IN THE COURT OF APPEALS OF IOWA

No. 2-674 / 11-1763
Filed September 6, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ELGIN SHABAZZ RICHMOND,
Defendant-Appellant.

Appeal from the Iowa District Court for Winnebago County, Christopher C. Foy, Judge.

Elgin Richmond appeals his conviction for willful injury, in violation of Iowa Code section 708.4(2). **AFFIRMED.**

Mark C. Smith, State Appellate Defender, David Arthur Adams, Assistant State Appellate Defender, and Laurie Heron, Student Intern, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, and Adam D. Sauer, County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Doyle and Tabor, JJ.

TABOR, J.

In this appeal from his conviction for willful injury causing bodily injury, Elgin Richmond challenges the State's proof of his intent to commit serious injury. He also argues he was prejudiced by trial counsel's failure to object to the admission of a videotape exhibit containing hearsay statements and suggesting he engaged in prior violent acts.

Viewing the evidence in the light most favorable to upholding the jury's verdict and indulging reasonable inferences from the location of the injuries and the objects used to inflict them, we affirm Richmond's willful injury conviction. We preserve the claims of ineffective assistance of counsel for possible postconviction relief.

I. Facts and Proceedings

Assistant Police Chief Thomas Montgomery responded to an emergency dispatch at the Village Chateau apartments in Forest City just after 1:30 a.m. on May 8, 2011. He found thirty-year-old Jennafer White sitting on the sidewalk in front of the apartment she shared with Richmond and her four children. She was crying and splattered with blood. The officer saw injuries on her hands, her face, her shoulders, and the back of her head. Richmond was not on the scene.

According to White's testimony, she and Richmond went out drinking that night to celebrate Mother's Day, but Richmond left the bar without telling her. When White returned to the apartment, they argued. White told the jury that was when Richmond hit her.

The prosecution also played for the jury a recording captured on a body camera worn by Officer Montgomery. White can be heard saying to the officer: "You know Elgin Richmond?" The officer responds: "Oh yeah, we know him very well." White, who is sobbing, then says: "Yeah. He's at it again. He went back there in the woods. I think he's gone on foot . . . . Please find him. He beat me with a vacuum cleaner and a stroller. He beat me with the vacuum 'til it fell apart. You can look in there." When officers looked inside the apartment, they found pieces of a broken upright vacuum cleaner and a baby stroller with clumps of hair tangled in the wheels.

The State filed a trial information charging Richmond with four counts: willful injury, a class "D" felony in violation of Iowa Code section 708.2(2) (2011); domestic abuse assault, third offense, a class "D" felony in violation of sections 708.2A(1), 708.2A(4), and 236.2(2)(a); kidnapping in the third degree, a class "C" felony in violation of sections 710.1 and 710.4; and child endangerment, an aggravated misdemeanor in violation of sections 726.2(1)(a) and 726.6(7). A jury heard the case on August 4 and 5, 2011. The prosecution presented testimony from peace officers, a paramedic, and White. The prosecution also offered video-recordings, without objection, showing the officer's conversations with White the night of the assault and again the next day.

White testified she did not know whether Richmond hit her with the vacuum cleaner and could not remember if he hit her with a stroller. White said at the time of trial she was pregnant with Richmond's child. She responded to a

question from the prosecutor by saying: "You know, I have a really hard time helping you send my children's father to prison."

The court granted Richmond's motion for judgment of acquittal on counts three and four of the trial information. The jury returned verdicts of guilty on the charges of willful injury and domestic abuse assault. The prosecutor dismissed the enhancements previously alleged on the domestic abuse assault. On October 31, 2011, the district court entered judgment on the class "D" felony willful injury and simple misdemeanor domestic abuse assault convictions and sentenced Richmond to an indeterminate five-year term. On November 1, 2011, Richmond's counsel filed a notice of appeal from the willful injury conviction.[1]

II. Scope and Standards of Review

We review sufficiency of the evidence claims for errors at law. *State v. Serrato*, 787 N.W.2d 462, 465 (Iowa 2010). We will uphold the jury's verdict unless there is an absence of substantial evidence in the record to sustain it. *State v. Hennings*, 791 N.W.2d 828, 832-33 (Iowa 2010). "Substantial evidence" is the kind of proof which could convince a rational fact finder the defendant is guilty beyond a reasonable doubt. *Id*. We follow the "long-standing admonition" to consider the facts in a light most favorable to upholding the jury's verdict. *State v. Meyers*, 799 N.W.2d 132, 146 (Iowa 2011). In doing so, we indulge all legitimate inferences and presumptions that may be fairly and reasonably

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[1] Richmond's brief states he also appeals from a conviction for serious misdemeanor domestic abuse assault. The record shows he was only convicted of simple misdemeanor assault. There is no right to direct appeal from a simple misdemeanor conviction. Iowa Code § 814.6(2)(d). Moreover, Richmond's notice of appeal did not request review of his misdemeanor offense. Accordingly, we will limit our consideration to Richmond's felony conviction.

deduced from the evidence offered at trial. *State v. Leckington*, 713 N.W.2d 208, 213 (Iowa 2006).

When we turn to Richmond's claims of ineffective assistance of counsel, our review is de novo. *See State v. Clark*, 814 N.W.2d 551, 560 (Iowa 2012). Richmond's burden is spelled out in *Strickland v. Washington,* 466 U.S. 668, 687-92 (1984), which requires a litigant to show (1) his trial counsel failed to perform an essential duty and (2) the failure resulted in prejudice.

Two routes are available to an appellate court faced with a claim concerning trial counsel's performance. *See State v. Taylor*, 689 N.W.2d 116, 134 (Iowa 2004). The first and more traveled route is to preserve the matter for possible postconviction relief so the record can be developed more fully. *See State v. Atley*, 564 N.W.2d 817, 833 (Iowa 1997) (explaining only in "rare cases" will trial record be sufficient to resolve claim); *see also State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978) (introducing the oft-repeated maxim: "Even a lawyer is entitled to his day in court, especially when his professional reputation is impugned"). The second option is to affirm or reverse the conviction on direct appeal—without preserving such claims; we will decide the constitutional question on direct appeal only if the record is adequate to determine the effectiveness of counsel as a matter of law. *See State v. Brubaker*, 805 N.W.2d 164, 170-71 (Iowa 2011) (pointing to waste of time and judicial resources from preserving claim that can be decided on direct appeal).

III. Merits

A. Did the State Offer Substantial Evidence of Richmond's Intent to Cause Serious Injury?

To convict Richmond of willful injury, the State was required to satisfy the following elements: (1) he assaulted White; (2) he specifically intended to cause serious injury; and (3) she sustained a bodily injury. Iowa Code § 708.4(2). On appeal, Richmond challenges only the State's proof of the second element, his specific intent to cause serious injury.

The court defined serious injury for the jurors as "a bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement or extended loss or impairment of the function of any bodily part or organ." *See* Iowa Code § 702.18. For the class "D" felony offense, the jury was not required to find White sustained a serious injury, only that Richmond intended to cause such harm. Because the State seldom will be able to offer direct proof of a defendant's intent, we permit the fact finder to rely on circumstantial evidence to satisfy this element of willful injury. *See State v. Delay*, 320 N.W.2d 831, 835 (Iowa 1982).

Here, the State offered evidence showing Richmond hit White repeatedly in the head, face, and shoulders with a vacuum cleaner and a baby stroller. The blows were so forceful that he broke the vacuum into pieces and embedded White's hair in the wheels of the stroller. The laceration to White's scalp required stitches. Reasonable jurors could draw the inference that striking a victim in particularly vulnerable parts of the body, such as the skull and face, with

relatively sturdy household items, revealed his intent to cause her death, permanent disfigurement, or prolonged loss of function. *See State v. Crandall*, 288 N.W. 85, 88 (Iowa 1939) (holding specific intent can be proved by circumstances attending assault); s*ee also People v. Hamlin*, 89 Cal. Rptr. 3d 402, 415 (Cal. Ct. App. 2009) (holding circumstances of the offense can establish intent, including defendant's focus of attack on particularly vulnerable area such as the face). The jury's verdict should stand.

B. Did Richmond Show He Was Prejudiced by Counsel's Performance?

The harder question in this appeal is whether counsel's representation fell below an objective standard of reasonableness. *See Strickland*, 466 U.S. at 693. Richmond presents a compelling argument that many statements in the video-recordings played for the jury were inadmissible hearsay and described prior bad acts committed by Richmond that should have been excluded under Iowa Rule of Evidence 5.404(b). He argues his trial attorney's failure to object to the admission of the video exhibit resulted in prejudice to his defense.

The thirty-minute-long recording of Officer Montgomery's investigation in the early morning hours of May 8, 2011, contained not only statements from a distraught White, but also discussions among the responding police officers about Richmond being "the same subject that took off on us last summer." The jury also heard the dispatcher tell Officer Montgomery that Richmond had a no-contact order involving "another Jennifer."

Another twenty minutes of recording from the officer's body camera captured his conversation with White the following day when she was not still under the stress of the attack. White gave the officer a more detailed version of Richmond's assaults against her, describing how he punched her in the face and then used both the "brand new" vacuum and the stroller to strike her. She also recounted her injuries, including fractured eye sockets and a broken nose. The jury was allowed to hear the victim tell the officer she "feared for her life" if Richmond was released from jail because he had "nothing to lose." The officer agreed with White about the threat posed by Richmond and added: "What's going to happen next time?" The jury also heard White describe an incident the previous Father's Day when Richmond brandished a golf club and beat up both her and his former girlfriend. Also on the videotape, the officer fielded a question from a shirtless neighbor standing in White's kitchen; the unidentified man asked if he would get in trouble if he "stepped in" to help defend White from Richmond. The officer responded: "I'd expect you to."

On appeal, the State contends White's reaction when the officer arrived at the scene was admissible under the hearsay exception for excited utterances. *See* Iowa R. Evid. 5.803(2). But the State does not defend the admissibility of any other statements on the video-recordings. Instead, the State submits "any failure of trial counsel to object to the evidence was not prejudicial in light of the overwhelming evidence of Richmond's guilt."

At trial, the State faced the common phenomenon of a reluctant witness in a domestic violence prosecution. *See State v. Rodriquez*, 636 N.W.2d 234, 245

(Iowa 2001) (summarizing testimony of domestic violence expert concerning hesitance of battered women to testify against their batterers); *see also* Tom Lininger, *Evidentiary Issues in Federal Prosecutions of Violence Against Women*, 36 Ind. L. Rev. 687, 709 n.76 (2003) (noting research estimating between eighty and ninety percent of domestic violence victims recant their accusations or refuse to cooperate with a prosecution). While White acknowledged during direct examination that Richmond hit her, she testified she did not know if he hit her with a vacuum cleaner and did not remember if he hit her with a baby stroller. She also said she did not remember discussing the broken vacuum during her deposition. She expressed her frustration with the process:

> . . . I don't recall much. I choose not to. Like those pictures that you're showing me, I don't—I told you in depositions I didn't want to see them and I still choose not to see them. So I've pretty much blocked out everything on purpose. I can't move forward if I'm constantly reminded of it . . . . I mean there's no point to it. He's in jail. We're trying to move on with our lives and we can't if we're constantly reminded, which is why I made it very clear that I didn't want to testify. Also, I made it clear I didn't want to do depositions, but you guys don't seem to understand that or it doesn't seem to matter, so.

Realizing White's hostility toward the prosecution, the State turned to out-of-court statements to establish Richmond's guilt. *See* Eleanor Simon, *Confrontation and Domestic Violence Post-Davis: Is There and Should There Be a Doctrinal Exception?*, 17 Mich. J. Gend. & L. 175, 184 (2011) (describing "evidence-based" prosecutions which do not require the victim's live testimony). Trouble developed because the State was not the least bit selective in presenting extra-judicial statements to the jury. Indisputably, the jury heard evidence that could have been successfully excluded under rules 5.802 and 5.404(b).

The question is whether we can decide the ineffective assistance claim on direct appeal. If trial strategy could explain defense counsel's decision not to challenge the videotape, we must preserve the ineffectiveness claim for postconviction proceedings. *See State v. Fountain*, 786 N.W.2d 260, 267 (Iowa 2010) (repeating the principle that an action for postconviction relief is often required to "discern the difference between improvident trial strategy and ineffective assistance"). Richmond asserts: "Nothing in the record suggests the defense attorney's trial strategy prevented him from objecting." We disagree. In counsel's cross-examination of White, he asked her about aspects of the videotape, particularly about a neighbor's statement to her: "I love you girl; I never did like that man." White confirmed the neighbor had "made advances toward [her]" in the past and she did not know "who or what hit [her]" that night. Defense counsel returned to the videotape in his closing argument, contrasting how much White remembered during the follow-up conversation with the officer compared to the night of the assault. Counsel also asked the jury to consider: "Who else is there, this other guy?" and suggested that everyone on the videotape "jumped on the bandwagon, said it's Elgin."

We will not reverse a conviction where counsel has made a reasonable decision concerning trial tactics, even if such judgments are ultimately unsuccessful for his client. *State v. Ondayog*, 722 N.W.2d 778, 786 (Iowa 2006) ("'[R]epresentation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.'") (quoting *Strickland*, 466 U.S. at 693). A fuller record is necessary to discern the difference in this case.

Accordingly, we preserve the claims of ineffective assistance for a potential postconviction relief action.

AFFIRMED.