

IN THE COURT OF APPEALS OF IOWA

No. 3-1009 / 13-0238
Filed January 9, 2014

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BARRY BRUCE EVANS,
Defendant-Appellant.

Appeal from the Iowa District Court for Tama County, Ian K. Thornhill,
Judge.

Barry Evans appeals his judgment and sentence for domestic abuse
assault causing bodily injury. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Melinda J. Nye, Assistant
Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Tyler J. Buller, Assistant Attorney
General, Brent D. Heeren, County Attorney, and Niki Whitacre, Assistant County
Attorney, for appellee.

Considered by Danilson, C.J., and Vaitheswaran and Potterfield, JJ.

VAITHESWARAN, J.

Barry Evans appeals his judgment and sentence for domestic abuse assault causing bodily injury. He contends (1) the district court abused its discretion in admitting evidence of a prior altercation and (2) his attorney was ineffective in failing to request a limiting instruction and in failing to impeach the complaining witness with her “previous inconsistent testimony and actions.”

I. Background Facts and Proceedings

Evans had a relationship with a woman for several months and lived in her home during that period. The woman eventually asked Evans to move out. Evans left but returned twice the next day, both times entering her bedroom. The second time, he “backhanded [the woman] onto the bed and jumped on top of” her, placing one hand around her throat and the other over her mouth and nose. The woman did not call police.

Meanwhile, the woman had the locks on her house changed and asked a friend to stay with her.

Three days after this altercation, Evans again came to the woman’s home and was let in by her son. The woman told her friend to stay close and listen, and stepped outside with Evans. She testified Evans was “very angry” and accused her of cheating on him. She tried “to sidestep him to go back around into [her] house,” but Evans “picked [her] up by [her] throat” until her feet were “dangling” and carried her “face-to-face down [the] steps, around the corner of [the] house” toward where his car was parked. As he was carrying her, he said, “I’m going to fucking kill you, I’m going to destroy your life, you should have said

goodbye to your son when you were in there because you're not going to see him again."

Momentarily, the woman's friend came out of the house. Evans dropped the woman, said, "I'll be back to finish you off bitch," and fled. This time, the police were contacted.

The woman showed signs of swelling and redness in her neck and face, had a bruise on her jawline, and experienced pain.

The State charged Evans with (1) domestic abuse assault by strangulation causing bodily injury and (2) domestic abuse assault first offense, causing bodily injury. These charges stemmed from the incident outside the house.

Evans filed a motion to exclude the admission of evidence relating to the altercation in the bedroom three days earlier. He argued that the evidence was "irrelevant, and if relevant, any probative value [was] substantially outweighed by the danger of unfair prejudice." The State countered that evidence of the earlier confrontation was admissible to establish Evans's intent to commit the charged crime. The district court agreed with the State and denied the motion.

The case proceeded to trial. A jury found Evans not guilty of domestic abuse assault by strangulation causing bodily injury but guilty of domestic abuse assault first offense causing bodily injury. The district court imposed sentence and this appeal followed.

II. Admissibility of Prior Bad Acts Evidence

Iowa Rule of Evidence 5.404(b) states:

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, preparation, plan, knowledge, identity, or absence of mistake or accident.

Before admitting prior bad acts evidence, the court must “(1) find the evidence is ‘relevant and material to a *legitimate* issue in the case other than a general propensity to commit wrongful acts,’ and (2) determine whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice to the defendant.” *State v. Reynolds*, 765 N.W.2d 283, 289-90 (Iowa 2009) (internal quotations and citations omitted).

With respect to the first prong of the test, the Iowa Supreme Court has found prior acts of assaultive conduct towards a person with whom the defendant is emotionally involved relevant to the specific intent element of certain charged crimes. *State v. Taylor*, 689 N.W.2d 116, 125 (Iowa 2004). The rationale is as follows:

[T]here is a logical connection between a defendant’s intent at the time of a crime, when the crime involves a person to whom he has an emotional attachment, and how the defendant has reacted to disappointment or anger directed at that person in the past, including acts of violence, rage, and physical control. In other words, the defendant’s prior conduct directed to the victim of a crime, whether loving or violent, reveals the emotional relationship between the defendant and the victim and is highly probative of the defendant’s probable motivation and intent in subsequent situations.

Id., see also *State v. Richards*, 809 N.W.2d 80, 93 (Iowa 2012) (finding evidence that defendant physically abused his ex-wife in the year before he was charged with killing her “relevant and probative.”); *State v. White*, 668 N.W.2d 850, 854 (Iowa 2003) (finding estranged husband’s “prior acts of banging [wife’s] head against a wall and threatening to shoot her are undoubtedly relevant to the [kidnapping and burglary] charges” against the husband); *State v. Rodriguez*,

636 N.W.2d 234, 242 (Iowa 2001) (finding evidence of prior domestic assaults on girlfriend relevant to the question of “whether the defendant intended to cause [his girlfriend] a serious injury . . . for purposes of the willful injury and kidnapping charges” against him).

Based on this precedent, the State reprises its trial court argument that the altercation in the bedroom was a prior bad act that was relevant to the specific intent element of the crimes with which Evans was charged. Evans agrees intent is an element of the crimes but maintains that he “did not put his intent in issue.”

To the contrary, Evans challenged the State’s proof on the intent element by offering a different narrative of the incident than his ex-girlfriend presented. See *Taylor*, 689 N.W.2d at 127 (“Evidence reflecting the nature of the relationship between the defendant and the victim would be crucial to a fact finder resolving the inconsistencies in the witnesses’ testimony.”); see also *Richards*, 809 N.W.2d at 94 (stating Richards’ assertion that he “did not make his intent or state of mind a contested issue . . . parses his defense too narrowly” because his “denials that he was the perpetrator put at issue all the elements of the offense”). Evans acknowledged that there was a confrontation outside her house that resulted in physical contact and possible injury, but testified that his ex-girlfriend precipitated the incident by “jump[ing] up around [his] neck” and then “slid[ing] down and wrap[ping] around [his] leg.” He asserted that, when he heard the door behind him slam, he felt the need to “drag her” as he “sprinted to the car.” This version stood in stark contrast to the woman’s version of a jealous boyfriend who “was going to take [her] to his car” and would have “killed [her]” had her friend not come out of the house.

These divergent accounts squarely placed intent before the jury. Because intent was a contested issue, the precedent cited above establishes that the prior bedroom altercation was relevant. See *Taylor*, 689 N.W.2d at 128 (holding the defendant’s “prior acts of violence . . . reflect his emotional relationship with [his wife and] is a circumstance relevant to his motive and intent on the day in question”).

We turn to the second prong, whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice.

Unfair prejudice arises when the evidence would cause the jury to base its decision on something other than the proven facts and applicable law, such as sympathy for one party or a desire to punish a party. In determining whether unfair prejudice generated by evidence of a defendant’s other misconduct substantially outweighs the probative value of the evidence, the court should consider the need for the evidence in light of the issues and the other evidence available to the prosecution, whether there is clear proof the defendant committed the prior bad acts, the strength or weakness of the evidence on the relevant issue, and the degree to which the fact finder will be prompted to decide the case on an improper basis.

Id. at 124 (internal citations and quotation marks omitted); see also Iowa R. Evid. 5.403.

As discussed, the evidence of the prior incident was needed to assist the jury in reconciling the differing renditions of events presented by Evans and the woman. See *Rodriquez*, 636 N.W.2d at 242 (“In light of the ‘he said/she said’ nature of this disagreement, the need for other evidence on the issue was substantial”). Clear proof of the incident was offered through the testimony of the woman, testimony that was specific as to time and place and replete with details of the assault. See *State v. Reyes*, 744 N.W.2d 95, 101 (Iowa 2008) (“[D]irect

testimony from the victim of a prior alleged assault, as a matter of law, is sufficient ‘clear proof’ to meet the code requirement.”). The incident took place just three days before the charged crimes, eliminating concerns about its weight. See *State v. Sullivan*, 679 N.W.2d 19, 29 (Iowa 2004).

We acknowledge that the district court did not mitigate the prejudicial effect of the evidence by instructing the jury on the limited purpose for which it was being offered. See *State v. Martin*, 704 N.W.2d 665, 673 (Iowa 2005) (“We have often recognized the importance limiting instructions have in minimizing prejudice.”). But this was the only prior domestic abuse incident raised at trial and, by Evans’s own admission, was not the focus of the prosecutor’s closing argument.

We conclude the district court did not abuse its discretion in finding that the balance tipped in favor of admitting evidence of the bedroom incident. *State v. Cox*, 781 N.W.2d 757, 760 (Iowa 2010) (holding this court “review[s] a district court’s evidentiary rulings regarding the admission of prior bad acts for abuse of discretion”).

III. Ineffective Assistance of Counsel Claims

Evans contends his trial attorney was ineffective in failing to (1) request a limiting instruction on the prior bad act evidence discussed above, and (2) impeach his victim with her “previous inconsistent testimony and actions.”

With respect to the first claim, Evans cannot establish *Strickland* prejudice. See *Reynolds*, 670 N.W.2d at 415. While the testimony concerning the prior incident was graphic, the State did not dwell on it and the defense softened its

effect by highlighting the fact that the woman did not contact the police. Accordingly, the claim fails.

The second issue is based on the woman's testimony at an earlier hearing to lift a no-contact order. At that hearing, the woman stated she was no longer afraid of Evans. Evans contends his attorney should have used this testimony to impeach the woman at trial. To prevail, Evans must show that (1) counsel breached an essential duty and (2) prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). On our de novo review, we are convinced Evans cannot establish a breach.

The hearing to lift the no-contact order took place a month after the incident on which the criminal charges were based. The woman's state of mind at that later point in time had no bearing on the elements of the crimes. Accordingly, impeachment with that evidence would have done little to undermine the State's case. Impeachment also would have done little to undermine the woman's credibility because her reason for seeking a cancellation of the no-contact order was not to reconcile with Evans but to address "mutual bills." Indeed, when the prosecutor asked her whether she was "still in agreement with" the charges filed by the State, the woman responded, "Yes."

Finding no breach of an essential duty, we conclude Evans cannot prevail on his second ineffective-assistance-of-counsel claim.

IV. Disposition

We affirm Evans's judgment and sentence for domestic abuse assault causing bodily injury.

AFFIRMED.