IN THE COURT OF APPEALS OF IOWA

No. 0-492 / 09-1362
Filed October 6, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RICHARD GILBERT CORTEZ,
Defendant-Appellant.

Appeal from the Iowa District Court for Floyd County, James M. Drew, Judge.

Richard Cortez appeals from his convictions and sentences for murder in the second degree, in violation of Iowa Code section 707.3 (2007), and two counts of willful injury causing serious injury, in violation of section 708.4(1). **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

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

Richard G. Cortez, pro se.

Thomas J. Miller, Attorney General, Thomas S. Tauber and Andrew Prosser, Assistant Attorneys General, and Jesse Marzen, County Attorney, for appellee.

Heard by Vaitheswaran, P.J., and Eisenhauer and Danilson, JJ. Tabor, J., takes no part.

DANILSON, J.

Richard Cortez appeals his convictions and sentences for murder in the second degree, in violation of Iowa Code section 707.3 (2007), and two counts of willful injury causing serious injury, in violation of section 708.4(1). Cortez seeks a new trial as newly discovered evidence revealed a State's witness committed perjury. Cortez further contends he received ineffective assistance of counsel because his trial counsel failed to challenge the sufficiency of the evidence supporting one conviction for willful injury causing serious injury and failed to object to justification instructions that incorrectly limited application of his justification defense. In a pro se brief, Cortez contends the district court abused its discretion in denying his motion for a new trial based on an improper intoxication instruction and in overruling his motion for a mistrial based on prospective jurors' improper television exposure.

I. Background Facts and Proceedings.

On May 16, 2008, Cortez, whose left arm was in a cast, spent the afternoon and evening drinking alcohol at various locations in and around the Charles City area with friends. As was his practice, Cortez was carrying a fixed-blade knife approximately six inches in length in a sheath on his belt. Later in the evening, Cortez arrived at Tori's bar in Charles City, where more than one hundred other patrons were estimated to be present. Several patrons noticed Cortez's knife and sheath on his belt.[1]

[1] At least one other person at Tori's, Donald Brown, was carrying a knife. But Brown was outside when the incident at issue occurred, and no evidence indicates anyone saw Brown's knife. Two people, Tyree Cranshaw and Zachary Schilling, testified they saw only Cortez with a knife on the night in question.

While at Tori's, Cortez became involved in a confrontation with a man named Kenyon (a/k/a Keyon) Armstrong. According to Cortez during an investigational interview on May 17, Cortez recalled drinking heavily and talking to a man after he tried to dance with a woman (Tiffany Fisher) at Tori's. He told officers Fisher refused to dance stating her "old man" (Armstrong) would beat Cortez if he did not leave her alone. Cortez did not know Fisher or Armstrong. Cortez said he told Armstrong he was "not trying to start anything" and he just wanted to "have a good time and dance with people." Cortez did not recall exchanging any other words with Armstrong. Cortez told investigators that the night before he was a fifteen on a drunkenness scale of one to ten (ten being "absolutely hammered"). Throughout this interview, Cortez repeatedly stated he could not remember what happened at Tori's and asked what he had done to end up in custody. Cortez also said, "[A]ll I know is right now when somebody evokes me . . . I do get ugly. And I'm not gonna let, you know, anybody try to provoke me."

At trial, others present at Tori's testified about the events of the early morning hours of May 17. Robert Luckett, age seventeen, was in the bar drinking. He testified that Fisher, who was the mother of Armstrong's child, danced with Cortez in an effort to make Armstrong jealous. Tyree Cranshaw, a cousin of Armstrong, testified he saw Cortez and Armstrong talking to each other, but did not see any pushing or shouting.

After an exchange of words, Cortez and Armstrong, followed by Cranshaw, went into the men's restroom. According to Cranshaw, while the three were in the restroom, he overheard Cortez say, "This is my girl and I have

to—I have to do what I gotta do." Cranshaw testified Cortez then took out his knife, but it fell to the floor. Cranshaw pushed Armstrong out of the restroom "because somethin' was gonna happen."

Marquis Gentry and Dustin Obermeier, two other patrons at the bar, observed Cortez, Armstrong, and Cranshaw go into and come out of the restroom. Gentry testified that after the men left the restroom, Armstrong returned to the dance floor where his current girlfriend, Jennifer Foster, was located. Soon after, Foster and Fisher got into a short altercation on the dance floor. According to Cranshaw's testimony, Cortez came out of the restroom and began approaching Armstrong on the dance floor. Cranshaw testified he saw Cortez come in contact with a different man on the dance floor (Cyrus Riley) while Cortez was approaching Armstrong. Riley fell to the ground, stood back up, and exited the dance floor. Cranshaw then saw Cortez "walkin' over towards other people and . . . swingin' whatever that was in his hand," which Cranshaw testified was a knife. Cranshaw's view was obstructed when a fight broke out on the dance floor. Cranshaw then saw Cortez stab another patron in the thigh area.

Nicholas Pipes testified he too saw Cortez "swingin' the knife at [Armstrong], swingin' in the motion of strikin' [Armstrong]" as Armstrong tried to get out of the way.

Gentry, Obermeier, and deejay Zachary Schilling all testified they saw Cortez make a lunging motion as though punching Armstrong in the chest with his fist. Gentry and Obermeier also testified they saw the knife in Cortez's hand immediately after the lunging motion. Obermeier testified that after he saw

Cortez strike Armstrong, he "saw [Armstrong] grab his chest." Schilling testified he saw Armstrong "taking his shirt off and there was a little trickle of blood coming down his chest." According to Gentry, Armstrong grabbed his chest and left Tori's through the front entrance.

Riley testified Cortez sliced Riley's left elbow and kept "[w]alkin' real fast" toward Armstrong. Riley testified that when Cortez "spotted [Armstrong], [Cortez] came directly at [Armstrong's] chest" and stabbed him. After realizing he had been cut on his elbow, Riley grabbed a beer bottle and approached Cortez. He threw the bottle at Cortez, but he missed and turned to run away. Riley then slipped and fell to the ground. Cortez had pursued Riley, and he too slipped and stabbed Riley in the leg.

Luckett testified Riley threw a beer bottle at Cortez, Riley fell down, and Cortez stabbed Riley in the leg. Luckett further testified that after Cortez stabbed Riley, Cortez stabbed Luckett in the right arm.

Cranshaw testified he saw Cortez stab one patron in the leg and another in the arm.

In other testimony, Marquis Gentry stated that he saw Armstrong grab his chest. Cortez began to approach Gentry with the knife, so Gentry punched him in the cheek. According to Gentry, the punch knocked Cortez to the floor, causing the knife to fall out of Cortez's hand. At that point, several patrons in the bar kicked and hit Cortez as he lay on the floor.

Schilling testified he approached Cortez, who was unconscious at the time, and tried to control the crowd. According to Schilling, he leaned over Cortez, saw the knife in his hand, and removed it. Schilling gave the knife to

John Hayen. Hayen was the manager of Tori's, but was not there to work that night. Hayen testified he gave the knife to Jonie Kruger "to get it out of the—off the floor and behind the bar by the tills."

Kevin Beaver, a Charles City police officer, was sitting in his police car in Tori's north parking lot at about 1:15 a.m. and heard the commotion. As he approached the bar, he "observed a group of black subjects pulling another black male out of the bar." That male was Armstrong, and Officer Beaver observed him on the ground outside the bar. Officer Beaver then pushed his way through the crowd to enter Tori's and observed Cortez on the floor with blood coming from his mouth. Officer Beaver initially planned to administer first aid, but Cortez rolled over. Officer Beaver patted Cortez down for weapons and found none. Hayen approached Beaver, stated they had the knife, and retrieved a knife wrapped in napkins. Beaver placed the knife in his pocket.

Despite Officer Beaver's orders to remain on the ground, Cortez continually tried to stand up. Cortez then "put his arms up in the air and acted like he was trying to taunt [Officer Beaver] into a fight." Cortez hit Officer Beaver in the face with his cast. Officer Zach Eckenrod arrived on the scene to help, and Officer Beaver used his Taser on Cortez to gain compliance. The officers then placed Cortez in flex cuffs due to his cast and took him to Officer Eckenrod's squad car. A breath test administered following the arrest indicated Cortez had a blood alcohol level of 0.272. Police did not find any cuts, stab wounds, or obvious injuries on Cortez's body.

Armstrong was taken to the hospital, where he later died. Julia Goodin, the state medical examiner, determined the cause of Armstrong's death was a

single stab wound to the chest, which passed through Armstrong's breastbone and into his heart.

Riley suffered a cut to the elbow, which did not require stitches. However, Riley's leg wound caused him to be hospitalized for three days, and he testified his recovery lasted a month to a month and a half. At the time of trial, Riley stated he continued to suffer "sharp," "stab-like" pain in his leg.

Luckett suffered a deep cut to the inner part of his right arm. He was taken to the hospital where doctors wrapped his arm. No further treatment was administered. At the time of trial, Luckett's wound had healed.

A DNA profile obtained from the knife taken from Cortez indicated the presence of a mixture of DNA from more than one individual, Luckett's blood being the "major contributor or most prominent person" in the mixture.

On May 28, 2008, the State filed a trial information charging Cortez with murder in the first degree in the death of Armstrong (count I); one count of attempted murder and one count of willful injury causing serious injury with respect to Luckett (counts II and III); and one count of attempted murder and one count of willful injury causing serious injury with respect to Riley (counts IV and V).

After jury selection but before trial began, side images of some members of the jury pool were shown on television. The tape, played during the news, showed Cortez and his defense counsel walking into the courtroom during the jury selection process and revealed some of the prospective jurors who were sitting between the camera and the door. Cortez made a motion for a mistrial,

arguing his Fourteenth Amendment rights to a fair trial and due process had been violated because the broadcast had the potential to bias the jurors.

The district court ruled:

> I saw the broadcast at 10:00 last night, and what I saw was coverage of Mr. Cortez and counsel coming into the courtroom from the door that prospective jurors were sitting between the camera and the door. We had folding chairs two or three rows deep out in front of the jury box. And I won't say I know for sure how many faces were shown. I would call it several, less than six in all likelihood. We'll know for sure when we see the videotape. But it was—it was definitely brief and the point of the shot was to show the defendant and his attorneys, not the jurors.
>
> The Rule, 25.2(5), allows for expanded media coverage of the return of the jury's verdict. It goes on to say, "In all other circumstances, however, expanded media coverage of jurors is prohibited except to the extent it is unavoidable in the coverage of other trial participants or courtroom proceedings. The policy of the rules in this chapter is to prevent unnecessary or prolonged photographic or video coverage of individual jurors."
>
> I think what's appropriate for me to do at this point in time is to tell you that if I don't see anything markedly different than what I saw last night I'm going to deny your motion, but I think it's fair for me to take it under advisement until you're allowed to supplement the record so that I can look at the video more closely.

Later, after reviewing the ten-second recording, the court found the substance to be as previously recited, found "the coverage was consistent with the rules regarding expanded media coverage," and denied the motion for mistrial.

The jury trial began on April 21, 2009. The jury heard the testimony of Cranshaw, Officer Eckenrod, Gentry, Riley, Luckett, Pipes, Obermeier, Schilling, Hayen, Officer Beaver, Goodin, criminalist Amy Pollpeter, and Iowa Division of Criminal Investigation (DCI) special agent Mike Krapfl.

Mary Forry, Donald Brown, and Rodney Usher testified for the defense. Cortez argued that his actions were justified, asserting he was threatened and cornered, and merely defended himself against Armstrong and a crowd.

The district court provided the jury with instructions relating to the justification defense, including the two following specifically referring to the issues of provocation and withdrawal from confrontation:

> Instruction No. 40
>
> No matter how insulting the words used by Kenyon Armstrong, if any, 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.

> Instruction No. 41
>
> With respect to the element of justification for each Count and its included offenses, though a person who provokes the use of force against himself is not justified, there is an exception.
>
> If you find the defendant provoked the use of force by Kenyon Armstrong, but the defendant, in good faith, withdrew from physical contact with Kenyon Armstrong and clearly indicated to Kenyon Armstrong that he desired to end the fight, but Kenyon Armstrong continued or resumed the fight, then the defendant was justified.

Cortez's trial counsel did not object to the instructions on justification.

Although Cortez did not raise an intoxication defense, the district court provided the jury with the following intoxication instruction:

> Instruction No. 23
>
> The fact that a person is under the influence of intoxicants does not excuse nor aggravate his guilt.
>
> Even if a person is under the influence of an intoxicant, 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 the intoxicant 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 intoxicants taken voluntarily can reduce second degree murder to manslaughter.

Cortez objected, arguing the instruction impermissibly shifted the burden to him when he did not raise an intoxication defense. The district court, however, submitted the intoxication instruction to the jury, finding it was an accurate statement of the law and "help[ed] to clarify things" because evidence existed in the record regarding Cortez's intoxication on the night in question.

On count I, the jury found Cortez guilty of the lesser offense of murder in the second degree in violation of Iowa Code section 707.3. The jury did not find Cortez guilty on either count of attempted murder, but did find him guilty of the lesser offenses of assault with intent to inflict serious injury under counts II and IV. The jury found Cortez guilty of willful injury causing serious injury as charged in counts III and V.

Following trial but before sentencing, the State and the defense learned Cyrus Riley's name was actually Barry Holden. Holden previously had been convicted of felonies in Illinois.

In an amended motion for new trial, which the State resisted, Cortez asserted: (1) the court erred in instructing the jury on intoxication, improperly placing the burden on him to disprove a defense he did not raise, violating his Fifth, Sixth, and Fourteenth Amendments rights under the United States Constitution; (2) the verdicts were not supported by sufficient evidence; (3) the court erred in denying his motion for mistrial due to the improper televising of potential jurors' images; and (4) the newly discovered evidence that Riley was Holden entitled him to a new trial as he had been denied his Sixth and

Fourteenth Amendment confrontation rights. After hearing evidence[2] on Cortez's motion for a new trial immediately before sentencing on August 7, 2009, the court denied the motion in its entirety.

The district court then sentenced Cortez to an indeterminate term of imprisonment not to exceed fifty years for second-degree murder on count I. The court merged both convictions for assault with intent to inflict serious injury into the willful injury causing serious injury convictions. The district court imposed indeterminate ten-year sentences on the willful injury convictions, which were to run concurrently to one another but consecutively to the second-degree murder sentence.

Cortez now appeals, arguing: (1) the trial court erred and deprived him of due process when it failed to grant him a new trial after it was discovered one of the State's witnesses had committed perjury; (2) his trial counsel was ineffective in failing to raise a due process argument with respect to the perjured testimony and the motion for new trial; (3) his trial counsel was ineffective in failing to challenge the sufficiency of the evidence with respect to whether Luckett sustained a serious injury; and (4) his trial counsel was ineffective in failing to object to language in the justification instructions on provocation and withdrawal, which incorrectly limited their application to the defendant's conduct with only one of the three victims. Cortez's pro se supplemental brief raises the issue of whether the district court erred in instructing the jury on the intoxication "defense" over defense counsel's objection. He also asserts the court erred in overruling

[2] Eugene Czarnecki, a criminalist with the DCI, testified that prior to trial, he had sought and did not find a match of Riley's fingerprints in either the state or federal fingerprint identification systems.

his motion for a mistrial based on the improper television exposure of prospective jurors.

II. Newly Discovered Evidence.

After trial it was learned the person who testified as Cyrus Riley is named Barry Holden. The jury did not learn of Holden's true name and former felony conviction(s).[3] Cortez sought a new trial arguing the jury was not able to accurately evaluate Riley/Holden's credibility and absent knowing the witness's true name he was not able to confront the witness fully.[4] On appeal, he also argues trial counsel was ineffective in failing to argue the use of Riley's perjured testimony violated his right to due process.

We address this last claim first. When the basis for relief is a constitutional violation, our review is de novo. *Harrington v. State*, 659 N.W.2d 509, 519 (Iowa 2003).

In order to prevail on a claim of ineffective assistance of counsel, the defendant must prove by a preponderance of the evidence, both that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *State v. Fountain*, 786 N.W.2d 260, 265-66 (Iowa 2010). "To fail in an essential duty means the attorney's performance falls outside the normal range of competency." *State v. Greene*, 592 N.W.2d 24, 29 (Iowa 1999). Trial counsel has no duty to raise an issue that has no merit, *State v. Graves*, 668 N.W.2d 860, 881 (Iowa 2003), and

[3] This record does not establish the type or number of felonies of which Holden has been convicted.

[4] Cortez acknowledges his claim does not represent a "traditional confrontation case" as there is no claim the State denied the defense access to the witness's true identity. *See*, *e.g.*, *Smith v. Illinois*, 390 U.S. 129 88 S. Ct. 748, 19 L. Ed. 2d 956 (1968).

is not required to predict changes in the law. *State v. Schoelerman*, 315 N.W.2d 67, 72 (Iowa 1982).

We acknowledge a defendant's right to a fair trial and due process; it is well settled that the knowing use of perjured testimony or suppression of evidence favorable to the accused offends due process. *See Brady v. Maryland*, 373 U.S. 83, 86-87, 83 S. Ct. 1194, 1196, 10 L. Ed. 2d 215, 218 (1963). But our review of the authorities cited by Cortez reflects that unless there is some prosecutorial misconduct or *Brady* violation, the courts have generally examined claims similar to Cortez's in context with the standards for granting a new trial on the ground of newly discovered evidence. *See Evanstad v. Carlson*, 470 F.3d 777, 784 (8th Cir. 2006); *see generally* J. Gabriel Carpenter, Comment, *Determining Whether the Unintentional Use of Perjury by the Prosecution Warrants a New Trial in Evanstad v. Carlson: The Probability Test or the Possibility Test?*, 31 Am. J. Trial Advoc. 389, 389 (2007). Because there is no clearly established state or federal law on whether the unintentional use of perjured testimony violates due process,[5] we cannot find counsel failed to perform an essential duty in not raising such a claim.

We thus review the district court's denial of his motion for a new trial. To prevail on his newly discovered evidence issue, Cortez was required to show:

> (1) that the evidence was discovered after the verdict; (2) that it could not have been discovered earlier in the exercise of due

[5] Cortez contends that even if the prosecution is unaware one of its witnesses offered perjured testimony, a due process violation may arise if the testimony was material and would have led to a different result. *See Evanstad*, 470 F.3d at 783 n.6 (citing factors in *United States v. Ogle*, 425 F.3d 471, 472 (7th Cir. 2005). Cortez acknowledges, however, that neither the Iowa Supreme Court nor the United States Supreme Court has addressed this issue. *See id.* at 783.

> diligence; (3) that the evidence is material to the issues in the case and not merely cumulative or impeaching; and (4) that the evidence probably would have changed the result of the trial.

Harrington v. State, 659 N.W.2d 509, 516 (Iowa 2003). We review a district court's denial of a motion for new trial based upon newly discovered evidence for an abuse of discretion. *State v. Weaver*, 554 N.W.2d 240, 245 (Iowa 1996) *overruled on other grounds by State v. Hallum*, 585 N.W.2d 249, 254 (Iowa 1998).

Here the perjury related to the witness's name and criminal history, clearly matters pertaining to credibility and which are subjects of impeachment. Cortez argues that "[h]ad the jury been aware of Riley's falsehoods and his prior convictions,[6] there is a reasonable probability the jury would have acquitted Cortez on the charges related to Riley." The trial court disagreed.

> [W]ith respect to Mr. Holden, who everyone believed was Mr. Riley at the time of trial, obviously things would be better had Mr. Holden elected to be truthful with us about who he was, and certainly I'm not happy about the fact that the lied about his identity. However, at the end of the day I think the issue is still whether that might have changed the result of the trial, and I don't believe that I would have, primarily because there were enough other witnesses testifying to establish the defendant's guilt and, frankly, even though Mr. Holden lied about his identity, his testimony concerning the incidents on the night in question was consistent with what other witnesses were observing. I don't believe there's any reason to think he was being untruthful about his observations and the things that happened to him. So I don't see any basis to conclude the verdict would have been any different had it been known that he was someone other than he claimed to be.
>
> As far as the constitutional issues go on the right to confrontation, uncharted waters, as you've indicated [counsel], . . . but I think the same analysis applies and at the end of the day I

[6] The record does not disclose what these prior convictions are or when they occurred. As not all prior convictions are admissible at trial, *see* Iowa R. Evid. 5.609, this basis of the defendant's argument is questionable.

> think as long as the court is satisfied the outcome would not have been changed that that defeats the argument you've raised . . . .

We give weight to the district court's conclusions as to whether the proffered newly discovered evidence would have altered the fact-finder's decision to convict had the evidence been introduced at trial. *State v. Miles*, 490 N.W.2d 798, 799 (Iowa 1992). This is so because the trial court's "closer vantage point" provides a "clearer view of this crucial question." *Id*.

The jury was already aware of Holden/Riley's use of alcohol and drugs that night, as well as any inconsistencies in his testimony at trial and during pretrial depositions. Cortez has not claimed Riley/Holden's perjured portion of his testimony had any bearing on his observations of the events of the evening. Cortez's claim would be stronger if Riley/Holden was the single source of evidence. *See, e.g., United States v.Gordon*, 246 F. Supp. 522, 525 (D.C. Cir. 1965) (granting motion for new trial upon newly discovered evidence of the complaining witness's prior conviction where "there being no corroboration and no [other] eye witnesses").

The fact Riley did not disclose his true name to medical personnel during the course of this investigation or at trial reflects on his credibility. *See Smith*, 390 U.S. at 131, 88 S. Ct. at 750, 19 L. Ed. 2d at 959 ("The witness'[s] name and address open countless avenues of in-court examination and out-of-court investigation."). But, Riley/Holden's credibility was challenged extensively at trial.

The jury heard Riley/Holden state he had at least one moniker (Stro) and had been in Charles City only two weeks at the time of the altercation at Tori's. He testified he was under the influence of the drug ecstasy, as well as drinking

Hennessy (cognac) and beer the night at issue. He further admitted he had used marijuana earlier in the day. Cortez's counsel thoroughly cross-examined Riley/Holden on inconsistencies between his trial and deposition testimony.

Riley/Holden also testified on cross-examination that although in town only a short time he had had "relations" with Armstrong's current girlfriend, and that Armstrong "didn't like" him. Riley/Holden also testified he wanted to, and did try to, "retaliate" against Cortez, whom he did not know, after being cut in the arm. The jury heard him state he threw a bottle at Cortez and then ran for cover being the "first one out the door" of Tori's. He testified he talked with police whose guns were drawn "trying to see what was going on," he redirected their attention to a person inside Tori's, and then promptly "hopped in the car and left." Even though he had been stabbed twice, he did not wait for an ambulance. He left the scene with a person he stated he did not know.

The credibility of the witnesses is a question for the jury. *State v. Frank*, 298 N.W.2d 324, 329 (Iowa 1980) (stating the general rule that "the credibility of a witness is to be determined by the jury"). With respect to credibility, jurors are instructed:

> Decide the facts from the evidence. Consider the evidence using your observations, common sense and experience. Try to reconcile any conflicts in the evidence; but if you cannot, accept the evidence you find more believable.
>
> In determining the facts, you may have to decide what testimony you believe. You may believe all, part or none of any witness's testimony.
>
> There are many factors which you may consider in deciding what testimony to believe, for example:
>
> 1. Whether the testimony is reasonable and consistent with other evidence you believe.
>
> 2. Whether a witness has made inconsistent statements.

> 3. The witness's appearance, conduct, age, intelligence, memory and knowledge of the facts.
> 4. The witness's interest in the trial, their motive, candor, bias and prejudice.

Iowa Crim. Jury Instr. 100.7 (citing *State v. Harrington*, 284 N.W.2d 244 (Iowa 1979), *State v. Ochoa*, 244 N.W.2d 773 (Iowa 1976)). We presume the jury considered the relevant factors on which they were instructed. *Frank*, 298 N.W.2d at 327.

Here, the jury had much to contemplate with respect to Riley/Holden's credibility and could determine whether to accept all or some of his testimony. Iowa Crim. Jury Instr. 100.7. Cortez has not established that had the jury received the additional evidence that Riley/Holden was using an assumed name and had prior felony convictions, the jury would have ignored Riley/Holden's testimony of his observations, or the observations of other witnesses. The trial court concluded Cortez failed to show a reasonable probability or likelihood that the jury would have acquitted him on his charges. We find no abuse of discretion.

III. Failure to Challenge the Sufficiency of the Evidence.

Cortez also claims trial counsel was ineffective in failing to challenge the sufficiency of the evidence for willful injury causing serious injury to Luckett via a motion for judgment of acquittal. Cortez claims that "at most" Luckett sustained a bodily injury. The State responds that counsel has no duty to raise a meritless claim, *see Fountain*, 786 N.W.2d at 263, and that this claim should be preserved for possible postconviction proceedings to create a better record on the extent of Luckett's injury. We agree with the State that this record is inadequate to

determine if there is sufficient evidence with respect to the extent of Luckett's injury. We disagree, however, that the remedy is to preserve the question for postconviction relief.

In *State v. Truesdell*, 679 N.W.2d 611, 615-16 (Iowa 2004), the court stated,

> A claim of ineffective assistance of trial counsel based on the failure of counsel to raise a claim of insufficient evidence to support a conviction is a matter that normally can be decided on direct appeal. *See State v. Scalise,* 660 N.W.2d 58, 62 (Iowa 2003). Clearly, if the record in this case fails to reveal substantial evidence to support the convictions, counsel was ineffective for failing to properly raise the issue and prejudice resulted. On the other hand, if the record reveals substantial evidence, counsel's failure to raise the claim of error could not be prejudicial.

Substantial evidence exists to support a verdict when the record reveals evidence that a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *State v. Thomas,* 561 N.W.2d 37, 39 (Iowa 1997). In making this determination, "[w]e view the evidence in the light most favorable to the verdict," including all reasonable inferences that may be deduced from the record. *State v. Gay,* 526 N.W.2d 294, 295 (Iowa 1995).

A serious injury is defined in Iowa Code section 702.18 and includes a "bodily injury" that "creates a substantial risk of death," or that "causes serious permanent disfigurement" or "extended loss or impairment of the function of any bodily member or organ." Iowa Code § 702.18. "[E]ach case must be judged on its own facts when deciding if there has been a serious injury." *State v. Carter*, 602 N.W.2d 818, 821 (Iowa 1999). An injury that leaves the victim "permanently scarred or twisted . . . in contrast to a black eye, a bloody nose, and even a

simple broken arm or leg" comes within the definition of serious injury. *State v. Epps*, 313 N.W.2d 553, 557 (Iowa 1981) (citation omitted).

The jury had an opportunity to view Luckett's arm during the trial to view any scarring, but we lack privy to those observations. We are able to view Exhibit 39, a photograph of Luckett's arm shortly after the injury; yet it offers little illumination as to the extent of the injury suffered. The record before us does not support a conviction of willful injury causing serious injury, but does support a conviction of the lesser offense submitted to the jury of willful injury causing bodily injury. *See State v. Morris*, 677 N.W.2d 787, 788 (Iowa 2004). We remand for entry of an amended judgment of conviction of the lesser-included offense and resentencing thereon. *See id.*

IV. Failure to Challenge the Justification Instruction.

Cortez contends trial counsel was ineffective in failing to challenge jury instructions 40 and 41[7] because the instructions only referenced Armstrong. Because the instructions did not refer to Riley/Holden and Luckett, the instructions limited his justification defense as to Riley/Holden and Luckett. But if there is no evidence to support a requested instruction, the court is not required to give it. *State v. Predka*, 555 N.W.2d 202, 214, (Iowa 1996).

In this record there is no evidence that either Riley/Holden or Luckett exchanged words of any kind with Cortez. Consequently, there was no evidence to support a request for Instruction No. 40 concerning words of a provocative and insulting nature that applied to Riley/Holden or Luckett. Nor is there evidence Cortez "in good faith, withdrew from physical contact with [either Riley/Holden or

[7] We have set forth those instructions in full above at page nine.

Luckett] and clearly indicated to [either Riley/Holden or Luckett] that he desired to end the fight, but [either Riley/Holden or Luckett] continued or resumed the fight." Because of the lack of evidence, the court properly limited the application of justification instructions No. 40 and 41 to Armstrong.[8] Counsel is not required to submit a request for a meritless instruction. *See State v. Wills*, 696 N.W.2d 20, 24 (Iowa 2005) (finding counsel is "not ineffective for failing to . . . object to the instruction because there was no legal basis" for it). Cortez's ineffectiveness claim on this ground thus fails.

V. Intoxication Instruction.

Cortez argued at trial his intoxication limited his physical capabilities, but he specifically did not claim intoxication limited his ability to form specific intent. Defendant has submitted a supplemental pro se brief in which he asserts the district court erred in instructing the jury on intoxication when he did not raise that defense. This claim is without merit. *See State v. Jenkins*, 412 N.W.2d 174, 176-77 (Iowa 1987) (rejecting defendant's claim that the trial court erred in instructing jury on intoxication where he had not advanced that defense where there was "considerable testimony, both from State and defense witnesses, pointing to defendant's intoxication on the night in question"). "It is well settled that the court must instruct on all material issues so that the jury understands the matters which they are to decide." *Id.*; *see also State v. Collins*, 305 N.W.2d 434, 437 (Iowa 1981) ("Intoxication is . . . often inaccurately referred to as a 'defense,' in criminal prosecutions. The concept is now codified in [Iowa Code] section

[8] We observe that the other justification instructions were not similarly limited.

701.5. . . . Temporary intoxication is simply evidence to be considered by the jury on the issue of intent."). Section 701.5 provides:

> 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.

Here there was evidence of Cortez's intoxication presented to the jury, and various crimes identified in the jury instructions contained an element of specific intent. The district court properly crafted the instruction to the facts and charges. We find no abuse of discretion in the trial court instructing the jury on intoxication where there was considerable evidence of Cortez's intoxication.

VI. Televising Images of Prospective Jurors.

Cortez also makes the pro se claim that the trial court erred in denying his motion for mistrial based on improper television exposure. He cannot establish the brief televised images of prospective jurors had an adverse impact on the jurors, however, and this claim also fails. *See State v. Douglas*, 485 N.W.2d 619, 625 (Iowa 1992) (stating defendant must show "adverse impact on the trial participants sufficient to constitute a denial of due process").

VII. Summary.

Cortez has failed to establish a reasonable probability that the results of his trial would have been different had the jury been aware Cyrus Riley was an assumed name for Barry Holden, and his claims of newly discovered evidence and ineffective-assistance-of-counsel based upon this information fail. We remand for amended judgment of conviction of willful injury causing bodily injury

with respect to the criminal conduct committed upon Luckett. Trial counsel was not ineffective in failing to object to the justification instructions given. The district court did not abuse its discretion in denying Cortez's motion for a new trial based on an asserted improper intoxication instruction, or in overruling his motion for a mistrial based on prospective jurors' improper television exposure. We therefore affirm in part, reverse in part, and remand for entry of an amended judgment and resentencing on the amended conviction.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.