

IN THE COURT OF APPEALS OF IOWA

No. 2-424 / 11-0739
Filed July 11, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JULIE ANN RAMOS-OCHOA,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Christine Dalton,
District Associate Judge.

Julie Ramos-Ochoa appeals her conviction for domestic abuse assault
causing bodily injury. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney
General, Michael J. Walton, County Attorney, and Will Ripley, Assistant County
Attorney, for appellee.

Considered by Vogel, P.J., and Tabor and Bower, JJ.

TABOR, J.

Julie Ramos-Ochoa appeals her conviction for domestic abuse assault causing bodily injury. She contends the State failed to rebut her claim that she was justified in biting her boyfriend on the chest during a struggle in their home. Because the evidence raised a jury question concerning Ramos-Ochoa's claim of self defense, we will not disturb the guilty verdict.

I. Background Facts and Proceedings

Hans Navota and his live-in girlfriend, Julie Ramos-Ochoa, did not keep their dinner plans for New Year's Eve of 2010. Instead, after the couple returned home from playing pool, Ramos-Ochoa confronted Navota about pornographic images she found on his laptop computer. Navota retreated to the basement of his house to avoid an argument. Ramos-Ochoa blasted loud music and Navota repeatedly ascended the stairs to turn it down. Eventually Navota pulled the circuit breaker. Ramos-Ochoa responded by meeting Navota on the stairs and placing her hands around his throat. The State offered no evidence that this act resulted in injury to Navota.

Navota soon restored the power and pushed past Ramos-Ochoa on his way to the garage. He stayed there forty-five minutes, drinking beer and waiting for her to cool down. Eventually he heard the garage door open,

I thought maybe she was going to, you know, [say] I'm sorry and let's not do this, it's New Year's, and that's not what happened. She came in and asked if I wanted to see how mad she was.

Ramos-Ochoa showed Navota that she had thrown a cell phone across the driveway, smashed his laptop on the floor of the kitchen, and generally "torn up

the house.” Navota was angered by the property damage, but decided to go back to the garage.

When he returned to the house, he recalled seeing Ramos-Ochoa holding a knife in her hand. During a struggle to disarm her, Navota sustained a cut across his thumb. After wresting the knife from Ramos-Ochoa’s control, Navota again returned to the garage—“waiting [and] hoping she’d pass out [from drinking alcohol] and it would stop.”

Ramos-Ochoa recounted the confrontation differently, testifying that Navota “body slammed” her and flipped her over his shoulder, causing her to land on her tailbone. She testified to grabbing the knife from the counter for protection. Ramos-Ochoa said that after the fight she stayed in the kitchen and “just proceeded to drink” the beer and champagne she had purchased for the holiday celebration.

Navota recalled “getting kind of cold” and found himself locked out of his house, so he kicked in the door. In his words, “[t]here was another little scuffle”—during which he put his arms around Ramos-Ochoa to restrain her because “she was just wild.” As he tried to calm her down, he repeated: “Stop, stop.” And she responded: “Let go, let go.” Ramos-Ochoa testified that Navota had her pinned to the floor. At this point Ramos-Ochoa admittedly sunk her teeth into Navota’s chest, leaving a bite mark. Navota then left the house and called his friend Randy Schutters from the garage. Before Schutters arrived, Navota made one last attempt to talk to Ramos-Ochoa, but she met him at the door holding a knife and saying: “You think so?”

Both Schutters and Navota called the police. When the officers arrived, they located a very intoxicated Ramos-Ochoa playing loud music inside the dark house. They also found Navota's laptop at the bottom of a small backyard pond. Ramos-Ochoa told police Navota would not allow her to leave the residence. The officers did not see any visible signs of injury to Ramos-Ochoa. They did document that Navota had a lacerated thumb, a bite-mark to his chest, and scratches on his face.

On January 24, 2011, the State charged Ramos-Ochoa with domestic abuse assault resulting in bodily injury, in violation of Iowa Code sections 236.2, 708.1 and 708.2A(2)(b) (2011). Ramos-Ochoa filed a notice of self defense.

A jury heard the case on April 18, 2011. The State offered testimony from Navota and Schutters, as well as the two responding officers. Ramos-Ochoa took the stand in her own defense. The jury returned a guilty verdict.

The district court sentenced Ramos-Ochoa to 120 days in jail, all but two days suspended; ordered her to complete the batterer's education program; and placed her on unsupervised probation for one year. Ramos-Ochoa appeals her conviction, challenging the sufficiency of the evidence.

II. Scope and Standard of Review

We review challenges to the sufficiency of the evidence supporting a guilty verdict for correction of legal error. *State v. Webb*, 648 N.W.2d 72, 75 (Iowa 2002). If substantial evidence supports the jury's verdict, we will uphold it. *Id.* We describe evidence as "substantial" if it is capable of convincing a reasonable

fact finder, beyond a reasonable doubt, that the defendant committed the charged crime. *Id.* at 75–76.

On appeal, we view “the evidence in the light most favorable to the State, including legitimate inferences and presumptions that may fairly and reasonably be deduced from the evidence in the record.” *Id.* at 76. We consider all the evidence in the record, regardless of whether it supports or detracts from the verdict. *See id.*

Because Ramos-Ochoa advanced a claim of self defense, the burden rested with the State to prove beyond a reasonable doubt that the alleged justification did not exist. *See State v. Rubino*, 602 N.W.2d 558, 565 (Iowa 1999). The jurors were free to give the testimony of Ramos-Ochoa “such weight as they thought it should receive.” *See State v. Shanahan*, 712 N.W.2d 121, 135 (Iowa 2006). The jury’s function is to weigh the evidence and determine whose version of events was more credible. *Id.*

To the extent Ramos-Ochoa raises a claim of ineffective assistance of counsel for failing to properly preserve error, our review is de novo. *State v. Oetken*, 613 N.W.2d 679, 683 (Iowa 2000).

III. Analysis

To convict Ramos-Ochoa of domestic abuse assault resulting in bodily injury, the jury was required to find that the State offered substantial evidence supporting the following elements:

1. On or about the 31st day of December, 2010, the defendant did an act which was intended to cause pain or injury, result in physical contact which was insulting or offensive, or place

Hans R. Navota in fear of immediate physical contact which would have been painful, injurious, insulting or offensive to him.

2. The defendant had the apparent ability to do the act.
3. The defendant's act caused a bodily injury to Hans R.

Navota

4. The act occurred between family or household members who resided together at the time of the incident.
5. The defendant did not act with justification.

On appeal, Ramos-Ochoa contests the State's proof of the first, third, and fifth elements.

The State concedes Ramos-Ochoa preserved error on her challenge to the first and third elements, but alleges she did not adequately address the justification issue in her motion in arrest of judgment.¹ We agree the defense motion failed to give the district court an opportunity to rule on her claim she acted in self defense. See *State v. Crone*, 545 N.W.2d 267, 270 (Iowa 1996) (finding motion for judgment of acquittal did not preserve specific arguments that were being made for the first time on appeal).

In her brief Ramos-Ochoa offers a one-sentence fallback position: "To the extent that error may not have been preserved because of the absence of a Motion for New Trial, or Motion in Arrest of Judgment, this matter should be reviewed under the Ineffectiveness of Counsel standard." Ramos-Ochoa cites no authority and does not expound on her alternative claim of ineffective assistance of counsel. Normally we would not find such a random mention of an

¹ Defense counsel said at trial he was making a "motion for directed verdict." For purposes of this appeal we will refer to his trial challenge to the sufficiency of the evidence as a motion for judgment of acquittal. See *State v. Deets*, 195 N.W.2d 118, 123 (Iowa 1972) (holding that a grant of a motion for directed verdict "is tantamount to a judgment of acquittal in a criminal action"), *overruled on other grounds by State v. Walker*, 574 N.W.2d 280, 283 (Iowa 1998).

issue to be sufficient for our consideration. See *State v. Mann*, 602 N.W.2d 785, 788 n.1 (Iowa 1999). But because the State does not argue Ramos-Ochoa has waived her Sixth Amendment claim on appeal and in fact, has analyzed the justification issue under the rubric of ineffective assistance, we will do the same.

Ramos-Ochoa observes on appeal that “the State claims numerous assaults.”² Indeed, at trial, the prosecutor responded to the defense motion for judgment of acquittal as follows:

[T]here were multiple assaults throughout this incident, more than just the one involving the knife. There was the bite, there was choking at the stairs, which was probably the earliest of any of them. And I guess on the one hand alternatively, of course, the whole thing was one large assault, and so the injuries clearly resulted from the assault that covered various different times throughout this incident.

On appeal the State does not resurrect its assertion that the series of clashes between Navota and Ramos-Ochoa constituted “one large assault.” Instead, the State argues both the knife-cut and the biting could constitute assaults causing bodily injury.

Ramos-Ochoa contends she did not commit an assault which resulted in Navota’s thumb laceration. She argues Navota initiated the struggle to take the

² We note the trial information did not specify which of these several assaults formed the basis for the single offense charged. Such lack of specificity could potentially be a due process problem. See *State v. Griffin*, 386 N.W.2d 529, 531 (Iowa Ct. App. 1986) (citing *Rosen v. United States*, 161 U.S. 29, 40 (1896) for the proposition that a defendant “should be apprised of the crime charged with sufficient certainty to enable him to prepare his defense and to protect against another prosecution for the same offense”). Likewise, “when one offense is charged, and the evidence tends to show that more than one has been committed . . . , the accused has the clear right to know upon which the state will rely for conviction.” *State v. King*, 91 N.W. 768, 770 (Iowa 1902); *State v. Hurd*, 70 N.W. 613, 616 (Iowa 1897). But because these issues were not raised on appeal we do not reach their merits.

knife away from her and in doing so received a cut on his hand. The State counters that Ramos-Ochoa played a “significant role” in the event resulting in the injury to his hand.

Even when viewed in the light most favorable to the State, Navota’s testimony did not support a conviction for assault based on the struggle for the knife. In his direct examination, he described that event for the jury as follows:

Q. . . . Where were you when you first saw the knife? A. Well, I was coming in the back door and I was coming towards her, trying to – trying to talk to her, and that’s when I noticed it because she was quartered away from me.

Q. What do you mean by quartered away from you? A. She was turned away from me, like her back was to me, but I saw it in her right hand and that’s when there was a scuffle on the floor, because she didn’t need to have the knife and I didn’t know where it was intended to go, but I got it away.

Q. How did you get it away? A. Grabbed it with my left hand.

Q. And then pulled it from her hand, or how did you get it? A. Well, she had a very—she had a death grip on that knife, I was trying to control it more than anything. And once I did get it released, I slid it across the floor so it was out of her reach.

On cross examination he expounded on their struggle on the floor:

Q. . . . But did you guys go to the ground during this course of events? A. Yes, we did.

Q. And was it because you took her to the ground? A. She was fighting to keep it in her hand. I was fighting to get it out of her hand. However, it ended up, but I wouldn’t have turned my back on her with that knife in her hand.

An assault is defined as an act which is either intended to cause pain or injury, or which is intended to result in physical contact which is insulting or offensive, or is intended to place another in fear of such contact. Iowa Code §

708.1(1) and (2).³ Navato's testimony does not describe any act committed by Ramos-Ochoa other than holding the knife and "fighting" to keep it in her hand. While Navota may well have felt threatened by the fact that Ramos-Ochoa was holding a knife, because she did not use the knife offensively against him we cannot find that his apprehension supports an assault conviction.

We now turn to the question whether substantial evidence supported the State's allegation Ramos-Ochoa assaulted Navota by biting his chest. Ramos-Ochoa states in her brief: "Absent justification, this arguably could be an assault resulting in bodily injury." She goes on to assert the State failed to show the absence of justification.

The district court properly instructed the jury that Ramos-Ochoa was justified in using reasonable force if she reasonably believed it was necessary to defend herself from the imminent use of unlawful force. See Iowa Code § 704.3. The court also informed the jurors that once the defendant offered substantial evidence in support of this defense, the burden rested on the State to disprove justification. See *Rubino*, 602 N.W.2d at 565. The State could do so by showing any one of the following elements:

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 she was in imminent danger of death or injury and the use of force was not necessary to save her.

³ A person can also commit an assault by displaying in a threatening manner any dangerous weapon toward another. Iowa Code § 708.1(3). But the court did not instruct the jury on this third assault alternative.

4. The defendant did not have reasonable grounds for the belief.
5. The force used by the defendant was unreasonable.

The question we must decide is whether Ramos-Ochoa's trial counsel was constitutionally remiss in not alleging that she was entitled to a judgment of acquittal based on her justification defense. Because the district court could have found substantial evidence disproving justification, counsel was not ineffective for failing to argue that ground for acquittal. See *State v. Lane*, 743 N.W.2d 178, 183 (Iowa 2007). The State's evidence created a jury question on several aspects of Ramos-Ochoa's self-defense claim. For example, the jurors could have accepted Navota's testimony that Ramos-Ochoa initiated or perpetuated the hostile exchanges on the night of December 31. In addition, the jurors were entitled to believe Navota's claim that he wrapped his arms around her to settle her down and disbelieve Ramos-Ochoa's testimony that she reasonably believed biting him was a necessary use of force to save her from imminent danger of injury. See *Shanahan*, 712 N.W.2d at 135 ("The jury members were free to give [witness's] testimony such weight as they thought it should receive [and] were free to accept or reject any of [witness's] testimony."). Ramos-Ochoa cannot show a reasonable probability of a different outcome had counsel raised justification in the motion for judgment of acquittal. Given the conflicting evidence and the important role of assessing witness credibility, we will not disturb the jury's verdict.

AFFIRMED.