

IN THE COURT OF APPEALS OF IOWA

No. 3-398 / 12-0554
Filed July 10, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

STEWART W. DRAKE,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Carla T. Schemmel,
Judge.

Defendant appeals his convictions for domestic abuse assault causing
bodily injury and domestic abuse assault. **REVERSED AND REMANDED.**

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

Thomas J. Miller, Attorney General, Tyler J. Buller, Assistant Attorney
General, John P. Sarcone, County Attorney, and Mike Salvner, Assistant County
Attorney, for appellee.

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

EISENHAUER, C.J.

Stewart Drake appeals from his convictions for domestic abuse assault causing bodily injury and domestic abuse assault.¹ He argues trial counsel rendered ineffective assistance in failing to object to the general intent instruction. We reverse and remand.²

I. Background Facts and Proceedings.

In August 2010, Melissa moved from Omaha to live with Drake in Des Moines. In April 2011, after a dispute, she moved into an apartment. In June 2011, Drake and Melissa reconciled, and Melissa moved back into Drake's house. At a June 24 party at the house, both Melissa and Drake were drinking. Melissa became angry and jealous after talking with a neighbor. Around 10:00 p.m., Melissa confronted Drake, they argued, and Melissa was injured.

Melissa went to her apartment, and her former brother-in-law, a state trooper, arrived. He testified Melissa was emotional and the "first thing I noticed was a black eye; her left eye . . . [a]lso dried blood on the side of her neck from her ear, kind of near her chest area." After talking with Melissa, the trooper called the police and, early in the morning of June 25, he drove her to the hospital.

At the hospital, Melissa told two nurses and the treating doctor she needed treatment due to domestic abuse. The doctor noted: "Female was

¹ In December 2012, the Iowa Supreme Court granted Drake's application for discretionary review of his simple misdemeanor conviction.

² Drake also argues the court imposed an illegal sentence by failing to merge the offenses at sentencing. Based on our resolution of his ineffective-assistance claim, we need not address this issue.

assaulted by her boyfriend. Patient states . . . boyfriend assaulted her, knocked her down, held arm against throat, trying to choke her, and hit her left eye.”

Police Officer Leo arrived at the emergency room and spoke with Melissa. Leo testified she was “visibly shaken up, scared, [and] crying.” Leo observed an eye injury and dried blood down the side of her face. Because Drake was a police officer, Leo contacted a supervisor and Captain Hoffman came to the hospital. Hoffman talked with an “emotional” Melissa and observed injuries to her eye, dried blood down the side of her face, and blood in her ear.

Leo and Hoffman drove to Drake’s residence and woke him. Leo testified they told Drake their reason for being there and Drake did not appear surprised. When questioned, Drake originally stated, “No, there was nothing at all.” However, upon continued questioning, Drake changed his story and admitted to a verbal argument but stated “it never got physical.” Hoffman could smell alcohol on Drake, and he observed suspected blood spots on the living room carpet. Leo opined Drake was intoxicated. Neither Hoffman nor Leo observed any marks on Drake. Leo asked Drake to show his chest. Drake pulled out his shirt, looked down, and reported, “No, nothing.” Drake did not allow Leo to look at his chest.

When Melissa was released from the hospital, the trooper drove her to his house. Later, they drove to Drake’s house to meet a police officer and collect Melissa’s possessions. On June 27, 2011, Officer Keller met with Melissa and had her write a description of the incident. Melissa wrote:

We were sitting on the couch arguing. He got mad and brought his forearm across my throat. We fell back on the couch. I was struggling to free myself. His body weight was on top of me. He

grabbed my throat, and the next thing I remember, I was shaking my head and grabbing his shirt. I scratched his chest to free myself. My left cheek was swollen and bruising, and there was blood running down the left side of my face.

Shortly thereafter, Melissa started preparing to leave the state. On July 6, Melissa told Keller her memory was starting to get better. At trial she testified:

Q. And in the conversation you told [Keller], "I remember his hands around my neck." Do you remember telling [Keller] that?

A. Yes.

Q. Do you remember saying, "I also remember it was his forearm or elbow that hit my face, my left eye, and cheek"?

A. Yes.

Q. And when you told [Keller] that you were being pressured from mutual friends, do you remember what Detective Keller told you to do? A. To have them call [Keller and to tell the truth].

On July 7, Melissa filled out a victim impact statement and stated Drake "needed to be held accountable for his actions." She hoped "he would realize the man he had become due to alcohol and he would need to get help." On July 8, Melissa filled out an application for State of Iowa crime victim registration and listed the crime as domestic assault. On July 25, Drake was charged with domestic abuse assault with intent to inflict serious injury and domestic abuse assault causing bodily injury. See Iowa Code §§ 708.2A(2)(b), (c) (2009). At some point, Melissa moved to Kansas.

On September 8, 2011, Melissa wrote to the police, the county attorney, and Drake's defense attorney. She informed them the incident didn't happen "the way I said." In November, Melissa filed a handwritten statement seeking rescission of the no-contact order: "There was no domestic abuse incident that took place. I have moved out of state and I don't believe there is [any] reason

the no contact order should remain in place. I was not struck by my boyfriend.” After a hearing, the court declined to rescind the order.

At the January 2012 trial, Melissa testified Drake did not strike her and Drake did not choke her. Rather, she was injured when she pulled on Drake’s shirt and “we lost our balance” and fell on a couch with wood in its arm. Drake fell on top of her. Drake “tried to break his fall with his arm, and that crossed my chest.” Melissa explained her anger at Drake caused her to fabricate her earlier statements. She also explained she had not been honest in the past because she was upset about the way Drake was treating her and his involvement with another woman. Additionally, Melissa testified the victim services information she provided was inaccurate because she was moving out of town and “just didn’t care.”

The court’s instructions to the jury defined both specific intent and general intent. As detailed below, defense counsel objected several times during the jury instruction conference. However, counsel did not object to the court’s including the instruction defining general intent. This failure to object is the grounds for Drake’s ineffective-assistance claim.

The marshaling instructions for both counts followed the uniform instructions and contain three identical elements:

1. On or about the 24th day of June, 2011, [Drake] did an act which was meant to cause pain or injury or result in physical contact which was insulting or offensive or place [Melissa] in fear of immediate physical contact which would have been painful, injurious, insulting or offensive to [Melissa].
2. [Drake] had the apparent ability to do the act.
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4. The act occurred between . . . household members who resided together at the time of the incident or persons who have

been . . . household members residing together within the past year

On Count I (domestic abuse assault with intent to inflict serious injury), the third element stated: “3. At that time [Drake] intended to cause a serious injury to [Melissa].” See ISBA Uniform Criminal Jury Instruction No. 830.4. During the instruction conference, defense counsel objected to element 3 and requested the court add the word “specifically” in front of the word “intended.”³ Alternatively, defense counsel argued:

I think if . . . there’s an instruction somewhere that says every time I think or intended to do something must be specifically, I would agree with that, but I don’t see that. So when you go back to specific intent, it defines specific intent. It doesn’t say what crimes you need specific intent for It should be in bodily injury also, because I believe there’s specific intent required in bodily injury [Count II]. . . .

Prosecutor: Judge, I absolutely personally believe that specific intent is required for both. That’s the reason why we’ve only included the specific intent instruction.

The court overruled the objection.

On Count II (domestic abuse assault causing bodily injury) the third element stated: “3. “[Drake] caused a ‘bodily injury.’” See ISBA Uniform Criminal Jury Instruction No. 830.2. During the instruction conference, defense counsel objected to element 3: “It doesn’t say that he specifically intended to cause bodily injury.” The prosecutor responded:

I’m allowed to treat these as general intent crimes. I don’t trust the court always sees it that way, and, therefore, I don’t ask for the general intent instruction. There is no requirement under domestic abuse assault causing bodily injury that the defendant

³ On appeal, Drake’s counsel now states element three of Count I is the “only portion of the marshaling instructions which clearly set out the correct specific intent requirement With this clear instruction, the jury did not find Drake guilty of the aggravated charge.”

intended to cause a bodily injury. That [is] not an element the State must prove.

I am actually showing a heavier burden on my charges by asking for only [the specific intent] instruction. Again, because I believe that's what is clear for the jury. I believe when it's saying you have to have general intent for that one, specific intent for that one, it gets confusing.

The court overruled defense counsel's objection and followed the uniform instruction's language.

During deliberations, a jury note asked: "In point 1 of both counts does the word 'meant' imply it was an intentional act?" and "Does the word 'meant' apply to every option or just 'to cause pain or injury'?" After discussion with counsel, the court informed the jury: "You must make your decision based on the evidence presented at trial and the instructions you have been given. Please re-read the instructions and use the instructions as a whole to reach your decision."

On Count I, the jury found Drake guilty of the lesser-included offense of domestic abuse assault.⁴ On Count II, the jury found Drake guilty of domestic abuse assault causing bodily injury. Drake now appeals.

II. Scope and Standards of Review.

Normally, failure to make a timely objection to jury instructions waives error on direct appeal. *State v. Taggart*, 430 N.W.2d 423, 425 (Iowa 1988). Drake, however, argues counsel's failure to object to the submission of the general intent instruction constitutes ineffective assistance. Ineffective-assistance-of-counsel claims are an exception to this error-preservation rule.

⁴ Count I stated, if "the State has proved only elements 1, 2 and 4, [Drake] is guilty of domestic abuse assault." See ISBA Uniform Criminal Jury Instruction No. 830.1.

State v. Ondayog, 722 N.W.2d 778, 784 (Iowa 2006). Drake, therefore, may raise this claim on direct appeal and we review de novo. *Id.*

III. Ineffective Assistance of Counsel—Jury Instructions.

To establish a claim of ineffective assistance of counsel, Drake must prove by a preponderance of the evidence: (1) trial counsel failed to perform an essential duty and (2) prejudice resulted from this failure. See *State v. Clay*, 824 N.W.2d 488, 495 (Iowa 2012). The claim fails if Drake is unable to prove either element of this test. See *id.* Although we normally preserve ineffective assistance claims for postconviction relief proceedings to allow for a full development of the facts surrounding the attorney's conduct, *State v. Atley*, 564 N.W.2d 817, 833 (Iowa 1997), we will resolve the claims on direct appeal when the record is adequate. *State v. Arne*, 579 N.W.2d 326, 329 (Iowa 1998). We find the record is adequate to address Drake's claims.

The jury instructions defined the terms "general intent" and "specific intent." Drake argues counsel was ineffective in not objecting "to the submission of the general intent instruction when all charged crimes required proof of specific intent" because "inclusion of the general intent instruction reduced the State's burden of proof required to convict." See *State v. Fountain*, 786 N.W.2d 260, 267 (Iowa 2010) (noting "specific intent is a higher burden for the State to prove"). Drake claims the jury's act of sending out a note with questions indicates the jury was confused and defense counsel was ineffective and missed an opportunity to clarify the specific intent element by not objecting to the court's response to the jury.

This case presents another example of the conundrum concerning the intent requirement for assault crimes. *State v. Murray*, 796 N.W.2d 907, 909 (Iowa 2011) (noting “the type of intent required to sustain an assault conviction has been the subject of much debate recently”); *State v. Taylor*, 689 N.W.2d 116, 132 (Iowa 2004) (declining to address intent required for domestic abuse assault because “regardless of whether assault is a specific intent or general intent crime, the State must prove . . . 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”).

General intent is “the intention to make the bodily movement that constitutes the act” required for the crime, “while specific intent requires an act calculated to produce a result” forbidden by the law. *Fountain*, 786 N.W.2d at 264.

In 2001, the Iowa Supreme Court overruled precedent and held the crime of assault includes a specific intent element. *State v. Heard*, 636 N.W.2d 227, 231 (Iowa 2001). The *Heard* court ruled specific intent is required because the statute requires “the act constituting assault [to] be done with the intent to make physical contact that is insulting or offensive to another.” *Fountain*, 786 N.W.2d at 264. After *Heard*, the Iowa legislature amended the statute to introduce the statutory definition of assault with the statement: “An assault as defined in this section is a general intent crime.” See Iowa Code § 708.1 (2003). Subsequently, in *State v. Bedard*, 668 N.W.2d 598, 601 (Iowa 2003), the court concluded the “general intent” amendment “did not alter the substantive content of the statute as it pertains to the elements of the crime. The intent elements discussed in

Heard . . . continue to be matters that the State must prove by evidence beyond a reasonable doubt.”

In 2006, the State asked the court to resolve a sufficiency-of-evidence issue under the standard of the assault statute only requiring “a general intent element.” *State v. Keeton*, 710 N.W.2d 531, 534 (Iowa 2006). The court ruled the issue presented “can be decided without considering whether the statutory language used to define the crime of assault requires a specific or general intent.” *Id.* at 533. Noting the two labels—specific and general intent—were difficult to apply and emphasizing the need to focus on the elements of the crime involved, the court held the State must demonstrate not only that the defendant intended to make physical contact, but that the defendant intended the physical contact to be insulting or offensive. *Id.*; see also *Wyatt v. Iowa Dep’t. of Human Servs.*, 744 N.W.2d 89, 94-95 (Iowa 2008) (applying *Bedard* and *Keeton* and ruling nurse who did not intend to harm or offensively contact patient did not “have the intent necessary” to assault patient).

In 2011, the Iowa Supreme Court again discussed the interplay between the legislature’s “general intent” amendment and the court’s continuing recognition of a specific intent element. *Fountain*, 786 N.W.2d at 265. The court ruled “the trial court erred in failing to instruct on specific intent because the crime of assault includes a specific intent element.” *Id.* The court explained:

The elements of assault under Iowa Code section 708.1 have not changed since our decision in *Heard* 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. Therefore, we adhere to our prior decisions

holding that the 2002 amendment “did not alter the substantive content of the statute.”

Our conclusion that assault includes an element of specific intent is not inconsistent with the legislature’s action in amending the statute. As we discussed, the legislature did not change the elements of an assault; it merely designated assault as a general intent crime. In criminal law, the designation of an offense as a general intent crime may carry with it certain consequences. Although we do not decide the effect or constitutionality of this amendment to the assault statute, we believe the amendment was simply an attempt to prevent a defendant charged with assault from relying on the defenses of intoxication and diminished capacity.

Id.

Turning to the facts of this case, no one disputed all the crimes charged are specific intent crimes and, as detailed above, the prosecutor only requested a specific intent instruction. The court instructed the jury on the definition of specific intent and, without objection, also instructed on the definition of general intent. The instructions as a whole provided no guidance to the jury as to how the specific intent instruction *or* the general intent instruction applied to the elements in the marshaling instructions. The resultant jury confusion is illustrated by the jury’s note requesting further clarification.⁵ As recognized in *Keeton*, “[s]pecific intent and general intent have been notoriously difficult . . . to define and apply.” 710 N.W.2d at 533 (citations omitted). Despite this notorious difficulty, the jury received no guidance, even after questioning, in this difficult arena. Under these circumstances, where the instructions as a whole allowed

⁵ We do not believe the circumstances of this case fall within the *Fountain*, 786 N.W.2d at 267, language:

If the assault was alleged to be incidental to the sexual encounter a specific intent instruction may have aided Fountain's defense. On the other hand, if an assault separate from the sex was alleged and the defense was simply that it did not occur, the distinction between a general intent instruction and a specific intent instruction may not have aided [defendant]. If the defense strategy is to deny that any assaultive contact occurred, the individual elements of assault become unimportant.

the jury to reach guilty verdicts on the specific intent elements of assault based upon a finding of general intent, defense counsel breached an essential duty in failing to object to the general intent instruction.

We next address the prejudice prong of Drake's ineffective-assistance claim. He must demonstrate "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." See *Strickland v. Washington*, 466 U.S. 668, 694 (1984). Where the evidence of guilt is overwhelming, we will find no prejudice. See *id.* at 696; *State v. Carey*, 709 N.W.2d 547, 559 (Iowa 2006) ("The most important factor under the test for prejudice is the strength of the State's case.").

Prior to trial and during trial, the alleged victim recanted her earlier statements. Therefore, the State's case was not particularly strong. Additionally, the jury was confused as to the applicable standard of intent and the instructions as a whole allowed the jury to render a guilty verdict using the general intent standard. Our confidence in the outcome of this case is undermined and Drake has been prejudiced. See *State v. Bowman*, 710 N.W.2d 200, 207-08 (Iowa 2006).

In conclusion, Drake established his ineffective-assistance-of-counsel claim and is entitled to a new trial.

REVERSED AND REMANDED.