IN THE COURT OF APPEALS OF IOWA

No. 6-612 / 05-1387
Filed January 18, 2007

STATE OF IOWA,
Plaintiff-Appellee/Cross-Appellant,

vs.

DAVID MICHAEL SMITH,
Defendant-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Black Hawk County, K.D. Briner, Judge.

David Smith appeals his judgment and sentences for willful injury, domestic abuse assault while using or displaying a dangerous weapon, and domestic abuse assault causing bodily injury. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Theresa R. Wilson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Mary E. Tabor, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Linda Myers, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Vaitheswaran, J., and Robinson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9208 (2005).

VAITHESWARAN, J.

A jury found David Michael Smith guilty of willful injury, domestic abuse assault while using or displaying a dangerous weapon, and domestic abuse assault causing bodily injury. Iowa Code §§ 708.4(2), 708.2A(2)(c), 708.2A(2)(b) (2003). The jury found Smith not guilty of going armed with intent. Iowa Code § 708.8. On appeal, Smith challenges an evidentiary ruling and the sufficiency-of-the-evidence to support the jury's findings of guilt. He also raises several ineffective-assistance-of-counsel claims. The State cross-appeals from the judgment of acquittal on the "going armed with intent" count. We affirm on the appeal and cross-appeal.

I. Background Facts and Proceedings

Smith and Crystal West lived together as "boyfriend and girlfriend." Following a party, Smith got angry at something West said and, according to West, told her he would "bust [her] mother f'ing head" if she lied to him. West testified that she believed the threat because Smith had slapped her approximately two weeks earlier.

When West and Smith arrived home, West went inside, called her sister to pick her up, and grabbed a handgun. She was about to leave, when Smith came into the house and told her to go upstairs. He then hit West on the side of her head and charged her. West countered by hitting Smith on the head with the butt of the handgun. When Smith saw the gun, he said, "Oh, bitch, you got a gun. You got a gun. I'm going to take this mother fucker and kill you with it." He charged at West again, knocking her to the ground. Next, he sat on top of her

and bit her near her right eye. At this point, West released the handgun and Smith began hitting her with it. When Smith eventually got off West, she ran out, called 911, and flagged down a passing driver, who gave her a ride to the police station. West was later treated for her injuries.

Prior to trial, Smith filed a motion in limine seeking to exclude evidence of the prior assault. The district court initially sustained the motion but later reconsidered, concluding that Smith's trial strategy and his theory of self-defense made it inevitable that the prior slapping evidence would be introduced.

During trial, the State filed an amended trial information seeking an enhancement based on Smith's status as an habitual offender. After the jury returned its findings of guilt, Smith admitted his prior felony convictions and was sentenced.

II. Evidence of Prior Bad Act

As noted, West testified that Smith slapped her two weeks earlier. On cross-examination, West said she told police about the slap, but nothing ever came of it. Smith asserts this testimony was irrelevant and unfairly prejudicial. Our review of this issue is for an abuse of discretion. *State v. Taylor*, 689 N.W.2d 116, 124 (Iowa 2004).

Under Iowa Rule of Evidence 5.404(*b*), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith." The evidence may, however, be admissible for other purposes set forth in the rule. Iowa R. Evid. 5.404(*b*).

As a preliminary matter, the evidence must be relevant. Iowa R. Evid. 5.401 (defining relevant evidence as evidence that has a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"); *State v. Sullivan*, 679 N.W.2d 19, 24 (Iowa 2004). Smith argues the evidence was irrelevant to any issue in the case. The State responds that this question was not preserved. We disagree, as trial counsel specifically mentioned relevance in arguing for a ruling excluding the evidence. Turning to the merits, our highest court has found similar "bad act" evidence relevant to a charge of assault, reasoning as follows:

> [T]here 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.

Taylor, 689 N.W.2d at 125. Based on this rationale, we agree with the State that the evidence of Smith's prior slapping of West was relevant.

We move to the next question: whether the probative value of the evidence was substantially outweighed by its unfair prejudice. *Id.* at 129. On this question, we note that the references to Smith's slapping of West were brief, the district court provided the jury with a limiting instruction, and the evidence of the prior bad act was far less inflammatory than the evidence of the acts with which Smith was charged.

Finally, we agree with the State that West's testimony satisfied the "clear proof" requirement for admitting "bad acts" evidence. *Id.* at 130 ("In assessing whether there is clear proof of prior misconduct, it is not required that the prior act be established beyond a reasonable doubt, nor is corroboration necessary.").

We conclude the district court did not abuse its discretion in admitting the "prior bad act" evidence.

III. Sufficiency of the Evidence

In his pro se brief, Smith argues there was insufficient evidence to support findings of guilt on the counts of willful injury, domestic abuse assault with a dangerous weapon, or domestic abuse assault causing bodily injury. The State counters that Smith failed to preserve error. We agree with the State.

"To preserve error on a claim of insufficient evidence for appellate review in a criminal case, the defendant must make a motion for judgment of acquittal at trial that identifies the specific grounds raised on appeal." *State v. Truesdell*, 679 N.W.2d 611, 615 (Iowa 2004). Smith's trial counsel only moved for judgment of acquittal on the "going armed with intent" charge. Therefore, error was not preserved.

IV. Ineffective Assistance of Counsel Claims

Smith claims trial counsel was ineffective in failing to: (A) object to testimony concerning the existence of a no-contact order; (B) request a jury instruction regarding provocation and disproportional force; (C) object to an amended trial information charging Smith as an habitual offender; and (D) raise a defense of duress rather than self-defense. To prevail on these claims, Smith

must show (1) the failure to perform an essential duty, and (2) resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 2066, 80 L. Ed. 2d 674, 695 (1984). Our review of these claims is de novo. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006).

A. No Contact Order

During trial, the prosecutor questioned West about a letter she received from Smith. She elicited testimony that the letter was sent through a friend to circumvent a no-contact order issued against Smith. On appeal, Smith argues his trial counsel was ineffective in failing to object to "West's subsequent bad acts testimony indicating Smith had violated a no-contact order following the conduct for which he was on trial."

Smith cannot satisfy the second prong of the *Strickland* test. Brief mention was made of the no-contact order to explain why the letter was addressed to a friend rather than to West. The lion's share of West's testimony related to the acts with which Smith was charged. With respect to those acts, West testified that Smith was the aggressor throughout. First, he threatened to "bust" her head. Then, when she tried to leave the house, he prevented her from doing so. He swung her around the room, hitting her from wall to wall. He tackled West to the floor, sat on her, and bit her face. When she released the gun, he hit her in the head with it from three to twelve times. West called 911, went to the police station, and received medical treatment for her injuries. Based on this testimony, as well as testimony from the physician who treated her and an officer who saw her immediately after the incident, we conclude there is no

reasonable probability that the brief references to a no-contact order would have changed the outcome of trial.

B*. *Jury Instruction

Smith's trial counsel sought and obtained a jury instruction on justification. On appeal, Smith argues trial counsel also should have requested the uniform jury instruction on provocation and use of disproportionate force. *See* Iowa Uniform Crim. Jury Instruction 400.14. The district court would have been obligated to give the instruction only if there was substantial evidence that West "used force greatly disproportionate to the provocation and it was so great that [Smith] reasonably believed he was in imminent danger of death or injury." *Id*. There is evidence that West hit Smith with the gun in an effort to get him off her. This evidence did not create a submissible issue on the question of West's use of "disproportionate force." Therefore, counsel did not breach an essential duty in failing to seek this instruction. *See State v. Campbell*, 214 N.W.2d 195, 197 (Iowa 1974) (finding no issue of self-defense where victim had been disarmed and there was no longer any threat of harm to the defendant). *Cf. State v. Dunson*, 433 N.W.2d 676, 677-79 (Iowa 1988) (concluding disproportionate force instruction should have been given where victim was scratching or hitting the defendant and striking him with a glass vase). Additionally, for the reasons stated in Part A, we conclude there is no reasonable probability that the outcome would have changed had counsel requested this instruction.

C. Amended Trial Information

In his pro se brief, Smith argues he was never formally charged with the habitual offender enhancement and, accordingly, "could not have been reasonably expected to have prepared for the offense of Habitual Offender." He later acknowledges that the State filed an amended trial information with the habitual offender enhancement but, alternately, contends that he did not have sufficient notice to prepare because it was filed "on the day he was found guilty." In his view, trial counsel should have objected to the State's efforts to amend the trial information. We disagree.

Iowa Rule of Criminal Procedure 2.4(8)(*a*) allows the State to amend a trial information "before or during trial" to correct errors or omissions in form or substance. Such an amendment is permitted so long as (1) substantial rights of the defendant are not prejudiced, and (2) a wholly new or different offense is not charged. *State v. Berney*, 378 N.W.2d 915, 919 (Iowa 1985).

Smith cannot show that his substantial rights were prejudiced by the amendment. The amended trial information was filed after Smith rejected a plea offer. The district court discussed the rejected plea offer with Smith and specifically asked him whether he understood that "part of the deal here is that if you do not take the offer, the state will seek enhancement punishment of you as an habitual felon, if you're found guilty." Smith responded, "[y]es, I understand." Smith's trial counsel then acknowledged that the prosecutor could seek the enhancement at that late date. He stated:

> We do not have any objection to the filing of the habitual enhancement. It is my understanding that she can do so right up to

> the time of sentencing. The other side, it is not a surprise or delay on the part of [the prosecutor]. She waited until the last minute to see if there was going to be a plea agreement. She assured us of her desire to do that if he didn't accept the plea agreement . . .

Smith also cannot show that a wholly new or different offense was charged. The habitual offender statute under which Smith was charged "does not define a separate crime but merely constitutes a predicate for enhanced punishment." *Id.* *See also* Iowa Code § 902.8.

Because Smith cannot show that the district court would have disallowed the amendment to the trial information, he also cannot establish that trial counsel breached an essential duty in failing to object to the amended trial information. Therefore, this ineffective-assistance-of-counsel claim must fail.

D. Duress

Smith argues his trial counsel provided ineffective assistance by presenting a self-defense theory rather than a duress defense. Again, we disagree. The duress defense was simply inapplicable to the facts of this case. *See State v. Clay*, 220 Iowa 1191, 1202-03, 264 N.W. 77, 83 (1935) (stating duress defense presupposes that crime was committed by "a number of offenders," defendant was compelled to commit crime "by threats on the part of the offenders instantly to kill him, or to do him grievous bodily harm if he refuses," and compulsion arose "without the negligence or fault of the" defendant). Therefore, counsel was not ineffective in failing to raise it.

V. Cross-Appeal

In its cross-appeal, the State argues that the district court erred in instructing the jury on the elements of the "going armed with intent" charge. The

State concedes the jury found Smith not guilty on this count but maintains that we may still opine on the correctness of the instruction.

We recognize that our highest court has reached issues in this fashion. *See State v. McCoy*, 618 N.W.2d 324, 326 (Iowa 2000); *State v. Flack*, 251 Iowa 529, 530, 101 N.W.2d 535, 536 (1960). The court has done so even though the State could not benefit from a ruling in its favor. *McCoy*, 618 N.W.2d at 326 ("We reverse the trial court on this issue, but do not remand because the defendant has already been once put in jeopardy for this offense."). The court has explained its reason for deciding these issues as follows:

> The judgment of acquittal is final as to defendant. However, we will entertain an appeal by the state in a criminal case where it presents a legal question the determination of which will be beneficial, or a guide to trial courts in the future.

Flack, 251 Iowa at 530, 101 N.W.2d at 536.

This rationale does not apply here. The State's appeal brief states that "this case involves the application of existing legal principles to the facts herein," rendering transfer to the court of appeals appropriate. *See* Iowa R. App. P. 6.401(3)(*b*). *Cf.* Iowa R. App. P. 6.401(3)(*a*) ("Cases which involve substantial questions of enunciating or changing legal principles shall be retained."). The State further concedes that the district court's resolution of this issue was consistent with authority cited in the comment to the uniform jury instruction on this crime. The State seeks to have our court adopt a "broader reading" of the Iowa Code than currently exists. As our opinion would serve no utility to Smith or the State in this matter and would have no precedential value, we decline the State's invitation to delve into this legal issue.

VI. Disposition

We affirm Smith's judgment and sentences for willful injury as an habitual offender, domestic abuse assault while using or displaying a dangerous weapon, and domestic abuse assault causing bodily injury. We affirm the jury's finding of not guilty on the "going armed with intent" count.

AFFIRMED.

Sackett, C.J., concurs; Robinson, S.J., specially concurs.

ROBINSON, S.J. (concurring specially)

I believe the State's objections to the court's marshalling instruction for the crime of going armed with intent were too general and therefore insufficient to warrant reversal. *See State v. Hepperle*, 530 N.W.2d 735, 738 (Iowa 1995). Nevertheless, the issue merits some discussion.

Although the prosecutor objected to the court instructing the jury that the State had to prove the defendant specifically intended to shoot another person, s*ee State v. Slayton*, 417 N.W.2d 432, 434 (Iowa 1987), it merely requested the court to submit Iowa Criminal Instruction No. 800.15 (Going Armed with Intent – Elements). This request did not alert the court to the need to craft instructions which were necessary to the State's theory of the case.

Iowa Code section 708.8 (2003) provides:

> A person who goes armed with any dangerous weapon with the intent to use without justification such weapon against the person of another commits a class "D" felony.

Section 702.7 defines "dangerous weapon" as follows:

> A "*dangerous weapon*" is any instrument or device designed primarily for use in inflicting death or injury upon a human being or animal, and which is capable of inflicting death upon a human being when used in the manner for which it was designed. Additionally, any instrument or device of any sort whatsoever which is actually used in such a manner as to indicate that the defendant intends to inflict death or serious injury upon the other; and which, when so used, is capable or inflicting death upon a human being, is a dangerous weapon. Dangerous weapons include, but are not limited to, any offensive weapon, pistol, revolver, or other firearm, dagger, razor, stiletto, switchblade knife, or knife having a blade exceeding five inches in length.

The alleged "dangerous weapon" in this case was a revolver handgun. By merely asking for "uniform instructions" the State was requesting the court to

define the "instrument or device" as a dangerous weapon as a matter of law. That would not have been proper since the instrument (firearm) was used only as a bludgeoning device. Thus, under the facts of this case, the handgun was much the same as a hammer, crowbar, baseball bat, rock, etc.

Tailoring the instructions to the facts of the case, if so requested, the court then could have instructed as follows:

> I. Elements of Going Armed with Intent
>
> 1. On or about January 16, 2005, the defendant was armed with a revolver.
> 2. The revolver was a dangerous weapon as defined in Instr. No. ___.
> 3. The defendant was armed with the specific intent to use the revolver against another person.
>
> II. Definition of Dangerous Weapon
>
> A "dangerous weapon" is any sort of instrument or device which is actually used in such a way as to indicate the user intended to inflict death or serious injury, and when so used is capable of inflicting death.

By so instructing, the instrument (handgun-firearm) would be taken out of the category of dangerous weapon as a matter of law.