IN THE COURT OF APPEALS OF IOWA

No. 2-264 / 11-1078
Filed April 25, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOSHUA WAYNE KAMERICK,
Defendant-Appellant.

Appeal from the Iowa District Court for Marion County, Paul R. Huscher, Judge.

Defendant appeals his conviction for domestic abuse assault. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, Ed Bull, County Attorney, and Tiffany Kragnes, Assistant County Attorney, for appellee.

Considered by Potterfield, P.J., and Danilson and Bower, JJ.

POTTERFIELD, P.J.

Joshua Kamerick appeals from his conviction of domestic abuse assault, enhanced, claiming the evidence was insufficient to prove he did an act which was intended to cause pain or injury, or intended to result in physical contact which would be would be insulting or offensive. He also contends trial counsel was ineffective in failing to object to hearsay, and to prejudicial, and prior bad acts evidence.

The jury was presented with two versions of the events of April 2, 2011. A witness testified that he observed the defendant yelling obscenities from the roof over a porch of a house at a young woman as she walked down the street. The woman was in "knickers-type pants" and "had no shoes on." He then saw the defendant "jogging down the street towards the young lady." The witness then "observed him catching up with the young lady and giving her a little shove off the sidewalk." The two then "had a few words" and the defendant put his arm around the woman's and "it kind of looked to me like he had ahold of her left arm by his hand." The witness then called 9-1-1 and talked to the dispatcher until police encountered the pair. The witness estimated he was "well over 300 feet away" when he saw the defendant push the woman off the sidewalk.

Officer Tim Donelson testified he responded to a dispatch of a couple fighting. The dispatcher was on the phone with the officer and with the witness who kept the dispatcher apprised of the couple's location. When the officer came upon the defendant and a young woman, the dispatcher said "the witness says 'You've got them now. That's them.'" Officer Donelson stated that when he spoke with the two, the woman's face was red and she appeared to have been

crying. After hearing what the two had to say, the defendant was arrested for domestic assault.

The twenty-year-old, pregnant fiancée of the defendant testified she and the defendant had a verbal argument and she left their apartment to go to his father's home. After she left the apartment, she stated the defendant

> was yelling and then he ran up and he asked me if I would come back with him and I said no, and we kept kind of arguing about it and we kept walking and he just wanted me to come back to talk to him. And I said no, that we—if we went back there we were just going to keep arguing, so I kind of like—we were walking down the street and I kind of turned into the bank parking lot, kind of by the windows, an that's where he kind of asked me if he could just go to his dad's with me, and so we decided to go back to his dad's together and we were better.

She denied that he pushed or shoved her.

On cross-examination, the woman was asked when the two had become engaged and how the defendant proposed. She stated that the defendant and she "were just in our apartment and he asked me when we were sitting in our living room." She couldn't remember the "exact date" they were engaged, but acknowledged that if it was on April 7, which was the date she posted it on Facebook, it would have been at a time when there was a no-contact order in place between her and the defendant.

The jury found the defendant guilty and the defendant appeals.

I. Sufficiency of the evidence.

We will assume, without deciding, that trial counsel's non-specific motion for judgment of acquittal preserved his sufficiency-of-the-evidence claim in this

case.[1] *See State v. Williams*, 695 N.W.2d 23, 27 (Iowa 2005) (recognizing an exception to the general error-preservation rule when the record indicates that the grounds for a motion were "obvious and understood by the trial court and counsel"). We review sufficiency claims for correction of errors at law. *Id.*

"Evidence is sufficient to withstand a motion for judgment of acquittal when, viewing the evidence in the light most favorable to the State and drawing all reasonable inferences in the State's favor, there is substantial evidence in the record to support a finding of the challenged element." *Id.* (internal quotation marks and citation omitted). The credibility of the witnesses and the weight to afford testimony is for the jury to determine. *Id.* at 28.

The district court did not err in overruling the motion for acquittal as substantial evidence supports the conviction. The independent witness testified the defendant was yelling, ran after the woman, and then shoved her off the sidewalk. The jury could reasonably find from that evidence that the defendant "did an act which was intended to cause pain or injury, or was intended to result in physical contact which would be insulting or offensive to" the woman.[2] The

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[1] The defendant had moved for directed verdict claiming the State had failed to meet the burden of proof for "the critical element of assault, that being the defendant did an action which resulted in physical contact which was insulting or offensive." Counsel went on to argue that there was no in-court identification of Kamerick, and so the evidence lacked a connection between any assault and Kamerick. The motion for acquittal renewed the motion for directed verdict and was for the "same reasons as previously mentioned." It is clear the central dispute of the case was whether the defendant pushed the woman, and, if so, whether he had the specific intent to do an act which was insulting or offensive to her.

[2] The jury was instructed that the State "must prove all of the following elements":

> 1. On or about April 2, 2011, Joshua Wayne Kamerick did an act which was intended to cause pain or injury, or was intended to result in physical contact which would be insulting or offensive to [woman].
> 2. The defendant had the apparent ability to do the act.

jury was free to disbelieve the woman's testimony that the defendant did not push her. *See State v. Padavich*, 536 N.W.2d 743, 752 (Iowa 1995) (finding a witness's romantic involvement with the defendant was one reason the jury could disbelieve her testimony).

The question, raised by the dissenting opinion, is whether the jury was also free to infer the specific intent element that, in shoving his girlfriend, Kamerick had the specific intent to do an act which was insulting or offensive, citing *Wyatt v. Iowa Department of Human Services*, 744 N.W.2d 89, 94 (Iowa 2008). In *Wyatt*, our supreme court was presented with a specific finding of fact[3] by the agency that the alleged assailant, Wyatt, "did not intend to harm or to offensively contact" the alleged assault victim. 744 N.W.2d at 94. The court said,

> The central question on this appeal, therefore, is whether assault under Iowa Code section 708.1 requires that the actor have a specific intent to offend or insult the victim, as contended by Wyatt, or a lesser showing that the intended physical conduct could be objectively viewed as insulting or offensive, as found by the director.

Id. The supreme court reaffirmed its prior holdings that assault is a specific intent crime, *see State v. Keeton*, 710 N.W.2d 531 (Iowa 2006), and rejected the State's theory of "negligent assault." *See Wyatt*, 744 N.W.2d at 94.

> 3. That Joshua Wayne Kamerick and [woman] were family or household members who resided together at the time of the incident.

[3] In the findings of fact, the ALJ found that Wyatt was not trying to hurt, punish, harm, cause fear, or offensively contact E.W. when she placed the pillow over his mouth. The ALJ concluded that Wyatt's only concern was for the safety of her patient. *Wyatt*, 744 N.W.2d at 92.

Here, the jury found as a fact that the elements of the crime had been proven, including the element of specific intent. There is no question of a "lesser showing" of an objective or third-party opinion as to specific intent.

The woman's testimony that she and the defendant had been arguing, and the police officer's observations of the woman's condition when the pair were encountered, is evidence from which the jury could find that Kamerick's actions were, and were intended to be, insulting and offensive to her.

Viewing the evidence in the light most favorable to the State, we conclude there was substantial evidence to support the conviction.

II. Ineffective-assistance-of-counsel claims.

We review ineffective-assistance-of-counsel claims de novo. *State v. Ondayog*, 722 N.W.2d 778, 783 (Iowa 2006). To prove a claim of ineffective assistance of counsel, Kamerick must show by a preponderance of evidence that (1) his trial counsel failed to perform an essential duty and (2) prejudice resulted. *See Id.* at 784. An ineffectiveness claim fails if the defendant is unable to prove either element of this test. *Id.*

A. Hearsay. Statements are hearsay only if offered to prove the truth of the matter asserted. Iowa R. Evid. 5.801(c). Consequently, testimony of out-of-court statements offered to explain subsequent conduct are not hearsay. *State v. Mitchell*, 450 N.W.2d 828, 832 (Iowa 1990). Officer Donelson testified that the dispatcher sent him to the location of the couple—testimony responsive to the prosecutor's question on direct examination, "How were you provided a description or how were you able to locate the individuals?" Officer Donelson went on to testify, however, to additional information provided by the witness to

the dispatcher—testimony that was double hearsay and which went beyond the dispatcher's directions to him that explained his arrival at the location. Kamerick's counsel did not object to the question that elicited the double hearsay. However, Kamerick does not argue how he was prejudiced by the testimony. Upon our de novo review, we conclude the testimony was cumulative to the details given to the jury by the eyewitness, and did not prejudice Kamerick. Kamerick has not proved his counsel was ineffective in failing to object to the officer's testimony.

B. Prejudicial matters. Kamerick complains that the prosecutor's questions on cross-examination of the woman about the manner in which defendant proposed to her, the date of their engagement, and whether the defendant attended her first doctor's appointment after she learned she was pregnant "can only be explained by the State's desire to inflame the jury" and should have been objected to by counsel. He also contends that mention of a no-contact order constituted evidence of other crimes or wrongs and was not admissible under rule of evidence 5.404(b) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, . . . knowledge, . . . or absence of mistake or accident."). He argues counsel was ineffective in failing to object.

The State responds that the evidence was admissible to show the woman's interest and bias in minimizing the defendant's actions on April 2, 2011. *See State v. Campbell*, 714 N.W.2d 622, 630 (Iowa 2006) ("Partiality, or any

acts, relationships, or motives reasonably likely to produce it, may be proved to impeach credibility." (citation omitted)); *State v. Willey*, 171 N.W.2d 301, 303 (Iowa 1969) (concluding there was no abuse of discretion in allowing evidence on rebuttal that might have been offered as part of the State's main case).

We agree the elicited testimony concerning the couple's engagement status and date was relevant to show the woman's interest or bias. Counsel's failure to object was not a breach of his duty to Kamerick.

The relevance of the no-contact order or Kamerick's absence at the doctor's office is less apparent. We cannot determine whether defendant's counsel was ineffective in this regard on the record before us. *See Ondayog*, 722 N.W.2d at 785 ("[W]e must evaluate trial counsel's actions from the perspective of when the decision was made—during the course of trial."). We therefore preserve this claim for possible postconviction proceedings. *See State v. Fountain*, 786 N.W.2d 260, 267 (Iowa 2010).

AFFIRMED.

Bower, J., concurs; Danilson, J., dissents.

DANILSON, J. (dissenting)

I respectfully dissent. Physical contact alone is not a criminal act. As instructed in the case, unless the contact was intended to cause pain or injury or intended to be insulting or offensive to the alleged victim, the contact is not a crime. Iowa Code § 708.1(1). Here, there was no evidence Kamerick had such a specific intent, or that the alleged victim found the contact to be painful, insulting or offensive, and there was no injury. *See Wyatt v. Iowa Dep't of Human Servs.*, 744 N.W.2d 89, 94 (Iowa 2008) (rejecting the theory that the conduct could be objectively viewed as insulting or offensive). I would reverse as I believe the district court should have granted the motion for directed verdict.