IN THE COURT OF APPEALS OF IOWA

No. 2-1002 / 12-0330
Filed February 13, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

OSCAR IBARRA,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Robert A. Hutchison, Judge.

Oscar Ibarra appeals from his first-degree murder conviction. **AFFIRMED.**

Alfredo Parrish and Andrew Dunn of Parrish, Kruidenier, Dunn, Boles, Gribble, Parrish, Gentry & Fisher, L.L.P., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, John P. Sarcone, County Attorney, and Michael Hunter, Assistant County Attorney, for appellee.

Heard by Potterfield, P.J., and Danilson and Tabor, JJ.

DANILSON, J.

Oscar Ibarra appeals from his first-degree murder conviction, contending his trial counsel had an impermissible conflict-of-interest, his conviction is not supported by sufficient evidence, and trial counsel was ineffective in several respects. Because neither of Ibarra's trial counsel personally represented either Cody Brown or Patrick Wilson, had not seen the files of either case, and because Ibarra expressly waived any conflict of interest on the record, we find no violation of Ibarra's right to counsel. There is substantial evidence from which a rational fact-finder could conclude Ibarra did not act with justification in stabbing Patrick Wilson; and that he did stab Wilson with malice aforethought and in a willful, deliberate, and premeditated manner; and with the specific intent to kill Wilson. We reject Ibarra's ineffectiveness claims, and we therefore affirm his conviction.[1]

I. Background Facts and Proceedings.

At about 3:30 a.m. on April 9, 2011, Riley Wilson, age thirteen, looked out his window and saw someone crouching by his father's truck. Riley went outside and again saw the man crouched beside the truck. Riley's father, Patrick Wilson (Wilson), came outside, and Riley told him he had seen someone. Wilson went around the house once but did not see anyone. Riley told him the person was beside the truck, and Wilson walked over to the truck telling Riley to stay where he was. Riley saw that "right when he gets to the side of the truck, the man pops

[1] We filed our decision in this appeal on January 9, 2013. The appellant subsequently filed a belated petition for rehearing, noting one claim of ineffective assistance of counsel had not been resolved. We granted the petition for rehearing. Our January 9 decision is therefore vacated and this decision replaces it.

out at him." Wilson yelled and then told Riley to call the police. Riley saw the man "come out at him [Wilson], like, in a hitting—like he was getting ready to hit him, in that kind of position." Riley ran inside the house and told his mother that "my dad is getting beat up." When Wilson's wife, Christy Wilson, ran outside, she saw someone standing over her husband.

John Brooks, who lived nearby, was awakened by the sound of Wilson's yelling. He went outside and heard Wilson telling Riley to call the police. As he ran toward Wilson's yard, Brooks heard Wilson say, "Stop. I've got kids. I've got children. Stop. I've got children. Ow. Help." Brooks yelled, "Oscar, stop," and he saw Oscar Ibarra strike Wilson two more times. Ibarra then ran away.

Brooks started to pursue Ibarra but turned back when he heard someone scream, "No, Pat, no." He ran to where Wilson was lying and noted that Wilson had lost a lot of blood. Brooks lifted up Wilson's shirt and saw "gash upon gash and deep-seated purple wounds, and . . . I knew it wasn't good."

Police were alerted to the Wilson's house at 3:53 a.m. When emergency personnel arrived at the scene, they found that Wilson had no pulse and was not breathing. Despite their efforts to revive him, Wilson's heart had no electrical activity when he reached the hospital.

Ibarra was charged with first-degree murder. At the subsequent jury trial he presented justification and intoxication defenses.

The testimony at trial showed that Ibarra spent the day of April 8, 2011, "hanging out" and shopping at a mall with friends. At one point during the day, Ibarra showed Cody Brown a Smith and Wesson knife that he had. Cody put the

knife in his pocket and forgot about it. Later in the day, Ibarra, Brown, Alyssa Ameneiro, Amanda Mills, and Arin Wilson (Patrick Wilson's daughter), all underage, decided to go to a bar—the Komodo Klub—and try to get in using false identification cards. They went to Ameneiro's house to get ready for the evening and started drinking vodka. Then they drove to the Komodo Klub in Arin's car, drinking vodka on the way. When they arrived at the Komodo Klub after 10 p.m., Arin gained entry, Ameneiro was turned away, and the others decided not to try.

After taking Mills home around 12:30 a.m., Ibarra, Brown, and Ameneiro went in Arin's car, with Ameneiro driving, to Nick Vasey's dorm room. There, they drank tequila. Ibarra and Ameneiro were arguing, and Vasey asked them to leave. Ibarra, Ameneiro, and Brown left in Arin's car. Ameneiro was driving, though she testified she was "really drunk" and did not remember much of the drive only that she and Ibarra later were parked in a Hy-Vee parking lot with the windshield broken, and Ameneiro stated, "Look what you did to the windshield."

Brown testified that after leaving Vasey's room, Ameneiro stopped the car in the middle of the street arguing with Ibarra. Ibarra got out saying he was going to walk. Brown told Ameneiro he would drive because she was intoxicated. Ibarra returned to the car saying he was sorry. Ameneiro was crying. Brown got out of the car to go around to the driver's seat, and Ibarra yelled, "Go, go, go." Ameneiro and Ibarra drove off, leaving Brown in the street. Brown called Ibarra to ask why they had left him, and Ibarra told him Ameneiro left Ibarra as well. According to Brown, Ibarra said he had punched out the windshield of the car

because Ameneiro refused to go back and pick up Brown. On cross-examination, however, Brown was asked if Ameneiro left because Brown was angry that she was not moving the car, and Brown punched the windshield. Brown responded, "That I don't remember."

Brown walked to Wilson's house, which was about four blocks away. When Brown arrived at Wilson's house, he heard music and Wilson singing in the garage. Brown knocked on the door to the garage. Wilson let him in, and the two smoked marijuana. Brown told Wilson that Arin was at the club, Ameneiro was drunk and driving Arin's car, Ibarra had hit Ameneiro, and Ibarra broke Arin's car's windshield. Brown acknowledged he told Wilson Ibarra had hit Ameneiro because he "knew that would be something that would get Pat stirred up."

Wilson called Arin and told her to call Ameneiro and have her get the car to Wilson's house. He also called his twenty-year-old son, Andrew, and told him that Brown needed a ride. Ibarra and Ameneiro arrived at Wilson's house, where Ibarra asked to talk with Brown.

Brown told Ibarra he was angry about being left to walk, he did not want to talk to Ibarra "because [Ibarra] was real drunk," and told Ibarra to leave. Wilson then told Ibarra to leave. Ibarra did leave. Both Wilson and Brown called his son Andrew again; Wilson told him he needed to get his friends out of there.

Andrew arrived at the house after 3:00 a.m. and arranged for Brown to ride with him in his Jeep and for Ameneiro to take Arin's car to pick up Arin. As Andrew and Brown started to get into the Jeep, Ibarra came out from behind a fence and got into Arin's car with Ameneiro. Andrew approached the car,

opened the door, and told Ibarra he had five seconds to leave or Andrew was "going to beat his ass." Ibarra got out of the car and stood in front of Andrew and Brown. Andrew started counting down from five and Ibarra left. Ameneiro then left in Arin's car, and Andrew and Brown left in Andrew's Jeep.

Later, Brown and Andrew were driving around downtown when Andrew got a call that his father had been stabbed. When they arrived at Wilson's house and learned of Wilson's stabbing, Brown dropped the knife Ibarra had given him because there was a warrant out for Brown's arrest.

Riley testified about seeing the man crouching by his father's truck, his father approaching the truck, and the man jumping out like he was going to hit Wilson. He stated he went to get his mother, and when they came back outside, he saw the man run off through the neighbors' yards. Riley went to his father, who was lying on his stomach on the ground. Riley testified he panicked and ran to the neighbor's house (Robby Wilson) and there called 911.

Christy Wilson testified Wilson struggled with drug addiction. She stated his addiction started with self-medicating because he had transverse myelitis, which "causes a lot of pain" and numbness in his legs, and left Wilson unable to feel his bowels or his feet. She stated, "He started finding prescription pain medications on the street, meth, cocaine, whatever made him feel better and kept him going." The transverse myelitis was properly diagnosed after seven or eight years, however; and Wilson was given prescription medication, but by then "he had already started abusing and was also abusing those." She stated he used marijuana daily and "meth" "made him feel younger." Christy testified she

and Wilson had attempted to have Wilson admitted on April 8, 2011, for "in-house detox and treatment," but were told he could "do outpatient, that they wouldn't accept him for in-house." She stated that after that, "there was a lot lighter mood because he had that off his shoulders that everyone knew what his problem was and that he was going to get help." Wilson "seemed in better spirits than he had been in quite awhile" and set about working on the house, "fixing up the house before he had to go" to treatment.

Christy went to bed about 9 p.m. on April 8, and was awakened by Riley. She went outside and saw someone, whom she described as "Caucasian, small, skinny," standing over Wilson. Wilson was on the ground across the street in a neighbor's yard. She testified she screamed and the person ran off. When she ran to her husband, she stated he told her to "[t]ell them that he hit me in my heart." She asked him, "Who did this to you?" and he responded, "Oscar," which was "the last word he ever said to me."

Ameneiro testified that she and Ibarra were "unofficially dating," beginning on St. Patrick's Day 2011. At trial, she recounted the events on April 8, 2011, including going to the mall and then her house, picking up Mills and going to the Komodo Klub, drinking tequila at Vasey's dorm room, and seeing the broken windshield. She recounted going to Wilson's and then driving to pick up Arin. While in the car with Arin, Arin received a phone call from Megan Belcher to go to Wilson's. The two drove to Wilson's, where there were "a lot of police." She stated that while at Wilson's she received a call from Ibarra, who was "crying and said he was sorry."

Megan Belcher and Andrew also spoke with Ibarra on the phone. Ibarra told Belcher, "You're next, Bitch." Andrew asked Ibarra whether he realized when he left Wilson's house that Wilson was lying in the yard dead. Ibarra replied that he "didn't do it."

Sometime during the early morning hours of April 9, Vasey got text messages from the Ibarra saying, "I need a ride ASAP" and "I messed up, man." Also during those early morning hours, Ibarra's sister, Marlyn, spoke with Ibarra on the phone and asked him to come home. Ibarra said he could not come home, that he had "murdered someone." He asked Marlyn if the police were there, and Marlyn said they had just been there.

At about 10:00 a.m., Cody Peacock was awakened by knocking on his back door and found Ibarra wearing bloody clothes and rubbing his hands back and forth. Ibarra told him he had been in a fight the night before and asked if he could come inside and get cleaned up. He also told Peacock he had stayed in the Peacocks' garage. Later in the day, Ibarra arranged to meet his sister and parents at Gray's Lake. Ibarra was crying, shaking, and hyperventilating, and he had a black eye and scratches on his arm. His family persuaded him to turn himself in. He returned home with them, his parents called the police, and Ibarra was arrested. Police photographed Ibarra's injuries on April 11, noting fifteen different injuries to Ibarra's head, shoulder, right and left hands, arms, and legs. At trial these injuries were described as "minor," not requiring medical attention.

An autopsy showed that Wilson had suffered fifteen stab wounds, including a fatal wound to his heart and a wound that went completely through

his forearm and could be considered a defensive wound. Although the knife Ibarra had earlier shown to Brown was found near the scene, it showed no traces of blood.

Ibarra was convicted of first-degree murder and he now appeals. He contends his right to counsel was violated because of an impermissible conflict of interest. He also argues there is insufficient evidence to sustain his conviction. Finally, Ibarra asserts he was denied the effective assistance of counsel because his attorney failed to object to alleged prosecutorial misconduct during closing arguments, failed to request pertinent jury instructions, and failed to move for a mistrial based on improper juror influence.

II. Scope and Standards of Review.

We review de novo a district court decision implicating a defendant's constitutional rights. *State v*. *Becker*, 818 N.W.2d 136, 141 (Iowa 2012).

We review sufficiency-of-evidence claims for errors at law. *State v*. *Leckington*, 713 N.W.2d 218, 221 (Iowa 2006). "The jury's findings of guilt are binding on appeal if supported by substantial evidence." *State v*. *Hopkins*, 576 N.W.2d 374, 377 (Iowa 1998). "Substantial evidence is evidence that could convince a rational trier of fact that a defendant is guilty beyond a reasonable doubt." *Id*. In determining whether there is substantial evidence, we view the record in a light most favorable to the State, including all legitimate inferences that may fairly and reasonably be deduced from the evidence. *State v*. *Williams*, 695 N.W.2d 23, 27 (Iowa 2005).

III. Anaylsis.

A. *Conflict of interest*. Two public defenders were appointed to represent Ibarra on the murder charge. The same public defender's office also provided representation for Brown and had previously provided representation for Wilson. Ibarra argues that the public defender's office had an impermissible conflict of interest, which violated his Sixth Amendment rights and his corresponding rights under article 1, section 10 of the Iowa Constitution.[2] He contends reversal and remand are required under the presumed prejudice standard enunciated in *State v*. *Watson*, 620 N.W.2d 233, 237 (Iowa 2000) (holding that "where the trial court knew or should have known of a particular conflict, reversal is required without a showing that the conflict adversely affected counsel's performance, even though no objection was made at trial").

The State responds that where the district court has inquired into possible conflict—as was the case here—the defendant must show an adverse effect on his counsel's performance. *See State v*. *Smitherman*, 733 N.W.2d 341, 346 (Iowa 2007).

"The foundation for [a conflict of interest] claim is an alleged denial of an accused's constitutional right to effective assistance of counsel." *State v*. *Williams*, 652 N.W.2d 844, 847 (Iowa Ct. App. 2002). As explained by the United States Supreme Court,

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[2] The Sixth Amendment to the United States Constitution states: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." U.S. Const. amend. VI. The Iowa Constitution similarly states: "In all criminal prosecutions . . . the accused shall have a right to . . . have the assistance of counsel." Iowa Const. art. I, § 10.

> The Sixth Amendment provides that a criminal defendant shall have the right to "the Assistance of Counsel for his defence." This right has been accorded, we have said, "not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." It follows from this that assistance which is ineffective in preserving fairness does not meet the constitutional mandate, and it also follows that defects in assistance that have no probable effect upon the trial's outcome do not establish a constitutional violation. As a general matter, a defendant alleging a Sixth Amendment violation must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."
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> There is an exception to this general rule. We have spared the defendant the need of showing probable effect upon the outcome, and have simply presumed such effect, where assistance of counsel has been denied entirely or during a critical stage of the proceeding. When that has occurred, the likelihood that the verdict is unreliable is so high that a case-by-case inquiry is unnecessary. But only in "circumstances of that magnitude" do we forgo individual inquiry into whether counsel's inadequate performance undermined the reliability of the verdict.
>
> We have held in several cases that "circumstances of that magnitude" may also arise when the defendant's attorney actively represented conflicting interests.

Mickens v. *Taylor*, 535 U.S. 162, 166-67 (2002) (citations omitted).

Whether raised as an ineffective-assistance-of-counsel claim or otherwise, "[t]he analysis is basically one question: whether the defendant has made a showing whereby we can presume prejudice." *Smitherman*, 733 N.W.2d at 346. If so, the defendant's constitutional rights have been violated, and a new trial is warranted. *Id*.

Prejudice can be presumed when there is an actual conflict of interest the trial court knew or should have known about, but failed to make meaningful or reasonable inquiry into. *State v*. *Smith*, 761 N.W.2d 63, 71 (Iowa 2009); *see Mickens*, 535 U.S. at 172 n.5 ("[W]e have used 'conflict of interest' to mean a division of loyalties *that affected counsel's performance*. . . . An 'actual conflict,'

for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance."). However, when—as is the case here—the district court has conducted a inquiry into the claimed conflict prior to the conviction, the defendant must show the conflict of interest actually affected the adequacy of counsel's performance. *Smith*, 761 N.W.2d at 71; *Smitherman*, 733 N.W.2d at 347; *see also Cuyler v*. *Sullivan*, 466 U.S. 335, 349–50 (1980) ("[A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief. But until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance."). In *Smitherman*, the court concluded automatic reversal was not required because "all the parties were manifestly aware of the conflict and took several precautions to assure [Smitherman's] rights were not violated," and Smitherman requested his defense counsel be permitted to continue the representation notwithstanding the conflict. 733 N.W.2d at 348.

Here, prior to trial, the State requested a hearing to determine whether there was a conflict of interest on the part of the Polk County Adult Public Defender's Office, which was representing Ibarra and Brown, and had represented the decedent, Wilson. A hearing was held, and on October 7, 2011, the district court entered an order stating in part:

> Throughout his criminal proceedings, including the probation revocation proceeding, Brown was represented by Darren Page, Annette Hitchcock and Kathleen Masterpole, all members of the Des Moines Adult Public Defender's Unit.
>
> Defendant's attorneys Valorie Wilson and Jennifer Russell took a deposition of Cody Brown on August 18, 2011, in the above-

> captioned matter. During that deposition, Brown was questioned extensively concerning his adult and juvenile criminal history, as well as his use of illegal drugs and alcohol, both on the date of the crime and otherwise.
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> On the day of the deposition, Brown was still being represented by other attorneys from the Adult Public Defender's Unit. The Court was also advised during the hearing on October 5, 2011 that the Adult Public Defender's Unit had previously represented the decedent, Patrick Wilson. The Court is not aware of the exact nature of that representation, or when it occurred, but notes that Cody Brown was questioned extensively during his deposition concerning Brown's knowledge of illegal drug use by Patrick Wilson.
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> It is the position of the Adult Public Defender's Unit that it has no conflict of interest and should continue to represent defendant Ibarra. Attorney Russell stated that neither she nor attorney Wilson had examined any files belonging to Cody Brown; Attorney Russell further advised the Court that she had consulted with Mark Smith, the State Appellate Defender, and that he had advised her that he perceived no conflict of interest. The Court and counsel conducted a colloquy with defendant Ibarra as to his wishes in this matter. He stated, on the record, that he wished to retain attorneys Wilson and Russell as his trial counsel and waived any possible conflict of interest.

The district court noted it had considered the governing case law and determined this case was most like *Smitherman*, where the public defender was simultaneously representing a defendant and a witness. *See Smitherman*, 733 N.W.2d at 344. The district court wrote:

> There are a number of troubling issues raised by the facts set forth above. It is difficult for the Court to see how there is not a serious potential conflict of interest—if not an actual conflict of interest—based upon the record made. It is clear from reading the deposition of Cody Brown that his criminal background and substance abuse history will be an integral part of his examination and cross-examination at trial. It is further clear that the defendant's attorneys plan to make Patrick Wilson's use and history of alcohol and illegal drugs a part of the case. In both instances, the potential exists for the members of the Des Moines Adult Public Defender's Unit to have access to information that would otherwise

> be privileged. Finally, the Adult Public Defender was representing both the defendant and Brown on the date of his deposition.[3]
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> The second troubling matter concerns the representation by the Des Moines Public Defender that neither she nor the Appellate Public Defender perceives a conflict of interest. In *Smitherman*, the Public Defender assured the Court that its representation of the defendant would not violate the principles enunciated in *Watson*, and further that a "Chinese wall" would be created to prevent any access by the attorneys representing the defendant to files of the witness. A colloquy was conducted with the defendant, who stated that he wished to keep his current attorneys. Nevertheless, after the defendant was convicted, the primary issue raised by the Appellate Public Defender was that there was a conflict of interest, and that the existence of the conflict required reversal. . . .
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> Before making a final ruling on the issue of disqualification of the Des Moines Public Defender's Unit, the Court concludes that it is necessary to make inquiry of the State's witness, Cody Ray Brown, as to his willingness to waive any potential conflict of interest, at least with certain safeguards in place. The Polk County Juvenile Public Defender is hereby appointed to make such inquiry, and then to report to counsel and the Court Brown's response. A hearing for purposes of making a record concerning Brown's wishes will be held upon request of any party or the Juvenile Public Defender. Once a report to the Court has been made concerning the position of Cory Brown, the Court will enter a final order pursuant to Watson.

The district court further ordered that Ibarra's attorneys have no access to any of the public defender files concerning either Brown or Wilson and that the public defender's office take "all steps necessary to ensure that confidential information pertaining to either Brown or Patrick Wilson is not communicated" to Ibarra's attorneys.

On October 17, the court entered a supplemental order noting that Brown had made a written statement waiving any potential conflict of interest. The court ruled, "In light of the waiver by Mr. Brown and the previous ruling of the Court,

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[3] The only employees of the public defender's office present for the deposition were Valorie Wilson and Jennifer Russell.

the Court determines that there is no need for disqualification of the Polk County Adult Public Defender, or for appointment of a separate attorney to cross examine Mr. Brown at trial." The court ordered the public defender to continue to follow the previous order not to examine any client files of Brown or Wilson in connection with the case.

Upon our de novo review, we conclude that Ibarra's attorneys had a conflict of interest, but Ibarra has failed to show an adverse effect on his counsel's performance as required by *Smitherman*, 733 N.W.2d at 346. We have no trouble concluding that the public defender's office had a conflict of interest due to their concurrent representation of Brown, a witness adverse to Ibarra's interests, and the past representation of Wilson, the victim.[4] Although Valorie Wilson and Jennifer Russell had not previously represented Brown or Wilson, the conflict of other members of the public defender's office was imputed to them. *See* Iowa Rs. Prof'l Conduct 32:1.7 and 32:1.10. However, the existence of a conflict of interest does not end our analysis.

"[W]hen the court makes an inquiry in some form into the conflict, the attorney is no longer quietly inflicting the inherent harm into the trial that supports the automatic reversal rule." *Smitherman*, 733 N.W.2d at 348. Moreover, "explicit acquiescence in [the] representation" allows the court to "impose an obligation to show an adverse effect on defense counsel's performance." *Id*.

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[4] The public defender's office represented Wilson in 2009 on a possession of controlled substance charge. The office represented Brown in two criminal cases, one of which led to Brown's probation revocation and ultimate incarceration while Ibarra's case was pending but before Ibarra's trial.

A "*Watson*" hearing[5] was held on October 5, 2011. On that day, the conflict involving the public defender's office's representation of Brown and Wilson was discussed in the presence of Ibarra. Ibarra stated on the record that he wished to retain his attorneys Valarie Wilson and Jennifer Russell as his trial counsel, and he waived any possible conflict of interest. *See Smith*, 761 N.W.2d at 73 ("[A] defendant's informed, voluntary, and express waiver of counsel's conflict is a significant factor in our determination of whether the defendant's right to counsel has been violated."). Subsequently, Brown, too, signed a written acknowledgement and waiver of conflict of interest. While the conflicts of interest here were exacerbated by the continuing representations of both Brown and Ibarra by the same public defender's office, we are bound by the holding in *Smitherman* that requires a defendant to prove an adverse effect once he or she explicitly acquiesces to the conflict at a hearing on the issue.

There is nothing in the record to suggest defense counsel's performance was affected by a conflict of interest. Ibarra raised in his motion for new trial filed by current appellate counsel, and argues on appeal that because Ibarra's attorneys were precluded from examining the files in the public defender's office, their access to information of Wilson's assaultive history was compromised. This issue was addressed by the district court in its ruling on the motion for new trial stating, "If Mr. Ibarra had chosen to obtain new counsel prior to trial, the new attorneys would not have had access to the Public Defender's files on Mr. Brown

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[5] *See Watson*, 620 N.W.2d at 241-42.

or Mr. Wilson, but would have had access only to the same information utilized by Ms. Wilson and Ms. Russell." We agree.

Moreover, Brown was questioned extensively at deposition and at trial concerning his adult and juvenile criminal history, as well as his use of illegal drugs and alcohol, both on the date of the crime and otherwise. *See id*. at 73-76 (discussing factors relevant to determining whether conflict requires disqualification, including the nature of the conflict; the voluntary waiver on the record; and the rules of professional conduct). The district court's ruling on the motion for new trial also notes:

> As the record of the proceedings discloses, Ms. Wilson aggressively cross-examined Mr. Brown at trial. The defense strategy was to argue diminished capacity and justification as defenses to defendant's acknowledged stabbing of Mr. Wilson. The record discloses that the defense vigorously asserted throughout the trial that Mr. Wilson was the aggressor during the fatal incident.

We reach the same conclusion as the district court in our review of the transcript of the proceedings. There is also no connection between the alleged conflict and the alleged deficiencies in Ibarra's defense, which we address later in this opinion. Because Ibarra has not shown his counsel was adversely affected by a conflict of interest, his constitutional rights to conflict-free counsel were not violated.

On appeal, Ibarra's counsel also argues that independent counsel should have been appointed to advise Ibarra of the risks related to proceeding with current counsel in light of the conflicts. Although this argument has some appeal,

Ibarra has not cited any authority for this proposition, and our supreme court has not required independent counsel under these circumstances.

Ibarra has also alleged that, in addition to a violation of his Sixth Amendment rights, his corresponding rights under article I, section 10 of Iowa's Constitution have been violated. We acknowledge that our supreme court has left open the question of whether it may follow a more restrictive definition of "actual conflict" than defined in *Mickens*, 535 U.S. at 172, in its interpretation of the Iowa Constitution. *See Smitherman*, 733 N.W.2d at 347. However, we decline to apply a different interpretation under the current authority.

B. *Sufficiency of the evidence*. Ibarra next argues that there is insufficient evidence to sustain his conviction. Ibarra acknowledges that he stabbed Wilson. He contends, however, there was "substantial evidence of justification," citing Iowa Code section 704.3 (2011). That section provides: "A person is justified in the use of reasonable force when the person reasonably believes that such force is necessary to defend oneself or another from any imminent use of unlawful force. Iowa Code § 704.3.

Iowa Code section 704.1 provides:

> "Reasonable force" is that force and no more which a reasonable person, in like circumstances, would judge to be necessary to prevent an injury or loss and can include deadly force if it is reasonable to believe that such force is necessary to avoid injury or risk to one's life or safety or the life or safety of another, or it is reasonable to believe that such force is necessary to resist a like force or threat. Reasonable force, including deadly force, may be used even if an alternative course of action is available if the alternative entails a risk to life or safety, or the life or safety of a third party, or requires one to abandon or retreat from one's dwelling or place of business or employment.

Ibarra argues he "was clearly in peril: he had been drinking for hours and was very intoxicated; he was threatened by three separate men; Wilson had been using both methamphetamine and marijuana; and Wilson came at Ibarra across the dark street, yelling, and initiated a confrontation with" Ibarra, who was smaller and younger. Ibarra also emphasizes that though Wilson was stabbed, there is no evidence Ibarra was armed when Wilson approached him. Finally, he contends his intoxication negated the specific intent required for conviction of first-degree murder.

When a defendant raises a justification defense, the State must prove beyond a reasonable doubt that justification did not exist. *State v*. *Coffman*, 562 N.W.2d 766, 768 (Iowa 1997). The State can meet its burden by proving any *one* of the following:

> "1. The defendant started or continued the incident which resulted in death; or
> 2. An alternative course of action was available to the defendant; or
> 3. The defendant did not believe he was in immediate danger of death or injury and the use of force was not necessary to save himself; or
> 4. The defendant did not have reasonable grounds for the belief; or
> 5. The force used by the defendant was unreasonable."

Id. (quoting *State v*. *Mayes*, 286 N.W.2d 387, 392-93 (Iowa 1979)).

Whether the defendant's acts were justified under the circumstances was a question for the jury to determine. *See State v*. *Badgett*, 167 N.W.2d 680, 683 (Iowa 1969). "[T]he jury is at liberty to believe or disbelieve the testimony of witnesses as it chooses and give such weight to the evidence as in its judgment the evidence was entitled to receive." *State v*. *Blair*, 347 N.W.2d 416, 420 (Iowa

1984) (citations omitted). "The very function of the jury is to sort out the evidence presented and place credibility where it belongs." *Id*.

Viewing the evidence in the light most favorable to the State, *see Coffman*, 562 N.W.2d at 768, there was substantial evidence supporting a finding of lack of justification. There is evidence from which a rational jury—at the very least—could find Ibarra started or continued the incident which resulted in the death. Ibarra had left Wilson's property and returned, and was seen by Riley crouching by Wilson's vehicle. When Wilson went to investigate, Riley saw Ibarra jump out at Wilson with his arms raised as if to hit Wilson. The jury also could have found Ibarra had an alternative course of action available—he could have left the area.

There was also substantial evidence from which a rational jury could have determined that Ibarra did act with malice aforethought, deliberation, and premeditation. *See State v*. *Buenaventura*, 660 N.W.2d 38, 49 (Iowa 2003) (discussing malice aforethought and noting "it does not have to exist for any length of time" and "[m]alice may also be inferred from the use of a deadly weapon" (alternations and citation omitted in first quote)); *State v*. *Reeves*, 636 N.W.2d 22, 25 (Iowa 2001) (discussing that first-degree murder requires proof of deliberation and premeditation in addition to malice aforethought, and that "use of a deadly weapon supports an inference of malice, and when accompanied by an opportunity to deliberate, also supports an inference of deliberation and premeditation"); *State v*. *Blair*, 347 N.W.2d 416, 421 (Iowa 1984) ("Deliberation and premeditation may be shown by circumstantial evidence in one or more of

three ways: (1) evidence of planning activity of the defendant which was directed toward the killing; (2) evidence of motive which might be inferred from entire relationships between defendant and victim; and (3) evidence regarding the nature of the killing.").

Ibarra was told many times to leave the Wilson property. He returned on more than one occasion, the final time after others present had left. Ibarra was seen crouching by Wilson's vehicle, and jumped out and attacked Wilson. He struck Wilson and continued to do so after Wilson begged him to stop. In addition, we note the violent nature of Wilson's death—numerous stab wounds, some of which were very deep. These facts belie self-defense and provide substantial evidence from which the jury could find deliberation, premeditation, and malice aforethought.

Ibarra also contends his "intoxication precluded the formation of the specific intent necessary to complete first-degree murder." *See State v. Broughton*, 425 N.W.2d 48, 49 (Iowa 1988) ("Intoxication of course, is not a complete defense to a crime; it is relevant, however, 'in proving the person's specific intent . . . or in proving any element of the public offense . . . .'" (citing Iowa Code § 701.5)). Where the defendant has raised the defense of intoxication, the State must negate the defense as an additional element in its proof. *State v. Templeton*, 258 N.W.2d 380, 383 (Iowa 1977).

The jury was instructed on the elements of first-degree murder. It was also instructed on the intoxication defense as follows:

> The defendant claims he was under the influence of alcohol at the time of the alleged crime. The fact that a person is under the

> influence of alcohol does not excuse nor aggravate his guilt. Even if a person is under the influence of alcohol, he is responsible for his act if he had sufficient mental capacity to form the specific intent necessary to the crime charged or had the specific intent before he fell under the influence of alcohol and then committed the act. Intoxication is a defense only when it causes a mental disability which makes the person incapable of forming the specific intent.
>
> No amount of alcohol taken voluntarily can reduce second degree murder to manslaughter.

Jury Instruction No. 22. The instruction follows the language of Iowa Criminal Jury Instruction 200.14 and is a correct statement of the law. *See* Iowa Code § 701.5 ("The fact that a person is under the influence of intoxicants or drugs neither excuses the person's act nor aggravates the person's guilt, but may be shown where it is relevant in proving the person's specific intent or recklessness at the time of the person's alleged criminal act or in proving any element of the public offense with which the person is charged."); *State v*. *Caldwell*, 385 N.W.2d 553, 557 (Iowa 1986).

The jury could reasonably conclude from the evidence that Ibarra had formed the specific intent to kill Wilson. "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. The effect of defendant's heavy drinking on formation of the requisite specific intent to kill was for the jury to determine." *State v*. *Wilkens*, 346 N.W.2d 16, 20-21 (Iowa 1984).

C. *Effective assistance of counsel*. Ibarra also contends his trial attorneys were ineffective (1) in failing to object to statements by the prosecutor, (2) in failing to request additional jury instructions concerning justification and defining "under the influence," and (3) in failing to make a record and move for a

mistrial based on improper juror influence. Generally, ineffective-assistance-of-counsel claims are preserved for possible postconviction proceedings. *State v*. *Shanahan*, 712 N.W.2d 121, 136 (Iowa 2006). However, we will address the claim if the record is adequate to permit a ruling. *Id*. Both parties assert the record is adequate to reach the issue here.

To prevail on his ineffective-assistance claim, Ibarra must show counsel failed to perform an essential duty, and prejudice resulted. *Id*. "The claim fails if the defendant is unable to prove either element of this test." *State v*. *Fountain*, 786 N.W.2d 260, 266 (Iowa 2010).

1. *Prosecutor's statements during closing arguments*. Ibarra argues the prosecutor committed misconduct in final rebuttal arguments. The defendant's theory of the case was that there had been an unintentional killing. As argued by defense counsel in closing arguments, Ibarra was drinking heavily and was intoxicated. He was also unarmed, having given his knife to Brown on April 8. Counsel argued Brown purposely got Wilson—who had recently used methamphetamine and marijuana—upset with Ibarra, and that Wilson, Brown, and Andrew Wilson all threatened Ibarra at some point before the stabbing. Defense counsel stated, in part:

> How do you know that Patrick didn't have the knife? Just because he was the one that died doesn't mean that he didn't have the knife. In fact, the evidence that the State has presented indicates that Patrick had the knife. No one—again, no one saw Oscar with a knife. He was around several people that night. No one saw him with it. The evidence indicates that Patrick had the knife, Patrick brought the knife to this fight.
>
> We know that Patrick had high levels of meth in his system. We know from Dr. Rehberg that—the effects of meth, you know, aggression, paranoia, a distortion of reality. We know at this period

> of time from his family that he wasn't sleeping, not eating. We know that he had nearly a toxic level of meth in his system. This was someone getting ready to go into treatment, that tried to go into detox on April the 8th, someone with a terrible drug problem, with terrible side effects, bringing a knife over to Oscar.

Defense counsel stated several more times that Wilson "had the knife" or "brought the knife" or "started out with the knife," and argued Ibarra was justified in believing he was in imminent danger, and his intoxication negated specific intent.

In rebuttal, the prosecutor stated:

> Wow, I almost wonder if [defense counsel] was sitting in the same trial. Are you kidding me; Patrick brought the knife? The problem with her argument is there is no evidence to support it.
>
> I mean, just because she says it doesn't mean it's true. There has to be evidence. You will base your verdict on the evidence. And if I understand the argument, it was, Oscar did it, but I was justified. *If I wasn't justified*, *I was drunk*, *so excuse my conduct*. *Our law does not work that badly*.
>
> . . . .
>
> . . . I mean these are all choices and decision he's making, each time forming specific intent to do something, to hide by the truck, and he sees a man coming, to put the knife in his hand.
>
> He formed the specific intent to stay instead of run. He formed specific intent to wait for Pat to get there. And he formed specific intent to attack Pat, to attack him with a knife, to stab him in the face, to stab him in the chest, in the arm, the torso, repeatedly, all actions done with specific intent.
>
> And then afterwards—and we wonder, don't we, how many times he might have stabbed him had John Brooks not interrupted his murder. But only when John Brooks tells him, "Oscar, stop" does he run and flee, as opposed to staying and explain some type of, "He had a knife, and I was defending myself."
>
> No, he formed specific intent to hide from police, to ditch the murder weapon, to make more phone calls, to call specific people; right? I mean here is a guy who is drunk, right, but he goes—he's not so drunk he doesn't know who he is, where he is, who his friends are, who he is calling, where he is going; right?
>
> I mean, as Andrew said, there is levels of drunk. *Our law doesn't work that badly*. *Can you imagine*, *I get drunk and I've got a license to kill people? No*. *Our law does not work that way*.

On appeal, Ibarra contends the emphasized statements by the prosecutor were tantamount to suggesting an intoxication defense is a license to kill, which is a deliberate misstatement of controlling law. He argues his defenses "could not withstand the prosecutor's rebuttal statements that disparaged defense counsel and misrepresented the law of justification and intoxication." He asserts his trial counsel was ineffective in failing to object to the statements, and he suffered prejudice because of the timing of these statements he had "no chance to correct the prosecutor's nullification of the law regarding justification and intoxication."

In making closing arguments, a prosecutor is entitled to some latitude when analyzing the evidence admitted during the trial. *Shanahan*, 712 N.W.2d at 139. The prosecutor is allowed to draw conclusions and argue permissible inferences that may be reasonably derived from the evidence. *Id*. The prosecutor cannot, however, assert a personal opinion or create evidence, nor misstate the law. *Id*. at 139-40.

Here, even if we were to conclude that the prosecutor's statements should have been objected to, we cannot conclude there is a reasonable probability that, but for an objection to the statements, the result of the proceeding would have been different. The jury was correctly instructed on the elements of the offense with which Ibarra was charged, which included that "[t]he defendant acted with the specific intent to kill Patrick Wilson," and that the State was required to prove those elements beyond a reasonable doubt. The jury was also correctly instructed that the "State must prove the defendant was not acting with

justification." The instructions further accurately stated, "Even if a person is under the influence of alcohol, he is responsible for his act if he had sufficient mental capacity to form the specific intent necessary to the crime charged or had the specific intent before he fell under the influence of alcohol and then committed the act." The jury was also instructed to base its verdict "only upon the evidence and these instructions." They were further instructed that the statements, arguments, questions, and comments by the lawyers were not evidence. The jury is presumed to follow the instructions of the court, and there is no evidence they did not follow the instructions in this case. *State v. Ondayog*, 722 N.W.2d 778, 785 n.2 (Iowa 2006).

We disagree that the isolated statements by the prosecutor to which Ibarra now objects likely swayed the jury to ignore the instructions. *See State v. Owens*, 635 N.W.2d 478, 483 (Iowa 2001) ("We presume juries follow the court's instructions."); *cf. State v. Graves*, 668 N.W.2d 860, 880-81 (Iowa 2003) (requiring reversal where "not only did the county attorney's statement distort the burden of proof, it was unquestionably incorrect" and "[t]he misconduct related to a critical issue in the case"; "[i]t was not isolated, but rather became a central theme of the government's prosecution"; "[o]ther improper arguments made by the prosecution further diverted the jury's attention from the actual issues in the case, exacerbating the impact of the misconduct challenged on appeal"; "[b]ecause trial counsel did not object, the trial judge took no curative measures"; and "the State's case was not strong"). Within the context of the entire trial, the misconduct was neither severe nor pervasive and does not establish prejudice.

2. *Failure to request additional instructions*. Ibarra asserts trial counsel should have asked for three additional instructions, specifically Iowa Criminal Jury Instructions 400.10, 400.12, and 2500.5. Because counsel has no duty to raise an issue with no merit, we must decide whether it can be determined as a matter of law that Ibarra's counsel was ineffective in failing to request these specific instructions. *Fountain*, 786 N.W.2d at 263. If so, we must determine whether the record demonstrates he was prejudiced because of the error. *Id*.

The district court must instruct the jury fully and fairly on the law regarding all material issues raised by the evidence. *State v*. *Becker*, 818 N.W.2d 135, 141 (Iowa 2012). We consider the instructions given as a whole, not piecemeal. *Id*. Instructions must correctly state the law, but they do not need to "contain or mirror the precise language of the applicable statute." *State v*. *Schuler*, 774 N.W.2d 294, 298 (Iowa 2009).

To begin, we set out the instructions given in some detail. Here, the jury was instructed that in order to convict Ibarra of first-degree murder, the State had to prove beyond a reasonable doubt:

> 1. On or about the 9th day of April, 2011, the defendant, without justification, stabbed Patrick Wilson.
> 2. Patrick Wilson died as a result of being stabbed.
> 3. The defendant acted with malice aforethought.
> 4. The defendant acted willfully, deliberately, premeditatedly and with a specific intent to kill Patrick Wilson.

Jury Instruction No. 24.

As to the instructions related to Ibarra's justification defense, the jury was informed:

The defendant claims he acted with justification.

A person may use reasonable force to prevent injury to a person. The use of this force is known as justification.

Reasonable force is only the amount of force a reasonable person would find necessary to use under the circumstances to prevent death or injury.

A person can use deadly force against another if it is reasonable to believe that such force is necessary to avoid injury or risk to one's life or safety or the life or safety of another, or it is reasonable to believe that such force is necessary to resist a like force or threat.

The State must prove the defendant was not acting with justification.

Jury Instruction No. 27.

A person is justified in using reasonable force if he reasonably believes the force is necessary to defend himself from any imminent use of unlawful force.

If the State has proved any one of the following elements, the defendant was not justified:

1. The defendant started or continued the incident which resulted in death:

2. An alternative course of action was available to the defendant.

3. The defendant did not believe he was in imminent danger of death or injury and the use of force was not necessary to save him.

4. The defendant did not have reasonable grounds for the belief.

5. The force used by the defendant was unreasonable.

Jury Instruction No. 28.

Concerning element number 4 of Instruction No. 28, the defendant was not required to act with perfect judgment. However, he was required to act with the care and caution a reasonable person would have used under the circumstances which existed at that time.

If in the defendant's mind the danger was actual, real, imminent or unavoidable, even though it did not exist, that is sufficient if a reasonable person would have seen it in the same light.

Jury Instruction No. 29.

> Concerning element number 3 of Instruction No. 28, the defendant claims danger existed. You are to consider the danger or apparent danger from the viewpoint of a reasonable person under the circumstances which existed at that time.
>
> It is not necessary that there was actual danger, but the defendant must have acted in an honest and sincere belief that the danger actually existed.
>
> Apparent danger with knowledge that no real danger existed is no excuse for using force.

Jury Instruction No. 30.

> No matter how insulting the words used by Patrick Wilson they will not in and of themselves justify the use of force by the defendant.
>
> However, words of a provocative and insulting nature may be considered, together with all of the other evidence, to determine who started the incident and whether the defendant's apprehension of danger was reasonable.

Jury Instruction No. 31.

> Concerning element number 1 of Instruction No. 28, though a person who provokes the use of force against himself is not justified, there is an exception.
>
> If the defendant provoked the use of force, but Patrick Wilson used force greatly disproportionate to the provocation and it was so great that the defendant reasonably believed he was in imminent danger of death or injury, he is not considered to have provoked the incident and his acts would be justified.

Jury Instruction No. 32.

Deadly force was defined in Instruction No. 33, and in Instruction No. 34 the jury was informed that a "person is not justified when he provokes or causes force to be used against him, intending to use it as an excuse to injure another."

Iowa Criminal Jury Instructions No. 400.10 and 400.12.[6] Ibarra contends trial counsel was constitutionally ineffective in failing to request two additional instructions, one concerning an alternative course of action, and the other concerning prior threats by the victim. Contrary to the defendant's claims, neither instruction was required. There is no basis to support a finding that Ibarra had no alternative course of action—he had taken it twice earlier—leaving Wilson's property only to return.

Ibarra also argues "just prior to the incident" he had been "aggressively confronted and threatened by Wilson, Andrew Wilson, and Brown." The evidence presented does not support that assertion—even if we view statements made by Wilson, Andrew, and Brown as aggressive and threatening, the statements were made before Ibarra left the vicinity. The attack occurred later, after Andrew and Brown also left the area. Ibarra returned to the area and crouched by Wilson's vehicle, jumping out at Wilson.

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[6] Model instruction 400.10 provides:

> Concerning element number _____ of Instruction No. _____, if a defendant is confronted with the use of unlawful force against [him], [he] is required to avoid the confrontation by seeking an alternative course of action before [he] is justified in repelling the force used against [him]. However, there is an exception.
>
> . . . .
>
> *If the alternative course of action involved a risk to [his] life or safety, and [he] reasonably believed that, then [he] was not required to take or use the alternative course of action to avoid the confrontation, and [he] could repel the force with reasonable force (including deadly force).

Instruction 400.12 provides:

> If you find that before the incident, (name of victim) made a threat(s) against the defendant, and because of this the defendant had reasonable cause for believing [he] was in imminent danger of [death or injury], you may consider the evidence of the threat in determining whether the defendant acted reasonably when [he] (e.g., fired the shots in question).

Instruction No. 2500.5. The defendant's intoxication defense was addressed in Instruction No. 22:

> The defendant claims he was under the influence of alcohol at the time of the alleged crime. The fact that a person is under the influence of alcohol does not excuse nor aggravate his guilt. Even if a person is under the influence of alcohol, he is responsible for his act if he had sufficient mental capacity to form the specific intent necessary to the crime charged or had the specific intent before he fell under the influence of alcohol and then committed the act. Intoxication is a defense only when it causes a mental disability which makes the person incapable of forming the specific intent.
>
> No amount of alcohol taken voluntarily can reduce second degree murder to manslaughter.

Ibarra argues his trial counsel breached an essential duty in failing to request Iowa Criminal Jury Instruction No. 2500.5, which defines "under the influence" for purposes of a charge of operating while intoxicated, one element of the offense of which is that at the time the defendant was operating a motor vehicle, "the defendant was under the influence of [alcohol] [drugs] [combination of alcohol and drugs]." We are not persuaded that such an instruction was required here because the material issue of the defense was whether the defendant "had sufficient mental capacity to form the specific intent necessary to the crime charged or had the specific intent before he fell under the influence of alcohol and then committed the act." *See* Iowa Code § 701.5. The record shows that the jurors were well aware that the State was required to prove all elements of the crime beyond a reasonable doubt and that to convict the defendant of first-degree murder the jurors would need to find that the defendant acted with specific intent to kill. The instruction given correctly informed the jury that "[i]ntoxication is a defense only when it causes a mental disability which makes

the person incapable of forming the specific intent." *See Caldwell*, 385 N.W.2d at 557. The defendant has failed to establish trial counsel was ineffective in failing to request these instructions.

3. Failure to move for a mistrial based on improper juror influence. On the fifth day of trial, a juror informed the court she had overheard another juror saying "that she stared him down really good so that should take care of that." The trial judge spoke with the juror in the presence of counsel and the defendant. The juror told the trial judge she assumed the other juror was referring to the defendant. She told the court there was nothing about the incident that would affect her ability to continue as a juror. The court then questioned the other juror, who clarified that the person she had "stared down" was not the defendant or one of the attorneys, but rather a person "with the gray T-shirt with the pocket in the front row." She stated she "felt like this person has been staring at us . . . trying to intimidate us." The trial judge then admonished the spectators in the courtroom that they "need to be careful what you do and what you say here in the courtroom."

On appeal, Ibarra contends trial counsel was ineffective in failing to make a record and move for a mistrial. We reject this claim as well. "Misconduct on the part of a spectator constitutes grounds for a mistrial if the misconduct is of such character as to prejudice the defendant or influence the verdict." *State v. Hackett*, 197 N.W.2d 569, 572 (Iowa 1972); *see also State v. Curtis*, 192 N.W.2d 758, 761 (Iowa 1971). We conclude that even assuming a spectator did stare at the jurors, and that the conduct should be considered misconduct, we agree with

the State that there is nothing to suggest the conduct influenced the verdict. The first juror questioned by the trial judge told the court there was nothing about the incident that would affect her ability to continue as a juror. The second juror questioned by the court told other jurors that her action in returning the man's stare and "that should take care of that." The court admonished the spectators in the courtroom. The defendant has failed to establish the prejudice required to prove his trial counsel was ineffective. The defendant has failed to establish trial counsel was ineffective in the respects asserted, and we therefore affirm his conviction.

AFFIRMED.