**IN THE COURT OF APPEALS OF IOWA**

No. 9-578 / 08-0455
Filed September 2, 2009

**STATE OF IOWA,**
Plaintiff-Appellee,

**vs.**

**JAIME MARIN,**
Defendant-Appellant.

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Appeal from the Iowa District Court for Johnson County, Douglas S. Russell, Judge.

Jaime Marin appeals from his conviction of assault causing bodily injury. **AFFIRMED.**

Clemens A. Erdahl and Mark D. Fisher of Nidey Peterson Erdahl & Tindal, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Janet M. Lyness, County Attorney, and Anne M. Lahey, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Mansfield, J., and Schechtman, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

**SCHECHTMAN, S.J.**

Jaime Marin appeals from judgment entered upon his conviction of assault causing bodily injury.

**I. Background Facts and Proceedings.**

Jaime Marin was charged with assault causing serious injury, after an incident with a fellow employee. Marin and Jose Castro were concrete laborers employed by Bud Maas Construction. Castro's first language is Spanish. Marin's employer often relied upon him to translate for Castro as Marin is bilingual. On April 16, 2007, Marin and Castro were part of a crew pouring cement for a steep driveway in Iowa City. Two versions of the incident were related at trial.

Castro, the victim, testified, via an interpreter, that Marin was about five steps up the drive from Castro yelling orders at him in Spanish, using "some words that were rude." Castro removed his glasses[1] and asked Marin to "leave me alone." Castro turned away as "the boss told me to move because they were going to pour more cement. When I turned back, all I could feel was the impact on my face."

Marin testified that earlier in the day Marin was advised by a finisher that the grade stakes for the cement forms were too high. Marin shouted to Castro to come up and recheck the forms. Marin surmised Castro "thought I was trying to give him orders" and "started giving me hand gestures and saying, in Spanish, 'You ain't my boss,' and, 'Mind your business.'"

[1] Apparently, the cement workers wore safety glasses with silver lenses.

> Q. Did he do anything besides talking to you? A. Once the argument got pretty heated . . . I was trying to get him to understand that we needed to keep moving and to quit arguing . . . I wasn't trying to degrade him, but I was trying to get him to understand, you know, we needed to do it the way we was doing it, otherwise we are not getting caught up; we are getting behind.
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> Q. But at that point was he saying you were trying to degrade him? A. I don't know. All I know is that he slammed his come-along [a long rake-like tool] down and turned his hat around and he grabbed his glasses . . . he started walking up to me and said . . . . [in Spanish], "Let's go." And then, . . . "whenever you are ready. . . ."

When Castro stepped forward, Marin punched him in the face. Marin added that "when we had gotten in an argument, I never would have hit Jose if he wouldn't have stepped forward. At that point I wasn't going to turn my back on him."

Testimony from other workers supported both versions of the confrontation, though they were unable to comprehend the verbal exchange between Castro and Marin, as it was in Spanish.

Castro was transported to a medical clinic. The examining physician observed that Castro "didn't appear to be impaired by drugs or alcohol," was alert, and was able to respond to his inquiries. Castro reported the incident to the police. Marin was charged with assault causing serious injury. Marin filed notice that he would rely upon the defense of self-defense.

The jury returned a verdict of guilty to the lesser included offense of assault causing bodily injury. Marin's motion for new trial was overruled.

Marin appeals. He asserts the trial court erred in (1) sustaining the objection to the question to Castro about the results of blood tests and (2) failing to give the place of employment instruction.

**II. Scope and Standards of Review.**

A trial court's rulings on the admissibility of evidence are discretionary. *State v. Hubka,* 480 N.W.2d 867, 868 (Iowa 1992). We reverse evidentiary rulings only when the trial court is shown to have "abused its discretion in balancing the probative force of the challenged evidence against the danger of undue prejudice or influence." *State v. Alvey,* 458 N.W.2d 850, 852 (Iowa 1990).

We review challenges to jury instructions for correction of errors at law. *State v. Reynolds*, 765 N.W.2d 283, 288 (Iowa 2009); *State v. Heemstra,* 721 N.W.2d 549, 553 (Iowa 2006). "Error in giving a jury instruction does not merit reversal unless it results in prejudice to the defendant." *State v. Fintel,* 689 N.W.2d 95, 99 (Iowa 2004).

**III. Analysis.**

*A. Drug Testing Results*. At trial, Marin's counsel asked Castro,

> Q. Were you tested for the presence of drugs and alcohol at the hospital? A. Yes.
> Q. And what were the results of those?

The State objected upon the ground of relevancy.[2] The objection was sustained.

Marin contends the trial court erred in sustaining the relevancy objection to the question posed to Castro regarding the results of the drug test performed at the medical clinic. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the

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[2] The State did not object on the basis of physician-patient privilege. *See* Iowa Code section 622.10 (2007); *State v. Henneberry,* 558 N.W.2d 708, 710 (Iowa 1997) (stating the privilege covers blood samples drawn for treatment purposes). The doctor opined that Castro did not appear under the influence, which would appear to waive the privilege, in any event.

action more probable or less probable than it would be without the evidence. *See* Iowa R. Evid. 5.401. Marin now argues that "surely evidence of drug and alcohol use by the victim at or around the time of the assault must be relevant to show that the Defendant's perception of the victim was reasonable," and that "[i]ntoxication due to drug and alcohol use is always relevant to a theory of self-defense." He provides no citation to authorities for either assertion, though the State concedes the use of drugs or alcohol may affect a victim or witness's behavior or ability to perceive an event.

There is no support in the record for Marin's implication that Castro was under the influence of any substance. The examining physician did not observe any indications of its presence or use. No one testified, including Marin, that the victim appeared under the influence of drugs or alcohol.

But most importantly, error was not preserved. Counsel did not request or make an offer of proof to elicit an answer. An offer of proof is oftentimes necessary to preserve error. *See generally State v. Schutz*, 579 N.W.2d 317, 318-19 (Iowa 1998); *State v. Harrington,* 349 N.W.2d 758, 760 (Iowa 1984) ("[w]e have often held they are necessary to preserve error"); *State v. Windsor,* 316 N.W.2d 684, 688 (Iowa 1982) ("[P]rejudice will not be presumed or found when the answer to the question was not obvious and the proponent made no offer of proof."). Error is not preserved, absent an offer of proof, unless "the whole record makes apparent what is sought to be proven." *In re Estate of Hern,* 284 N.W.2d 191, 197 (Iowa 1979).

We are not privy to what the answer to the question would have been, and thus cannot determine whether its denial resulted in any prejudice. Prejudice will not be presumed as the record does not make the answer apparent. *Id*. Failing to make an offer of proof is fatal to error preservation on this issue.

*B. Jury Instructions.* In response to Marin's justification defense, the trial court gave the following jury instructions:

> Instruction No. 20:
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> The defendant claims he acted with justification.
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> A person may use reasonable force to prevent injury to a person, including the defendant. The use of this force is known as justification.
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> Reasonable force is only the amount of force a reasonable person would find necessary to use under the circumstances to prevent injury.
>
> The State must prove the defendant was not acting with justification.

> Instruction No. 21:
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> A person is justified in using reasonable force if he reasonably believes the force is necessary to defend himself from any imminent use of unlawful force.
>
> If the State has proved any one of the following elements, the defendant is not justified:
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> 1. The defendant started or continued the incident which resulted in injury.
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> 2. An alternative course of action was available to the defendant.
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> 3. The defendant did not believe he was in imminent danger of injury and the use of force was not necessary to save him.
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> 4. The defendant did not have reasonable grounds for the belief.
>
> 5. The force used by the defendant was unreasonable.

The trial court denied Marin's request that the jury be given an instruction excepting one's place of employment from the alternative course of action requirement (element 2 of Instruction 21). An applicable version of Model Jury Instruction 400.10 reads:

> Concerning [the alternative course of action requirement, element 2 of Instruction 21], if the 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.
>
> If the defendant was in his place of employment 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, he was not required to do so and he could repel force with reasonable force.

Marin contends that denying him the requested instruction violated his due process rights under the United States and Iowa Constitutions, as well as his equal protection rights. The district court concluded that the "place of employment" exception to the duty of taking an alternative course of action applies to business premises, i.e., a building or a workplace, but not to "a job site owned by a customer of the employer." The court found no violation of the defendant's right to due process.

Marin asserts, "Iowa law clearly mandates a broad interpretation of the 'place of business' exception to the duty to retreat." He contends the district court erred in denying his request for a jury instruction excepting him from the duty to retreat.[3] We review a district court's failure to give a jury instruction for an abuse of discretion. *State v. Piper,* 663 N.W.2d 894, 914 (Iowa 2003).

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[3] Marin also argues the trial court's interpretation of the rule was unconstitutional. The State responds that Marin has waived his constitutional claims by failing to cite any supporting authority in his motion for new trial or in his appellate brief. We agree that his failure to cite supporting authority waives his constitutional claims. *See* Iowa R. App. P. 6.14(1)(*c*); *In re Detention of Garren*, 620 N.W.2d 275, 285 (Iowa 2000) (noting that the appellate court will not "assume a partisan role and undertake [a party's] research and advocacy," especially where a party's failure to address a matter hinders our consideration of the issue" (citation omitted)).

In *State v. Kellogg,* 542 N.W.2d 514, 516 (Iowa 1996), it was noted that as long as a requested instruction correctly states the law, has application to the case, and is not stated elsewhere in the instructions, the court must give the requested instruction.

Under Iowa law, "[a] person is justified in the use of reasonable force when the person reasonably believes such force is necessary to defend oneself or another from any imminent use of unlawful force." Iowa Code § 704.3 (2007). Iowa Code section 704.1 defines reasonable force as follows:

> "*Reasonable force*" is that force and no more which a reasonable person, in like circumstances, would judge to be necessary to prevent an injury or loss and can include deadly force if it is reasonable to believe such force is necessary to avoid injury or risk to one's life or safety or the life or safety of another, or it is reasonable to believe that such force is necessary to resist a like force or threat. Reasonable force, including deadly force, may be used *even if an alternative course of action is available if the alternative* entails a risk to life or safety, or the life or safety of a third party, or *requires one to abandon or retreat from one's* dwelling *or place of business or employment*.

(Emphasis added.) This section was a part of the complete revision of our state's substantive criminal laws, entitled the "Iowa Criminal Code," effective January 1, 1978. 1976 Iowa Acts ch. 1245, § 401.

This "alternative course of action" arises from the common law "duty to retreat"; that is, the duty of the assailed person to "retreat to the wall" before he or she is justified in repelling force with force; it has been generally modified by modern legal thought. *See generally State v. Sipes*, 202 Iowa 173, 176-85, 209 N.W. 458, 460-63 (1926).

In *Sipes*, our supreme court explored the scope of the duty to retreat, noting that Iowa followed the majority viewpoint "that, when a person, being without fault, and in a place where he has a right to be, is violently assaulted, he may, without retreating, repel force by force . . . ." *Id.* at 177, 209 N.W. at 460. The court discussed several Iowa cases upholding the exception to the duty to retreat and concluded:

> To put it more succinctly, under our holdings we have placed a man's home, his office, or place of business and the property owned or lawfully occupied by him all under the same rule, and it must follow, as a direct conclusion from the aforesaid lines of authority, that where one is feloniously assaulted while in any of these places, he is not bound to retreat.

*Id.* at 185, 209 N.W. at 463.

> We are committed to the rule that a person attacked in his home, or place of business, may meet force with force, even to the extent of taking life if it is necessary. The doctrine of 'retreat to the wall' in such cases has been expressly repudiated.

*State v. Baratta*, 242 Iowa 1308, 1316, 49 N.W.2d 866, 871 (1951).

Under these facts, this query arises: Does the "place of employment" exception apply when (1) the assailant and the victim are on a job site owned by the employer's customer, and/or (2) are co-workers? Marin was in a place where he had a right to be, as was Castro. But that bland assertion does not afford comfort to Marin, as this would severely repugn the duty to retreat and extend the alternative course of action exception to parking lots, public highways,[4] and

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[4] *See State v. Sedig,* 235 Iowa 609, 615, 16 N.W.2d 247, 250 (1944) (concluding that where the location was a county road and the victim a farm employee of the defendant, "a finding would be justified that the defendant did not make reasonable effort to retreat or run away from the decedent").

schools grounds,[5] to name a few. One apparent reason for appending "place of employment" to section 704.1 was to cover the multiple situations where the owner of the business and site is a corporation and its majority shareholder(s) an employee. It would appear to depart from the requirement of ownership or tenancy, but to include any place where the subject person or persons are directly employed. Another clear reason was to include an employee who is performing an essential service for his employer, not merely the owner or operator. But that can lead to a raft of gray areas, due to the expected mobility of countless employees, and would require constant review of an employee's scope of employment, e.g., travelling salespersons, and, a host of employees who are required as part of their employment to move from one place to another. One's place of employment is not so susceptible to an easy definition (an airplane or car when travelling on business, a restaurant when entertaining a customer, a hotel while attending a business convention), and the collateral need to assess the person or persons able to claim the exception may prove equally elusive. It seems more logical that "place of employment" is restricted to that location(s) upon which the employer exercises dominion, either through ownership, rental, or other vested possessory right; not to a customer's job or work site, where any occupancy or possession is temporal. But without deciding this quandary, we conclude that an alternate course of action exception does not extend to a co-worker, wherever the venue.

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[5] *State v. Coffman*, 562 N.W.2d 766, 769 (Iowa Ct. App. 1997) (concluding the assailant needed to use alternate course of action while outside high school).

The Model Penal Code requires retreat from a co-worker. *See* Model Penal Code § 3.04(2)(b)(ii)(A) (2001) ("[T]he actor [contemplating protective force] is not obliged to retreat from his dwelling or place of work, unless he was the initial aggressor or is assailed in his place of work by another person whose place of work the actor knows it to be."). Statutes in Hawaii, Nebraska, and Pennsylvania follow the Model Penal Code. *See generally* Steven P. Aggergaard, *Criminal Law—Retreat from Reason: How Minnesota's No-Retreat Rule Confuses the Law and Cries for Alteration—State v. Glowacki*, 29 Wm. Mitchell L. Rev. 657, 667 & n.57 (2002) (noting the Model Penal Code requires retreat from a co-worker, but not a co-resident). A place of employment or business for a co-worker does not deserve the same protection or refuge as a co-occupant's home or, as constantly referred to, as one's "castle."[6] When retreat is required in self-defense, the law presumes there is a safe sanctuary to go to—home. This provides a significant reason to distinguish co-workers from co-residents when addressing the duty to retreat. Too, ordinarily when an assault involves a co-worker, it is a clear disregard to the employer's interests. The same assumption would generally not be true when the assailant is a discordant customer or an unwelcome visitor. In accord is *Savage v. Employment Appeal Board,* 529 N.W.2d 640, 642 (Iowa Ct. App. 1995). Savage and a co-employee exchanged a series of blows and hair pulling at their employer's office. Savage was terminated for misconduct and denied

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[6] *See Sipes,* 202 Iowa at 177, 209 N.W. at 460 ("It is quite the universal rule that, where the person is in his own house, or, as denominated by common law, in his castle, he is not bound to retreat when feloniously attacked.").

unemployment benefits. On appeal, Savage contended the board should have concluded that she was acting in self-defense and protecting herself from a co-worker; that this conduct showed justification and use of reasonable force. The court stated, "there is a duty to retire from the affray if there is an available opportunity. . . . [T]here is no evidence she attempted a retreat, clearly available to her." *Id*. Lastly, the concept of retreat is a part of the greater concept of necessity; there is more gravity to leaving one's home than to leaving one's workplace.

There is a dearth of cases on this factual circumstance.[7] *Buckner v. State*, 81 So. 687, 688 (Ala. App. 1919), supports the duty to retreat by a co-employee, in stating,

> While it is true the evidence tended to show that both the decedent and the defendant were employed by the railway company, and that the difficulty occurred "on the yard" where they were employed, we do not think that this excused the defendant from the duty to retreat.

There was sufficient evidence that Marin had plenty of room to safely back away and to avoid a physical confrontation. The instructions on self-defense contained the law material to that issue, in accordance with Iowa Rule of Civil Procedure 1.924 (court is required to "instruct the jury as to the law applicable to all material issues in the case.").[8]

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[7] *See generally* Jeffrey F. Ghent, *Homicide: Duty to Retreat as Condition of Self-Defense When One is Attacked at His Office, or Place of Business or Employment*, 41 A.L.R.3d 584 (1972).

[8] The rules concerning jury instructions in civil cases also apply to criminal cases. Iowa R. Crim. P. 2.19(5)(*f*).

**V. Conclusion.**

Error was not preserved on the challenged relevancy objection for failure to urge an offer of proof. The instructions given the jury were appropriate and Marin was not entitled to an instruction on the exception to the duty to retreat when allegedly assailed by a co-worker. We therefore affirm.

**AFFIRMED.**