

IN THE COURT OF APPEALS OF IOWA

No. 0-488 / 09-0750
Filed August 25, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CHRISTINA MAXINE JENKINS,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Odell McGhee,
District Associate Judge.

The defendant appeals from her conviction for assault causing bodily
injury in violation of Iowa Code section 708.2(2) (2007). **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Dennis D. Hendrickson,
Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney
General, John P. Sarcone, County Attorney, and Jess Vilsack and Zach Brost,
Assistant County Attorneys, for appellee.

Considered by Vogel, P.J., and Doyle and Mansfield, JJ. Tabor, J., takes
no part.

VOGEL, P.J.

Christina Jenkins appeals her conviction for assault causing bodily injury, a serious misdemeanor, in violation of Iowa Code section 708.2(2) (2007). She claims her attorney was ineffective for failing to object to the jury being given both a general and specific intent instruction. Because the marshalling instruction was clear as to each element, including the intent the jury must find in reaching its verdict, Christina cannot demonstrate she suffered any prejudice. We also find sufficient evidence to sustain her conviction and that she waived her claim as to the district court's ruling on her motion for new trial.

I. Background Facts and Proceedings.

Forty-seven-year-old Christina Jenkins and sixty-year-old Cheryl Cummins lived in the same multi-family building consisting of eight apartments. On August 30, 2008, Jenkins and Cummins got into a dispute which led to a physical altercation. Cummins testified that she noticed some broken glass in the grass and on the shared driveway, and raked the glass into a small pile on the edge of the driveway. Cummins moved the glass because her grandchildren were playing in the yard, but did not dispose of it because she "didn't put it there." Approximately fifteen or twenty minutes later, Jenkins asked Cummins if she was going to pick up the glass. Cummins responded, "No, that it wasn't my glass." Cummins then walked up the steps to the landing of her porch. Jenkins "stormed into her house," returned with a broom and plastic dustpan, gathered the pile of glass, and dumped it into Cummins's flowerpot. On Jenkins's second trip to the flower pot, and after Cummins warned her to stay away, Jenkins came towards Cummins, and a pushing match ensued. Jenkins shoved Cummins into a corner,

and struck Cummins several times with the edge of the dustpan, leaving cuts on Cummins's arm and neck and a bruise on her temple. At some point during the fray, Cummins grabbed a birdhouse and swung it at Jenkins.

Jenkins's testimony varied significantly from Cummins's, as she asserted she acted in self-defense. Jenkins testified she went up Cummins's steps and dumped the glass on Cummins's doormat. On the third trip with the glass shards, Cummins picked up the doormat, and threw the glass and other debris from the mat at Jenkins. As Jenkins turned to leave, Cummins struck her from behind. Jenkins, trying to maintain her balance, hung on to the banister, then turned around and hit Cummins with the dustpan. Jenkins testified that in spite of her plea to stop, Cummins hit her repeatedly, first with her fist then with some object in her hand.

On October 6, 2008, Jenkins was charged with assault causing bodily injury. Although Jenkins adamantly testified she only acted in self-defense, the jury found her guilty as charged after a February 2009 trial. Jenkins appeals.

II. Ineffective Assistance of Counsel.

Jenkins first asserts that her trial counsel was ineffective for failing to object to a jury instruction on general intent. See *State v. Fountain*, ___ N.W.2d ___, ___ (Iowa 2010) (discussing that generally an objection must be made to jury instructions in order to preserve the issue for appeal, but ineffective-assistance-of-counsel claims are an exception to the traditional error preservation rules). We review ineffective-assistance-of-counsel claims de novo. *State v. Stewart*, 691 N.W.2d 747, 750 (Iowa 2004). Although we ordinarily preserve ineffective-assistance-of-counsel claims for postconviction proceedings,

we find that in the present case the record is adequate to decide the claim. See *id.* at 751.

In order to succeed on a claim of ineffective assistance of counsel, a defendant must prove by a preponderance of evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Fountain*, ___ N.W.2d at ___. A claim may be resolved on either prong. *Id.*

The jury was instructed as follows:

Instruction No. 11

To commit a crime a person must intend to do an act which is against the law. While it is not necessary that a person knows the act is against the law, it is necessary that the person was aware he was doing the act and he did it voluntarily, not by mistake or accident. You may, but are not required to, conclude a person intends the natural results of his acts.

Instruction No. 12

“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 she 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 results of her acts.

Instruction No. 13

The State must prove all of the following elements of the crime of Assault Causing Bodily Injury:

1. On or about the 30th day of August 2008, the defendant did an act which was:
 - a. intended to cause pain or injury to Cheryl Cummins; OR
 - b. intended to result in physical contact which was insulting or offensive to Cheryl Cummins.
2. The defendant had the apparent ability to do the act.
3. The act caused bodily injury to Cheryl Cummins.

If the State has proved all of the elements, the defendant is guilty of Assault Causing Bodily Injury. If the State has proved elements 1 and 2, but failed to prove element 3, the defendant is guilty of

Assault. If the State had failed to prove either 1 or 2, the defendant is not guilty.

See Iowa Crim. Jury Instructions 200.1, 200.2.

We do not need to determine whether there was a breach of duty because we can resolve this issue on the prejudice prong. See *Kirchner v. State*, 756 N.W.2d 202, 204 (Iowa 2008) (“The court need not address both components if the [applicant] makes an insufficient showing on one of the prongs.”). Prejudice is found where there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). Jenkins asserts that the jury could have convicted her simply upon a general intent finding. We disagree. In addition to the general intent instruction, the jury was instructed as to specific intent. See *Fountain*, ___ N.W.2d at ___ (stating that although the legislature has defined assault as a general intent crime, “the crime of assault includes a specific intent element”). Further, the marshalling instruction given (number thirteen), specifically required a finding that Jenkins’s acts were either “intended to cause pain or injury” or were “intended to result in physical contact which was insulting or offensive.” Because the jury was instructed as to specific intent and the marshalling instruction clearly detailed the necessary intent, we find Jenkins was not prejudiced by the inclusion of the general intent instruction. *Id.*; *State v. Kellogg*, 542 N.W.2d 514, 516 (Iowa 1996) (“Error in giving or refusing jury instructions does not merit reversal unless it results in prejudice to the defendant.”). Therefore, Jenkins cannot prevail on this claim of ineffective assistance of counsel.

III. Sufficiency of the Evidence.

Jenkins next asserts that there was not sufficient evidence to convict her because “[t]he evidence suggested mutual combatants, a justification defense was asserted,” and “conflicting evidence was presented as to who initiated the touching.” Our review is for correction of errors at law. *State v. Jorgensen*, 758 N.W.2d 830, 834 (Iowa 2008) (“Sufficiency-of-the-evidence challenges are reviewed for correction of errors at law.”) Jenkins does not specify what element of the crime was not supported by the testimony. Rather she essentially challenges the credibility of Cummins, asserting that the conviction was “based upon conjecture, speculation and suspicion alone.” She urges this court to find her version of the incident more credible than Cummins’s version. We decline to do so. The credibility of a witness and the weight of each witness’s testimony is the province of the jury. *State v. Laffey*, 600 N.W.2d 57, 59 (Iowa 1999). Where there is conflicting testimony, as there clearly was in this case, the jury is in the best position to judge whom and what to believe. *State v. Knox*, 536 N.W.2d 735, 742 (Iowa 1995). “A jury’s assessment of credibility may only be ignored on appeal when the testimony is so impossible, absurd, and self-contradictory that it may be deemed a nullity.” *State v. Speaks*, 576 N.W.2d 629, 632 (Iowa Ct. App. 1998). We find there is sufficient evidence in the record which supports the jury’s verdict.

IV. Motion for a New Trial.

Finally, Jenkins claims that the district court abused its discretion by failing to exercise its discretion in denying her motion for a new trial. We review a district court’s ruling on a motion for a new trial for an abuse of discretion. *State*

v. Reeves, 670 N.W.2d 199, 202 (Iowa 2003). Jenkins moved for a new trial, asserting that the jury's verdict was against the weight of the evidence and challenging Cummins's credibility. At the bottom of the motion, the district court hand wrote, "Motion Denied—No basis for motion (on the record)." On appeal, Jenkins asserts that the district court erred because it is impossible to discern what standard the district court used in ruling on the motion.

The State responds that the lack of record for purposes of this appeal effectively waives Jenkins's claim. While we agree with Jenkins that it is difficult to discern what standard the district court utilized in denying Jenkins's motion, we have little to review. It is the moving party's responsibility to produce a record on appeal, either by a "statement of the evidence or proceedings" under Iowa Rule of Appellate Procedure 6.806(1) or by creating a bill of exceptions under Iowa Rule of Criminal Procedure 2.25. *State v. Alloway*, 707 N.W.2d 582, 586 (Iowa 2006) ("[W]e will not permit a defendant to raise an issue without attempting to give us a record upon which we can decide the issue."); *State v. Mundra*, 532 N.W.2d 765, 767 (Iowa 1995) (explaining the refusal of a reviewing court to speculate on what transpired at the district court and stating, "It is a defendant's obligation to provide this court with a record affirmatively disclosing the error relied upon."). Because Jenkins has failed to provide us with a record to review, she has waived her claim that the district court abused its discretion in denying her motion for new trial. We affirm the district court.

AFFIRMED.