IN THE SUPREME COURT OF IOWA
Supreme Court No. 18-0765

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KEN LORENZE KUHSE,
Defendant-Appellant.

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

APPELLEE'S BRIEF

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

I. There was substantial evidence that Kuhse was not justified assaulting the victim. Has he shown ineffective assistance of counsel for failing to object to correct, uniform instructions on self-defense?

Authorities

Jackson v. Virginia, 443 U.S. 307 (1979)
Knowles v. Mirzayance, 129 S.Ct. 1411 (2009)
Michel v. Louisiana, 350 U.S. 91 (1955)
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Iowa R. App. P. 6.903(2)(*g*)(3)

ROUTING STATEMENT

The Court should transfer this matter to the Court of Appeals. Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

Nature of the Case

Ken Kuhse was convicted by jury of domestic abuse assault causing bodily injury, a serious misdemeanor. *See* Iowa Code §§ 708.2A(1), 708.2A(2)(b) (Supp. 2017). He contends that counsel should have objected to the marshalling instruction.

The Honorable Russell G. Keast presided.

Course of Proceedings

The State accepts the defendant's statement of the procedural history of the case. Iowa R. App. P. 6.903(3).

Facts

The State accepts the defendant's statement of facts. Iowa R. App. P. 6.903(3).

ARGUMENT

I. There was substantial evidence that Kuhse was not justified grabbing the victim and slamming her to the floor twice. Counsel bore no duty to insist that the uniform instructions on domestic abuse assault read that the jury could acquit if the State failed to prove he acted without justification. And the uniform instructions did not cause Kuhse *Strickland* prejudice.

Preservation of Errors

Although a person may raise ineffective assistance of counsel for the first time on appeal, postconviction relief is the better course. *State v. Bennett*, 503 N.W.2d 42, 47 (Iowa Ct. App. 1993). Doing so allows the court to consider a better-developed set of facts. *Id.* It allows the allegedly ineffective attorney to explain his or her conduct. *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978). "Even a lawyer is entitled to his day in court, especially when his professional reputation is impugned." *Id.* The stakes for defense counsel are significant. A finding of ineffective assistance of counsel opens the door to a malpractice claim. Iowa Code §§ 814.11, 815.10(6); *Barker v. Capotosto*, 875 N.W.2d 157, 161, 167-68 (Iowa 2016); *Trobaugh v. Sondag*, 668 N.W.2d 577, 582-83 (Iowa 2003).

Standard of Review

The Court on appeal reviews the record *de novo* when a defendant claims a denial of his right to effective assistance of counsel has occurred. *State v. Clay*, 824 N.W.2d 488, 494 (Iowa 2012); *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999).

Merits

Kuhse notes that the marshalling instruction did not specify that the State must prove that he acted "without justification." Relying on an unpublished Court of Appeals decision, he contends that trial counsel was ineffective for failing to seek the additional language. To the contrary, counsel neither bore that duty nor is there a reasonable likelihood of a different result had the instructions read as he wished.

A. Principles of ineffective assistance of counsel do not require meritless objections nor allow reversal in the absence of *Strickland* prejudice.

The constitutions of the United States and Iowa guarantee a criminal defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Iowa Const. Art. I, § 10.[1]

[1] Kuhse does not cite either the Sixth Amendment to the U.S. Constitution or Article I, section 10. This may mean the court can consider both provisions. *King v. State*, 797 N.W.2d 565, 571 (Iowa 2011). But Kuhse does not argue for a different result or analysis

To establish ineffective assistance of counsel, a defendant must show that: (1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom. *Wemark v. State*, 602 N.W.2d 810, 814 (Iowa 1999) (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984)); *Ledezma v. State,* 626 N.W.2d 134, 141-42, 145 (Iowa 2001)[2]. However, both elements do not need to be addressed: if the claim lacks prejudice—as will often be the case—the case may be decided on that basis alone. *Strickland*, 466 U.S. at 697.

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under state constitutional principles. *See State v. Halverson*, 857 N.W.2d 632, 634-35 (Iowa 2015) (noting parallel state provision for effective assistance of counsel). In the absence of argument or authority for a novel result, the Court should decline to apply anything but established principles. Iowa R. App. P. 6.903(2)(*g*)(3) (stating failure to cite authority in support of an issue may be deemed a waiver of that issue); *State v. Piper*, 663 N.W.2d 894, 913-14 (Iowa 2003) (overruled on other grounds by *State v. Hanes*, 790 N.W.2d 545, 550 (Iowa 2010) and declining to undertake party's research and advocacy).

[2] Iowa courts have stated that both these elements require proof by a "preponderance of the evidence." *See*, *e.g.*, *Halverson*, 857 N.W.2d at 635; *Ledezma*, 626 N.W.2d at 142. Federal courts, however, have indicated that this incorrect, at least with respect to proof of prejudice. *Paulson v. Newton Corr. Facility, Warden*, 703 F.3d 416, 420-21 (8th Cir. 2013); *Shelton v. Mapes*, U.S. D.Ct. No. 4:12-cv-00076-JAJ (filed Sept. 9, 30, 2014) *aff'd on appeal* 821 F.3d 921 (8th Cir. 2016). The prejudice standard is simply whether there is a likelihood of a different outcome sufficient to undermine confidence in the verdict.

There is a strong presumption that counsel performed within the "wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689; *Wemark*, 602 N.W.2d at 814. Counsel's actions are judged objectively, whether they were reasonable under prevailing professional norms. *Strickland*, 466 U.S. at 688. Tactical considerations, even if improvident, insulate the conviction from reversal. *State v. Johnson*, 604 N.W.2d 669, 673 (Iowa Ct. App. 1999). Given the strong presumption of competence, if counsel's conduct "'*might* be considered sound trial strategy,'" then it is deemed so. *Strickland*, 466 U.S. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955) (emphasis added)).

A breach does not occur if counsel refrains from asserting a meritless issue. *State v. Hoskins*, 711 N.W.2d 720, 730-31 (Iowa 2006); *State v. Graves*, 668 N.W.2d 860, 881 (Iowa 2001). Nor must counsel assert an issue merely because it would not hurt. *See Knowles v. Mirzayance*, 129 S.Ct. 1411, 1419-20 (2009) ("This Court has never established anything akin to [a] 'nothing to lose' standard for evaluating *Strickland* claims."). And, the test is not whether some attorney somewhere would have tried the case differently. *State v. Ondayog*, 722 N.W.2d 778, 786 (Iowa 2006). "There are countless

ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Caldwell v. State*, 494 N.W.2d 213, 215 (Iowa 1992).

"Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Strickland*, 466 U.S. at 693. Thus, trial tactics "may require counsel to forego certain defenses or objections in pursuit of the best interest of the accused." *State v. Lyman*, 776 N.W.2d 865, 879 (Iowa 2010) (overruled on other grounds by *Alcala v. Marriott Int'l. Inc.*, 880 N.W.2d 699, 708 n.3 (Iowa 2016)). The reasoned choice of which claims to abandon or pursue, even if incorrect in hindsight, does not amount to ineffective assistance. *See Osborn v. State*, 573 N.W.2d 917, 923 (Iowa 1998) (regarding ineffective assistance of counsel claims abandoned on appeal).

Counsel is presumed competent and appellate courts do not generally second-guess or "Monday morning quarterback" the use of a reasonable trial strategy. *Ondayog*, 722 N.W.2d at 785; *Fullenwider v. State*, 674 N.W.2d 73, 75 (Iowa 2004). It is "all too easy for a court, examining counsel's defense after it has proved

unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Caldwell*, 494 N.W.2d at 215.

As for the second element of the ineffective assistance of counsel claim, "[t]he crux of the prejudice component rests on whether the defendant has shown 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

B. The uniform instructions on assault and self-defense correctly state the law.

Iowa Code section 708.1 provides that a person commits assault when, "without justification," the person does an "act intended to cause pain or injury or which intended to result in physical contact which will be insulting or offensive to another, coupled with the apparent ability to do the act." Iowa Code § 708.1(2)(*a*). Lack of justification is not, however, an element of assault. *State v. Delay*, 320 N.W.2d 831, 834 (Iowa 1982). "Domestic abuse assault" occurs when one commits an assault on a domestic partner as defined in Iowa Code section 236.2(*a*)–(*d*).

The jury was told that where the instructions provide the "State must prove something, it must be by evidence beyond a reasonable doubt." Jury Instr. No. 3; App. 11. The burden of proof remains with the State. Jury Instr. No. 3, 4; App. 11, 12. And, the jury was directed that it must consider all the instructions. Jury Instr. No. 22; App. 22. If the State fails to meet its burden, "your verdict must be not guilty." Jury Instr. No. 3; *see also* Jury Instr. No. 4; App. 11, 12.

Consistent with the Uniform Instructions, the jury was informed,

> The State must prove all of the following elements of the crime of Domestic Abuse Assault Causing Bodily Injury:
>
> 1. On or about the 20th day of August, 2017, the defendant either 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 P[f]eiffer-Kuhse and Ken Kuhse were married at the time of the incident.

> If the State has proved all of these numbered elements, the defendant is guilty of Domestic Abuse Assault Causing Bodily Injury and you should sign Form of Verdict No. 1.
>
> ***
>
> If the State has failed to prove either element 1 or 2, the Defendant is not guilty and you should sign Form of Verdict No. 5.

Amended and Subst. Jury Instr. No. 9; App. 13; *see* Iowa Unif. Instr. No. 830.2; *see also* Iowa Code §§ 236.2, 708.1(2)(*a*), (*b*).

The Code provides for the defense of "justification." Iowa Code §§ 704.1, 704.3, 704.6. The court here gave the jury seven instructions on self-defense or "justification," also from the model jury instructions. Jury Instr. No. 12-19; App. 14-21; *see* Unif. Jury Instr. No. 400.1, 400.2, 400.7, 400.8, 400.10, 400.14, 400.15. The first of these states:

> The Defendant claims he acted with justification.
>
> A person may use reasonable force to prevent injury to a person, including the Defendant. The used of this force is known as justification.
>
> *The State must prove the Defendant was not acting with justification.*

Jury Instr. No. 12; App. 14 (emphasis added); *see* Unif. Jury Instr. No. 400.1.

The next instruction provides,

> A person is justified in using reasonable force if he reasonably believes the force if necessary to defend himself from any imminent use of unlawful force.
>
> If the State has proved any of the following elements, the Defendant was not justified:
>
> 1. The Defendant started or continued the incident which resulted in injury.
>
> 2. An alternative course of action was available to the Defendant.
>
> 3. The Defendant did not believe he was in imminent danger of death or injury and the use of force was not necessary to save him.
>
> 4. The Defendant did not have reasonable grounds for the belief.
>
> 5. The force used by the Defendant was unreasonable.

Jury Instr. No. 13; App. 15; *see* Unif. Jury Instr. No. 400.2.

The jury was also told that a defendant may not provoke the use of force as an excuse to injure the other person. Jury Instr. No. 14; App. 16. But, there would be an exception, such as when the "victim" then uses a "greatly disproportionate" force that is "so great that the Defendant reasonably believed they were in immediate danger of death or injury…." Jury Instr. No. 15; App. 17; *see* Unif. Jury Instr. No. 400.14.

Concerning the second element of the marshalling instruction on self-defense, "if a Defendant is confronted with the use of unlawful force[,] … they are required to avoid the confrontation by seeking an alternative course of action before they are justified in repelling the force used against them." Jury Instr. No. 16; App. 18; *see* Unif. Jury Instr. No. 400.10. But, there is an exception for one in his own home and the alternative course required him to leave his position. Jury Instr. No. 16; App. 18.

As to elements three and four of the self-defense marshalling instruction, the jury was informed to consider the claim of danger from the perspective of a reasonable person. Jury Instr. No. 17; App. 19; *see* Unif. Jury Instr. No. 400.8. "Apparent danger with the knowledge that no real danger existed is no excuse for using force." *Id.*; App. 19.

As to those same elements, the Defendant is not required to act with "perfect judgment." Jury Instr. No. 18; App. 20; *see* Unif. Jury Instr. No. 400.7. He is "required to act with the care and caution of a reasonable person." *Id.*; App. 20.

Finally, as to the fifth element of the marshalling instruction on self-defense, the jury was informed that the Defendant could "only

use reasonable force [and] only the amount of force a reasonable person would find necessary to use under the circumstances to prevent injury." Jury Instr. No. 19; App. 21; *see* Unif. Jury Instr. No. 400.1.

As mentioned above, "without justification" is not an element of assault. *Delay*, 320 N.W.2d at 834. It is an affirmative defense. *Id.* The court need only instruct on self-defense if the defendant generates a jury question on it. *State v. Stallings*, 541 N.W.2d 855, 857 (Iowa 1995). If he does, the State bears the burden to prove the Defendant acted without justification. *Id.* So, the instructions here were correct: assault does not require proof of lack of justification, a defendant is entitled to use reasonable force in his own defense, and the State must disprove it.

A district court is, of course, required to accurately instruct the jury correctly on the law. *State v. Marin*, 788 N.W.2d 833, 837 (Iowa 2010). The instructions need not read a specific way; only fairly state the law as applied to the facts. *State v. Becker*, 818 N.W.2d 135, 141 (Iowa 2012) (overruled on other grounds by *Alcala*, 880 N.W.2d at 708 n.3).

On review, a court does not look a given instruction in isolation. The court considers them all as a whole. *State v. Fintel*, 689 N.W.2d 95, 104 (Iowa 2004). And the court is slow to disapprove of uniform instructions. *State v. Beets*, 528 N.W.2d 521, 523 (Iowa 1995). Indeed, the Supreme Court has advised district courts to adhere to the uniform instructions. *Becker*, 818 N.W.2d at 143. Afterall, they are presumably correct.

The instructions here correctly state the law.

Nevertheless, Kuhse draws this court's attention to *State v. Gomez*, S.Ct. No. 13-0462, 2014 WL 1714451 (Iowa Ct. App. Apr. 30, 2014) where the defendant acknowledged the instructions correctly stated the law. Gomez was charged with assault resulting in bodily injury. He contended his trial attorney was ineffective for failing to make the district court "relate the justification instructions to the assault" marshalling instruction. *Gomez*, S.Ct. No. 13-0462, 2014 1714451, *3. The Court of Appeals held,

> If a lack-of-justification element is not included in the 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.

The Court of Appeals reasoned,

> In the absence of an element requiring the State to prove lack of justification, the jury could have mistakenly believed it could convict Gomez if the State satisfied the three elements listed in the marshalling instructions. The jury had no guidance on how to apply the free-floating instructions on justification.

Id. From this, the Court of Appeals determined that counsel breached a duty causing Gomez *Strickland* prejudice. *Id.*

Gomez may be re-examined or, at least, it does not apply here. First, this jury was told what to do if it found the State failed to prove beyond a reasonable doubt something the court said it was required to prove. Jury Instr. No. 3, 4; App. 11, 12. It must acquit. *Id.*; App. 11, 12. Not to put too fine a point on it, but the jury was informed in Instruction 12 that the State was required to prove the defendant acted without justification. Jury Instr. No. 12; App. 14. So, if the State failed to do so, Instructions 3 and 4 informed the jury that it must acquit. Jury Instr. No. 3, 4; App. 11, 12.

Gomez also does not defer to established law or uniform instructions. It notes the defendant's acknowledgment that the instructions correctly stated the law. *Id.* at *3, n.3. Nevertheless, it concluded counsel should have objected to them.

For another thing, *Gomez* does not account for the principle that courts review all instructions together. Here, the jury was told it "must consider all of the instructions together. No one instruction includes all of the applicable law." Jury Instr. No. 22; App. 22. The self-defense instructions explain that a person is entitled to use reasonable force to defend himself. For *Gomez*'s reasoning to apply here, a jury that convicts on the assault instruction alone would have to ignore the instructions on self-defense. It makes no sense to think one may act in self-defense yet be guilty of assault for doing so.

The record does not show counsel bore a duty to object to the uniform instructions on domestic abuse assault and justification.

C. The proposed instruction would not likely have changed the result where the State proved Kuhse was not justified.

Unlike cases of preserved error, a claim of ineffective assistance of counsel requires a defendant to prove the reasonable likelihood of a different outcome. *Everett v. State*, 789 N.W.2d 151, 158 (Iowa 2010). When an instruction omits a required element, the defendant must show a reasonable probability of a different result if the court had supplied it. *State v. Ambrose*, 861 N.W.2d 550, 559 (Iowa 2015); *State v. Propps*, 376 N.W.2d 619, 623 (Iowa 1985). If another

instruction, such as Instruction 12 here, provides the missing element, then the defendant does not prevail. *Propps*, 376 N.W.2d at 623. If there is sufficient evidence to support the State's case on a missing element, then the defendant does not prevail. *Ambrose*, 861 N.W.2d at 559.

This is true for justification. The defendant must show that "a reasonable probability exists that the result would have been different if the correct [justification] instruction was given." *State v. Shelton*, S.Ct. No. 08-1962, 2011 WL 441932 *5 (Iowa Ct. App. Feb. 9, 2011) (citing *State v. Hopkins*, 576 N.W.2d 374, 379 (Iowa 1998)). If there is sufficient evidence the defendant did not act with justification, the defendant does not prevail. *Id.*

Finally, if defense counsel explains to the jury that it must acquit if it finds his client acted with justification, this too undermines prejudice. *State v. Johnson*, S.Ct. No. 16-0517, 2017 WL 3283280, *4 n.3 (Iowa Ct. App. Aug. 2, 2017); *see also State v. Yaggy*, S.Ct. No. 10-1186, 2012 WL 163234 *9 (Iowa Ct. App. Jan. 19, 2012) (counsel mitigated prejudice from prosecutor's misconduct by addressing it in closing argument).

Taking these principles in reverse order, defense counsel provided the tie between the justification marshalling instruction and the offense. Tr. Vol. II, p. 31, l. 18-p. 32, l. 21. She argued (correctly), "Now, the State has to prove one of the following elements to show the defendant was not justified." Tr. Vol. II, p. 31, ll. 19-21; *see* Jury Instr. No. 12; App. 14. From there, she argued the State failed to prove Kuhse "started or continued the incident which resulted in an injury." Tr. Vol. II, p. 31, ll. 21-23; *see* Jury Instr. No. 13; App. 15. She argued that because Kuhse was in his own home, he had no duty to retreat. Tr. Vol. II, p. 32, ll. 8-11; *see* Jury Instr. No. 16; App. 18. She argued Kuhse feared death or injury. Tr. Vol. II, p. 32, ll. 11-14; *see* Jury Instr. No. 13; App. 15. She argued that he did have reasonable grounds for his belief. Tr. Vol. II, p. 32, ll. 14-16; *see* Jury Instr. No. 13; App. 15. Finally, she argued that the force he used was reasonable. Tr. Vol. II, p. 32, ll. 16-19; *see* Jury Instr. No. 17, 18, 19; App. 19, 20, 21. From there, she asked the jury to return a not guilty verdict.

Neither the court nor the prosecutor indicated that counsel misstated the law or instructions.

It is unlikely that the jury would have misunderstood the import of the self-defense instructions. Just as the first reads, a defendant is entitled to use reasonable force in self-defense. Jury Instr. No. 12; App. 14. Instructions 3 and 4 make clear the State must prove assigned elements or the jury must acquit. Jury Instr. No. 3, 4; App. 11, 12. And, counsel made clear the tie between the marshalling instruction and the justification. There is little likelihood the jury would return a guilty verdict if it also believed that the State failed to prove any of the alternatives in Instruction 13.

Considering those elements, the record shows substantial evidence that Kuhse either started the incident, had an alternative short of leaving the home, or used unreasonable force. If substantial evidence exists for any of these, Kuhse would not likely have been acquitted or convicted of a lesser offense.

"Substantial evidence" is evidence which "would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt." *State v. Williams*, 695 N.W.2d 23, 27-28 (Iowa 2005); *see also Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *State v. Vance*, 790 N.W.2d 775, 783 (Iowa 2010). The testimony of one credible witness would uphold a conviction. *State v. Mullins*, 260 N.W.2d

628, 630 (S.D. 1977); *State v. Oliver*, 267 N.W.2d 333, 336 (Wis. 1978).

The jury enjoys the prerogative and bears the duty to sort the conflicting testimony and assign all of it such weight as it deserves. A jury is entitled to believe all, some or none of any witness's testimony without interference. *State v. McPhillips*, 580 N.W.2d 748, 753 (Iowa 1998); *State v. Phanhsouvanh*, 494 N.W.2d 219, 223 (Iowa 1992); *State v. Brown*, 466 N.W.2d 702, 704 (Iowa Ct. App. 1990).

Here, Victoria Pfeiffer-Kuhse ("Victoria") testified that she went to the basement to retrieve her laundry when Kuhse—who had been drinking rum and Cokes—came up behind her mumbling and being "abusive." Tr. Vol. I, p. 133, ll. 10-18, p. 135, ll. 10-24. Even assuming they insulted one another, it was Kuhse who first grabbed Victoria by the neck. Tr. Vol. I, p. 136, l. 2-p. 137, l. 12. She bore the marks of it. Tr. Vol. I, p. 119, ll. 15-20, p. 173, ll. 1-4, p. 183, ll. 18-25; Ex. 1 (CD photos of Victoria). This is to say, Kuhse "started or continued the incident which resulted in injury." Jury Instr. No. 13; App. 15.

It is true, of course, that Kuhse was in that portion of the house where he tended to stay. But, the first assault occurred outside the laundry room, near the landing of the stairs. Tr. Vol. I, p. 136, l. 15-

p. 137, l. 12. Rather than go anywhere else in the basement, Kuhse told her insultingly to "get up." Tr. Vol. I, p. 138, ll. 15-17. If, by some stretch, this provoked her then her response was muted. It did not justify then slamming her into the coffee table. His response was more than necessary. *See* Tr. Vol. I, p. 138, ll. 21-24; Jury Instr. No. 13, 15, 19; App. 15, 17, 21.

Even assuming a version of Kuhse's story was true—that Victoria had been "following him" attempting to start a fight, there was little danger from the five-foot, two-and-a-half inch one hundred-and-five-pound woman. Tr. Vol. I, p. 137, ll. 13-17. His scratch and bruise were minor. *See* Tr. Vol. I, p. 185, l. 4-p. 186, l. 7. She had abrasions, scratches, and bruises on her chest and lower neck area, knees. *See* Jury Instr. No. 13, 17, 18, 19; App. 15, 19, 20, 21.

The State proved Kuhse started or continued the incident that caused Victoria's injuries. Jury Instr. No. 13, 14, 15; App. 15, 16, 17. The State proved Kuhse had a less violent alternative than what he employed. Jury Instr. No. 13, 16; App. 15, 18. The State proved Kuhse's reaction was outsized to any perceived provocation or danger. Jury Instr. No. 13; App. 15. And, the State proved the

amount of force used against her was unreasonable. Jury Instr. No. 13, 19; App. 15, 21.

There was sufficient evidence in the record to support the jury's finding that Kuhse did not act with justification. As such, the absence of an explanation what to do if Kuhse *was* justified did not prejudice him.

CONCLUSION

The judgment and sentence should be affirmed.

REQUEST FOR ORAL SUBMISSION

The State requests oral argument.

Respectfully submitted,

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