zbieroski, Assistant Attorney General, for plaintiff-appellee.

Considered by Oxberger, C.J., and Schlegel and Hayden, JJ.

HAYDEN, J.

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Defendant, Donny Mike Cameron, appeals his conviction of second-degree murder. His only assertion on appeal is there was insufficient evidence to support a finding of malice aforethought, an element of second-degree murder.

As stated in State v. Bass, 340 N.W.2d 498, 500 (Iowa 1984):

When reviewing the sufficiency of evidence, we view the evidence in the light most favorable to the State, including all legitimate inferences and presumptions which may fairly and reasonably be deduced from the evidence in the record. It is necessary to consider all of the evidence and not just the evidence supporting the verdict. A jury verdict is binding upon this court and will be upheld unless the record lacks substantial evidence to support the charge. Substantial evidence means evidence which would convince a rational trier of fact that the [defendant is] guilty of the crime charged beyond a reasonable doubt.

Id. If the case is tried to the court, as here, the trial court's factfindings have the same effect as a special jury verdict. State v. Hall, 287 N.W.2d 564, 565 (Iowa 1980).

In this case, we must determine whether there is substantial evidence in the record to support the finding of the trial court that Cameron acted with malice aforethought. Malice aforethought is a fixed purpose or design to do physical harm to another which exists prior to the act committed. State v. Higginbotham, 351 N.W.2d 513, 515 (Iowa 1984). Malice aforethought need not exist for any given length of time; it is sufficient if it exists at any time before the killing. State v. Love, 302 N.W.2d 115, 119 (Iowa 1981); State v. Nunn, 356 N.W.2d 601, 603 (Iowa App. 1984). Malice aforethought may be inferred from any of the following: the acts and conduct of the defendant, State v. Gramenz, 256 Iowa 134, 142, 126 N.W.2d 285, 290 (1964); the circumstances surrounding the killing, e.g., State v. Veverka, 271 N.W.2d 744, 747 (Iowa 1978) (malice implied from a finding defendant intentionally or deliberately set the fire that caused the deaths); the defendant's threats to do bodily harm, State

v. Baratta, 252 Iowa 1308, 1314, 49 N.W.2d 866, 870 (1951); the defendant's use of a dangerous weapon accompanied by an opportunity to deliberate, State v. Love, 302 N.W.2d 115, 119 (Iowa 1981); or prior hostile relations between the defendant and the victim. State v. O'Connell, 275 N.W.2d 197, 202 (Iowa 1979).

On June 1, 1986, Cameron and his girlfriend, Rhonda Stevenson, were at the home of Charlene Peterson and the victim, Charles Lane. While they were grilling ribs in the backyard, Cameron began teasing Peterson's five-year-old daughter, Monica, by smearing blood on her from a wound he had incurred earlier in the day as the result of a dog bite. Monica became understandably hysterical. Immediately thereafter, Stevenson and Cameron began arguing vociferously. This argument led to Cameron slapping her and Stevenson responding in kind. At this point, Peterson and Lane attempted to separate them. Cameron thereupon hit Lane on the head with an empty wine bottle and the two began wrestling on the ground. Cameron then grabbed a piece of glass, held it to Lane's throat, and told him that if he moved he was going to "slice his throat." Stevenson and Peterson successfully got the glass out of Cameron's hand and separated the two men. Cameron then began hitting Stevenson, again. Once more, Lane and Peterson separated them. Cameron responded by retrieving his fillet knife from the tree stump in which he had stuck it. In the ensuing fracas, Stevenson was stabbed in the chest and Lane was stabbed in the hand, nose, and abdomen. Lane's abdomen wound proved fatal.

Cameron asserts the killing was in the heat of passion caused by fear, anger, and the excitement of mutual combat. He contends the combat was continuous and, therefore, he had no opportunity to deliberate on his actions or "cool" down. We disagree.

We find the record reveals Cameron had the opportunity to deliberate each time he was separated from either Stevenson or Lane. In each instance, this deliberation time was extinguished, in large part, by a fresh attack by Cameron. Also indicative of malice aforethought was Cameron's threat to slice Lane's throat with the broken glass.

We also reject Cameron's assertion his intoxication at the time rendered him unable to deliberate on his actions. We note, as does Cameron, that intoxication cannot be offered to negate the element of malice aforethought. State v. Caldwell, 385 N.W.2d 553, 557 (Iowa 1986). We decline to erode this principle by allowing Cameron to offer his intoxication to negate the deliberation element of malice aforethought.

Based on the foregoing, we conclude there is substantial evidence in the record to support the finding of the trial court that Cameron acted with malice aforethought.

AFFIRMED.