IN THE COURT OF APPEALS OF IOWA

No. 0-082 / 09-0459
Filed August 25, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RONNIE GREER,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, James E. Kelley, Judge.

Ronnie Greer appeals from the judgment and sentence entered on his convictions for domestic abuse assault, third offense, and operating a vehicle without the owner's consent. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Stephan Japuntich, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Michael J. Walton, County Attorney, and Amy DeVine, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Doyle and Danilson, JJ. Tabor, J., takes no part.

DANILSON, J.

Ronnie Greer appeals from the judgment and sentences entered on his convictions for domestic abuse assault, third offense, in violation of Iowa Code sections 708.1 and 708.2A(2)(b) (2007), and operating a vehicle without the owner's consent, in violation of section 714.7. He argues his counsel was ineffective in failing to request a specific intent instruction. Greer further contends there was insufficient evidence to support his convictions. We affirm.

I. Background Facts and Proceedings.

In 2008, Pamela Mottet had been living in Scott County with her daughter, Rodell Morgart; her son-in-law, William "Jay" Morgart; and her five grandchildren. Mottet was employed, but also helped with housework, providing transportation for her grandchildren after school, and helping take care of them. In late September to early October 2008, Mottet began spending considerable time with Ronnie Greer, often staying overnight at various hotels. Her interaction with the Morgarts abruptly ceased, and the Morgarts tried to locate her without success.

On or about October 7, 2008, Greer and Mottet ran out of money and had to leave the City Center Hotel in Bettendorf where they had stayed for the past week or so. They loaded their belongings into Mottet's car. Greer and Mottet began to argue as Greer was driving Mottet's car. Mottet asked him to stop the car and let her out. Greer got angry and hit Mottet in the face. Mottet stated, "Oh you stupid fuck. I think you broke my cheek." Greer said, "Don't call me that again" and hit her a second time. Greer pulled the car to the side of the street. Mottet tried to grab Greer and he hit her a third time. Mottet's nose started

bleeding, and Greer stopped hitting her. Greer pulled a towel or shirt from the backseat and gave it to Mottet for her bleeding nose. Greer stopped at his sister's house to get Mottet some ice to put on her injuries. They spent the next two nights in Mottet's car in an apartment parking lot. With her left eye swollen shut and her face black and blue, Mottet called her employer and said she could not come to work because she had "an accident." She also called Jay and told him she was not able to pick up the grandchildren from school. Worried about Mottet's uncharacteristic behavior and lack of contact with the Morgart family, Jay contacted Mottet's employer and learned she had called to say she would not be at work because she had been in an accident.

On October 9, 2008, Mottet donned large sunglasses that covered her eyes and most of her cheek and went to pick up her paycheck from her employer. With that money, Greer and Mottet checked into a Super 8 motel. They kept their belongings in Mottet's car. For the third day in a row, Mottet called Jay and told him she was unable to pick up the grandchildren from school. Jay called Mottet back at the number from which she had called and discovered Mottet was at the Super 8 motel. Jay went immediately to the motel. He telephoned Rodell to say he had found Mottet. Rodell left work to go to the motel as well and called the police while en route. Jay found Mottet's room, where he noticed she was wearing sunglasses and had a bruise on her cheek. Greer was still in the room. Mottet went to the parking lot with Jay. She started crying, and she took off her sunglasses. Jay and Mottet were talking when Rodell arrived, immediately noticed her mother's injuries, and insisted Mottet leave with them.

By this time, Greer had come outside to the parking lot from the motel room. Jay and Rodell told Greer to take his things out of Mottet's car. Instead, Greer took Mottet's car and left the motel.

Davenport Police Officer Roberto Luna was dispatched to the scene. Upon his arrival, he noticed swelling and bruising around Mottet's left eye. He called an evidence technician to photograph the injuries. While Luna was talking to Mottet, he received a call from dispatch that Greer, in Mottet's vehicle, had been stopped by Moline law enforcement. Jay and Mottet went to retrieve her vehicle.

The State filed a trial information charging Greer for the offenses of operating a motor vehicle without the owner's consent (Count I); domestic abuse assault, third or subsequent offense (Count II); domestic abuse assault, third or subsequent offense (Count III); and criminal mischief in the fourth degree (Count IV).[1] Greer filed a motion to sever Counts I and II from Counts III and IV, which was granted by the district court. After a trial on Counts I and II, a jury found Greer guilty on both counts. The court sentenced Greer to two years and a $625 fine for Count I and five years and a $750 fine for Count II, to be served concurrently.

Greer now appeals, contending his trial counsel was ineffective in failing to request a specific intent instruction on the domestic abuse assault charge. Greer also contends there was insufficient evidence in Count I of intent to drive Mottet's

[1] Counts III and IV were in regard to another woman with whom Greer had been involved in a romantic relationship. The charges stemmed from an alleged assault on October 12, 2008, that occurred when Greer and the woman argued while in her vehicle.

car without her permission, and in Count II that he and Mottet were cohabiting to support a domestic abuse assault.

II. Merits.

A. Ineffective Assistance of Counsel.

The jury was instructed in Instruction No. 12:

> Under Count 2, the State must prove all of the following elements of the crime of Domestic Abuse Assault:
>
> 1. On or about the 6th day of October, 2008, the defendant did an act which was meant[2] to cause pain or injury to Pamela Mottet.
>
> 2. The defendant had the apparent ability to do the act.
>
> 3. The act occurred between family or household members who resided together at the time of the incident.
>
> If the State has proved all of these numbered elements, the defendant is guilty of Domestic Abuse Assault under Count 2. If the State has proved only elements of 1 and 2, the defendant is guilty of Assault under Count 2. If the State has failed to prove either elements 1 or 2, the defendant is not guilty under Count 2.

The instruction follows the language of Iowa Criminal Instruction 830.1, published by the Iowa State Bar Association.[3] Greer contends on appeal that trial counsel was ineffective in requesting a specific intent instruction.

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[2] Iowa Code section 708.1 uses the term "intended" whereas the instruction included the term "meant." One definition of "mean" is "to have a purpose or intention; intend." American Heritage College Dictionary 858 (4th ed. 2004).

[3] Iowa Criminal Jury Instruction 830.1 provides:

> Domestic Abuse Assault—Elements. The State must prove all of the following elements of the crime of Domestic Abuse Assault:
>
> 1. On or about the ____ day of_____,20___ , the defendant did an act which was meant to [cause pain or injury] [result in physical contact which was insulting or offensive] [place (name of victim) in fear of immediate physical contact which would have been painful, injurious, insulting or offensive] to (victim).
>
> 2. The defendant had the apparent ability to do the act.
>
> 3. The act occurred between [family or household members who resided together at the time of the incident] [separated spouses or persons divorced from each other and not residing together at the time of the incident] [persons who are the parents of the same minor child]

Greer raises failure to instruct the jury on specific intent as an ineffective-assistance-of-counsel claim, which is an exception to the traditional error preservation rules and may be raised on direct appeal. *See State v. Fountain*¸___ N.W.2d ___, ___ (Iowa 2010). Ineffective-assistance-of-counsel claims have their basis in the Sixth Amendment to the United States Constitution and thus our review is de novo. *State v. Lyman*, 776 N.W.2d 865, 877 (Iowa 2010). Although we generally preserve ineffective assistance of counsel claims for postconviction proceedings, we consider such claims on direct appeal if the record is sufficient. *Fountain*, ___ N.W.2d at ___.

We must decide (1) whether it can be determined as a matter of law that Greer's counsel was ineffective in failing to request a specific intent jury instruction on Greer's domestic abuse assault charge and (2) whether the record demonstrates Greer was prejudiced because of this error. *Id*. at ____. A defendant's failure to prove either element by a preponderance of the evidence is fatal to a claim of ineffective assistance. *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001).

Our supreme court recently 'reaffirmed" its position that assault is a specific intent crime, concluding it was error for a trial court not to instruct on specific intent where the defendant was charged with domestic abuse assault. *Fountain*, ___ N.W.2d at ___. The court noted that under Iowa Code section

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> [persons who have been family or household members residing together within the past year but not residing together at the time of the incident].
>
> If the State has proved all of these numbered elements, the defendant is guilty of Domestic Abuse Assault. If the State has proved only elements 1 and 2, the defendant is guilty of Assault. If the State has failed to prove either elements 1 or 2, the defendant is not guilty.

Iowa Bar Ass'n, *Iowa Crim. Jury Instructions* 830.1 (*available at* http://iabar.net).

708.1, "a defendant must commit an act that he intends to cause pain or injury to the victim." *Id.* at ___. The *Fountain* court found trial counsel "should have been aware of the case law declaring that assault includes the element of specific intent." *Id.* at ___. Because "specific intent is a higher burden for the state to prove," the *Fountain* court stated "only trial strategy could explain counsel's failure to request a specific intent instruction." *Id*. at ___. The court concluded that based on the record provided, it could not determine either the prosecution's theory or the nature of Fountain's defense strategy, and it was therefore necessary to preserve the issue for possible postconviction proceedings. *Id*. In Greer's case, however, we have an adequate record.

Greer's defense was two-fold. Greer's counsel argued there was no cohabitation. More significantly, Greer cross-examined Mottet about, and argued in closing that, Mottet had in fact received her injuries during a fight with another woman, not Greer. As the *Fountain* court noted, "If the defense strategy is to deny that any assaultive contact occurred, the individual elements of assault become unimportant." *Id.* at ___. Under the circumstances presented, we are inclined to conclude a normally competent attorney would have found the question was not worth raising. *See id.* at ___ (citing *State v. Schoelerman*, 315 N.W.2d 67, 72 (Iowa 1982)).

If the issue were worth raising Greer must show that there is a reasonable probability that had the jury been instructed on specific intent, the outcome of the proceedings would have been different to establish the prejudice prong of his ineffective-assistance claim. *Ledezma*, 626 N.W.2d at 143. A reasonable

probability is one that undermines confidence in the outcome. *Millam v. State*, 745 N.W.2d 719, 722 (Iowa 2008). We conclude Greer cannot establish the requisite prejudice.

The jury was instructed that in order to find Greer guilty of domestic abuse assault, it had to find "the defendant did an act which was meant to cause pain or injury to Pamela Mottet." We interpret the language "meant to" as arguably sufficient to convey the meaning of the "intended to" language required under the assault statute. *See* n.2 above. We also find it significant that Greer did not argue at trial—and does not argue on appeal—that there is insufficient evidence of intent to cause pain or injury.

Mottet denied her injuries occurred during an assault with someone other than Greer. She testified Greer got angry and hit her in the face. Mottet stated, "Oh you stupid fuck. I think you broke my cheek." Whereupon Greer said, "Don't call me that again" and hit her a second time. Greer pulled the car to the side of the street. Mottet tried to grab Greer and he hit her a third time. Mottet testified "it felt like a brick hitting me in the face." Days after the assault, Mottet had a "huge black eye and her eye was almost bleeding." Photographs taken on October 9, 2008, show Mottet also had bruising covering the entire left side of her face, spreading down onto her neck. The jury's verdicts indicate the jury found Mottet credible.

Specific intent is defined in Iowa Criminal Jury Instruction 200.2:

> "Specific intent" means not only being aware of doing an act and doing it voluntarily, but in addition, doing it with a specific purpose in mind.

> Because determining the defendant's specific intent requires you to decide what he was thinking when an act was done, it is seldom capable of direct proof. Therefore, you should consider the facts and circumstances surrounding the act to determine the defendant's specific intent. You may, but are not required to, conclude a person intends the natural result of his acts.

Mottet's description of the facts and circumstances and the photographs of her injuries, reflect that Greer committed several overt acts that were intended to cause pain or injury to Mottet. Pain and injury, together with physical contact, or the insulting and offensive nature of the acts, reasonably and naturally followed those overt acts. Greer was aware of doing the acts and did them voluntarily, without justification. We conclude that had the jury received the specific intent instruction, the outcome would not have been different.

B. Sufficiency of the Evidence.

We review challenges to the sufficiency of the evidence for the correction of errors of law. Iowa R. App. P. 6.907; *State v. Keeton*, 710 N.W.2d 531, 532 (Iowa 2006). A jury's findings of guilt are binding on appeal if supported by substantial evidence. *State v. Enderle*, 745 N.W.2d 438, 443 (Iowa 2007). Substantial evidence is evidence that could convince a rational trier of fact a defendant is guilty beyond a reasonable doubt. *Id*. In reviewing challenges to the sufficiency of the evidence supporting a guilty verdict, we consider all of the evidence in the record in the light most favorable to the State and make all reasonable inferences that may fairly be drawn from the evidence. *Keeton*, 710 N.W.2d at 532.

Greer makes two claims with regard to the sufficiency of the evidence on appeal. First, Greer argues the evidence is insufficient to prove one element of

Count I, operating a motor vehicle without the owner's consent: that he "intended" to possess Mottet's vehicle without her consent. The State argues that error was not preserved on this issue. We disagree. As the State points out, the record reveals Greer made two motions for judgment of acquittal, each asserting the evidence was insufficient to show Greer possessed Moffet's vehicle without her consent. In the motions, Greer specifically conceded he intentionally took the vehicle, but argued that he did not do so without Mottet's implied consent. We believe this is the same issue raised on appeal.

In regard to the offense of operating a motor vehicle without the owner's consent, before Greer took Mottet's vehicle, Greer was told to remove his possessions from the vehicle by Mottet's daughter in Mottet's presence. Historically, Greer never drove the vehicle unless Mottet was a passenger. In this instance, Mottet did not accompany Greer. Greer also knew the police had been called to facilitate Mottet leaving the hotel. Greer never asked Mottet if he could take the vehicle. These facts negate any implied consent to operate Mottet's vehicle and constitute substantial evidence to support the jury's finding of guilt. *See State v. Torres*, 495 N.W.2d 678, 681 (Iowa 1993).

Second, Greer contends the evidence is insufficient to prove one element of Count II, domestic abuse assault: that he and Mottet were "cohabitating." In support of this contention, Greer argues that he and Mottet's relationship had not gone on very long, and that the relationship was "off and on." He points out that Mottet continued to receive her mail and kept some personal belongings at the Morgarts.

The determination whether a couple is cohabiting "is a peculiarly factual question which must be answered after examining the situation as a whole. It is appropriate for the jury to decide this." *State v. Kellogg*, 542 N.W.2d 514, 518 (Iowa 1996). We have reviewed the record, particularly including the testimony of the victim and the victim's family, as well as the factors to be considered in determining cohabitation. *See* Iowa Code § 236.2; *Kellogg*, 542 N.W.2d at 518. Mottet testified that she had a sexual relationship with Greer. In September and October 2008, she began staying in various hotels with him. Greer kept all his belongings in her car, and Mottet's money was used for both of them to live in the hotel rooms. Further, Greer argued that he had permission to use Mottet's car, that they shared it, and that he had had his own key. Considering the record in the light most favorable to the State and making all reasonable inferences that fairly may be drawn, we find substantial evidence supports the jury's finding that Greer and Mottet were cohabiting. We affirm on this issue.

III. Conclusion.

We conclude that had the jury received the specific intent instruction, the outcome would not have been different and, therefore, Greer has failed to establish trial counsel was ineffective. We also conclude there was substantial evidence that Greer was operating Mottet's vehicle without her consent and that Greer and Mottet were cohabiting to support the convictions. Having considered all issues raised on appeal, we affirm Greer's convictions and sentences.

AFFIRMED.