

IN THE COURT OF APPEALS OF IOWA

No. 2-997 / 11-2124
Filed January 9, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TRACEY ANN RICHTER,
Defendant-Appellant.

Appeal from the Iowa District Court for Sac County, Kurt L. Wilke, Judge.

Tracey Ann Richter appeals from her conviction of first-degree murder.

AFFIRMED.

Mark C. Smith, State Appellate Defender, and Theresa R. Wilson,
Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney
General, Ben Smith, County Attorney, and Doug Hammerand, Assistant County
Attorney, for appellee.

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

POTTERFIELD, P.J.

Tracey Ann Richter appeals from her conviction of first-degree murder, contending the evidence was insufficient to rebut her defense of justification, the trial court abused its discretion in excluding the psychological testimony of her expert, and she was denied the effective assistance of counsel when her attorney failed to challenge the weight of the evidence. Because we find there was substantial evidence that the killing was not justified, the trial court did not abuse its discretion in limiting the expert's testimony, and counsel was not ineffective, we affirm the conviction.

I. Facts and Proceedings

On December 13, 2001, Richter shot and killed Dustin Wehde in her home in Early, Iowa. A trial information was filed against her in Sac County almost ten years later on August 5, 2011, charging her with murder in the first degree. Richter pleaded not guilty and filed a notice of an affirmative defense of justification. Trial was moved to Webster County.

There was no question Richter shot and killed Wehde. Richter used two different guns, and the autopsy showed Wehde had been shot nine times. Three shots were to the back of his head and neck; the trajectory of some of those wounds indicated the shots came from above Wehde. At least one shot occurred after blood had started to congeal. The crucial question at trial was whether Richter was justified in shooting Wehde.

The jury heard two very different stories. Each party has laboriously set out in their briefs the evidence supporting their version of events. The State emphasizes evidence showing Richter intentionally, deliberately, and

premeditatedly killed Dustin Wehde to frame her ex-husband. For example, the State's crime scene reconstructionist, Rodney Englert, testified that the trajectories of the bullets and the wounds to Wehde indicated the initial shots could have been fired from an area in the southeast corner of the master bedroom near the gun safe and that the shots could have been fired as Tracey was crouched or kneeling. Englert stated later shots to Wehde's head would have been fired from above Wehde and that there was congealed blood on Wehde's face indicating a shot was fired into his head after he was dead.

Mary Higgins had been a good friend of Richter's in Early. She told the jury that shortly after the shooting, Richter and her family went on a several-week trip to Australia. When Richter returned in February, Richter told Higgins about the shooting "[l]ike she was telling me her grocery list. She basically had no emotion to it." Richter told Higgins that she "unloaded" the gun as she was being pulled at by the two intruders; she then got up and stepped over what she thought was dirty clothes to check on her children. Richter told Higgins,

She took the two—well, the three children down the hall. And as they were going down the hall, there was a body there and she told me that the body was moving and she stood over him and said, "Stop moving" or either it was, "I'll blow your fucking brains out" or "I'll blow your head off."

And she told me he continued to move and she stood over him and she fired the gun until he quit moving. Then they proceeded down the stairs.

Higgins further testified that Richter's son, Bert, came into the room while Richter was relaying the story and became "extremely agitated," began banging his head against the table, and stated "Why did you go up there? Why did you go back up there? You didn't have to shoot him. You didn't have to kill him."

Higgins further testified that Richter told her that the police found an older model computer and a pink notebook in the car left in her driveway the night of the purported home invasion. Richter described to Higgins details of the contents of that pink notebook, which included contact information for her first husband, Dr. John Pitman, with whom Richter was involved in a custody dispute. Richter told Higgins the notebook would prove her ex-husband was involved.

There was evidence that the contents of the notebook had been kept from the public by law enforcement, and Richter should not have known what was written in it. Higgins recounted an incident in 2004 when Richter pointed at Higgins face and told her “to forget about the pink notebook.” The State argued that the contents of the notebook, referring to Richter’s ex-husband and his detailed plans to have Richter and Bert killed, came from Richter herself in an attempt to win the custody dispute over Bert.

As for the defense, Richter points out testimony supporting her claim that she acted in self-defense during a home invasion.¹ Richter claimed she acted in self-defense, giving several statements to police that two (or three) men broke into her home and accosted her, choking her with a pair of panty hose until she was unconscious. She was able to get to a gun safe in the master bedroom and, shooting blindly over her shoulder, shot one of the intruders and the other (or others) ran away.

Richter’s son, Bert, who was eleven years old at the time of the shooting, testified that while watching TV in his room, he heard Richter yelling for help from down the hall. After Richter was pulled away from the door to Bert’s room, Bert

¹ The police found no signs of forced entry.

heard banging around in the hallway. Bert reported hearing Richter making a “very awful choking sound” for a few minutes. Then Wehde—whom Bert knew from previous interactions—came to the bedroom door and threatened Bert. Later, Bert heard footsteps running away from his room followed by yelling and several loud bangs. Richter then opened the door to Bert’s room. Bert said her wrists were bound with pantyhose. Bert then followed his mother, who had a gun in each hand. Bert said Wehde, who was lying on the floor, started to move. Bert said he then heard his mother warn Wehde not to move followed by a couple shots. On cross-examination, Bert agreed that his interview with police on the night of the shooting was his most accurate recall of the incident.

In the police interview, which occurred within hours of the shooting, Bert said nothing about Richter being pulled away from his room, about hearing banging and kicking noises in the hallway, or about hearing choking noises. Nor did Bert say in the interview that he saw Wehde moving or trying to get up, and he did not say he heard Richter telling Wehde to stay down.

The jury convicted Richter of first-degree murder, and she was sentenced to prison for life.

On appeal, Richter argues the district court erred in overruling her motion for judgment of acquittal because the evidence was insufficient to rebut her justification defense. She also argues the trial court abused its discretion in excluding testimony of her psychological expert. Finally, Richter claims she was denied the effective assistance of counsel when her attorney failed to challenge, in addition to the sufficiency of the evidence, that the conviction was not supported by the weight of the evidence.

II. Sufficiency of the Evidence.

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). Direct and circumstantial evidence are equally probative. Iowa R. App. P. 6.904(3)(p).

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).² 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 Iowa Code section 704.3 (2001) 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.” Reasonable force is defined in Iowa Code section 704.1:

“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.

2. An alternative course of action was available to the defendant; or
3. The defendant did not believe [s]he was in immediate danger of death or injury and the use of force was not necessary to save h[er]self; 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 a lack of justification. The State emphasizes that, in addition to Richter’s knowledge of the pink notebook, there was other evidence to indicate she staged matters to make it appear as if she killed Wehde in self-defense. After the shooting, for example, Richter went to the hospital with a red mark on her neck she claimed was the result of being strangled with pantyhose. But when the medical examiner reviewed photos of the mark on Richter’s neck, he determined they were inconsistent with ligature marks. Rather, they appeared to be friction burns caused by rubbing something on the neck. The marks were positioned over the thyroid cartilage, which would have prevented strangulation to the point

of unconsciousness as Richter had reported. Thus, a rational jury could conclude Richter's claim of being choked was staged.

The jury also could have found Richter shot Wehde after he was already incapacitated or dead to make it look like he was trying to get up and resume the attack. Richter claimed she shot Wehde once in the head when he was trying to get up. But blood spatter analysis showed the last shot was fired into coagulated blood, suggesting Wehde had already died.

The jury also heard evidence supporting a theory that Richter intended to kill Wehde in a plot to frame her ex-husband. She had a motive to implicate Dr. Pitman in a crime so she could gain an advantage in pending child custody proceedings. The evidence can be viewed to show she followed through by having Wehde write fictitious journal entries in the pink notebook and by staging evidence to make it appear as if she was defending herself.

We conclude there was substantial evidence from which a jury could reasonably conclude the killing was not justified because there was proof the defendant continued the incident after Wehde was incapacitated; the defendant did not believe she was in immediate danger of death or injury and the use of force was not necessary to save herself; the defendant did not have reasonable grounds for the belief that she was in immediate danger of death or injury when she shot the incapacitated Wehde in the head; or the force used by the defendant was unreasonable.

II. Expert testimony.

Our review of evidentiary rulings is for an abuse of discretion. *State v. Belken*, 633 N.W.2d 786, 793 (Iowa 2001) (“We review rulings on general

evidentiary issues and the admissibility of expert testimony for an abuse of discretion.”). “An abuse of discretion occurs when the trial court’s ruling is based on untenable grounds.” *State v. Myers*, 382 N.W.2d 91, 93 (Iowa 1986).

During the defense case, Richter offered testimony from David Grove, a clinical psychologist. Dr. Grove explained that he had met with and interviewed Richter about a month earlier for around two or two and one-half hours. When asked about the purpose of the interview, Dr. Grove explained his intent was to “determine if her description of events that she described had psychological implication and to determine if her telling of that story, the content of the story, were congruent with her emotions and body language” He said the process “would indicate if the facts she believes and, in fact, did experience the things that she was telling me occurred on the date of,” at which point the prosecutor requested a sidebar.

The jury was excused, and the defendant made an offer of proof. Dr. Grove explained that “the perception of what happened from the subjective point of view of the person experiencing it is different than what an objective observer would see.” Based on his interview with Richter, Dr. Grove diagnosed her with acute stress syndrome and post traumatic stress disorder (PTSD) that he concluded “specifically involv[ed] the December 13, 2001 shooting.” In order to make the diagnosis for acute stress syndrome, Grove had to determine “whether or not there was a credible threat to her.” Dr. Grove stated:

I’m not going to address whether she’s truthful or not. It’s did she experience something that created a cluster of symptoms associated with this syndrome and is her description of what happened the kind of situation that would trigger that diagnos[i]s, if, in fact, it happened. And was her body language and nonverbal

presentation consistent with a person who experienced a traumatic event in the past. Did she cry? Did she shake? Did she show any of those signs as well? And so I can determine did I see those things when she described the event.

The district court ruled the proffered testimony was inadmissible because it was “basically saying . . . she’s telling the truth about this.” The court also ruled that the evidence would open the door to the prosecution’s questions about whether other events in Richter’s life during the ten years between the killing of Wehde and the trial might have been the cause of her PTSD. Those intervening events had been excluded by the court in granting Richter’s motion in limine.

The defendant attempts to characterize the testimony as expert opinion on the effects of a traumatic event on Richter’s inconsistent memory, but we find no abuse of discretion in the trial court’s ruling.

“As a general rule, we permit expert testimony if it consists of specialized knowledge that will aid the jury in understanding the evidence or in deciding a material issue.” *Belken*, 633 N.W.2d at 799. However, the expert may not testify as to the truthfulness of a witness. See *Myers*, 382 N.W.2d at 95. The court has stated,

[W]e generally will not admit expert opinion testimony that essentially passes on the guilt or innocence of the defendant. These inadmissible opinions go a step beyond merely aiding the fact finder in understanding the evidence and actually invade the exclusive domain of the jury, that is, the determination of the guilt or innocence of the accused. Additionally, expert opinions on the truthfulness of a witness should generally be excluded because weighing the truthfulness of a witness is a matter reserved exclusively to the fact finder.

Id.

Unlike the expert testimony in *State v. Gettier*, 438 N.W.2d 1, 5 (Iowa 1989) (allowing expert testimony “limited to an explanation of the effects of PTSD and the typical reaction of a rape victim”), and *State v. Griffin*, 564 N.W.2d 370, 375 (Iowa 1997) (allowing expert testimony “concerning the medical and psychological syndrome present in battered women generally”), Dr. Grove’s offer-of-proof testimony commented directly on Richter’s reactions to law enforcement and crossed the line into the realm of bolstering Richter’s credibility. We affirm the court’s exercise of discretion in its ruling.

III. Effective Assistance of Counsel.

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.*

We review constitutional claims de novo. *Nguyen v. State*, 707 N.W.2d 317, 323 (Iowa 2005).

To prevail on her ineffective-assistance claim, Richter 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).

Richter contends trial counsel’s performance was constitutionally inadequate in failing to move for a new trial challenging the weight of the credible evidence. She contends the credible evidence at trial supported a finding that she had a reasonable belief that her use of deadly force was reasonable and necessary to prevent the imminent and unlawful use of force by Wehde against

either her or her children, and that she did not provoke the force used by Wehde. Reciting the same evidence used to challenge the sufficiency of the evidence, Richter argues her claim of self-defense was supported.

Iowa Rule of Criminal Procedure 2.24(2)(b)(6) authorizes the district court to grant a new trial “when the verdict is contrary to the . . . evidence,” which has been held to mean contrary to the weight of the evidence. See *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998). A verdict is contrary to the weight of the evidence where “a greater amount of credible evidence supports one side of an issue or cause than the other.” *Id.* at 658. “This is a more stringent standard than the sufficiency-of-the-evidence standard.” *Nguyen*, 707 N.W.2d at 327.

We have reviewed the evidence presented in Richter’s trial. We conclude the evidence does not “preponderate heavily against the verdict.” See *id.*, (quotation marks and citation omitted). We therefore find no reasonable probability that the district court would have granted a new trial had Richter’s counsel made the motion. Having failed to prove the requisite prejudice, the defendant’s ineffectiveness claim fails. See *Fountain*, 786 N.W.2d at 266. We therefore affirm.

AFFIRMED.