

IN THE COURT OF APPEALS OF IOWA

No. 7-652 / 96-1556

000407

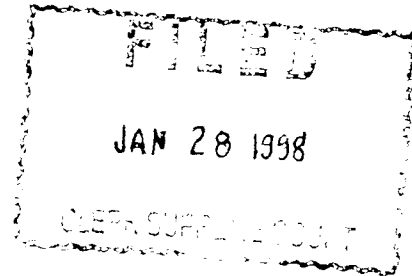
STATE OF IOWA,

Plaintiff-Appellee,

vs.

PEDRO ERLINDO HERNANDEZ,

Defendant-Appellant.



Appeal from the Iowa District Court for Johnson County, Stephen C. Gerard
II, District Associate Judge.

Defendant appeals his sentence for domestic abuse, assault, second offense,
in violation of Iowa Code sections 708.1, 708.2A(3)(a) and 236.2 (1995).

AFFIRMED.

Linda Del Gallo, State Appellate Defender, and Martha J. Lucey, Assistant
State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Julie H. Brown, Assistant Attorney
General, J. Patrick White, County Attorney, and Anne M. Lahey, Assistant County
Attorney, for appellee.

Considered by Streit, P.J., Vogel, J., and Habhab, S.J.*

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

HABHAB, S.J.

I. FACTUAL SETTING

While on patrol on August 15, 1996, Iowa City police officer Debora Petersen was dispatched to an apartment in response to a hang-up 911 call and a second call from a person reporting a fight with a woman screaming. Officer Petersen listened at the door and heard a woman crying or sniffing and a loud man's voice. When Officer Cummings arrived, both entered the apartment, which contained three men and two women. Petersen attempted to speak with the apparent victim while Cummings spoke with the defendant, but the defendant continually interrupted, yelling insults at the victim and telling her to be quiet. Petersen took the woman into the hall to question her. Petersen observed a large bump on the victim's head and red marks on her face, wrist, and arm. Using broken English and gestures, the woman described how her husband had hit her and pointed to spots on her body which were red or swollen, indicating with her hand or fist how the injuries occurred. Petersen later took pictures of the victim's injuries.

Petersen also spoke with the defendant. He admitted striking the victim, but claimed self-defense. The defendant told the officers, "what am I supposed to do when she has a knife?" Petersen did not observe a knife at the scene.

The two other men present in the apartment, Jose Reyes and Randy Vermace, testified at trial, in May, 1996. Neither of them witnessed the beginning of the altercation. Reyes observed the defendant restraining the victim with his arms. Once

she escaped his grasp, Reyes took her to the kitchen while Vermace restrained the defendant. While in the kitchen the victim grabbed a knife and headed for the defendant, who struck at the victim until Reyes and Vermace restrained and separated them again. Vermace had to pull the defendant off the victim. Reyes then took the knife from the victim and took her to get some water. At some point during the incident, the victim attempted to call the police, but the defendant disconnected the phone from the wall.

Officer Petersen testified for the State. The victim, although subpoenaed, did not appear to testify at trial. Officer Petersen described the events which took place when she and Officer Cummings responded to the 911 call. She testified concerning the victim's remarks, gestures, and indication the defendant had caused the injuries. The court admitted Officer Petersen's account of the victim's remarks and gestures under the excited utterance exception to the hearsay rule.

Both at the close of the State's case and at the close of all evidence, the defendant moved for a directed verdict of acquittal or to dismiss for insufficient evidence to submit the case to the jury. The court overruled both motions.

The court's instructions to the jury included instructions on justification. The jury unanimously found the defendant guilty of assault. After sentencing on August 21, 1996, the defendant appealed. On May 20, 1997, the trial court filed an order *nunc pro tunc* correcting the record to reflect the pretrial defense stipulation and

agreement that if the defendant was convicted of assault, the offense would be domestic abuse, second offense (penalty enhanced).

On appeal, the defendant argues there was insufficient evidence in the record to support his conviction. He also claims ineffective assistance of counsel for his trial counsel's failure to file a timely notice of self-defense as required by Iowa Rule of Criminal Procedure 10. The State contends there was sufficient evidence to support the conviction and that, since justification was argued at trial and the jury was instructed on justification, defense counsel was not ineffective.

II. SUFFICIENCY OF THE EVIDENCE

A. STANDARD OF REVIEW

Our review of a substantial evidence claim is on error. We are bound by the jury verdict unless the verdict is not supported by substantial evidence. In making this determination, we must consider all the evidence in the light most favorable to the State. We accept all legitimate inferences that may fairly and reasonably be deducted [sic] from the evidence. Evidence is substantial if it could convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. Direct and circumstantial evidence are equally probative. Evidence, whether direct or circumstantial, must however do more than create speculation, suspicion or conjecture.

State v. Sanborn, 564 N.W.2d 813, 816 (Iowa 1997) (quoting *State v. Bayles*, 551 N.W.2d 600, 608 (Iowa 1996) (citations omitted)). Because the defendant moved for a directed verdict of acquittal both at the close of the State's case-in-chief and again at the close of all evidence, we make two separate determinations of the sufficiency

of the evidence – just the evidence in the State’s case-in-chief, and all of the evidence adduced at trial.

B. DISCUSSION

1. Sufficiency of the State’s Case.

The State’s only witness was Officer Petersen. From her testimony, a reasonable jury could find the following facts. The victim had visible injuries. She claimed her husband caused the injuries by hitting her. The defendant acted aggressively toward the victim while the police were present in the apartment. Others in the apartment observed parts of the altercation. The defendant had physical contact with the victim which she struggled to avoid. Others in the apartment had to separate the parties and restrain both of them. The defendant admitted striking the victim, but claimed the victim had a knife. No knife was observed by either officer at the time. The defendant was the aggressor in the altercation.

We conclude substantial evidence exists in the record at the point of the defendant’s first motion for directed verdict to support the court’s decision to deny the defendant’s motion. We also conclude the record at that point contained sufficient evidence from which a reasonable jury could find the defendant guilty of assault beyond a reasonable doubt. Concerning the defendant’s justification defense, the record contains sufficient evidence at that point from which a reasonable jury could find any threat the victim may have made with a knife did not occur until after she had been assaulted first by the defendant.

2. Sufficiency of All the Evidence.

The defendant also moved for a directed verdict of acquittal after the close of all the evidence. The defendant's witness testified concerning the incident and the defendant's justification claim. The State's rebuttal witness also testified concerning the incident and the defendant's justification claim. In order to raise a justification defense, a defendant must admit the act which, apart from justification, would constitute committing the offense charged. *State v. Jeffries*, 313 N.W.2d 508, 509 (Iowa 1981). The court instructed the jury accordingly. Because the defendant admitted committing the act, our examination of the record is to determine whether the State presented sufficient evidence to rebut his justification defense.

From our review of the record, we conclude a reasonable jury could find at least the following additional facts. The victim did take a knife from the kitchen during the altercation. The defendant struck the victim while defending himself. Others in the apartment had to pull the defendant off of the victim prior to the victim taking the knife from the kitchen. There is substantial evidence rebutting the defendant's justification defense. We therefore affirm the trial court's denial of the defendant's second motion for directed verdict. The court properly submitted the case to the jury. From the evidence at trial, we find substantial evidence supporting the jury's verdict and affirm the verdict.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

A. STANDARD OF REVIEW

Our review of an allegation of ineffective assistance of counsel is de novo. *State v. Howes*, 525 N.W.2d 874, 876 (Iowa App.1994). The defendant has the burden of proving by a preponderance of the evidence his attorney did not perform an essential duty and, as a result, he was prejudiced. *Id.* To demonstrate prejudice the defendant must prove there is a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different. *State v. Tracy*, 482 N.W.2d 675, 680 (Iowa 1992).

B. DISCUSSION

The defendant alleges his trial counsel was ineffective in failing to file notice of intent to use the justification defense withing the time required by Iowa Rule of Criminal Procedure 10. The record reveals no notice of defense filed within the time set forth in the rule. However, the record also clearly reveals the defense was brought out in testimony at trial and explicitly submitted to the jury through several instructions without objection at trial nor raised on appeal. We therefore find the defendant was not prejudiced by the lack of notice being filed.

AFFIRMED.