

IN THE COURT OF APPEALS OF IOWA

No. 3-039 / 10-0687
Filed March 13, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MICHAEL ALLEN WAILAND,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Thomas H. Preacher, District Associate Judge.

Defendant appeals his conviction for assault causing bodily injury.

AFFIRMED.

Mark C. Smith, State Appellate Defender, and Shellie Knipfer, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Michael J. Walton, County Attorney, and James Cosby, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., Mullins, J., and Huitink, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2013).

HUITINK, S.J.**I. Background Facts & Proceedings.**

Michael Wailand was charged with assault resulting in bodily injury, in violation of Iowa Code section 708.2(2) (2009).¹ Wailand presented a defense of justification. He claimed his actions were reasonably necessary to defend his infant granddaughter. The case proceeded to a jury trial on March 29, 2010, where evidence was presented as follows.

In December 2009, Wailand and his wife, Trudy, were separated. At that time Wailand had physical care of their child, S.W., who was then six years old. Trudy arranged through her adult daughter, Ashley, to have visitation with S.W. at the Northpark Mall in Davenport, Iowa, on December 17, 2009. Trudy's adult son, Christopher, accompanied her for the visit.

At about 4:45 p.m. that day Trudy, Christopher, and S.W. came to the food court area where the child was to be returned to the care of Wailand. Trudy testified Wailand grabbed S.W. by the arm, but she did not want to go with him and started crying. Christopher came over to stand with his arms stretched out between Trudy and Wailand, telling Wailand if he was going to hit somebody he should hit him. Trudy stated Wailand hit Christopher's hand and Christopher's hand accidentally hit Ashley's infant daughter. Ashley then hit Christopher. Trudy was trying to comfort S.W., and she stated the next thing she saw was Christopher on the ground and Wailand was kicking him.

¹ Wailand was also charged with child endangerment. A jury found him not guilty of that charge, and it will not be discussed in this opinion.

Christopher testified that when he went to stand between Trudy and Wailand he put his hands up in the air and told Wailand, "If you're going to hit me, I ain't swinging back because you're going to go to jail." He stated his hand accidentally hit Ashley's infant daughter when Wailand hit him. Christopher stated Wailand hit him in the face, hit him in the chest, and after he fell on the ground, kicked him in the face.

A couple who was walking through the food court observed the incident. Carissa Bryant testified she heard someone yell, "you just hit my daughter," and this caused her to look in the direction where she saw the incident. She stated:

And the only thing that I really remember after that is the—the gentleman in the red leather jacket was pursuing the younger gentleman, and he—the younger gentleman kept backing up, and the older gentleman was, you know, pursuing him and had his arms up trying to punch him. He pushed him maybe two or three times, and then the younger gentleman went to the ground, and then the older gentleman proceeded to kick him the head.

She identified the defendant in the courtroom as the older gentleman. Carissa stated she never saw Christopher throw any sort of punch, stating he was "backing up, trying to get away from him. He didn't want to fight."

Justin Bryant testified, "the Defendant was striking the young man in the head, and the young man fell on the ground, and the Defendant continued to—to strike him in the head with his boots." When asked if he thought Christopher was attempting to strike Wailand, Justin replied,

I didn't see him attempt to strike. I saw him try to back up and come up into a defensive position (indicating), and then once he was on the ground, he was in the fetal position trying to defend his face again too, and the gentleman kept striking him.

Justin is a law enforcement official in Illinois.

The district court denied Wailand's motion for directed verdict. Ashley testified for the defense. She testified Christopher threw the first punch at Wailand and he punched her infant daughter. She testified she punched Christopher in the head, and her ring caught his ear, causing it to bleed.

Wailand stated that when Christopher started to take a swing at him, he hit Ashley's infant daughter, and Wailand, "lost it." When asked if his attack on Christopher was caused by Christopher striking the infant, Wailand responded it was "a combination of things, but yes, truthfully, that's—that's what set me off." He also testified he did not believe Christopher "knowingly" presented a danger to the infant. Wailand admitted he kicked Christopher after he was on the ground.

The jury was instructed on the defense of justification. The jury returned a verdict finding Wailand guilty of assault resulting in bodily injury. The district court denied Wailand's motion for a new trial. He was sentenced to 120 days in jail with all but thirty days suspended. At the sentencing hearing the district court stated Wailand had used an inadvertent touching of the infant "as a pretext to beat the crap out of the victim." Wailand now appeals his conviction, claiming the State did not sufficiently rebut his claim of justification for his actions against Christopher.

II. Standard of Review.

We will review a challenge to the sufficiency of the evidence for the correction of errors at law. *State v. Serrato*, 787 N.W.2d 462, 465 (Iowa 2010). The fact-finder's verdict will be upheld if it is supported by substantial evidence. *State v. Henderson*, 696 N.W.2d 5, 7 (Iowa 2005). Substantial evidence means

evidence that could convince a rational fact-finder that the defendant is guilty beyond a reasonable doubt. *State v. Heuser*, 661 N.W.2d 157, 165-66 (Iowa 2003). In reviewing challenges to the sufficiency of the evidence, we give consideration to all the evidence, not just that supporting the verdict, and view the evidence in the light most favorable to the State. *State v. Lambert*, 612 N.W.2d 810, 813 (Iowa 2000).

III. Justification.

The defense of justification is based on section 704.3, which 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.” When a defendant raises a defense of justification, the State has the burden to prove beyond a reasonable doubt that the alleged justification does not exist. *State v. Rubino*, 602 N.W.2d 558, 565 (Iowa 1999).

The State may establish a lack of justification by any one of the following factors:

- (1) The defendant was the provocator in initiating or continuing the difficulty which resulted in the [assault]; or
- (2) the defendant did not believe he was in imminent danger of death or injury and the use of force was not necessary to save him; or
- (3) he did not have reasonable grounds for such belief; or
- (4) the force used was unreasonable.

State v. Mayes, 286 N.W.2d 387, 392-93 (Iowa 1979). The State may also show an alternative course of action was open to the defendant. *State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993).

We determine there is sufficient evidence in the record to support the jury's finding that the State proved beyond a reasonable doubt Wailand lacked justification for his assault on Christopher. Trudy and Christopher both testified that Wailand initiated the conflict. Also, it is clear that an alternative course of action was available in that Wailand could have walked away from Christopher. Wailand's own testimony shows he did not believe Christopher presented a threat to Ashley's infant daughter. Even if Wailand did believe Christopher presented a threat, such a belief would not be reasonable based on the evidence. There was no evidence showing any reason why Christopher would have purposely hit the infant; it is clear from all evidence that the contact was accidental. Furthermore, the force used by Wailand was unreasonable—Wailand admitted he continued to kick Christopher in the head as he lay on the floor.

“The jury is free to believe or disbelieve any testimony as it chooses and to give weight to the evidence as in its judgment such evidence should receive. In fact, the very function of the jury is to sort out the evidence and ‘place credibility where it belongs.’” *Id.* (citations omitted). The jury found the testimony of Wailand and Ashley on the events in question to not be credible. The testimony of Trudy and Christopher was supported by that of two unbiased witnesses, Carissa and Justin Bryant. The jury could choose not to believe Wailand's claim he acted in defense of his infant granddaughter.

We affirm Wailand's conviction for assault causing bodily injury.

AFFIRMED.