IN THE COURT OF APPEALS OF IOWA

No. 3-254 / 12-0975
Filed April 24, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DAETON GULDBERG,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Nathan A. Callahan, District Associate Judge.

Daeton Guldberg appeals from his conviction of domestic abuse assault causing injury. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Tyler J. Buller, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Peter Blink, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Potterfield and Doyle, JJ.

POTTERFIELD, J.

Daeton Guldberg appeals from his conviction after a jury trial of domestic abuse assault causing injury. He contends there was insufficient evidence to sustain the conviction; the court erred in allowing testimony from the complaining witness that the defendant had hit her before; and trial counsel was ineffective in failing to request a justification jury instruction that one need not take an alternate course of action in one's own home.

I. Sufficiency of the Evidence.

Guldberg does not deny that he and Diana Watson resided together and that he choked her on September 23, 2011. He argues here, as he did at trial, that his actions were justified because Watson struck him with a bat.[1]

When a defendant raises justification as a defense, the State is required to prove the absence of justification. *State v*. *Shanahan*, 712 N.W.2d 121, 134 (Iowa 2006).

We review sufficiency-of-the-evidence claims for a correction of errors at law. *State v*. *Sanford*, 814 N.W.2d 611, 615 (Iowa 2012). In assessing the sufficiency of the evidence, we are obliged to view the record in a light most favorable to the State. *State v*. *Johnson*, 770 N.W.2d 814, 819 (Iowa 2009).

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[1] The State argues the defendant's sufficiency claim is not properly preserved. We have reviewed the transcript of the defendant's "motion for directed verdict" and, though a misnomer—our rules of criminal procedure allow a motion for judgment of acquittal, not directed verdict, *see* Iowa R. Crim. P. 2.19(8); *State v*. *Deets*, 195 N.W.2d 118, 123 (Iowa 1972) (holding that a grant of a motion for directed verdict "is tantamount to a judgment of acquittal in a criminal action") *overruled on other grounds by State v*. *Walker*, 574 N.W.2d 280, 283 (Iowa 1998)—we find the defendant sufficiently raised the issue that the State had failed to prove his actions were not justified. At trial, defense counsel acknowledged the State had presented sufficient evidence of assault, but "my client has alleged justification." The State responded, arguing the evidence showed the defendant's choking of Watson was not reasonable.

> "[W]e will uphold a verdict if substantial record evidence supports it." We will consider all the evidence presented, not just the inculpatory evidence. Evidence is considered substantial if, when viewed in the light most favorable to the State, it can convince a rational jury that the defendant is guilty beyond a reasonable doubt.

Sanford, 814 N.W.2d at 615 (citations omitted).

Whether the defendant acted without justification was a fact question for the jury to decide. *See* Iowa R. Crim. P. 2.21(2); *State v*. *Badgett*, 167 N.W.2d 680, 683 (Iowa 1969). "[T]he jury is at liberty to believe or disbelieve the testimony of witnesses as it chooses and give such weight to the evidence as in its judgment the evidence was entitled to receive." *State v*. *Blair*, 347 N.W.2d 416, 420 (Iowa 1984). "The very function of the jury is to sort out the evidence presented and place credibility where it belongs." *Id.*

The jury was instructed in Jury Instruction No. 11 that the State could meet its burden of proving the defendant acted without justification by establishing *any one* of the following: "[t]he defendant started or continued the incident which resulted in injury"; "[a]n alternative course of action was available to the defendant"; "[t]he defendant did not believe he was in imminent danger of death or injury and the use of force was not necessary to save himself"; "[t]he defendant did not have reasonable grounds for the belief"; or "[t]he force used by the defendant was unreasonable." Viewing the evidence in the light most favorable to upholding the conviction, the jury could reasonably find that Guldberg was not justified in choking Watson for *any* of the reasons stated.

Watson testified she went to the bedroom to retrieve her cell phone and Guldberg followed her and "was aggressive." She stated she grabbed a bat that she kept in the bedroom as she felt threatened because "me and him have been

into arguments and he's hit me before." Watson stated she jumped on the bed and Guldberg lunged at her. From this testimony, the jury could find Guldberg did not believe he was in imminent danger or the use of force was not necessary to save himself; or, if he did so believe, his belief was unreasonable. We conclude there was sufficient evidence that Guldberg's actions were without justification and, thus, there is substantial evidence to sustain the conviction.

II. Prior Acts.

Guldberg argues the district court erred in allowing prior bad acts evidence. The State had moved in limine for a ruling as to the admissibility of the defendant's prior assaultive behavior toward the complaining witness, as well as toward another. The district court discussed the court's reasoning of *State v. Taylor*, 689 N.W.2d 116 (Iowa 2004), stating:

> There must be some purpose of admitting prior bad acts that establishes some issue other than propensity . . . .
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> . . . .
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> In *Taylor*, the defendant was charged with first degree burglary, as well as domestic abuse causing bodily injury and according to the facts in that case, the defendant's intent was disputed at the trial. It was a hotly contested issue as is characterized in that opinion.
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> In this case, Mr. Guldberg has raised self-defense. A justification defense admits the offense. So when you say, yeah, I did it but I'm justified, the fact that the offense actually occurred is not a hotly contested issue and at this point, I think that the evidence in regards to intent or motive is not so necessary for the State in this particular case. . . .
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> . . . I am more inclined to consider the victim's testimony in regards to her fear of the defendant and why she picked up a baseball bat as a rationale for her being in fear. . . . And I am inclined to let the State go into that issue briefly for the purpose of explaining why she is using the bat. I don't want a lot of details about "look what's happened to me in the past" over and over again because that goes to sympathy and that goes to convicting somebody on evidence that's not in the trial.

At trial, Watson testified that when Guldberg followed her into the bedroom, "I felt threatened so I grabbed my bat." The prosecutor then asked Watson, "Why did you feel threatened and need to grab the bat at that moment?" Watson responded, "Um, me and him have been into arguments and he's hit me before."[2]

We review the court's evidentiary ruling for an abuse of discretion. *Taylor*, 689 N.W.2d at 124.

The district court analyzed the relevance and probative value of prior bad acts. The court found evidence of the defendant's prior assault on the complaining witness relevant to the witness's claimed fear of the defendant and limited such testimony to minimize unfair prejudice.[3] Even if we would weigh differently the relevance of Watson's fear against the possible prejudice of that evidence, we do conclude that the defense of justification placed the defendant's intent in issue. Watson's brief testimony that "he's hit me before" was relevant on the issue of Guldberg's intent in choking her on this occasion.

In *Taylor*, 689 N.W.2d at 125, our supreme court noted that in a domestic abuse assault charge where defendant claimed he pulled a woman from the van because "he only wanted to talk to his wife," evidence of prior conduct was relevant on the issue of the defendant's intent because "the State was required to

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[2] The State again argues that the defendant's claim of error was not preserved because no objection was made at the time of the testimony. However, we conclude the district court's ruling in limine sufficiently resolved the issue that no further objection was necessary at trial. *See State v. Alberts*, 722 N.W.2d 402, 406-07 (Iowa 2006).

[3] A victim's fear of a defendant has been found to be relevant to the issue of identity and malice aforethought in murder trials. *See State v. Richards*, 809 N.W.2d 80, 93-94 (Iowa 2012) (discussing prior acts of violence as relevant to explain victim's fear in a murder trial in which identity was an issue). In *Richards*, our supreme court discussed the significance of limiting the prior acts to a time close to the event resulting in the charge.

prove the defendant intended to cause pain and injury to his wife or to have physical contact that would be insulting or offensive to her when he lifted her out of the van." In addition,

> We also think there is a logical connection between a defendant's intent at the time of a crime, when the crime involves a person to whom he has an emotional attachment, and how the defendant has reacted to disappointment or anger directed at that person in the past, including acts of violence, rage, and physical control. In other words, the defendant's prior conduct directed to the victim of a crime, whether loving or violent, reveals the emotional relationship between the defendant and the victim and is highly probative of the defendant's probable motivation and intent in subsequent situations. *See State v. Laible*, 594 N.W.2d 328, 335 (S.D. 1999) ("When an accused had a close relationship with the victim, prior aggression, threats or abusive treatment of the same victim by the same perpetrator are admissible when offered on relevant issues under Rule 404(b).").

Id. at 125. Although the district court here did not limit Watson's testimony to a particular event, or a particular date, it did limit the scope of the testimony to prevent prejudice. We find no abuse of discretion.

III. Ineffective Assistance of Counsel.

Guldberg finally contends trial counsel was ineffective in failing to request Iowa Criminal Jury Instruction 400.10, which explains:

> Concerning element number [2] of Instruction No. [11[4]], if a defendant is confronted with the use of unlawful force against him, he is required to avoid the confrontation by seeking an alternative course of action before he is justified in repelling the force used against him. However, there is an exception.
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> If the defendant was in his own home which he was legally occupying and the alternative course of action was such that he reasonably believed he had to retreat or leave his position to avoid the confrontation, then he was not required to do so and he could repel force with reasonable force.
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> If the alternative course of action involved a risk to his life or safety, and he reasonably believed that, then he was not required

[4] *See* above at page 3.

> to take or use the alternative course of action to avoid the confrontation, and he could repel the force with reasonable force.

We must decide whether it can be determined as a matter of law that Guldberg's counsel was ineffective in failing to request this jury instruction and whether the record demonstrates Guldberg was prejudiced because of this error. *See State v. Fountain*, 786 N.W.2d 260, 263 (Iowa 2010). We can reject the ineffectiveness claim if the defendant fails to establish prejudice. *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001) ("If the claim lacks prejudice, it can be decided on that ground alone without deciding whether the attorney performed deficiently."). "[P]rejudice exists when 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* at 145 (citation omitted).

The record is inadequate to resolve the issue of counsel's strategy for failing to request the instruction, and it does not contain specifics about the lease of the apartment and whether it was a shared residence. We agree with the State that those details could be relevant to whether "either the defendant or the victim in a domestic abuse assault has the duty to take an alternative course of actions when the crime occurs in a shared dwelling." Nor can we say as a matter of law that Guldberg was not prejudiced by the omission of this relevant jury instruction. The jury was properly instructed as to the elements of the offense and as to the State's burden to prove that the defendant's actions were without justification. The jury was also instructed that if the State proved any one of five elements, including an alternative course of action, the defendant was not justified. If the jury was informed that Guldberg need not have taken an

alternative course of action if in his own home, it is possible a different result would have been reached. The jury could have found that the other four elements necessary for the State to prove lack of justification did not apply in light of Watson's initiation of physical contact and her arming herself with a bat.

We affirm Guldberg's conviction because there is substantial evidence his choking Watson was without justification, and the district court did not abuse its discretion in allowing Watson to briefly state Guldberg had hit her before. We preserve the issue of ineffective assistance of counsel for further development in potential postconviction relief proceedings.

AFFIRMED.