IN THE SUPREME COURT OF IOWA
Supreme Court No. 18-0765

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KEN LORENZE KUHSE
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR LINN COUNTY
THE HONORABLE RUSSELL G. KEAST, JUDGE

APPLICATION FOR FURTHER REVIEW

(Iowa Court of Appeals Decision June 19, 2019)

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QUESTION PRESENTED FOR REVIEW

(1) Taking all the instructions together, the jury was correctly informed of the state's burden of proof on the elements and on self-defense. Did the Court of Appeals correctly find counsel ineffective for failing to seek a change to the model instruction on the elements of the offense, particularly where there was sufficient evidence to support the verdict?

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STATEMENT SUPPORTING FURTHER REVIEW

The Court of Appeals entered a decision in conflict with established Supreme Court precedent. Iowa R. App. R. 6.1103(1)(b)(1). This is the third such decision on the topic.

A jury convicted Ken Kuhse of domestic abuse assault causing bodily injury. It received the model instruction correctly stating the elements of the offense. App. p. 13. It also received instructions placing the burden on the state to disprove self-defense. App. p. 14-21. It also was instructed to consider all the instructions together. App. 22.

The Court of Appeals concluded that counsel should have objected to the marshalling instruction because it did not also provide that the State had the burden to disprove self-defense. *Kuhse*, S.Ct. No. 18-0765, slip op. p. 6-7. Relying on its earlier unpublished decision in *State v. Gomez*, S.Ct. No. 13-0462, 2014 WL 1714451 (Iowa Ct. App. 30, 2014), the Court believed the jury could have believed its job was done once it found the elements of the offense were met. The Court of Appeals decided a similar issue with the compulsion defense in *State v. Hannegrefs*, S.Ct. No. 18-1419 (Iowa Ct. App. June 19, 2019).

The Court of Appeals' decision should be examined. First, the decision gives no fealty to the principle that lack of justification is not an element of the offense. *State v. Delay*, 320 N.W.2d 831, 834 (Iowa 1982).

Second, the decision fails to consider the instructions together. *State v. Fintel*, 689 N.W.2d 95, 104 (Iowa 2004). It puts no faith in the presumption that the jury follows its instruction to do the same. *State v. Ondayog*, 722 N.W.2d 778, 784-85 (Iowa 2006).

Third, the decision conflicts with the principle that model instructions are presumably correct. *State v. Becker*, 818 N.W.2d 135, 141 (Iowa 2012) (overruled on other grounds by *Alcala v. Marriott Int'l., Inc.*, 880 N.W.2d 699, 708, n.3 (Iowa 2016)). The instruction itself does not include negation of justification. Iowa Crim. Jury Instr. No. 800.1 (2018).

But, fourth, commentary to the model jury instruction does indicate that negation of justification should be added as an element of the offense when the defendant produces sufficient evidence. *Id.* It cites *Delay*, but *Delay* says no such thing.

Fifth, irrespective of whether *Gomez*, *Hannegrefs*, or this decision is correct, it is undesirable that unpublished decisions of the

Court of Appeals drive the wording of model jury instructions. Unpublished decisions are persuasive, but not controlling. Iowa R. App. P. 6.904(2)(*c*). The Supreme Court should make clear for the entire state whether justification is "added as an element."

Sixth, the Court of Appeals noted the State "contends *Gomez* should be 're-examined or, at least, it does not apply here.'" *Kuhse*, S.Ct. No. 18-0765, slip op. p. 5. Then, it observed that online records show the State did not seek further review of *Gomez*. *Id.* p. 5, n.2. Failure to seek further review—or rehearing, for that matter—does not preclude a party from seeking reversal or modification of a rule in later cases. If a contrary view takes hold the State will need to file further review applications as a matter of course.

Seventh, Kuhse claims trial counsel ineffective for the first time on appeal. *See* Iowa Code § 814.7(2). The Legislature enacted a new section 814.7 precluding such claims. 2019 Iowa Acts (S.F. 589) § 31. The Court has ordered briefing in two cases on further review to answer whether it is retroactive. *See* Order, *State v. Trane*, S.Ct. No. 18-0825 (filed June 18, 2019); Order, *State v. Macke*, S.Ct. No. 18-0839 (filed June 18, 2019). The Court should, at the least, retain this case until it has resolved the question.

STATEMENT OF THE CASE

Nature of the Case

The State seeks further review of the Court of Appeals' decision reversing the defendant's conviction for domestic abuse assault causing bodily injury, a serious misdemeanor. *See* Iowa Code §§ 708.2A(1), 708.2A(2)(b) (Supp. 2017).

Course of Proceedings

Ken Kuhse was charged on September 29, 2017. App. 5-7. He filed a notice of self-defense. App. p. 8. Trial began on March 19, 2018 and concluded the next day with a conviction as charged. App. 9. Kuhse was sentenced April 27, 2018. App. 23-24. On June 19, 2019, the Court of Appeals reversed and remanded for a new trial. *State v. Kuhse*, S.Ct. No. 18-0765, slip op. p. 8.

Facts

Victoria Pfeiffer-Kuhse ("Victoria") went to her basement to retrieve her laundry when Kuhse—who had been drinking rum and Cokes—came up behind her mumbling and calling her a "fucking cunt." Tr. Vol. I, p. 133, ll. 10-18, p. 135, ll. 10-24, p. 136, l. 25-p. 137, l. 2. She "probably called him an ass" in reply. *Id.* p. 137, ll. 5-6. Kuhse then grabbed her by the neck, squeezing "really tight. *Id.* p. 137, ll. 7-12.

"[G]ood thing, you fucking bitch, that I have long arms because there ain't a damn thing you can do about this right now." *Id.* Victoria was five feet two and a half inches tall and weighed 105 pounds. *Id.* p. 137, ll. 13-17.

He "finally" let go sending her backwards. *Id.* p. 138, ll. 1-14. Then, he threw her between an entertainment center and a table where she hit her head on the floor, dazing her. *Id.*

"Fucking bitch, get up, you're faking it," he said as he stood at the bar drinking. *Id.* p. 138, ll. 15-20.

When she did get up, she asked him why he was so mean. *Id.*

That, she said, was "when he grabbed me again and slammed me into the coffee table" injuring her hip. *Id.* p. 138, l. 21-p. 139, l. 1. She then fled the house. *Id.* p. 139, ll. 2-24. A friend helped her as she limped away. *Id.* She had abrasions, scratches, and bruises on her chest and lower neck area, knees. *Id.* p. 119, ll. 12-17; Ex. 1. She received treatment at a local hospital. *Id.* p. 144, ll. 9-p. 145, l. 20.

Kuhse had a scrape on his nose and a "little" bruise on his arm. Tr. Vol. 1, p. 124, ll. 2-7; Ex. 2. He told police that she had been "attempting to start a fight with him all day." Tr. Vol. 1, p. 184, ll. 4-9. He claimed that he received his injuries when she "bump[ed]" into

him and "[threw] herself onto his arm." *Id.* p. 184, ll. 20-25. He claimed she scratched his nose as he held her back with one arm. *Id.* p. 185, ll. 1-25. He claimed she hit the wall because he acted in self-defense. *Id.* p. 186, ll. 1-7.

ARGUMENT

I. The Court of Appeals erred. Disproof of justification is not an element assault. Counsel bore no duty to object to the uniform marshalling instruction. It, along with the other instructions on justification, correctly stated the law. And, where there was sufficient evidence Kuhse did not act in self-defense, he cannot show *Strickland* prejudice.

Preservation of Errors

Until recently, it was clear that a person could raise ineffective assistance of counsel for the first time on appeal. Iowa Code § 814.7(2) (2017); *State v. Bennett*, 503 N.W.2d 42, 47 (Iowa Ct. App. 1993). But, effective July 1, 2019, Iowa Code section 814.7 precludes consideration of ineffective assistance of counsel claims for the first time on appeal. 2019 Iowa Acts 140 (S.F. 589) § 31. The Supreme Court granted further review recently in two cases and ordered supplemental briefing whether this statutory change is retroactive. Order, *State v. Trane*, S.Ct. No. 18-0825 (filed June 18, 2019); Order, *State v. Macke*, S.Ct. No. 18-0839 (filed June 18, 2019). The State will address the issue if ordered. *See Alcala*, 880 N.W.2d at 711-12

(declining to address issued raised for the first time a further review application).

The Court typically prefers to consider ineffective assistance of counsel claims in postconviction relief. *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978). Doing so allows the court to consider a better-developed set of facts. *Id.* And "[e]ven a lawyer is entitled to his day in court, especially when his professional reputation is impugned." *Id.* The stakes are significant. A finding of ineffective assistance of counsel opens the door to a malpractice claim. Iowa Code §§ 814.11, 815.10(6); *Barker v. Capotosto*, 875 N.W.2d 157, 161, 167-68 (Iowa 2016); *Trobaugh v. Sondag*, 668 N.W.2d 577, 582-83 (Iowa 2003).

Standard of Review

The Court on appeal reviews the record *de novo* when a defendant claims a denial of his right to effective assistance of counsel has occurred. *State v. Clay*, 824 N.W.2d 488, 494 (Iowa 2012); *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999).

Merits

The jury here received instructions that—taken together—require the State to prove the elements of assault and disprove self-defense. The Court of Appeals erred. The model instructions do not

require revision. And, in any case, there is not a reasonable likelihood of a different result had the instructions read differently.

A. Principles of ineffective assistance of counsel do not require meritless objections or allow reversal in the absence of *Strickland* prejudice.

The constitutions of the United States and Iowa guarantee a criminal defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Iowa Const. art. I, § 10.[1]

To establish ineffective assistance of counsel, a defendant must show that: (1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom. *Wemark v. State*, 602 N.W.2d 810, 814 (Iowa 1999) (citing *Strickland v. Washington*, 466 U.S. 668, 688

[1] Kuhse does not cite either the Sixth Amendment to the U.S. Constitution or Article I, section 10. This may mean the court can consider both provisions. *King v. State*, 797 N.W.2d 565, 571 (Iowa 2011). But Kuhse does not argue for a different result or analysis under state constitutional principles. *See State v. Halverson*, 857 N.W.2d 632, 634-35 (Iowa 2015) (noting parallel state provision for effective assistance of counsel). In the absence of argument or authority for a novel result, the Court should decline to apply anything but established principles. Iowa R. App. P. 6.903(2)(*g*)(3) (stating failure to cite authority in support of an issue may be deemed a waiver of that issue); *State v. Piper*, 663 N.W.2d 894, 913-14 (Iowa 2003) (overruled on other grounds by *State v. Hanes*, 790 N.W.2d 545, 550 (Iowa 2010) and declining to undertake party's research and advocacy).

(1984)); *Ledezma v. State,* 626 N.W.2d 134, 141-42, 145 (Iowa 2001)[2]. However, both elements do not need to be addressed: if the claim lacks prejudice—as will often be the case—the case may be decided on that basis alone. *Strickland*, 466 U.S. at 697.

A breach does not occur if counsel refrains from asserting a meritless issue. *State v. Hoskins*, 711 N.W.2d 720, 730-31 (Iowa 2006); *State v. Graves*, 668 N.W.2d 860, 881 (Iowa 2001). Nor must counsel assert an issue merely because it would not hurt. *See Knowles v. Mirzayance*, 129 S.Ct. 1411, 1419-20 (2009) ("This Court has never established anything akin to [a] 'nothing to lose' standard for evaluating *Strickland* claims.").

"The crux of the prejudice component rests on whether the defendant has shown 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would

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[2] Iowa courts have stated that both these elements require proof by a "preponderance of the evidence." *See*, *e.g.*, *Halverson*, 857 N.W.2d at 635; *Ledezma*, 626 N.W.2d at 142. Federal courts, however, have indicated that this incorrect, at least with respect to proof of prejudice. *Paulson v. Newton Corr. Facility, Warden*, 703 F.3d 416, 420-21 (8th Cir. 2013); *Shelton v. Mapes*, U.S. D.Ct. No. 4:12-cv-00076-JAJ (filed Sept. 9, 30, 2014) *aff'd on appeal* 821 F.3d 921 (8th Cir. 2016). The prejudice standard is simply whether there is a likelihood of a different outcome sufficient to undermine confidence in the verdict.

have been different.'" *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

B. The uniform instructions on assault and self-defense correctly state the law.

The Court of Appeals failed to recognize that lack of justification is not an element assault. It is true that a person commits assault when, "without justification," the person does an "act intended to cause pain or injury or which intended to result in physical contact which will be insulting or offensive to another, coupled with the apparent ability to do the act." Iowa Code § 708.1(2)(*a*). But "justification is an affirmative defense to assault … rather than an element of the crime." *Delay*, 320 N.W.2d at 834; *see* Iowa Code §§ 704.1, 704.3, 704.6 (collectively defining the defense).

If there is substantial evidence of justification, and the defendant requests, the court must give self-defense instructions. *State v. Rains*, 574 N.W.2d 904, 915 (Iowa 1998); *State v. Stallings*, 541 N.W.2d 855, 857 (Iowa 1995); *State v. Dunson*, 433 N.W.2d 676, 677 (Iowa 1988). Then the burden shifts to the State to disprove the defense beyond a reasonable doubt. *Stallings*, 541 N.W.2d at 857; *Delay*, 320 N.W.2d at 834.

The jury here was instructed that where "State must prove something, it must be by evidence beyond a reasonable doubt." Jury Instr. No. 3; App. 11. The burden of proof remains with the State. Jury Instr. No. 3, 4; App. 11, 12. And, the jury was directed that it must consider all the instructions. Jury Instr. No. 22; App. 22. "You must consider all the instructions together. No one instruction includes all of the applicable law." *Id.*; App. 22.

Consistent with the model instructions, the jury was informed,

> The State must prove all of the following elements of the crime of Domestic Abuse Assault Causing Bodily Injury:
>
> 1. On or about the 20th day of August, 2017, the defendant either did an act which was meant to cause pain or injury, result in physical contact which was insulting or offensive, or place Victoria Pfeiffer-Kuhse in fear of immediate physical contact which would have been painful, injurious, insulting or offensive to Victoria Pfeiffer-Kuhse.
>
> 2. The defendant had the apparent ability to do the act.
>
> 3. The defendant's act caused a bodily injury to Victoria Pfeiffer-Kuhse as defined in Instruction No. 11.
>
> 4. Victoria P[f]eiffer-Kuhse and Ken Kuhse were married at the time of the incident.

> If the State has proved all of these numbered elements, the defendant is guilty of Domestic Abuse Assault Causing Bodily Injury and you should sign Form of Verdict No. 1.
>
> ***
>
> If the State has failed to prove either element 1 or 2, the Defendant is not guilty and you should sign Form of Verdict No. 5.

Amended and Subst. Jury Instr. No. 9; App. 13; *see* Iowa Crim. Instr. No. 830.2; *see also* Iowa Code §§ 236.2, 708.1(2)(*a*), (*b*).

The court gave the jury seven instructions on self-defense or "justification," also from the model jury instructions. Jury Instr. No. 12-19; App. 14-21; *see* Iowa Crim. Jury Instr. No. 400.1, 400.2, 400.7, 400.8, 400.10, 400.14, 400.15. The first of these states:

> The Defendant claims he acted with justification.
>
> A person may use reasonable force to prevent injury to a person, including the Defendant. The used of this force is known as justification.
>
> *The State must prove the Defendant was not acting with justification.*

Jury Instr. No. 12; App. 14 (emphasis added); *see* Iowa Crim. Jury Instr. No. 400.1.

The next instruction provides,

> A person is justified in using reasonable force if he reasonably believes the force if necessary to

> defend himself from any imminent use of unlawful force.
>
> *If the State has proved any of the following elements, the Defendant was not justified*:
>
> 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 he was in imminent danger of death or injury and the use of force was not necessary to save him.
>
> 4. The Defendant did not have reasonable grounds for the belief.
>
> 5. The force used by the Defendant was unreasonable.

Jury Instr. No. 13; App. 15 (emphasis added); *see* Iowa Crim. Jury Instr. No. 400.2.

So, the instructions here were correct: assault does not require proof of lack of justification, a defendant is entitled to use reasonable force in his own defense, and the State must disprove it. Jury Instr. No. 12, 13; App. 14, 15.

The Court of Appeals' decision did not reflect that instructions need not read a specific way; only fairly state the law as applied to the facts. *Becker*, 818 N.W.2d at 141 (overruled on other grounds by *Alcala*, 880 N.W.2d at 708 n.3). Neither did it recognize how juries

and reviewing courts must consider all the instructions together. *State v. Ambrose*, 861 N.W.2d 550, 560 (Iowa 2015); *Fintel*, 689 N.W.2d at 104.

The Court of Appeals' third error resides in how it treated the model instruction on assault. There is a presumption of correctness in the Bar Association's model instructions. *Ambrose*, 861 N.W.2d at 560-61; *State v. Beets*, 528 N.W.2d 521, 523 (Iowa 1995). Indeed, the Supreme Court has advised district courts to adhere to the uniform instructions. *Becker*, 818 N.W.2d at 143. The body of the marshalling instruction correctly stated the law under *Delay* and its progeny.

But, the Court of Appeals noted commentary to the model instruction that if the defendant produces sufficient evidence of justification, "the State's duty to negate the defense should be added as an element of the offense." Iowa Crim. Jury Instr. No. 800.1 cmt. (2018). This language stands at right angles to the case it cites. *Delay* held that justification was an affirmative defense, not an element of the offense. It appears the commentary changed recently. His language was not part of the commentary in 2016.

Although the Bar does yeoman's work and the body of the instruction is correct, the commentary is mistaken. *See Ambrose*, 861 N.W.2d at 562-63 (Wiggins, J., concurring and suggesting greater attention to ensure that instructions correctly state the law); *see also Ambrose*, 861 N.W.2d at 563 (Waterman, J., concurring and noting although the court normally approves uniform instructions, "[e]veryone knows" the Court is free to find a "particular instruction is faulty" and citing *State v. McMullin*, 421 N.W.2d 517, 518 (Iowa 1988)).

The Court of Appeals relied on its unpublished decision in *State v. Gomez*, S.Ct. No. 13-0462, 2014 WL 1714451 (Iowa Ct. App. Apr. 30, 2014). There, the defendant acknowledged the assault and justifications instructions correctly stated the law. He contended his trial attorney was ineffective for failing to make the district court "relate the justification instructions to the assault" marshalling instruction. *Gomez*, S.Ct. No. 13-0462, 2014 1714451, *3. The Court of Appeals held,

> If a lack-of-justification element is not included in the marshalling instruction, then the justification instructions must inform the jurors how to proceed if they find the State did not prove defendant was acting without justification.

The Court of Appeals reasoned,

> In the absence of an element requiring the State to prove lack of justification, the jury could have mistakenly believed it could convict Gomez if the State satisfied the three elements listed in the marshalling instructions. The jury had no guidance on how to apply the free-floating instructions on justification.

Id. From this, the Court of Appeals determined that counsel breached a duty causing Gomez *Strickland* prejudice. *Id.*

Collectively, *Gomez*, *Kuhse*, and the new commentary to Instruction 800.1 would require trial courts to write jury instructions on assault and self-defense in opposition to *Delay*. They also stand at odds with the principle that juries are instructed to and follow all the instructions, both the marshalling instruction and the affirmative defense instructions. This is undesirable. Unpublished Court of Appeals decisions, while "persuasive," are not controlling. Iowa R. App. P. 6.904(2)(*c*). Model instructions receive considerable warranted deference. But neither should change the law. *See State v. Eichler*, 248 Iowa 1267, 1270 83 N.W.2d 576, 578 (1957) ("If our previous holdings are to be overruled, we should ordinarily prefer to do it ourselves.").

The final concern the State has with the Court's opinion emanates from a suggestion in footnote 2 of the Court of Appeals' opinion. Recognizing the State's argument that *Gomez* should be re-examined, it observed "[i]t appears from the appellate docket available on Iowa Courts Online that the State did not seek further review of our decision in *State v. Gomez*." *Kuhse*, S.Ct. No. 18-0765, slip op. p. 5, n.2. There is little to draw from a party's election not to seek review. Unpublished decisions, for example, are not controlling. Published decisions are subject to requests for modification or abrogation.

Distilled, the complaint with the Court of Appeals' decision is this: the jury was informed it must consider all the instructions together. Four instructions made clear the State's burden of proof. Two stated the prosecution bore the burden of disproving justification. One provided that if the State failed in its duty, the jury must acquit. The instructions correctly stated the law. Counsel therefore bore no duty to object. The Court of Appeals erred.

C. The proposed instruction would not likely have changed the result where the State proved Kuhse was not justified.

The Court of Appeals also erred to find *Strickland* prejudice. Unlike cases of preserved error, a claim of ineffective assistance of counsel requires a defendant to prove the reasonable likelihood of a different outcome. *Everett v. State*, 789 N.W.2d 151, 158 (Iowa 2010). When an instruction omits a required element, the defendant must show a reasonable probability of a different result if the court had supplied it. *Ambrose*, 861 N.W.2d at 559; *State v. Propps*, 376 N.W.2d 619, 623 (Iowa 1985). If another instruction, such as Instruction 12 here, provides the missing element, then the defendant does not prevail. *Propps*, 376 N.W.2d at 623. If there is sufficient evidence to support the State's case on a missing element, then the defendant does not prevail. *Ambrose*, 861 N.W.2d at 559.

This is true for justification. The defendant must show that "a reasonable probability exists that the result would have been different if the correct [justification] instruction was given." *State v. Shelton*, S.Ct. No. 08-1962, 2011 WL 441932 *5 (Iowa Ct. App. Feb. 9, 2011) (citing *State v. Hopkins*, 576 N.W.2d 374, 379 (Iowa 1998)). If there

is sufficient evidence the defendant did not act with justification, the defendant does not prevail. *Id.*

Finally, if defense counsel explains to the jury that it must acquit if it finds his client acted with justification, this too undermines prejudice. *State v. Johnson*, S.Ct. No. 16-0517, 2017 WL 3283280, *4 n.3 (Iowa Ct. App. Aug. 2, 2017); *see also State v. Yaggy*, S.Ct. No. 10-1186, 2012 WL 163234 *9 (Iowa Ct. App. Jan. 19, 2012) (counsel mitigated prejudice from prosecutor's misconduct by addressing it in closing argument).

Taking these principles in reverse order, defense counsel provided the tie between the justification marshalling instruction and the offense. Tr. Vol. II, p. 31, l. 18-p. 32, l. 21. She argued (correctly), "Now, the State has to prove one of the following elements to show the defendant was not justified." Tr. Vol. II, p. 31, ll. 19-21; *see* Jury Instr. No. 12; App. 14. From there, she argued the State failed to prove Kuhse "started or continued the incident which resulted in an injury." Tr. Vol. II, p. 31, ll. 21-23; *see* Jury Instr. No. 13; App. 15. She argued that because Kuhse was in his own home, he had no duty to retreat. Tr. Vol. II, p. 32, ll. 8-11; *see* Jury Instr. No. 16; App. 18. She argued Kuhse feared death or injury. Tr. Vol. II, p. 32, ll. 11-14;

see Jury Instr. No. 13; App. 15. She argued that he did have reasonable grounds for his belief. Tr. Vol. II, p. 32, ll. 14-16; *see* Jury Instr. No. 13; App. 15. Finally, she argued that the force he used was reasonable. Tr. Vol. II, p. 32, ll. 16-19; *see* Jury Instr. No. 17, 18, 19; App. 19, 20, 21. From there, she asked the jury to return a not guilty verdict.

Neither the court nor the prosecutor indicated that counsel misstated the law or instructions.

It is unlikely that the jury would have misunderstood the import of the self-defense instructions. Just as the first reads, a defendant is entitled to use reasonable force in self-defense. Jury Instr. No. 12; App. 14. Instructions 3 and 4 make clear the State must prove assigned elements or the jury must acquit. Jury Instr. No. 3, 4; App. 11, 12. And, counsel made clear the tie between the marshalling instruction and the justification. There is little likelihood the jury would return a guilty verdict if it also believed that the State failed to prove any of the alternatives in Instruction 13.

Considering those elements, the record shows substantial evidence that Kuhse either started the incident, had an alternative short of leaving the home, or used unreasonable force. If substantial

evidence exists for any of these, Kuhse would not likely have been acquitted or convicted of a lesser offense.

"Substantial evidence" is evidence which "would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt." *State v. Williams*, 695 N.W.2d 23, 27-28 (Iowa 2005); *see also Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *State v. Vance*, 790 N.W.2d 775, 783 (Iowa 2010). The testimony of one credible witness would uphold a conviction. *State v. Mullins*, 260 N.W.2d 628, 630 (S.D. 1977); *State v. Oliver*, 267 N.W.2d 333, 336 (Wis. 1978).

The jury enjoys the prerogative and bears the duty to sort the conflicting testimony and assign all of it such weight as it deserves. A jury is entitled to believe all, some or none of any witness's testimony without interference. *State v. McPhillips*, 580 N.W.2d 748, 753 (Iowa 1998); *State v. Phanhsouvanh*, 494 N.W.2d 219, 223 (Iowa 1992); *State v. Brown*, 466 N.W.2d 702, 704 (Iowa Ct. App. 1990).

Here, Victoria Pfeiffer-Kuhse ("Victoria") testified that she went to the basement to retrieve her laundry when Kuhse—who had been drinking rum and Cokes—came up behind her mumbling and being "abusive." Tr. Vol. I, p. 133, ll. 10-18, p. 135, ll. 10-24. Even assuming

they insulted one another, it was Kuhse who first grabbed Victoria by the neck. Tr. Vol. I, p. 136, l. 2-p. 137, l. 12. She bore the marks of it. Tr. Vol. I, p. 119, ll. 15-20, p. 173, ll. 1-4, p. 183, ll. 18-25; Ex. 1 (CD photos of Victoria). Kuhse "started or continued the incident which resulted in injury." Jury Instr. No. 13; App. 15.

It is true, of course, that Kuhse was in that portion of the house where he tended to stay. But, the first assault occurred outside the laundry room, near the landing of the stairs. Tr. Vol. I, p. 136, l. 15-p. 137, l. 12. Rather than go anywhere else in the basement, Kuhse told her insultingly to "get up." Tr. Vol. I, p. 138, ll. 15-17. If, by some stretch, this provoked her then her response was muted. It did not justify then slamming her into the coffee table. His response was more than necessary. *See* Tr. Vol. I, p. 138, ll. 21-24; Jury Instr. No. 13, 15, 19; App. 15, 17, 21.

Even assuming a version of Kuhse's story was true—that Victoria had been "following him" attempting to start an argument, there was little danger from the five-foot, two-and-a-half inch one hundred-and-five-pound woman. Tr. Vol. I, p. 137, ll. 13-17. His scratch and bruise were minor. *See* Tr. Vol. I, p. 185, l. 4-p. 186, l. 7.

She had abrasions, scratches, and bruises on her chest and lower neck area, knees. *See* Jury Instr. No. 13, 17, 18, 19; App. 15, 19, 20, 21.

The State proved Kuhse started or continued the incident that caused Victoria's injuries. Jury Instr. No. 13, 14, 15; App. 15, 16, 17. The State proved Kuhse had a less violent alternative than what he employed. Jury Instr. No. 13, 16; App. 15, 18. The State proved Kuhse's reaction was outsized to any perceived provocation or danger. Jury Instr. No. 13; App. 15. And, the State proved the amount of force used against her was unreasonable. Jury Instr. No. 13, 19; App. 15, 21.

There was sufficient evidence in the record to support the jury's finding that Kuhse did not act with justification. As such, the absence of an element stating what to do if Kuhse *was* justified did not prejudice him.

CONCLUSION

The judgment and sentence should be affirmed.

REQUEST FOR ORAL SUBMISSION

The State asked to be heard in oral argument.

Respectfully submitted,

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