IN THE COURT OF APPEALS OF IOWA

No. 6-616 / 05-1545
Filed October 25, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

YOOSUF KAMAAL MOMENT,
Defendant-Appellant.

Appeal from the Iowa District Court for Dubuque County, Bruce Zager, Judge.

A defendant appeals his conviction and sentence by the district court for domestic abuse assault causing bodily injury. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Stephan J. Japuntich, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Fred H. McCaw, County Attorney, and Robert Richter, Assistant County Attorney for appellee State.

Considered by Vogel, P.J., and Miller and Eisenhauer, JJ.

VOGEL, P.J.

Yoosuf Moment appeals from the district court's judgment following a jury verdict finding him guilty of domestic abuse assault causing bodily injury (second offense), in violation of Iowa Code sections 708.2A(2)(b) and 708.2A(3)(b) (2003). He claims there is insufficient evidence to support the conviction, along with two ineffective assistance of counsel claims. We affirm.

I. Background Facts and Proceedings.

In this case the jury was presented with two versions of what happened in the early morning hours of February 2, 2005 between the defendant, Moment, and his live-in girlfriend, Toni. The two renditions came from the victim herself: one pretrial, when she reported an assault to the police, and the other at trial, when she recanted her prior story and instead claimed she had been the aggressor.

Moment and Toni lived together with their four children at the time of the incident. In the afternoon of February 2, 2005, Toni reported to the Dubuque police that Moment had assaulted her early that morning. She appeared to the two officers to be very upset and nervous as she was crying, trembling, and shaking. She reported to being afraid of defendant, fearing for her own safety and the safety of her children. Both Officers Scott Simpson and Steven Olson spoke with Toni and observed scratches on her chest, one near her left ear, and one on her neck, as well as her broken artificial fingernails. Photographs were taken of her injuries and introduced into evidence.

At trial, Toni reluctantly testified for the prosecution. Her trial version was that on February 2, 2005, she received an early morning phone call from

Moment's sister, Natasha, who needed to get away from an abusive situation. Toni brought Natasha and her children back to Toni and Moment's apartment. When they arrived, Moment was lying on the couch. Toni went into the bedroom while Moment and his sister talked about her situation. Later, Moment went into the bedroom. Toni was tired and angry with Moment for not coming home earlier that night and because Moment was intoxicated. She didn't want to hear any more about Natasha's assault, so she began yelling at him and pulling at the bedding to get him out of the apartment. Toni claimed she scratched Moment with her artificial nails when she grabbed at his arm. He then got out of bed, started yelling at Toni to leave him alone, and they began pushing each other. At one point Toni was sitting on the floor, and Moment pulled her by the hair, causing some hair loss. Toni asserted that after more arguing, name calling, and pushing, Moment, disapproving of the dress she was wearing, tore it off her and the couple engaged in sexual relations. Toni surmised at trial that she did not believe Moment intended to hurt her, but that she only went to the police because she wanted to get some mace in case the couple argued again. Moment's trial testimony was similar to Toni's.

Moment's sister, Natasha, testified at trial in his defense. Although both Moment and Toni testified that a great deal of yelling and fighting occurred that morning, Natasha claimed not to have heard anything from the next room. She also testified that she saw Toni later that morning and recalled that she didn't appear upset or mention any injuries. Although Natasha asserted that Toni told her "nothing happened," Natasha later conceded that Toni, "said she called the police because she was scared of Yoosuf."

Moment was charged by trial information with domestic abuse assault (second offense). The matter proceeded to trial on May 2 and 3, 2005, where Moment made unsuccessful motions for judgment of acquittal based upon sufficiency of the evidence. The jury returned a guilty verdict, and Moment also filed unsuccessful motions in arrest of judgment and for new trial. The district court overruled the motions, finding:

> In this case, there was a recanting victim who appears to continue in her relationship with the Defendant. While it is acknowledged that at this time she no longer endorses the version of events that she reported to the police, the testimony of the additional witnesses, and additional information provided, corroborates the original version of events. Likewise, while the photograph of the alleged victim did not readily provide evidence of injury, there was substantial other testimony which supports this conclusion. Specifically, the testimony revealed that this Defendant pulled the hair of the victim. Several of the victim's artificial nails were broken during the assault. Likewise, while the photographic evidence was not conclusive as to the scratches on the victim, the victim herself acknowledged having some scratches, and the police officers also confirmed their observations of scratches on the victim.

Moment now appeals, arguing insufficiency of the evidence and ineffective assistance of trial counsel.

II. Sufficiency of the Evidence.

We review challenges to the sufficiency of the evidence supporting a guilty verdict for correction of errors at law and will uphold a verdict if substantial record evidence supports it. *State v. Bash*, 670 N.W.2d 135, 137 (Iowa 2003). Evidence is considered substantial if, viewed in the light most favorable to the State, it can convince a rational jury that the defendant is guilty beyond a reasonable doubt. *State v. Nitcher*, 720 N.W.2d 547, 556 (Iowa 2006). "'Inherent in our standard of review of jury verdicts in criminal cases is the

recognition that the jury was free to reject certain evidence, and credit other evidence.'" *Id*. at 556 (quoting *State v. Anderson*, 517 N.W.2d 208, 211 (Iowa 1994)).

Moment argues that, in light of Toni's recantation and other testimony of the events of that morning, the evidence against him was insufficient to support a guilty verdict. We agree with the district court that there was substantial evidence in the record contradicting Toni's recantation. As our supreme court has noted, it is not unusual for a victim of alleged domestic abuse to recant his or her allegations:

> The challenge of prosecuting domestic abuse cases without the cooperation of the victim is not unique to this case. In a survey conducted by our Domestic Abuse Task Force, prosecutors reported that the majority of domestic abuse victims were uncooperative, with some victims failing to appear to testify even after having been subpoenaed.

State v. Taylor, 689 N.W.2d 116, 127 fn.5 (Iowa 2004).

Although Toni equivocated concerning the incident in her trial testimony, she admitted that Moment pushed her, pulled out some of her hair, and otherwise assaulted her that night by putting a pillow over her face. The photographic evidence and officer's testimony also support Toni's original version of events. As this boiled down to an issue of credibility largely between the victim's initial and trial testimony, each version supported with other evidence, the jury was free to accept, reject, and weigh the evidence as it saw fit. *State v. Maring*, 619 N.W.2d 393, 395 (Iowa 2000). There was substantial evidence to support the jury's verdict and we affirm on this issue.

III. Ineffective Assistance.

Ineffective-assistance-of-counsel claims are reviewed de novo. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006). In order to succeed on a claim of ineffective assistance of counsel, a defendant must prove (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Bowman v. State*, 710 N.W.2d 200, 203 (Iowa 2006). Ineffective-assistance claims are generally reserved for postconviction relief actions in order to allow full development of the facts surrounding counsel's conduct. *State v. Tate*, 710 N.W.2d 237, 240 (Iowa 2006). However, when the record is adequate, we will consider such claims on direct appeal. *State v. Leckington*, 713 N.W.2d 208, 217 (Iowa 2006).

Moment first claims that his trial counsel was ineffective for failing to make a self-defense claim or request a justification instruction to the jury. Because both he and Toni testified that Toni was the aggressor, Moment argues such a defense and jury instruction should have been requested. The State asserts that because the jury heard the testimony as to who was the aggressor, and rejected that, Moment cannot claim prejudice. In addition, the jury could observe the difference in the physical size of Moment and Toni, along with Toni's testimony that she was "tiny" compared to Moment. We agree with the State that, in light of the evidence presented, Moment does not explain how an assertion of a formal self-defense claim or submission of a justification instruction would alter the outcome of the trial, and therefore he fails to establish prejudice. *See State v. McBride*, 625 N.W.2d 372, 373 (Iowa Ct. App. 2001) (allowing issue to be decided on direct appeal if defendant fails to show either deficient performance or prejudice). We affirm on this issue.

Moment lastly asserts that his trial counsel was ineffective for failing to object on Confrontation Clause grounds to evidence of prior statements made by Toni to the police and introduced at trial. However, the United States Supreme Court has made it clear that,

> [w]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. It is therefore irrelevant that the reliability of some out-of-court statements "'cannot be replicated, even if the declarant testifies to the same matters in court.'" The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it.

Crawford v. Washington, 541 U.S. 36, 59, 124 S. Ct. 1354, 1369, 158 L.Ed.2d 177 (2004) (citations omitted).

As Toni testified at trial and was available for cross-examination on her previous statements to police, Moment fails to show a breach of duty by his trial counsel for failing to make a meritless objection. *State v. Wills*, 696 N.W.2d 20, 24 (Iowa 2005). We therefore affirm Moment's conviction and sentence.

AFFIRMED.