IN THE COURT OF APPEALS OF IOWA

No. 2-326 / 11-0619
Filed August 8, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ANTHONY RAY TORREZ,
Defendant-Appellant.

Appeal from the Iowa District Court for Woodbury County, Jeffrey A. Neary, Judge.

Anthony Torrez appeals his conviction of domestic abuse assault, third offense. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Robert Ranschau, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney General, Patrick Jennings, County Attorney, and Mark Campbell, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Tabor and Bower, JJ.

TABOR, J.

This case calls into question the practice of giving juries in criminal trials two sets of instructions: a preliminary set distributed before opening arguments and a final set delivered at the close of evidence. In appealing his conviction for third-offense domestic abuse assault, Anthony Torrez concedes the jury received a definition of reasonable doubt as a preliminary instruction, but contends his attorney should have objected when the jury did not receive the same reasonable doubt instruction in the set of final instructions. He also alleges counsel should have objected to the absence of an instruction defining specific intent.

Because the district court told the jury before its deliberations that the preliminary instructions and the final instructions were to be "read together," we decline to find counsel ineffective for not challenging the omission of the reasonable-doubt instruction from the set of final instructions. We likewise find no prejudice from the omission of the intent instruction.

I. Background Facts and Proceedings.

The State charged Torrez with domestic abuse assault, third offense, based on allegations that he pushed his girlfriend into a snowdrift, pushed her against the door of their residence, and raised his fist to threaten her. The girlfriend's teenaged children witnessed some of the assaultive conduct. A jury convicted Torrez, and he stipulated to his previous convictions. He now appeals from the judgment.

In his initial appellant's brief, Torrez alleged his trial attorney was ineffective for not requesting an instruction on reasonable doubt or objecting to

its omission. Torrez also argued "the jury was not given several other stock instructions that are typically included in the jury instructions," chief among them an instruction concerning the intent element of assault. The State's initial appellee's brief conceded "the jury instructions in the district court file do not include an instruction defining reasonable doubt." But the State also pointed to passages in the trial record indicating a reasonable doubt instruction was included in a set of "preliminary instructions" that the court read to jurors after they were selected. Both the trial transcript and the court's calendar entry recited that "preliminary instructions" were "read to the jury" before the prosecution gave its opening statement.

On May 24, 2012, our court remanded this case for correction of the record under Iowa Rule of Appellate Procedure 6.807. We said it was unclear why the preliminary instructions were not included with the trial court papers forwarded for purposes of the appeal. We asked the district court to issue an order stating whether written preliminary instructions were handed to the jurors and at what points during the trial, if any, the jurors had access to those instructions. If preliminary instructions were part of the record and omitted by error or accident, we instructed the court to correct that omission by certifying those instructions as a supplemental record. We also provided the parties an opportunity to file supplemental briefs.

On June 5, 2012, the court convened a hearing with the county attorney and trial counsel for Torrez. Both attorneys agreed the eight preliminary instructions marked as hearing exhibit one were submitted to the jury before the

opening statements in the Torrez trial. More specifically, they both agreed preliminary jury instruction number three was the reasonable doubt definition submitted to the jury.[1]

Also on June 5, 2012, the district court entered an order directing the clerk to supplement the record with the hearing exhibits, including "a copy of the Preliminary Instructions which this Court read to the jury and upon which they deliberated in conjunction with the Final Jury Instructions."

The parties filed supplemental briefs. Torrez now concedes the preliminary jury instructions included an instruction defining reasonable doubt. He also notes the final instructions informed the jury that the State must prove the charges beyond a reasonable doubt. But he emphasizes the final set of jury instructions did not include the instruction defining reasonable doubt. Torrez contends his trial counsel was ineffective for not requesting that reasonable doubt be defined in the final instructions or objecting to the omission. He argues:

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[1] That instruction read:

> The burden is on the State to prove the Defendant guilty beyond a reasonable doubt. A reasonable doubt is one that fairly and naturally arises from the evidence in the case, or from the lack or failure of evidence produced by the State.
>
> A reasonable doubt is a doubt based upon reason and common sense, and not the mere possibility of innocence. A reasonable doubt is the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.
>
> If, after a full and fair consideration of all the evidence, you are firmly convinced of the Defendant's guilt, then you have no reasonable doubt and you should find the Defendant guilty.
>
> But if, after a full and fair consideration of all the evidence in the case, or from the lack or failure of evidence produced by the State, you are not firmly convinced of the Defendant's guilt, then you have a reasonable doubt and you should find the Defendant not guilty.

"Giving the jury an instruction about reasonable doubt in the preliminary instructions but not the final instructions does not meet the standards of fundamental fairness and due process of law." Torrez alleges he was prejudiced by his attorney's error because "[i]t is the final instructions that the jury takes and uses during their deliberations."

In its supplemental brief, the State argues competent counsel was not required to object "just because the instructions were divided into two sets." As for prejudice, the State contends "there is no reasonable probability that the jury would have reached a different verdict if the instructions had been compiled into one packet instead of two."

II. Scope and Standard of Review.

To prevail on his claim that counsel was ineffective for not objecting to the jury instructions, Torrez must prove by a preponderance of evidence that his attorney breached a material duty and prejudice resulted. *See State v. See*, 805 N.W.2d 605, 607 (Iowa Ct. App. 2011) (citing *Strickland v. Washington,* 466 U.S. 668, 687 (1984)). The record created in this case allows us to decide Torrez's attack on his counsel's competence on direct appeal. *See id*. at 606. (noting although we normally preserve ineffective-assistance claims for postconviction relief, we will affirm on direct appeal if the record shows the defendant cannot prevail as a matter of law). Our review is de novo. *State v. Shanahan*, 712 N.W.2d 121, 136 (Iowa 2006).

III. Analysis.

As an initial matter, we agree with Torrez's discussion of the fundamental nature of the beyond-a-reasonable-doubt standard and recognize the importance of accurately defining that concept for jurors who must decide whether the prosecution has carried its burden of proof. *See State v. McGranahan*, 206 N.W.2d 88, 92 (Iowa 1973) (emphasizing "an understanding of reasonable doubt is crucial to the deliberations of the jury in nearly every criminal case"). But the district court's order correcting and supplementing the record took some of the boil out of the water for the defense argument. The question is no longer whether the court instructed the jury as to the meaning of reasonable doubt. It did. The dispute is whether the jurors' understanding of the concept was diminished because reasonable doubt was defined in the set of preliminary instructions and not in the set of final instructions.

To decide whether counsel was ineffective in not lodging an objection to the bifurcated process of instructing the jury in this case, we must first settle what appears to be a factual ambiguity in the record. On appeal, Torrez suggests the jurors took only the written set of final instructions into the jury room to use during their deliberations and not a written set of the preliminary instructions. But we read the record to show the jurors took the written set of preliminary instructions into the jury room along with the final instructions. This factual distinction is important because the rules of civil procedure relating to jury instructions (which are expressly applied to criminal cases by Iowa Rule of Criminal Procedure Rule

2.19(5)(f)) require the trial court to "instruct the jury as to the law applicable to all material issues in the case" and to do so "in writing." Iowa R. Civ. P. 1.924.[2]

At the hearing on June 5, 2012, the court said the set of preliminary instructions—including the reasonable doubt instruction—was "sent to the jury" and "read to them" before the presentation of the evidence. The court also recalled directing the jurors to consider the preliminary instructions "as part of the whole set of jury instructions at the close of the evidence of the case." Indeed, the trial transcript from March 30, 2011, reveals the judge advised the jury as the final instructions were being passed out: "[T]here is a preliminary set and there is a final set to be read together."

At the remand hearing, the prosecutor agreed the preliminary instructions were "given to the jury." The district court asked the experienced prosecutor whether he recalled "any judge, including the present judge, ever not submitting a reasonable doubt instruction, whether it be by preliminary instruction or final jury instructions in any case?" The prosecutor responded: "I've not seen the Court not instruct the jury by written instruction on beyond a reasonable doubt."

Torrez's trial counsel also recalled that a preliminary instruction defining reasonable doubt was given to the jury. She told the court: "I have considerable trial experience and wouldn't have submitted anything to the jury without a reasonable doubt instruction."[3]

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[2] This rule allows the instructions to be oral "in any action where the parties so agree."

[3] In her closing argument, defense counsel mentions the court defining reasonable doubt for the jurors.

We are also persuaded that the district court provided the preliminary instructions to the jury in writing based on the attorney's closing arguments. In his summation, the prosecutor asked the jury to "look at Instruction No. 6 of the preliminary instructions, that would be the preliminary instructions and not the final instructions." It would not make sense to direct the jurors' attention to a particular numbered instruction unless they had a written, numbered set of instructions in front of them.[4]

Having concluded the district court instructed the jury in writing on reasonable doubt and directed the jurors to read the preliminary instructions in conjunction with the final instructions, we find no breach of duty on the part of trial counsel. Jury instructions must be considered as a whole. *State v. Fintel*, 689 N.W.2d 95, 104 (Iowa 2004). The court instructed Torrez's jury to "consider all the instructions together." An objection to the court's failure to duplicate the reasonable doubt instruction in the set of final instructions would not have been successful. Trial counsel had no duty to urge a meritless point. *See State v. Griffin*, 691 N.W.2d 734, 737 (Iowa 2005).

We also find no prejudice in the method of instructing the jury in this case. Trial counsel could have rightly believed it was helpful to her client for the district court to give the jurors anticipatory guidance regarding the State's burden of proof. In fact, some commentators have suggested "it is asking the impossible to require the jury to retroactively apply principles of law it is hearing for the first

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[4] In addition, the trial transcript shows before court adjourned on March 29, 2011, the judge told the jurors to "leave [their] jury instructions" and the court attendant would gather them up for the jurors on the final morning of the trial.

time to several days or weeks worth of testimony." *See Timing—Preliminary Instructions*, 3 Crim. Prac. Manual § 99:2 (Westlaw 2012) (citing Schwarzer, *Reforming Jury Trials*, 1990 U. Chi. Legal F. 119, 130 (1990) (comparing the practice of giving jury instructions for the first time after the close of evidence to "telling jurors to watch a baseball game and decide who won without telling them what the rules are until the end of the game")); *see also In re Use by Trial Cts. of Standard Jury Instructions in Criminal Cases*, 431 So. 2d 594, 596 (Fla. 1981) (authorizing trial judge "in his discretion to bifurcate his charge to the jury by giving a portion of the general instruction prior to the taking of evidence, with the remaining instructions being given at the close of the evidence"). Torrez is unable to show it was reasonably probable the jury would have acquitted if it had received the reasonable doubt definition in the final instructions rather than as part of a combined set of preliminary and final instructions.

We now turn to the second contention raised in Torrez's initial brief: that trial counsel was ineffective for not objecting to the absence of a specific-intent instruction. The court provided the jurors a marshalling instruction on domestic abuse assault, listing the elements of assault as they appear in Iowa Code section 708.1(1) and (2). But the court did not submit a separate instruction defining specific intent.[5] In *State v. Fountain*, 786 N.W.2d 260, 265 (Iowa 2010),

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[5] The uniform instruction provides the following definition:

> "Specific intent" means not only being aware of doing an act and doing it voluntarily, but in addition, doing it with a specific purpose in mind. Because determining the defendant's specific intent requires you to decide what the defendant was thinking when an act was done, it is seldom capable of direct proof. Therefore, you should consider the facts and circumstances surrounding the act to determine the defendant's

our supreme court found the trial court erred in not giving a specific intent instruction in a trial for domestic abuse assault. But *Fountain* left open the question whether trial counsel was ineffective for not objecting to the absence of the specific intent instruction. 786 N.W.2d at 267. The *Fountain* court recognized not objecting could have been a matter of trial strategy. *Id*. "If the defense strategy is to deny that any assaultive contact occurred, the individual elements of assault become unimportant." *Id*.

In Torrez's case, the defense attorney argued in closing that the defendant's eyewitness saw "no one falling, no one being shoved, and no one being hit." Because the defense strategy was to deny Torrez committed an assault, it was not critical for the jury to be instructed on the definition of specific intent. Torrez cannot show that he suffered prejudice as a result of his trial counsel's handling of the jury instructions.

AFFIRMED.

> specific intent. You may, but are not required to conclude a person intends the natural results of his or her acts.

See Iowa Criminal Jury Instructions 200.2.