

IN THE SUPREME COURT OF IOWA

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STATE OF IOWA, )  
 )  
 Plaintiff-Appellee, )  
 )  
 v. ) S.CT. NO. 18-0765  
 )  
 KEN KUHSE, )  
 )  
 Defendant-Appellant. )

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APPEAL FROM THE IOWA DISTRICT COURT  
FOR LINN COUNTY  
HONORABLE RUSSEL G. KEAST, JUDGE

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APPELLANT'S BRIEF AND ARGUMENT

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## CERTIFICATE OF SERVICE

On the 12<sup>th</sup> day of February, 2019, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Ken Kuhse, P.O. Box 8082, Cedar Rapids, IA 52408.

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**STATEMENT OF THE ISSUE PRESENTED FOR REVIEW**

**I. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE MARSHALLING INSTRUCTION DOMESTIC ASSAULT CAUSING BODILY INJURY WHERE THE INSTRUCTION FAILED TO INCLUDE AN ELEMENT REQUIRING THE STATE TO PROVE THE ACT WAS DONE WITHOUT JUSTIFICATION.**

**Authorities**

State v. Kellogg, 263 N.W.2d 539, 543 (Iowa 1978)

State v. Hopkins, 576 N.W.2d 374, 378 (Iowa 1989)

State v. Buck, 510 N.W.2d 850, 853 (Iowa 1994)

State v. Clay, 824 N.W.2d 488, 494 (Iowa 2012)

State v. Gomez, No. 13-0462, 2014 WL 1714451, \*3 (Iowa Ct. App. Apr. 30, 2014)

Iowa State Bar Ass'n, Iowa Criminal Jury Instruction 800.1

State v. McCoy, 692 N.W.2d 6, 25 (Iowa 2005)

## **ROUTING STATEMENT**

This case should be transferred to the Court of Appeals because the issues raised involve applying existing legal principles. Iowa R. App. P. 6.903(2)(d) and 6.1101(3)(a).

## **STATEMENT OF THE CASE**

**Nature of the Case:** This is an appeal by the Defendant-Appellant, Ken Kuhse, from the judgment and sentence following appellant's conviction for the offense domestic assault causing bodily injury in violation of Iowa Code sections 708.2A(1) and 708.2A(2)(b) (Supp. 2017). The Honorable Russel G. Keast presided over the proceedings in Linn County District Court.

**Course of Proceedings in the District Court:** On September 29, 2017, Kuhse was charged by trial information with the offense domestic assault causing bodily injury. (Trial Information, 9/29/17) (App. pp. 5-7).

Kuhse filed a notice of self-defense before trial. (Notice of Defense of Self-Defense, 3/10/18)(App. p. 8).

A jury trial commenced March 19, 2018. Following the

State's evidence, Kuhse moved for judgment of acquittal which the district court denied. (Vol.1 p.194 L.7-p.195 L.5). The jury returned a verdict of guilty to the charge assault causing bodily injury (domestic abuse) which the trial court accepted. (Order, 3/20/18)(App. pp. 9-10).

In April Kuhse appeared in open court, with counsel, and was adjudged guilty of domestic assault causing bodily injury. (Judgment and Sentence, 4/27/18)(App. pp. 23-25). Kuhse was sentenced to five days in jail with credit for time served. He was fined \$315, assessed restitution costs, and assessed jail costs up to \$60 per day. He was also ordered to complete the Domestic Abuse Program. (Id. p.1)(App. p. 23).

Notice of appeal was timely filed. (Notice, 5/1/18) (App. p. 26).

**Facts:** Victoria Pfeifer-Kuhse [hereinafter "Victoria"] testified she and Kuhse were married nine years earlier on Halloween. (Vol.1 p.127 L.10-17). They had been together a total of 12 years. (Vol.2 p.127 L.21-22). They lived on Harbet Avenue, N.W., Cedar Rapids. (Vol.2 p.129 L.12-13). Victoria

generally stayed upstairs and Kuhse stayed in the basement. (Vol.2 p.131 L.10-17). In the basement of their home was a living area with an entertainment center, bar, TV, Foosball table, and a washer and dryer. (Vol.1 p.130 L.7-p.131 L.2).

Victoria testified that on August 20<sup>th</sup> she spent most of the day outside gardening and doing stuff in her bedroom upstairs. (Vol.1 p.131 L.18-p.132 L.12). Earlier in the afternoon Kuhse had friends over in the basement. (Vol.1 p.132 L.14-25, p.133 L.19-21). Victoria said she did not consume alcohol that day, but Ken was drinking rum and Cokes. (Vol.1 p.133 L.10-18).

Around 10:30 p.m., Victoria went downstairs to get the clothes out of the dryer. (Vol.1 p.135 L.10-7). Victoria claimed Kuhse came up behind her mumbling stuff and just generally being abusive. (Vol.1 p.135 L.15-24). Victoria said she started to walk away, words were exchanged, name calling, and then Kuhse grabbed her neck. (Vol.1 p.136 L.2-p.137 L.12). Victoria testified she swiped at Kuhse to get him to let go. (Vol.1 p.138 L.1-6). Victoria said that when he did let go she fell backwards and Kuhse grabbed her by the arm and

slammed her into the entertainment center. Victoria fell onto the floor between the entertainment center and table legs.

(Vol.1 p.138 L.6-14).

Victoria testified she was a bit dazed from hitting her head on the hard floor. (Vol.1 p.138 L.14). She claimed Kuhse stood at the bar, drinking, and accused her of “faking it”.

(Vol.1 p.138 L.15-17). Victor said she walked towards him and asked why he was so mean and disrespectful to her. (Vol.1 p.138 L.17-20). She said he grabbed her and slammed her into the coffee table causing her to hit her hip joint. (Vol.1 p.138 L.21-24).

Victoria stated that at some point during the altercation, her necklace got shoved into her neck and cut her. (Vol.1 p.140 L.16-20). It ended up on the floor. (Vol.1 p.140 L.21-22).

Victoria went upstairs, grabbed her purse, cell phone, and keys and drove her car to her friend Dave Denlinger’s apartment. (Vol.1 p.139 L.10-19, p.172 L.2-7). Denlinger called the police. (Vol.1 p.139 L.20-24).

Cedar Rapids Police Officers Casey Hoeger and Jeremiah White received the dispatch for a domestic assault around 11:50 p.m. (Vol.1 p.118 L.20-p.119 L.11, p.171 L.19-24). Hoeger and White observed Victoria had abrasions and scratches on her chest/lower neck area, knees, and arm which Hoeger photographed. (Vol.1 p.119 L.15-20, p.173 L.1-4, p.183 L.18-25; Ex. 1(CD photos of Victoria)).

White called an ambulance because Victoria appeared to be having difficulty breathing and because she was having hip and back pain. (Vol.1 p.122 L.4-9, p.173 L.16-22). Victoria refused to go in the ambulance, but did have Denlinger take her to the hospital emergency room for treatment. (Vol.1 p.144 L.2-18).

After talking to Victoria at Dillinger's residence, Hoeger and White went to Victoria and Kuhse's residence to talk to Kuhse. (Vol.1 p.122 L.13-21). Kuhse told White Victoria had been following him around all day attempting to start a fight. (Vol.1 p.184 L.8-10). Kuhse told White he sustained injury to his nose and arm. (Vol.1 p.175 L.20-25). Kuhse said he acted

in self-defense as he held Victoria back with one arm and at one point he pushed her away causing her to land against the wall. (Vol.1 p.185 L.4-p.186 L.7). Hoeger took photographs of Kuhse's scrape across his nose and bruising on his arm. (Vol.1 p.123 L.2-p.124 L.13, Ex. 2(CD photos of Kuhse). Kuhse told White there was a witness to the incident and gave him a name and phone number. (Vol.1 p.176 L.4-8). However, White's attempts to contact the person were unsuccessful. (Vol.1 p.176 L.9-24). Nor did the person return his phone calls. (Vol.1 p.176 L.25-p.177 L.7).

White returned to the hospital to again to get Victoria's version of events and check her injuries. (Vol.1 p.177 L.14-24, p.178 L.7-12). He also told her that Kuhse was claiming injuries, which she said happened when she defended herself. (Vol.1 p.178 L.13-22). White told Victoria they were going to arrest Kuhse. (Vol.1 p.145 L.12-20).

At the hospital Victoria was treated by Physician Assistant Alexa Zink Baxter. X-rays of Victoria's hip and elbow showed no abnormalities. (Vol.1 p.157 L.1-6). Nor was there any soft

tissue damage to her neck. (Vol.1 p.157 L.7). There were abrasions on Victoria's knee, forearm, front of her neck, and on the left shoulder. (Vol.1 p.157 L.8-17). There was no finger print bruising on her neck. (Vol.1 p.158 L.6-p.159 L.23).

Any other relevant facts will be discussed in the argument below.

## **ARGUMENT**

### **I. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE MARSHALLING INSTRUCTION DOMESTIC ASSAULT CAUSING BODILY INJURY WHERE THE INSTRUCTION FAILED TO INCLUDE AN ELEMENT REQUIRING THE STATE TO PROVE THE ACT WAS DONE WITHOUT JUSTIFICATION.**

**Preservation of Error:** Claims of ineffective assistance of counsel are properly before this court on direct appeal. See State v. Kellogg, 263 N.W.2d 539, 543 (Iowa 1978). Where the record is clear and plausible strategy and tactical decisions do not explain counsel's action, this court may resolve the claim on direct appeal. See State v. Hopkins, 576 N.W.2d 374, 378 (Iowa 1989)(finding the record was clear and plausible strategy and tactical considerations did not explain counsel's actions);

State v. Buck, 510 N.W.2d 850, 853 (Iowa 1994) (“We will resolve the claim on direct appeal... when the record adequately presents the issue.”).

**Scope of Review:** Kuhse alleges he was denied his Sixth Amendment right to counsel. This court reviews claims of ineffective assistance of counsel *de novo*. State v. Clay, 824 N.W.2d 488, 494 (Iowa 2012).

**Merits:** The issue here is whether trial counsel should have objected to the marshalling instruction and requested it include the State had to prove Kuhse acted “without justification”. Nowhere in the instructions did the court instruct the jurors how to proceed if they accepted his justification defense. Counsel’s failure to object to this defect was a breach of duty which resulted in prejudice to Kuhse.

**A. Breach:** Trial counsel should have objected to the marshalling instruction for not including as one of the elements that Kuhse acted “without justification”. Kuhse raised a justification defense that required the State to prove his actions were not justified. Yet, the instructions fail to tie these two

points together.

The jury was instructed that to find Kuhse guilty of domestic assault causing bodily injury, the jury had to find:

1. On or about the 2th day of August, 2017, the defendant did an act which was meant to cause pain or injury, result in physical contact which was insulting or offensive, or place Victoria Pfeiffer-Kuhse in fear of immediate physical contact which would have been painful, injurious, insulting or offensive to Victoria Pfeiffer-Kuhse.
2. The defendant had the apparent ability to do the act.
3. The defendant's act caused a bodily injury to Victoria Pfeiffer-Kuhse as defined in Instruction No. 11.
4. Victoria Pfeiffer-Kuhse and Ken Kuhse were married at the time of the incident.

If the State has proved all of the elements, the defendant is guilty of Domestic Assault Causing Bodily Injury and you should sign Form of Verdict No. 1. If the State has proven only elements 1, 2 and 3, then the defendant is guilty of Assault Causing Bodily Injury and you should sign Form of Verdict No. 2. If the State has proved only elements 1, 2 and 4, the defendant is guilty of Domestic Abuse Assault and you should sign Form of Verdict No. 3. If the State has only proved elements 1 and 2, the defendant is guilty of Assault and you should sign Form of Verdict No. 4. If the State has failed to prove either element 1 or element 2, the Defendant is not

guilty and you should sign Form of Verdict No. 5.

(Amended and Substituted Instr. No. 9 (marshalling instruction domestic assault causing bodily injury))(App. p. 13). The marshalling instruction made no mention that the State had to prove Kuhse acted without justification.

White testified Kuhse told him Victoria had been following him around all day attempting to start a fight. (Vol.1 p.184 L.8-10). Kuhse said he acted in self-defense as he held Victoria back with one arm and at one point he pushed her away causing her to land against the wall. (Vol.1 p.185 L.4-p.186 L.7). Kuhse sustained injuries to his nose and arm. (Vol.1 p.123 L.2-p.124 L.13, p.175 L.20-25(CD photos of Kuhse). Kuhse provided the name and number of one of two witnesses to the incident to support his claim. (Vol.1 p.176 L.4-8). However, White's attempts to contact the person were unsuccessful. (Vol.1 p.176 L.9-24).

The marshalling instruction for domestic assault did not include as an element that Kuhse acted "without justification." If Kuhse had not presented evidence of justification, then there

would be no error. However, as discussed above, he did present evidence of justification. See State v. Gomez, No. 13-0462, 2014 WL 1714451, \*3 (Iowa Ct. App. Apr. 30, 2014)(district court found sufficient evidence to generate a jury question on justification, therefore, it would have assisted the jurors by informing them in the marshalling instruction that defendant could not be found guilty unless State proved he acted without justification). In the present case the district court found sufficient evidence to generate a jury question on justification and gave the uniform instructions regarding justification. (Instr. Nos. 12(justification), 13(reasonable force))(App.pp. 14-15). “Therefore, the district court would have assisted the jurors by informing them - in the assault marshalling instruction – that they could not convict unless the State proved Gomez acted without justification.” Id. (citing Iowa State Bar Ass'n, Iowa Criminal Jury Instruction 800.1 (Assault-Elements) comment that lack of justification is not an element “unless the defendant has produced sufficient evidence to raise the defense. In that event the State must prove lack of

justification.”). “If a lack-of-justification element is not included in the assault marshalling instruction, then the justification instructions must inform the jurors how to proceed if they find the State did not prove defendant was acting without justification.” Id. Trial counsel breached his duty by failing to object to the incomplete instructions.

### **B. Prejudice.**

In order to establish a claim of ineffective assistance of counsel, a defendant must also prove he or she was prejudiced by counsel’s breach. Clay, 824 N.W.2d at 496. Kuhse was clearly prejudiced by counsel’s failure to object to the marshalling instruction as discussed above. “To establish prejudice, a defendant must show that there is a reasonable probability that, but for the counsel’s unprofessional errors, the result of the proceeding would have been different.” State v. McCoy, 692 N.W. 2d 6, 25 (Iowa 2005) (citations omitted).

The prejudice prong of the Strickland test does not mean a defendant must establish that counsel’s conduct more likely than not altered the outcome in the case. A defendant need only to show that the probability of a different result is sufficient to undermine confidence in the

outcome.

Clay, 824 N.W.2d at 496.

The marshalling instruction failed to include the requirement that the State had to prove that Kuhse acted without justification. The jury could have mistakenly concluded that the jury only had to prove the four elements listed in the marshalling instruction. “The jury had no guidance on how to apply the free-floating instructions on justification.” Gomez, No. 13-0462, 201 WL 1714451, \*3. Therefore, Kuhse was prejudiced by trial counsel’s failure to object to the marshalling instruction’s lack of inclusion of an element that the State had to prove Kuhse acted without justification.

### **CONCLUSION**

For the reasons stated above, the defendant respectfully requests this court to reverse his conviction and remand for a new trial.

**NONORAL SUBMISSION**

Counsel does not request to be heard in oral argument.

**ATTORNEY'S COST CERTIFICATE**

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was \$2.08, and that amount has been paid in full by the Office of the Appellate Defender.

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**CERTIFICATE OF COMPLIANCE WITH TYPEFACE  
REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR  
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This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because:

[X] this brief has been prepared in a proportionally spaced typeface Bookman Old Style, font 14 point and contains 2,245 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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