

IN THE COURT OF APPEALS OF IOWA

No. 0-674 / 10-0041
Filed February 9, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DONALD DAVID MARSH,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, William Price, District Associate Judge.

Defendant appeals the district court's denial of his motion for new trial on his conviction for domestic abuse assault causing bodily injury. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Robert P. Ranschau, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Holly Stott, Student Legal Intern, John P. Sarcone, County Attorney, and Michael Salvner, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., Potterfield, J., and Huitink, S.J.* Tabor, J., takes no part.

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

HUITINK, S.J.**I. Background Facts & Proceedings**

The following evidence was presented during the criminal trial in this case: On August 1, 2009, Thayne Patterson and Jacob Stanton were out on an apartment balcony smoking a cigarette when they heard a woman in a nearby apartment screaming, “stop punching me,” and “help.” Patterson and Stanton walked over to that apartment and from outside were able to see a man without a shirt on top of another person. They were able to hear a “ruckus” and things hitting the floor of the apartment.

Patterson and Stanton knocked on the door of the apartment. Donald Marsh, who was not wearing a shirt, answered the door. Leah Marsh was sitting hunched over, and she asked the men to get her out. Marsh shut the door, but after Patterson and Stanton knocked again, Leah came out. Marsh stated, “I f***ed up.” Leah had a lump on her head and one of her hands was swollen. She told Patterson and Stanton her husband, Marsh, had caused her injuries by hitting and punching her. Leah had been drinking, and there was differing testimony as to whether she was intoxicated or not.

Against Leah’s wishes, Stanton called the police. When officers went to Marsh’s apartment, he appeared to be intoxicated. He first denied anything happened. When an officer told Marsh about the accusations, he said, “[W]ell, she needs to be beat up.” He told a different officer there had been a fight, but he denied hurting Leah. After Marsh was arrested, he stated Leah had been the aggressor and she had injured his chest. The officers did not see any injuries on Marsh.

Marsh was charged with domestic abuse assault causing bodily injury, in violation of Iowa Code section 708.2A(2)(b) (2009). At the criminal trial, Leah testified she became extremely upset when Marsh would not permit her to leave to purchase methamphetamine, so she struck herself in the head, thereby injuring her hand and her head. She stated she did this so Marsh would be arrested and she would be able to leave. She testified Marsh did not touch her or cause her injuries.

Marsh testified Leah became angry with him on August 1, 2009, because she believed he was having an affair. He stated they had both been drinking alcohol. He said Leah threw a tequila bottle at his head, and he could not remember much after that.

The jury found Marsh guilty of domestic abuse assault causing bodily injury. The court denied Marsh's motion for new trial and motion in arrest of judgment. He was sentenced to a term of imprisonment not to exceed two years.

Marsh appealed his conviction, claiming the court abused its discretion in ruling on his motion for new trial because the verdict was contrary to the weight of the evidence. We were unable to determine if the court had applied the correct legal standard in ruling on Marsh's motion for new trial, and sent the case back to the court in a limited remand. The court entered an order applying *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998), and denied the motion for new trial.

II. Standard of Review

The district court has broad discretion in ruling on a motion for new trial. *State v. Maxwell*, 743 N.W.2d 185, 192 (Iowa 2008). We will find an abuse of discretion where the court exercises its discretion on grounds or for reasons

clearly untenable or to an extent clearly unreasonable. *State v. Reeves*, 670 N.W.2d 199, 202 (Iowa 2003).

III. Merits

On appeal, Marsh contends the district court erred by overruling his motion for a new trial. He claims the jury's verdict is contrary to the weight of the evidence. He points out that Leah testified he did not cause her injuries and that she stated she caused her own injuries.

A court may grant a new trial if the verdict is contrary to the weight of the evidence. *Ellis*, 578 N.W.2d at 659. The court should weigh the evidence and consider the credibility of witnesses. *State v. Taylor*, 689 N.W.2d 116, 134 (Iowa 2004). "Only in the extraordinary case, where the evidence preponderates heavily against the verdict, should a district court lessen the jury's role as the primary trier of fact and invoke its power to grant a new trial." *Maxwell*, 743 N.W.2d at 193.

In the remand order, the court determined Leah's statements at the time of the incident were credible, and that these statements were supported by the observations of lay witnesses and peace officers. The court concluded Marsh's testimony at trial was not credible. The court concluded the jury's verdict was supported by the weight of the evidence and denied the motion for new trial.

We conclude the court did not abuse its discretion in denying Marsh's motion for new trial. The court carefully considered the credibility of the witnesses and weighed the evidence accordingly. The court could reasonably determine Leah's and Marsh's testimony during the trial was not credible, while

Leah's statements at the time of the event, which were supported by the observations of Patterson, Stanton, and police officers, were credible.

Marsh's motion for new trial also raised the issue that the court had erred by overruling his objection to statements by Leah on the grounds of hearsay. He has not raised this issue on appeal. Even if we assumed, however, that he was raising this claim of error on appeal, we agree with the district court's conclusion that the statements were admissible under the excited utterance exception to the hearsay rule. See Iowa R. Evid. 5.803(2).

We affirm the decision of the district court denying Marsh's motion for new trial.

AFFIRMED.