

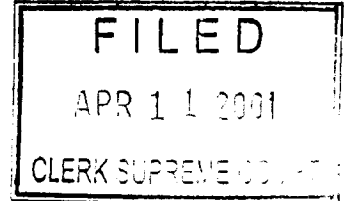
IN THE COURT OF APPEALS OF IOWA

No. 1-069 / 99-1817
Filed April 11, 2001

STATE OF IOWA,
Appellee,

vs.

DARTONYA LEE SHIVERS,
Appellant.



Appeal from the Iowa District Court for Webster County, Fredrick E. Breen, Judge.

Dartonya Shivers appeals his conviction and sentence for the offense of domestic abuse assault in violation of Iowa Code section 708.2A(3)(b).

AFFIRMED.

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

Thomas J. Miller, Attorney General, Denise A. Timmins, Assistant Attorney General, Ron Robertsen, County Attorney, and Wendy Samuelson, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Vogel and Mahan, JJ.

VOGEL, J.

Dartonya Shivers appeals his conviction and sentence for the offense of domestic abuse assault in violation of Iowa Code section 708.2A(3)(b). He contends the district court abused its discretion when it admitted a photograph of the victim and that it erred in denying his motions for judgment of acquittal and for a new trial as the evidence in the record was insufficient to support a verdict of guilt.¹ We affirm.

Background Facts and Proceeding. Shivers' wife, Melissa, returned to the couple's home in the afternoon hours of July 16, 1999. Melissa testified that when she returned home Shivers was angry because she had been absent since the night before. She further testified that as Shivers attempted to leave the home she grabbed him around his neck and that while her hands were still around his neck he struck her once, open-palmed, on the right side of her face. Melissa left the home and called the police. When the police arrived Melissa told them that Shivers had struck her on the face several times, but made no mention of grabbing Shivers around the neck. A photograph of Melissa taken at the scene showed red marks and/or bruising to the left side of her face. At trial the State successfully moved to have the photograph admitted. Despite Shivers' argument that he struck Melissa in self-defense, the jury returned a verdict of guilt. Shivers now appeals.

¹ Shivers also argues that trial counsel was ineffective, but only to the extent he failed to preserve any issues for appeal. As we find the issues were adequately preserved, we need not address this contention.

Scope of Review: admission of the photograph. Challenges to evidentiary rulings are reviewed for an abuse of discretion. *State v. Sallis*, 574 N.W.2d 15, 16 (Iowa 1998). Abuse is found where a district court exercised its discretion on clearly untenable grounds, for clearly untenable reasons, or to an clearly unreasonable extent. *State v. Bayles*, 551 N.W.2d 600, 604 (Iowa 1996).

Admission of the Photograph. Shivers challenges the photograph's admission on the grounds of relevance, undue prejudice, and impermissible use of a prior bad act. Evidence is relevant if it makes a desired inference about a material and consequential fact more probable than it would be without the evidence. Iowa R. Evid. 401; *State v. Casady*, 491 N.W.2d 782, 785 (Iowa 1992). Irrelevant evidence is inadmissible, while relevant evidence is generally admissible unless otherwise precluded by constitution, statute or rule. Iowa R. Evid. 402. One such rule prohibits admission of a prior wrong or act to show a general propensity to commit such a wrong or act, while allowing admission for certain other limited purposes. Iowa R. Evid. 404(b).

All relevant evidence, even if otherwise admissible, can be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Iowa R. Evid. 403. Evidence will not be excluded merely because it tends to demonstrate a defendant's guilt. *State v. McDaniel*, 512 N.W.2d 305, 308 (Iowa 1994). To be unfairly prejudicial, evidence must create an undue tendency in the jury to make a decision on an improper, and often emotional, basis. *State v. Brown*, 569 N.W.2d 113, 117 (Iowa 1997).

The State was required to prove Shivers assaulted Melissa during the incident in question and that, as a result, she suffered bodily injury. Iowa Code §§ 708.2A(1) & 708.2A(2)(b) (1999). Shivers does not deny that Melissa was struck on the day in question and that he is the one who struck her. The record further reveals that the photograph is a fair and accurate representation of Melissa's face shortly after the assault. The photograph is clearly relevant to the State's elements of proof and was properly admitted unless preclusion is otherwise dictated. Shivers contends preclusion is required by Rule 404(b).

The crux of Shivers' argument is that the injuries depicted in the photograph could not have been the result of the July 16 confrontation and must therefore have been the product of a prior assault.² He maintains this fact rendered the picture irrelevant to the pending charge and the only purpose of its offer and admission was to demonstrate a general propensity to batter his wife. The State contends the picture was never offered in support of a prior assault, but purely as evidence of Melissa's injuries on July 16.

It appears no evidence of a prior assault was presented to the jury, and the State maintains it did not refer to or attempt to insinuate the existence of such an occurrence. This would be insufficient to forestall a Rule 404(b) inquiry, however, if the picture raised a necessary inference that a prior assault had occurred. Although nothing in the photograph itself implies a prior bad act,

² Although not a part of the factual record, when arguing the issue of admissibility before the trial court both the State and defense counsel agreed Melissa was assaulted the week before the incident at issue in this case, and that the prior assault did result in some injury on the left side of the face.

Shivers argues that is the only conclusion the jury could reach, as Melissa testified he struck her on the right, rather than left, side of her face. While this assertion might have some merit if Melissa's trial testimony was the sole and decisive evidence offered on the pending charge, the remainder of the record reasonably supports the State's contention that the photograph was offered and admitted as evidence of the July 16 incident only.

Other persons testified that soon after the assault Melissa appeared frantic, scared, and upset, and at that point stated Shivers had hit her several times. The police officer who took the photograph testified the injuries to the left side of the face were consistent with how Melissa initially reported the attack by Shivers, and a neighbor of Melissa's testified she didn't recall seeing any bruising on Melissa's face in the two to three days leading up to the incident. Finally, Melissa failed to inform the police that she had been the one to initiate the contact between herself and Shivers, but did testify to that effect at trial where she contradicted her prior statement to the police and confirmed that she did not want Shivers to get in trouble. All the foregoing provided, for the jury's consideration, an explanation of the July 16 assault consistent with the injuries shown in the photograph.

As the photograph did not violate Rule 404(b), it was properly admitted unless Rule 403 required exclusion. The district court actively engaged in a balancing test and, considering appropriate factors, concluded the photograph's probative value was not substantially outweighed by a danger of unfair prejudice. See Iowa R. Evid. 403. We agree with this assessment. The nature of the injury

– redness and bruising – is not so extreme as to inflame the jury’s passions and create a danger that a decision was made upon an inappropriate basis. No other basis of possible prejudice being shown, Shivers has failed to demonstrate the district court abused its discretion in this regard. We therefore affirm the evidentiary ruling admitting the photograph.

Scope of Review: sufficiency/weight of the evidence. Shivers asserts the record contains insufficient evidence to warrant a conviction, and suggests that we review this matter for both the denial of his motion for judgment of acquittal and the denial of his motion for a new trial. Both rulings are reviewed for errors at law. Iowa R. App. P. 4. Shivers’ challenge to the sufficiency of the evidence is preserved by his motion for judgment of acquittal, and the jury’s guilty verdict will be binding on appeal so long as it is supported by substantial evidence. *State v. Hopkins*, 576 N.W.2d 374, 377 (Iowa 1998). Substantial evidence is found when, viewing all the evidence in the light most favorable to the State, a rational trier of fact could be convinced of the defendant’s guilt beyond a reasonable doubt. *Id.*

We look to see whether a district court’s denial of a new trial motion was an abuse of its discretion. *State v. Ellis*, 578 N.W.2d 655, 658-59 (Iowa 1998). A motion for a new trial should be granted only if, after considering both inculpatory and exculpatory evidence, the jury’s verdict was contrary to the weight of the evidence. *Id.* A verdict is contrary to the weight of the evidence where “a greater amount of credible evidence supports one side of an issue or cause than the

other.” *Id.* at 658 (quoting *Tibbs v. Florida*, 457 U.S. 31, 37-38, 102 S. Ct. 2211, 2216, 72 L. Ed. 2d 652, 658 (1982)).

Sufficiency/Weight of the Evidence. Shivers does not contend the record fails to support a finding that he struck Melissa or that it caused injury to her. Rather, he strictly limits his challenges on both the sufficiency and weight of the evidence to the question of whether the State disproved his claim of self-defense or justification. To refute Shivers’ justification defense the State had to prove, beyond a reasonable doubt, any one of the following elements: that Shivers had an alternate course of action available, that he did not believe he was in imminent danger of injury and the use of force was necessary, that if he did have such a belief it had no reasonable basis, or that the force used was unreasonable. See *State v. Coffman*, 562 N.W.2d 766, 768 (Iowa Ct. App. 1997).

In forwarding his argument Shivers relies exclusively on Melissa’s trial testimony and seems to ignore contradictory evidence presented by the State. Although Melissa testified she grabbed Shivers around his neck in an effort to prevent him from leaving the apartment, the record contains evidence that could cast doubt on the veracity of that statement. Conflicting evidence was also presented as to where and how often Melissa was struck.

The jury is in the best position to assess credibility. See *State v. Knox*, 536 N.W.2d 735, 742 (Iowa 1995). It is the jury’s duty to sort out the credibility of witnesses and to assign the evidence presented whatever weight it deems proper. *State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993). The jury may

believe or disbelieve the testimony of witnesses as it chooses. *Id.* Under this standard, a rational trier of fact could have found beyond a reasonable doubt that Shivers' use for force was unreasonable, in that Melissa's injuries were the result of multiple strikes or one strike of excessive force inflicted without any or with only minor physical provocation on her part. The record therefore contains substantial evidence in support of the guilty verdict.

In addition, at hearing on the new trial motion the district court found Shivers' use of force to be unreasonable based upon the level of force necessary to inflict Melissa's injuries and the physical disparity between Shivers and Melissa:

The Court observed both the victim and the defendant at trial. Victim is a slight woman. The defendant is a very large guy. And the kind of force he used to inflict the injury depicted in the photograph were certainly unnecessary in the circumstances and unreasonable, and certainly were the kind that a very large person would not have to inflict on a smaller person no matter what.

In evaluating the evidence the district court found the State had disproved Shivers' justification defense and thus the jury guilty verdict was not contrary to the weight of the evidence. Given the facts presented at trial, we find no abuse of discretion in that ruling.

Having considered all issues on appeal, we affirm Shivers' conviction and sentence.

AFFIRMED.