IN THE COURT OF APPEALS OF IOWA

No. 2-736 / 11-1230
Filed September 19, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ERIC JOHN NOSA,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Thomas G. Reidel (motion to adjudicate law points) and Nancy S. Tabor (trial), Judges.

Eric Nosa appeals from conviction of domestic abuse, third or subsequent offense, and the sentence imposed. **AFFIRMED IN PART, SENTENCE VACATED IN PART, AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Martha J. Lucey, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Benjamin M. Parrott, Assistant Attorney General, Michael J. Walton, County Attorney, and William Ripley, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Bower, JJ. Tabor, J. takes no part.

POTTERFIELD, J.

Eric Nosa appeals from conviction of domestic abuse, third or subsequent offense, and the sentence imposed. We reject his claims that the trial court was required to take his guilty plea at his initial appearance, and that trial counsel was ineffective for failing to propose a jury instruction on specific intent. We reverse the sentence to the extent it orders the defendant to repay the costs of legal representation in an amount exceeding the fee limitation.

I. Background Facts and Proceedings.

On Thursday, November 25, 2010—the Thanksgiving holiday—Kathleen Willette returned to her residence in the early afternoon after having been to church and lunch. Her live-in boyfriend of some twelve years, Eric Nosa, and a friend were playing video games and appeared "pretty intoxicated." Willette changed her clothing and went to the back yard to do yard work. Nosa came outside wanting Willette to buy him more beer. Willette had no money and continued to do her yard work. Nosa was "kind of upset and slammed the doors." Nosa came outside and went back inside three times. He accused Willette of stalling. On the fourth time Nosa came outside, Willette would later testify:

> [H]e was pretty hot and upset, and he pulled the lawn mower, jerked the lawn mower out of the shed, knocked the tools and everything out of the shed and kicked my big garbage can over that the city picks up every week and proceeded to kick the bags of leaves I had already raked and stuff and grabbed a rake and I was trying to pick up the stuff and when I was bent over trying, he kicked me in the stomach.

Willette went to her daughter's home across the street crying and holding her stomach. Her daughter, Tiana Ponciano-Davis, went to talk with Nosa and

Willette returned to try to clean up the yard. Willette heard Nosa and her daughter yelling at each other; Nosa insisted that Willette's daughter leave. The police arrived with the daughter's friend, Russ. Willette informed the police her stomach hurt, but she did not need an ambulance or further medical treatment.

Nosa was arrested and a complaint was filed charging him with simple domestic assault (against Willette), and simple assault (against Willette's daughter). Nosa made his initial appearance the following morning before the magistrate who learned from the prosecutor who was present that Nosa had a "long history of domestic assault convictions and arrests, including violation of no contact orders" and that the domestic assault charge "should be" a third offense, a class "D" felony. The prosecutor did not move to amend the charge to an enhanced offense. Nosa responded, "Since they haven't enhanced it, can I go ahead and plead guilty to it?" The prosecutor did not object. The magistrate refused to accept a plea at that time "because they need a chance to look at the charge." The court set bond at the felony level and appointed counsel to represent Nosa.

On December 3, 2010, in a hearing before Judge McDonald on a separate charge, Nosa again asked to be allowed to plead guilty to the simple domestic assault. The court indicated the county attorney "is going to up the charge"; the court did not have that file; and the defendant would need to have his attorney with him.

Also on December 3, a trial information was filed charging Nosa with domestic abuse assault, third or subsequent offense. On December 9, Nosa filed a written arraignment and plea of not guilty.

Nosa later filed a motion for adjudication of law points, asserting he was "improperly denied his right to enter a plea of guilty to the charge of simple domestic assault." The State resisted and a hearing was held before Judge Reidel. The court entered a written ruling on March 25, 2011, concluding the magistrate did not abuse his discretion in refusing to accept Nosa's plea because there is "no absolute right to have a guilty plea accepted," and "[a] court may reject a plea in exercise of sound judicial discretion."

The case proceeded to a jury trial at which Willette testified that on November 25, 2010, Nosa had attempted to kick her once, and then did kick her in the stomach. On cross-examination, counsel asked about Nosa's level of intoxication on that day,

> Q. You said he was slurring his words and what other indications of intoxication were you—did you remember? A. His—the music was extremely loud, and he didn't comprehend, I think, when I came in the house and said I was gonna change clothes and go to do the yard work, you know.
>
> Q. Okay. So he was kind of spaced out, not understanding what was going on? A. Yes.

Willette's daughter, Tiana Ponciano-Davis testified that on November 25, Willette appeared at her house "crying, a little bit hysterical." So Ponciano-Davis went to Willette's house where she found Nosa on the couch playing a video game. She told him to leave her mother's house or she would call the police. When asked how Nosa reacted, she stated, "Really angry, quite a bit. He was pretty belligerent." She testified he followed her across the room, with the two yelling and cussing at one other. Nosa grabbed a carpet shampooer and threw it—"It hit the couch so it didn't—it tapped me, but no, I didn't have any injuries or anything because of it." She explained that Nosa "never put his hands physically

on me, but his stomach was up against me, and I was up against the windowsill." She also stated he was visibly drunk. On cross-examination, defense counsel asked what visual clues indicated he was drunk and she responded, "Slurring, hair a mess, the smell of alcohol."

Officer Douglas Scroggins testified that he responded to a domestic disturbance report on November 25. Upon arrival he heard yelling from the back of the residence and then located two subjects—Ponciano-Davis and Nosa. Officer Scroggins separated the two and walked Nosa toward the squad car. He noted a "pretty strong odor of alcohol" coming from Nosa and was of the opinion that Nosa was intoxicated. He described Nosa's behavior:

> Actually, just prior to the trip, he was rather calm, gave me a brief explanation of his version of events. As soon as I didn't—I met with Officer Wayland, who requested I transport Mr. Nosa to the county [jail], and as soon as I put the car in drive, his—he changed from being rather calm to verbally aggressive. At one point he told me he was gonna "bash my fucking skull in."

There were no objections to the court's proposed jury instructions. Instruction 11 noted the elements of domestic abuse assault: (1) on or about November 25, 2010, "the defendant did an act which was meant to cause pain or injury, result in physical contact which was insulting or offensive, or [did] place Kathleen Willette in fear of immediate physical contact which would been painful, injurious, insulting or offensive to her"; (2) the defendant had the apparent ability to do the act; and 3) the act occurred between family or household members who resided together at the time.

Instruction 18 provided:

> The defendant claims he was under the influence of intoxicants at the time of the alleged crime. 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 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.

Closing arguments revolved around the defense of intoxication; and whether, because of intoxication, the defendant was unable to form the specific intent to achieve the consequences of assault.

The jury returned a guilty verdict on the charge of domestic abuse assault.[1]

Nosa now appeals. He argues the court abused its discretion in not allowing him to plead guilty to simple domestic assault. He also contends trial counsel was ineffective in failing to request a jury instruction defining specific intent as an element of assault. Finally, he asserts—and the State concedes—the trial court improperly ordered him to reimburse the State for attorney fees exceeding the statutory fee allowance.

II. Analysis.

A. *Rejection of guilty plea*. Both parties agree that our review of this issue is for an abuse of discretion. *See State v*. *Hager*, 630 N.W.2d 828, 833 (Iowa 2001) ("We review a decision of the district court to reject a guilty plea for an abuse of discretion."). We reject Nosa's contention that the court was required to accept his plea of guilty. While Iowa Rule of Criminal Procedure 2.63 requires a

[1] The jury found Nosa not guilty on the charge of simple assault of Willette's daughter.

defendant to enter a plea[2] upon initial appearance, a defendant has no constitutional right to have a guilty plea accepted. *See Santobello v. New York*, 404 U.S. 257, 262 (1971); *Hager*, 630 N.W.2d at 833. "Instead, courts have discretion to refuse to accept a guilty plea." *Hager,* 630 N.W.2d at 833 (internal quotation marks and citation omitted); *see* Iowa R. Crim. P. 2.8(2)(b) ("The court may refuse to accept a plea of guilty . . . .").

Though not directly on point, in *State v. Trainer*, 762 N.W.2d 155, 159 (Iowa Ct. App. 2008), we discussed a defendant's attempt to plead guilty to a lesser offense in an attempt to bar the prosecution of a greater offense charged in a separately filed trial information in the context of a Double Jeopardy claim. We concluded, like many other courts, that a defendant is "is not entitled to manipulate the proceedings against [him] and to use the Double Jeopardy Clause as a sword." *Id.* at 158 (citations omitted). We believe that reasoning is equally applicable here. The court did not abuse its discretion in refusing Nosa's offer to plead guilty in an attempt to stave off the enhanced charge of the trial information.

Nosa argues that his motive in offering the guilty plea is irrelevant and that the court's discretion to refuse to accept a guilty plea does not extend to assisting the prosecution. In the absence of an oral motion to amend the complaint, Nosa contends the magistrate was required to allow the guilty plea. While we agree that the magistrate is to remain neutral, our rules of criminal procedure permit the

[2] Pursuant to Iowa Rule of Criminal Procedure 2.8(2)(a), the plea may be guilty, not guilty, or former conviction or acquittal.

refusal of a guilty plea, as does our case law in the context of Double Jeopardy implications.

B. *Ineffective assistance of counsel*. Nosa contends trial counsel was ineffective in failing to request a specific intent jury instruction. In order to prevail on a claim of ineffective assistance of counsel, Nosa must prove that counsel failed in an essential duty, and prejudice resulted from that failure. *State v*. *Fountain*, 786 N.W.2d 260, 265-66 (Iowa 2010). We review this constitutional issue de novo. *Ledezma v*. *State*, 626 N.W.2d 134, 141 (Iowa 2001).

Nosa argues trial counsel should have requested the following instruction:

> "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 [he] [she] 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 specific intent. You may, but are not required to, conclude a person intends the natural results of [his] [her] acts.

Iowa Criminal Jury Instruction 200.2. Nosa argues the specific intent instruction was necessary to inform the jury the State had the burden to prove Nosa did an act with the specific intent to cause pain or injury, and that without the instruction informing the jury of the definition of specific intent the jury did not have the necessary information to apply the defense of intoxication.[3] Our supreme court has ruled that an assault includes a specific intent component because it requires

[3] Neither party raised the issue of whether intoxication remains an available defense to the specific intent element of assault after *Fountain*, nor do we reach that question here. 786 N.W.2d at 265 (stating the amendment to the assault statute was "simply an attempt to prevent a defendant charged with assault from relying on the defenses of intoxication and diminished capacity").

"an act that is done to achieve the additional consequences of causing the victim pain, injury or offensive physical contact." *Fountain*, 786 N.W.2d at 265.

The State responds that the jury instructions given adequately instructed the jury on the statutory elements of the offense as instruction 11 required the State to prove that the defendant did an act "meant to cause" the statutorily forbidden results. *See State v. Keeton*, 710 N.W.2d 531, 533-34 (Iowa 2006).[4] Moreover, the State contends the jury was instructed that for intoxication to be a defense it must "cause[] a mental disability which makes the person incapable of forming the specific intent." Finally, the State argues that even if defense

[4] In *Keeton*, 710 N.W.2d at 534, the court stated:

> Regardless of which label is attached to the offense, the State was still required to prove Keeton possessed the mens rea required by the statute, and we turn to decide if it did so. *State v. Taylor,* 689 N.W.2d 116, 132 (Iowa 2004) ("[R]egardless of whether assault is a specific intent or general intent crime, the State must prove by evidence beyond a reasonable doubt that the defendant intended his act to cause pain or injury to the victim or to result in physical contact that would be insulting or offensive to the victim."); *State v. Bedard,* 668 N.W.2d 598, 601 (Iowa 2003) ("The intent elements discussed in *Heard* remain as part of the definition of the offense and continue to be matters that the State must prove by evidence beyond a reasonable doubt."), *cert. denied,* 543 U.S. 932 (2004). *The State had to prove that Keeton did an act he intended either: (1) to cause the clerk pain or injury, (2) to make insulting or offensive physical contact with the clerk, or (3) to make the clerk fear immediate painful, injurious, insulting, or offensive physical contact.* Iowa Code § 708.1(1)-(2).

(Emphasis added.). The court reaffirmed these statements in *Fountain*, 786 N.W.2d at 265:

> The elements of assault under Iowa Code section 708.1 have not changed since our decision in *State v. Heard*, 636 N.W.2d 277, 231 (Iowa 2001). Under this section, a defendant must commit an act that he intends to cause pain or injury to the victim or to result in physical contact that would be insulting or offensive to the victim or to place the victim in fear of physical contact that will be injurious or offensive. Iowa Code § 708.1(1), (2). Because the elements of these assault alternatives include an act that is done to achieve the additional consequence of causing the victim pain, injury or offensive physical contact, the crime includes a specific intent component.

The instructions given to the jury in the instant case appear to adequately address the statutory elements.

counsel should have requested a specific intent instruction, Nosa cannot establish the requisite prejudice because "[h]is capacity to act purposefully . . . was overwhelmingly clear from the evidence."

Upon our de novo review we agree with the State that, even assuming Nosa's trial counsel had a duty to request a specific intent jury instruction be given, Nosa cannot demonstrate the requisite prejudice. The "intent required by the statute 'may be inferred from the circumstances of the transaction and the actions of the defendant.'" *Keeton*, 710 N.W.2d at 534 (citation omitted). Here, the evidence established that Nosa intentionally kicked Willette in her stomach upon her continued refusal to go get him more beer. Nosa's defense was that he was so intoxicated he could not have intended to cause her injury. However, there was no evidence that Nosa's ability to form specific intent was compromised by intoxication. While he was described as intoxicated, he was not described as incoherent. Rather, the evidence was that he wanted that Wilmette go purchase more beer and that he was upset by her failure to do so. When she did not do as he wished, he first dismantled the yard work she had accomplished and then kicked her when she attempted to clean up after his tantrum. He was "amicable" according to the police officer who arrived at the scene, giving a "brief explanation of his version of events." The jury was instructed, "Intoxication is a defense only when it causes a mental disability which makes the person incapable of forming the specific intent." His intent was the crux of closing arguments, and the jury returned a guilty verdict. Given the evidence against him, and the jury's rejection of his claim he could not form the requisite intent due to intoxication, Nosa cannot show that but for his trial counsel's alleged

unprofessional error, the result of his trial would have been different. We are therefore convinced the failure to give a specific intent instruction caused the defendant no prejudice. Accordingly, we affirm Nosa's judgment and conviction for domestic abuse assault, third or subsequent offense.

C. Restitution amount was erroneous. The court appointed counsel to represent Nosa. As a part of the sentence imposed upon his conviction, the court ordered Nosa to pay restitution for attorney fees in excess of the statutory fee limitation. The State concedes this was not proper. *See* Iowa Code § 815.9 (2009) ("If a person is granted an appointed attorney, the person shall be required to reimburse the state for the total cost of legal assistance provided to the person pursuant to this section."); *id.* § 815.14 (noting that in determining the amount of restitution the expense of the public defender or court appointed counsel "shall not exceed the fee limitations established in section 13B.4");[5] *State v. Dudley*, 766 N.W.2d 606, 622 (Iowa 2009). The fee limitation applicable here is $1200. We therefore strike that portion of the sentence ordering Nosa to pay attorney fee restitution and remand for entry of an order consistent with the fee limitation.

AFFIRMED IN PART, SENTENCE VACATED IN PART, AND REMANDED.

[5] This provision has been amended and now reads, "The expense of the public defender may exceed the fee limitations established in section 13B.4." 2012 Acts ch. 1063, § 12.