

**IN THE COURT OF APPEALS OF IOWA**

No. 2-631 / 11-1524  
Filed October 17, 2012

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**KIMBERLY HALL,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Johnson County, Marsha Bergan,  
Judge.

Kimberly Hall appeals the judgment and sentence entered following her  
conviction for assault with intent to commit serious injury. **AFFIRMED.**

Mark C. Meyer, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney  
General, Janet M. Lyness, County Attorney, and Elizabeth Beglin and Jude  
Pannell, Assistant County Attorneys, for appellee.

Heard by Eisenhauer, C.J., and Doyle and Tabor, JJ.

**TABOR, J.**

In this combined appeal, Kimberly Hall asks us to reverse her conviction for assault with intent to commit serious injury and challenges the district court's reliance on that conviction to revoke her deferred judgment in an earlier prosecution. She contends her attorney in the assault case did not effectively advance an inconsistent-verdict claim. She argues the district court erred by submitting lesser included offenses to the jury over her objection, by instructing the jury on general intent, and by overruling a motion for new trial. Finally, she alleges the State failed to prove her intent to inflict serious injury.

Finding competent representation by counsel, no prejudicial error in the challenged actions of the district court, and substantial evidence from which the jury could infer Hall's intent to commit serious injury, we affirm her conviction and the revocation of her deferred judgment.

***I. Background Facts and Procedures***

It was still hot after midnight in Iowa City on June 21, 2009, and the air conditioning was not working well at Los Cocos dance club. Tempers flared inside the club after Yohuncia "Yogi" House, the father of Rachel Archer's child, danced with another woman. The club owner told the rowdy patrons to take their dispute out to the parking lot. Police were called to break up the ensuing fight and ended up subduing Yogi with a taser and arresting his sister LaVasha House.

After these events, Archer overheard Kimberly Hall talking on her cell phone, blaming Archer for the trouble. Archer asked Hall: "Kim, what is wrong

with you?” Hall replied: “What is wrong with me? Your baby daddy got tazed and my friend gone to jail.” Archer told Hall the situation had nothing to do with her and when Hall would not end the phone call, Archer began punching her. The pair wrestled on the ground.

Archer eventually felt “funny” and “real hot”; when she touched her stomach and saw her hand was red, she realized she had been stabbed. Hall admitted pulling a knife out of her purse and “swing[ing] it.” Hall testified she did not intend to harm Archer. The size of both combatants became an issue at trial. Archer testified that because she weighed nearly 200 pounds, her tight-fitting shirt rode up during the struggle, explaining the fact that it was not torn by the knife blade. Hall testified she weighed more than 400 pounds and did not have the mobility to launch an attack against Archer.

Iowa City police were called to the location for a second time and found Hall in possession of a knife with a four-inch-long blade. Paramedics found Archer with a small puncture wound to her abdomen and two superficial cuts on her arm. When the paramedics tried to check Hall, she was not cooperative, but they did not see any obvious injuries.

On July 2, 2009, the State charged Hall with willful injury, a class “D” felony, in violation of Iowa Code section 708.4(2) (2009). The district court held a jury trial from August 15-19, 2011. The jury acquitted Hall of the willful injury offense, but returned a guilty verdict on the lesser included offense of assault with the intent to cause serious injury, an aggravated misdemeanor, in violation of Iowa Code sections 708.1 and 708.2(1). The court denied Hall’s posttrial

motions in arrest of judgment and for a new trial. On the assault conviction, Hall received a 365-day jail sentence, with all but 180 days suspended. Based on the assault conviction, the court revoked Hall's deferred judgment in an unrelated credit card fraud case and imposed a five-year suspended sentence. Our supreme court granted Hall's motion to consolidate the appeals from those two convictions.

## ***II. Scope and Standards of Review***

We engage in de novo review of Hall's constitutional claims, specifically her claim that trial counsel was ineffective for not properly raising the inconsistent-verdict issue. The underlying issue of inconsistent verdicts also "is affected by strong constitutional currents" and calls for de novo review. *State v. Halstead*, 791 N.W.2d 805, 808 (Iowa 2010). Hall also argues she had a due process right to decline jury instructions on lesser included offenses.

We look to correct errors at law on her challenge to the sufficiency of the evidence. *State v. Tucker*, 810 N.W.2d 519, 520 (Iowa Ct. App. 2012). We apply an abuse-of-discretion standard to her allegation that the verdict was against the weight of the evidence. *State v. Serrato*, 787 N.W.2d 462, 472 (Iowa 2010).

The district court has discretion to give additional instructions after the jury has retired for deliberations if the jury asks about a point of law. *State v. Query*, 594 N.W.2d 438, 445 (Iowa Ct. App. 1999). We will reverse only for an abuse of that discretion. *Id.* We review the substance of the instruction given for legal error. *State v. Marin*, 788 N.W.2d 833, 836 (Iowa 2010).

### III. Analysis

#### A. Inconsistent Verdicts/Ineffective Assistance of Counsel

Hall claims on appeal the verdict finding her guilty of assault with the intent to inflict serious injury must be set aside because it cannot be reconciled with the jury's not-guilty verdict on the greater offense of willful injury. She reasons that the only element missing from the lesser offense was the resulting bodily injury to Archer, and because no factual dispute existed over that element at trial, the jury's verdicts were mutually inconsistent.

This chart compares the elements of the two offenses.

Willful Injury § 708.4(2)	Assault with intent § 708.2(1)
Hall assaulted Archer w/o justification	Hall assaulted Archer w/o justification
Hall had the specific intent to cause serious injury	Hall had the specific intent to cause serious injury
Archer sustained bodily injury as a result of Hall's actions	

Hall contends: "Because the bodily injury element was undisputed, by acquitting [her] of willful injury, the jury necessarily found that the state had failed to prove [she] committed an act intended to cause serious injury."

Hall acknowledges trial counsel did not advance this argument.<sup>1</sup> Accordingly, we will consider this question in the context of Hall's claim of ineffective assistance of counsel. See *State v. Brubaker*, 805 N.W.2d 164, 170 (Iowa 2011) (confirming failure of trial counsel to preserve error can support Sixth Amendment claim).

<sup>1</sup> Hall alternatively cites *State v. Arthur*, 160 N.W.2d 470, 473 (Iowa 1968) for the proposition that this challenge may be considered for the first time on appeal. While salutary reasons may exist for recognizing a "plain error" rule, our supreme court has rejected invitations to do so. See *State v. McCright*, 569 N.W.2d 605, 607-08 (Iowa 1997); *State v. Hutchison*, 341 N.W.2d 33, 38-40 (Iowa 1983). We cannot do so in its stead.

Defendants may raise claims of ineffective assistance on direct appeal if they have reasonable grounds to believe the record is adequate for the court to address the merits. See Iowa Code § 814.7(2). We normally preserve such claims for postconviction relief proceedings to ensure the development of an adequate record. *Brubaker*, 805 N.W.2d at 170. But because the record in this case is sufficient to address the question of counsel's handling of the allegation of inconsistent verdicts, we opt to decide the question on direct appeal.

We apply a two-prong test for ineffective-assistance claims; Hall must prove by a preponderance of the evidence: (1) trial counsel failed to perform an essential duty, and (2) prejudice resulted. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To show a failure of duty, Hall must establish "counsel's representation fell below an objective standard of reasonableness." See *id.* at 688. To show prejudice, Hall must prove there was a reasonable probability that, but for her trial counsel's omissions the proceedings would have turned out differently. See *id.* at 694.

Hall anchors her inconsistent verdict argument on *State v. Halstead*, 791 N.W.2d at 814 (declining to follow approach in *United States v. Powell*, 469 U.S. 57 (1984) in case involving legally inconsistent verdicts). In *Halstead*, our supreme court reversed the defendant's conviction for assault while participating in a felony because the jury had acquitted him of the predicate felony. 791 N.W.2d at 816. In doing so, the court espoused the narrowness of its holding: "[W]e do not open a Pandora's box by probing into the sanctity of jury deliberations. Our analysis focuses solely on the legal impossibility of convicting

a defendant of a compound crime while at the same time acquitting the defendant of predicate crimes.” *Id.* at 815. Because *Halstead* addressed only a legal inconsistency between two verdicts, the court limited its review to the elements of the crime, the jury verdicts, and the instructions. *Id.*

Hall acknowledges her case would require an expansion of the *Halstead* holding because the inconsistency she alleges requires looking at the evidence presented at trial. But she asserts “the only factual inquiry necessary . . . is a limited review of the facts in the record to confirm that Archer suffered bodily injury, and to confirm that this was not an element disputed by the defense.” She contends the verdicts were mutually exclusive because the jury acquitted her on the greater offense and convicted her of the lesser offense, when the only disparate element was unchallenged. She contends trial counsel was constitutionally remiss in not presenting this argument to the district court.

The State does not address *Halstead*. Instead, the State argues the jurors were at liberty to find Archer did not suffer a bodily injury<sup>2</sup> and counsel had no duty to claim the verdicts were inconsistent.

The threshold question is whether the jury’s verdicts were truly inconsistent. See *State v. Fintel*, 689 N.W.2d 95, 101 (Iowa 2004) (applying the test from civil cases: “[W]hether the verdict is so logically and legally inconsistent as to be irreconcilable within the context of the case”). Under the *Fintel* test, which was discussed but not rejected in *Halstead*, the verdicts on the greater and lesser offenses in Hall’s case were not logically and legally inconsistent.

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<sup>2</sup> The jury received an instruction defining “bodily injury” as “physical pain, illness or any impairment of physical condition.”

The defense did not contest that Archer suffered a bodily injury. But the jury is free to reject uncontested and even stipulated evidence. See *State v. Roe*, 642 N.W.2d 252, 254 (Iowa 2002) (finding stipulation does not eliminate jury's duty to make a finding beyond a reasonable doubt on each essential element of crime). Moreover, it was conceivable the jury found Hall committed an assault with the intent to cause serious injury, but Archer's bodily injury was not a result of Hall's actions. Perhaps the jurors believed that when Hall waved the knife at Archer, she committed an assault with the intent to inflict serious injury, but before Hall actually inflicted any injury, Archer leaned into the knife and sustained an accidental injury.

Even if the *Fintel* test is not viable after *Halstead*, we decline Hall's invitation to stretch the *Halstead* holding to invalidate the verdict in this case. Unlike the purely legal question in *Halstead*, any inconsistency in Hall's verdicts depends on consideration of the evidence presented at trial. Each party in this case presented multiple witnesses who gave widely varying accounts. To determine whether the verdicts were inconsistent, we would be required to intrude into the jury's deliberative process by speculating on how the jury perceived and weighed the evidence. The *Halstead* court rightly disavowed such a speculative inquiry. Trial counsel did not breach an essential duty by not urging an extension of *Halstead*. See *State v. Kehoe*, 804 N.W.2d 302, 312 (Iowa Ct. App. 2011) (finding no ineffective assistance of counsel where argument was not worth raising under existing precedents).

**B. Supplemental Jury Instruction/General Intent**

After retiring for deliberations, the jury sent two questions to the court.

The first note asked: "What is the difference between Instruction 15.2 and 16.3?"

Instruction No. 15 stated:

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

1. On or about June 21, 2009, Kimberly Hall assaulted Rachel Archer by stabbing Rachel Archer in the abdomen with a knife and slashing Rachel Archer's arm in two locations.
2. Kimberly Hall specifically intended to cause a serious injury to Rachel Archer.
3. Rachel Archer sustained a bodily injury as a result of Kimberly Hall's actions.
4. Kimberly Hall did not act with justification.

If you find the State has proved all of the elements, Kimberly Hall is guilty of Willful Injury Causing Bodily Injury. If the State has failed to prove any of the elements Kimberly Hall is not guilty of Willful Injury Causing Bodily Injury, and you should consider the crime of Assault with Intent to Inflict Serious Injury as explained in the next Instruction.

Instruction No. 16 stated:

The State must prove all of the following elements of Assault with Intent to Inflict Serious Injury:

1. On or about June 21, 2009, Kimberly Hall did an act that was intended to: cause pain or injury to Rachel Archer; or result in physical contact that was insulting or offensive; or place Rachel Archer in fear of an immediate physical contact that would have been painful, injurious, insulting or offensive to Rachel Archer.
2. Kimberly Hall had the apparent ability to do the act.
3. The act was done with the specific intent to cause a serious injury.
4. Kimberly Hall did not act with Justification.

If the State has proved all of the elements, Kimberly Hall is guilty of Assault with Intent to Inflict Serious Injury. If the State has failed to prove any of the elements, Kimberly Hall is not guilty of Assault with Intent to Inflict Serious Injury and you should then consider the crime of Assault Causing Bodily Injury as explained in the next instruction.

The district court answered the jury's first question as follows: "The Court acknowledges that the words in 15.2 are different from the words in 16.3. There is, however, no legal difference between 15.2 and 16.3."

The jury's second note asked: "Can we get clarification on the difference between 15.1 and 16.1?" The court answered: "Jury Instruction No. 34 applies to 15.1. Jury Instruction No. 33 applies to 16.1." The court's answer informed the jury the first element of the willful injury required proof of specific intent, while the first element of the assault with intent to commit serious injury offense required proof of general intent.

In her motion for new trial, Hall asserted the court's answer to the second question "misdirected" the jurors by telling them the lesser included offense of assault with intent to inflict a serious injury was a general intent rather than a specific intent crime. Before pronouncing sentence, the court denied the new trial motion, concluding: "[T]he instructions that were given as a whole were appropriate."

On appeal, Hall relies on *State v. Fountain*, 786 N.W.2d 260 (Iowa 2010) to support her challenge to the supplemental instruction regarding general and specific intent. *Fountain* held because the elements of the assault alternatives in Iowa Code section 708.1(1) and (2) include an act "that is done to achieve the additional consequence of causing the victim pain, injury or offensive contact, the crime includes a specific intent component." 786 N.W.2d at 265. The supreme court concluded the language added by the legislature in 2002 deeming assault as defined in section 708.1 to be a "general intent crime" did not "alter the

substantive content of the statute as it pertains to the elements of the crime.” *Id.* *Fountain* held that the trial court erred in failing to provide the jury an instruction defining specific intent. *Id.*

In response to Hall’s argument, the State points out both the jury question and the court’s answer dealt specifically with the first element of Instruction No. 16 and not the third element, which required the jury to find Hall acted with specific intent to cause a serious injury. The State contends: “The jurors could not reasonably have read the court’s answer to negate element 3,” requiring proof of specific intent to inflict a serious injury. This point is even stronger in light of the court’s answer to the jury’s first question that there was “no legal difference” between the specific-intent-to-cause-serious-injury elements of the two offenses.

In her reply brief, Hall accuses the State of misconstruing the issue by looking to the element of specific intent to cause serious injury. Hall shifts the focus back to element one, contending on the authority of *Fountain*, “the judge should have instructed the jury that the state must prove that the defendant specifically intended to commit the acts described in element 1 of both offenses.”

Hall is correct, to a point. In light of *Fountain*, the district court should have instructed the jurors that assault as defined in the first element of Instruction No. 16 required proof of specific intent, that is, the subjective desire of a prohibited result. *Id.* at 264. The State was required to prove Hall intended “to achieve the additional consequence of causing the victim pain, injury or offensive physical contact.” *Id.* at 265. But the instructional error was of little consequence

here because the court included the language of the assault statute in the marshalling instruction. Whether the court attached the label of general or specific intent was of little importance when the jury was accurately informed of the elements. See *State v. Keeton*, 710 N.W.2d 531, 534 (Iowa 2006) (opining regardless of the specific label attached—specific intent or general intent—the State must prove the elements of the crime and their accompanying mens rea beyond a reasonable doubt).

The only language in the specific intent instruction not included in the general intent instruction was that the act must be done with “a specific purpose in mind.” Instruction No. 16 required the jury to find Hall acted with the specific purpose to inflict serious injury. That intent to bring about the more dire consequence of serious injury subsumed the intent to cause pain, injury, or offensive physical contact necessary for simple assault. Because the district court’s supplemental instruction did not prejudice Hall, we decline to reverse her conviction. See *State v. Hanes*, 790 N.W.2d 545, 550 (Iowa 2010) (explaining reversal is only warranted when an erroneous instruction has injuriously affected the rights of the complaining party).

### **C. Motion for New Trial/Weight of the Evidence Standard**

Hall moved for a new trial based on Iowa Rule of Criminal Procedure 2.24(2)(b)(6). That rule permits the court to grant a new trial “[w]hen the verdict is contrary to law or evidence.” Iowa R. Crim. P. 2.24(2)(b)(6). Contrary to evidence means contrary to the “weight of the evidence.” *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998).

When deciding such a motion, the district court is entitled to weigh the evidence and consider the credibility of the witnesses. *State v. Maxwell*, 743 N.W.2d 185, 192 (Iowa 2008). If the court determines the verdict is contrary to the weight of the evidence and a miscarriage of justice may have occurred, it is within the court's discretion to grant a new trial. *Id.* The weight-of-the-evidence standard is much broader than the sufficiency-of-the-evidence analysis in that it involves questions of credibility and requires gauging whether more credible evidence supports one side than the other. *Id.* at 193. "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." *Id.* Since our supreme court decided *Ellis*, "we have repeatedly remanded to make certain the proper standard was applied and reflected in the ruling." *State v. Root*, 801 N.W.2d 29, 31 (Iowa Ct. App. 2011).

Hall contends her case is a candidate for remand because the district court applied the wrong standard. She also argues the weight of the evidence preponderates heavily against the jury's verdict.

We turn first to the court's articulation of the standard. In denying Hall's new trial motion before sentencing, the court stated:

With regard to the sufficiency of the evidence that was raised both in the Motion in Arrest of Judgment and the Motion for New Trial, the court then applies a weight of the evidence standard and under the weight of the evidence standard, a trial court weighs the evidence and considers credibility as the court determines whether a greater amount of credible evidence supports one side of the issue or another. And in this case just as after the jury returned its verdict I reflected on it, I have since that time in light of defendant's request to consider it, I've done that, and the court finds that there is no reason to grant the Motion for New Trial and the—I really

don't have any question but that there was sufficient evidence, sufficient credible evidence for the jury's verdict. So I'm not going to grant the motion for that reason.

As Hall points out, the court's formulation "appears to confuse and blend the standard for sufficiency of the evidence as raised in the motions for judgment of acquittal, with the standard for new trial based on the weight of the evidence." Hall compares her case to *State v. Nichter*, 720 N.W.2d 547, 559-60 (2006) and *State v. Scalise*, 660 N.W.2d 58, 66 (Iowa 2003); in both of those cases, the supreme court found the trial courts applied the wrong standard in ruling on new trial motions because the trial courts referred back to motions for judgment of acquittal and viewed the evidence in the light most favorable to the verdict.

The State argues the part of the ruling preceding the dash properly addresses the weight-of-the-evidence standard, and the two sentences following the dash "constitute the court's ruling on Hall's claim that the evidence was not sufficient to support the verdict." It is true that Hall's motion in arrest of judgment asserted: "The evidence presented at trial is insufficient to convince the jury of any offense." But a motion in arrest of judgment may not be used to challenge the sufficiency of the evidence. *State v. Oldfather*, 306 N.W.2d 760, 762 (Iowa 1981). The district court did not reserve ruling on Hall's motion for judgment of acquittal. Accordingly, the question of the sufficiency of the evidence was not before the court post-verdict. See *State v. O'Shea*, 634 N.W.2d 150, 158 (Iowa Ct. App. 2001).

The question is whether the court's use of the terms "sufficiency" and "sufficient" taint its otherwise spot-on recitation of the *Ellis* weight-of-the-evidence

standard. The court's ruling is not as obviously an application of the wrong standard as occurred in *Nichter* and *Scalise*. In *Nichter*, the trial court characterized the new trial motion as a "reassertion of the same motions made during trial" and said "for the same reason they are rejected." 720 N.W.2d at 559. In *Scalise*, the trial court said it was viewing the evidence "in the light most favorable to the jury's decision." 660 N.W.2d at 66. The court did not reveal the same confusion here. We credit the court when it professed to weigh the evidence and consider whether a greater amount of credible evidence supported Hall's position. Hall's case is more similar to *O'Shea* where an isolated use of the word "substantial" did not otherwise defeat the court's application of the correct standard. See *O'Shea*, 634 N.W.2d at 155.

We turn now to the substance of Hall's weight-of-the-evidence challenge. Hall alleges the stabbing was justified and the more credible witnesses supported her version of events. The State counters that Hall's justification claim failed because the more credible evidence demonstrated the force she used was not reasonable. We agree with the State. Reasonable force is defined as "that force and no more which a reasonable person, in like circumstances, would judge to be necessary to prevent an injury or loss." Iowa Code § 704.1 (2011). Hall brought a knife to a fist fight. Archer admitted punching Hall, but the district court was entitled to credit the evidence that Hall did not suffer obvious injuries in the encounter. The district court did not abuse its discretion in determining the greater weight of credible evidence demonstrated Hall used unreasonable force in stabbing Archer in the abdomen and cutting her arm.

**D. Substantial Evidence/Intent to Inflict Serious Injury**

The jury convicted Hall of assault with intent to inflict serious injury. On appeal, Hall claims the State did not prove she acted with the specific intent to inflict serious injury. She alleges, at most, the jury could have inferred her intent to inflict a bodily injury.

The district court defined serious injury for the jury as “a bodily injury that creates a substantial risk of death or that causes serious permanent disfigurement or protracted loss or impairment of the function of a bodily part or organ.” See *id.* § 702.18. The instructions defined bodily injury as “physical pain, illness or impairment of physical condition.” The State is not required to prove a victim suffered serious injury to show the defendant harbored the intent to inflict serious injury. *State v. Taylor*, 538 N.W.2d 314, 316 (Iowa Ct. App. 1995).

When considering a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the evidence in the record. *State v. Hunt*, 801 N.W.2d 366, 376 (Iowa Ct. App. 2011). A defendant’s specific intent is seldom capable of direct proof. *Id.*

In this case, the jury could decipher Hall’s intent from several sources of evidence. First, the State presented evidence that Hall blamed Archer for the unrest that led to the initial police intervention at the dance club and engaged her in a heated conversation observed by an officer. Second, Hall wielded a knife capable of causing a serious injury and stabbed Archer in the lower abdomen,

threatening vital structures, according to a surgeon who testified. Third, the jury was entitled to discount Hall's testimony that she waved the knife only to scare Archer off, given the testimony of several eyewitnesses, including Archer, who did not see the knife before the stabbing. Substantial evidence existed in the record to prove Hall's intent to inflict serious injury. We will not disturb the jury's verdict.

**E. Lesser Included Offense Instructions/Prosecutor Veto Power**

Hall argues the district court erred in submitting jury instructions on lesser included offenses over her trial objection. She acknowledges that Iowa Rule of Criminal Procedure 2.6(3) requires the district court to instruct on lesser-included offenses supported by the evidence even when such instructions have not been requested. She also acknowledges the only recognized exception to that rule is when both parties agree to waive their submission. *See State v. Spates*, 779 N.W.2d 770, 774 n.2 (Iowa 2010). But she urges that allowing the prosecutor to veto the defendant's desired waiver of lesser included offenses is a due process violation. She cites no cases in support of her constitutional claim.

Because we are not in a position to revisit the supreme court's interpretation of rule 2.6(3) expressed in *Spates*, Hall cannot obtain relief on this ground.

**F. Revocation of Deferred Judgment**

Hall's conviction for assault with intent violated the terms of her probation related to her deferred judgment for credit card fraud. She claims in this combined appeal that if we were to grant relief on the assault conviction, the

revocation of her deferred judgment should be reversed. Because we affirm her assault conviction, she is not entitled to relief on the other appeal.

**AFFIRMED.**