

## IN THE IOWA DISTRICT COURT FOR PLYMOUTH COUNTY

STATE OF IOWA,  Plaintiff,  vs.  NOEL JERMAINE BENDER,  Defendant.	CRIMINAL NO. SRCR016095  FINDINGS, CONCLUSIONS, AND VERDICT
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On the 14<sup>th</sup> day of February, 2017, the above file came before the Court at the time and place set for trial. Defendant appeared personally and with counsel, Douglas Roehrich. The State appeared by Plymouth County Attorney Darin Raymond. The trial was stenographically reported.

**PRELIMINARY FINDINGS AND PROCEDURAL BACKGROUND**

Defendant and Gayle Banks (hereinafter Banks) met for the first time in December 2014 when Defendant was doing construction work for L & L at McDonald's in Sioux City. Banks was with friends and randomly and almost as a "dare" to herself started talking to Defendant and got his name and number. Defendant and Banks then began texting and communicating with each other by phone. Defendant at that time was on probation or parole and was placed at the Residential Treatment Facility operated by the Iowa Department of Corrections in Sioux City.

After a few weeks, Defendant and Banks began seeing each other on weekends. Defendant was being given weekend furloughs from the RTF to be spent at his father's home in Sioux City. Banks eventually started to stay overnight with Defendant at his father's house during these weekend furloughs. Banks at that time was living with her

three children in an apartment located at 1120 Second Street SE, Apartment A-4 in Le Mars, Plymouth County, Iowa.

According to Banks, she and Defendant during this time in early 2015 began to talk about their future. In particular, they started talking about moving to Colorado, starting a landscape business, and basically beginning a life together and with Banks's children as soon as Defendant completed the RTF program and his probation requirements.

As a result of an RTF rules violation, Defendant was told his anticipated completion and release date would be pushed back. In mid-February, Defendant then effectively absconded from the RTF – he left in the morning for work and did not return. According to Banks, Defendant just showed up at her apartment one day in mid-February. Although Banks knew that Defendant had been in the RTF, she allowed Defendant to stay at her apartment; and, according to her, their relationship continued to grow after that time. In particular, they continued to talk about their future and, at some time, even discussed the possibility of marriage. While staying at the apartment, Defendant was introduced to and started to form a relationship with Banks's children. When Banks's grandmother died, Defendant travelled to and stayed with her in Georgia for two to three weeks. Although Defendant could not be out in public often and could not apply for work for fear of getting caught and sent back to the RTF, he met Banks's parents and did some work for cash for her father's construction business.

Approximately two weeks after Defendant began staying at the apartment, Banks and Defendant saw Defendant's name and photo in the paper listed as one of Siouxland's "Most Wanted." According to Banks, she then began to tell and ask Defendant to turn himself in, accept the consequences, and then complete what he

needed to do so they could move to Colorado as planned. According to Banks, Defendant continued to stay with her at the apartment while deciding if or when to do so.

Defendant was still at the apartment on April 28, 2015. Banks claims that on that day she returned to the apartment and began arguing with Defendant about what she believed to be porn watched by Defendant on his phone. Banks told Defendant he needed to pack his stuff and leave. Banks claims that Defendant then basically "snapped" and began to hit her; threw her up against the wall; and also punched her several times after pushing her on to the floor. Defendant then left the apartment. Banks went to the apartment directly above hers where her friend and neighbor Makayla Bootsma lived, and Ms. Bootsma called 911.

Le Mars police officers went to the apartment building, looked inside Banks's apartment, and also spoke to Banks inside Bootsma's apartment. Based on the description given by Banks, Defendant was then located and apprehended at a nearby cemetery. Defendant was thereafter arrested and charged with the crime of domestic abuse assault in the above-captioned matter.

At trial, Le Mars Police Officers Jeff Kramer and Justin Daale testified for the State. Banks, Ms. Bootsma and Denecio Hernandez were also called to testify for the State. The State also offered and the Court received into evidence Exhibits 1 – 5 and 8 – 11. Defendant then testified in his own defense.

Additional findings are included in the Court's Conclusions and Analysis below. To the extent evidence submitted at trial is not specifically referenced herein, the Court finds such evidence to be cumulative or less probative than other evidence, or otherwise not dispositive of the issues or the Court's findings and conclusions.

## CONCLUSIONS / INSTRUCTIONS

### A. General "Instructions"

Plea/Presumption of Innocence: Defendant has entered a plea of not guilty. The plea of not guilty is a complete denial of the charge and places the burden on the State to prove guilt beyond a reasonable doubt. Defendant is presumed innocent and not guilty. This presumption of innocence requires the Court to put aside all suspicion which might arise from the arrest, charge, or the present situation of Defendant. The presumption of innocence remains with Defendant throughout the trial unless the evidence establishes guilt beyond a reasonable doubt.

Burden of Proof/Reasonable Doubt: "Burden of proof" means the obligation resting upon a party to prove the truth of an allegation made which is denied by the opposing party.

The burden is on the State to prove Defendant guilty beyond a reasonable doubt.

A reasonable doubt is one that fairly and naturally arises from the evidence in the case or from the lack or failure of evidence produced by the State.

A reasonable doubt is a doubt based upon reason and common sense and not the mere possibility of innocence. A reasonable doubt is the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

If, after a full and fair consideration of all the evidence, the Court is firmly convinced of Defendant's guilt, then there is no reasonable doubt and the Court should find him guilty.

But if, after a full and fair consideration of all the evidence in the case or from the lack or failure of evidence produced by the State, the Court is not firmly convinced of Defendant 's guilt, then there is a reasonable doubt, and the Court should find him not guilty.

Included Offenses: If there is a reasonable doubt as to the degree of the crime or included charges, Defendant shall only be convicted of the degree or included charge for which there is no reasonable doubt.

General Intent: To commit a crime Defendant must intend to do an act which is against the law. While it is not necessary that he knows the act is against the law, it is necessary that he was aware he was doing the act and he did it voluntarily, not by mistake or accident. The Court may, but is not required to, conclude Defendant intends the natural results of his acts.

Specific Intent: "Specific intent" means not only being aware of doing an act and doing it voluntarily; but, in addition, doing it with a specific purpose in mind. Because determining Defendant's specific intent requires the Court to decide what he was thinking when an act was done, it is seldom capable of direct proof. The Court, therefore, considers the facts and circumstances surrounding the act to determine his specific intent.

Credibility of Witnesses: In determining the facts, the Court may have to decide what testimony it believes. The Court may believe all, part, or none of any witness's testimony.

There are many factors which may be considered in deciding what testimony to believe, for example:

1. Whether the testimony is reasonable and consistent with other evidence

you believe.

2. Whether a witness has made inconsistent statements.
3. The witness's appearance, conduct, age, intelligence, memory, and knowledge of the facts.
4. The witness's interest in the trial, their motive, candor, bias, and prejudice.

Direct/Circumstantial Evidence: Facts may be proven by direct evidence, circumstantial evidence, or both. Direct evidence is evidence from a witness who claims actual knowledge of a fact, such as an eyewitness. Circumstantial evidence is evidence about a chain of facts which show Defendant is guilty or not guilty. The law makes no distinction between direct evidence and circumstantial evidence. The Court gives all the evidence the weight and value it thinks it is entitled to receive.

#### **B. Domestic Abuse Assault**

As noted above, the State has charged Defendant by Trial Information with the crime of Domestic Abuse Assault. The State must prove beyond a reasonable doubt all of the following numbered elements in regard to this charge of Domestic Abuse Assault:

1. On or about April 28, 2015, in Plymouth County, Iowa, Defendant did an act which was intended to:
  - a. Cause pain or injury to Gayle Banks;
  - b. Result in physical contact which would be insulting or offensive to Gayle Banks;
  - c. Place Gayle Banks in fear of immediate physical contact which would have been painful, injurious, insulting, or offensive to her.
2. Defendant had the apparent ability to do the act.
3. The act occurred between household members who resided together at the time of the incident or between persons who have been household members residing

together within the year prior to the incident but not residing together at the time of the incident.

If the State has proved all of these numbered elements, Defendant is guilty of domestic abuse assault. If the State has proved only Elements 1 and 2, Defendant is guilty of Assault. If the State has failed to prove either Element 1 or 2, Defendant is not guilty.

In regard to the above elements, the following terms are specifically defined:

1. Apparent ability: The term "apparent ability" means a reasonable person in Defendant's position would expect the act to be completed under the existing facts and circumstances.

2. Household members: "Household members" are persons cohabiting with each other. "Cohabiting" does not require a sexual relationship; however, it does require more than dwelling or living together in the same place. To determine if Defendant and Banks were cohabiting at the time of the alleged offense or within the year prior, the Court considers whether they had sexual relations while sharing the same living quarters; whether they shared income or expenses; whether they jointly used or owned property together; whether they held themselves out as husband and wife, the continuity and length of their relationship, and any other facts shown by the evidence bearing on their relationship with each other. Although cohabiting does not have a specific definition, it is something more than persons just living together in the same place ("roommates") and something less than persons living together as spouses.

See, State v. Kellogg, 542 N.W.2d 514, 516-518 (Iowa 1996). See also, State v. Virgil, an unpublished decision found at 2016 WL 6652347 \*2-3, No. 15-0971 (Iowa App. November 9, 2016); State v. Vela, an unpublished decision found at 798 N.W.2d 736

(Table), 2011 WL 268768, \*3-4, No. 10-0662 (Iowa App. March 7, 2011); State v. Benesh, an unpublished decision found at 781 N.W.2d 302 (Table), 2010 WL 786039, \*6-7, No. 09-0951 (Iowa App. March 10, 2010).

## ANALYSIS

The Court initially finds and concludes that the State has proven beyond a reasonable doubt Elements 1 and 2 for the crime of Domestic Abuse Assault. The Court finds the testimony of Banks to be credible, considering her knowledge of the facts, her demeanor, and other evidence submitted at trial that was consistent with her testimony, specifically including the testimony of Ms. Bootsma and the photographs of Banks. Defendant not only did an act that placed Banks in fear of physical contact, he actually physically assaulted her. During the April 28, 2015, incident, Defendant struck Banks several times and threw her up against a door. This caused pain and injury to Banks. Defendant had the apparent ability to do this act because he actually did them. His specific intent to cause pain or injury to Banks is easily found from his actions and the natural consequences of those actions. The State met its burden of proving these first two elements in its case-in-chief. The Court would further note that Defendant did not necessarily dispute the claim that an assault occurred. This is not to suggest that Defendant in any way had any burden in regard to this charge but, rather, is noted to demonstrate the lack of any reasonable doubt generated by the evidence.

The critical issue and question raised in this matter is whether the State proved beyond a reasonable doubt that Defendant and Banks were household members at the time of the assault. In particular, the question is whether the State proved beyond a reasonable doubt that Defendant and Banks were cohabiting.

As discussed above, the Court considers all of the evidence and certain factors

in determining whether the State has met its burden in this regard. Some of those factors weigh against the State's case and raise some doubt in regard to the State's proof. Defendant and Banks met for the first time approximately four months before the incident. At that time, Defendant was placed in the RTF, and his contact with Banks was limited. According to Banks, Defendant did not "show up" at her apartment after leaving the RTF until sometime in mid-February, and the testimony of Banks and Ms. Bootsma indicates that Defendant was continuously at the apartment for approximately three weeks (this excludes the approximate three weeks Defendant and Banks were in Georgia). This was not a lengthy relationship. Additionally, although Defendant and Banks may have discussed getting married in the future, they at no time prior to the incident held themselves out as husband and wife. They also owned no property together, and the apartment was leased under Banks's name only. Finally, all of Defendant's belongings or items of personal property at the apartment fit inside a medium-sized duffle bag.

The factors and considerations discussed above, however, are not required elements. For both cohabiting and Element 3, the State must prove Defendant and Banks resided together. The State, however, is otherwise not required to prove beyond a reasonable doubt that Defendant and Banks owned property together, held themselves out as husband and wife, and had a lengthy and continuous relationship. These are simply factors considered by the Court; and, although the nonexistence of these particular factors are certainly considered by this Court in determining whether there is reasonable doubt, the Court also considers other facts and circumstances established by the evidence in determining whether the State has met its burden.

In this regard, the Court finds and concludes that Defendant and Banks were

engaged in sexual relations. Defendant testified that the parties' relationship was "just sex" and sex only. For reasons discussed below, the Court finds such testimony to lack credibility. The question of whether Defendant and Banks were just having sex or were in a more serious romantic relationship, however, would be more relevant to the question of whether they were in an "intimate relationship" that is not applicable to a criminal charge of domestic abuse assault. The undisputed fact that Defendant and Banks were engaged in sexual relations, in and of itself, is certainly not conclusive proof of cohabitation; however, it is a fact considered by the Court in this regard.

The Court finds and concludes that Defendant was staying or otherwise living with Banks for at least three weeks, if not more. The Court finds the testimony of Banks that Defendant first showed up at her apartment sometime in Mid-February 2015 and, thus, stayed some overnights at the apartment before they went to Georgia to be credible. The Court also finds the testimony of Ms. Bootsma that Defendant was then at the apartment continuously for at least two to three weeks prior to the assault to be credible. The Court would further note that although they were not at the apartment, Defendant and Banks were together in Georgia after the death of Banks's grandmother for approximately two and a half weeks.

The Court further finds and concludes that Defendant and Banks were more than just roommates living together at the same place during this time. The Court finds the testimony of Banks that she and Defendant were developing a romantic relationship to be credible. Defendant's testimony diminishing the relationship and characterizing it as sex only is not credible. The Court first believes Banks. Additionally, the communications and contacts that were made between Defendant and Banks after Banks's arrest describe a serious romantic relationship not just at the post-assault times

those communications were made but also in reference to the times prior to and at the time of the assault.

Defendant also was developing a relationship with Banks's three children. He did not provide "daycare" for the children while Banks was at work; however, he was exposed to the children and the children to him, and Defendant and Banks did things together with the children.

Although all of his personal property fit in one medium-size duffel bag, Defendant also did have such personal property items at the apartment. These items included his phone, tablet, and other such accessories; personal hygiene toiletry items; electronic cigarette/vaporizer items; and prior mail/documents. Defendant also received some mail at the apartment. The Court recognizes that the mail found by the officers and introduced into evidence addressed to Defendant was for a different apartment address in Le Mars – presumably some of the mail that Defendant brought in his duffle bag. Banks, however, testified that Defendant used the apartment for mail, specifically including needed tax information, and the Court finds such testimony to be credible.

Although it was not a 50/50 split, Defendant and Banks also were essentially sharing expenses. Banks basically paid for everything: the rent, utilities, and the majority of groceries and other household items. Defendant used and shared the benefit of these expenditures and also purchased some miscellaneous items such cigarettes used by both of them. Again, this was not a 50/50 split. It also was not a situation, however, where each person paid their own financial obligation. Defendant did not pay and was not expected to pay a share of the rent or utilities. He did not pay and was not expected to pay for his own separate groceries or food.

Finally, there was no other place or location where Defendant lived or resided

after he left the RTF until the day of the assault. The Court recognizes that Defendant likely stayed in a hotel several nights during this time period, including hotels in the Sioux City area before he began staying at Banks's apartment, the hotel in South Sioux City where he exercised a visitation with his son, and possibly some nights with Banks when they were traveling to and from Georgia. The Court also recognizes that Defendant was still storing property at his father's residence both before and after he left the RTF. Based on the evidence, however, the Court finds and concludes that Defendant spent the majority of his time, including the majority of overnights, at Banks's apartment from mid-February until the day of the assault on April 28, 2015, and was staying at the apartment continuously for approximately three weeks prior to and to the day of the assault. It may not have been a "permanent" living arrangement; however, the State is not required to prove a permanent residence or domicile to establish that Defendant and Banks were "household members" residing together at the time of the assault.

Giving consideration to all of these facts and circumstances, the Court finds and concludes that the State sustained its burden of proving beyond a reasonable doubt that Defendant and Banks were household members residing together at the time of the April 28, 2015, assault. The Court, therefore, finds and concludes that the State has proven beyond a reasonable doubt that Defendant is guilty of Domestic Abuse Assault.

#### **PRIOR CONVICTIONS**

In its Trial Information, the State alleged two separate enhancements based on prior convictions. The State charged Defendant with Domestic Abuse Assault, Third or Subsequent Offense; which is a Class D felony under Iowa Code Section 708.2A(4). The State also charged Defendant as a Habitual Offender under Section 902.8.

At the conclusion of trial, record was made in regard to such prior convictions in the event of a guilty verdict on the underlying charge of Domestic Abuse Assault. The Court has not considered such record as evidence in regard to that underlying charge or the findings and conclusions stated above. In accordance with Rule 2.19(9), Defendant affirmed that he was the person convicted of the prior domestic abuse assault charges and the prior felony offenses identified in the Minutes of Testimony filed with the Trial Information.

#### **VERDICT AND ORDER**

The Court, therefore, finds Defendant Noel Bender:

Guilty of the charge of Domestic Abuse Assault, Third or Subsequent Offense, in violation of Iowa Code Section 708.2A(4), as an Habitual Offender under Section 902.8, as alleged the Trial Information.

IT IS THEREFORE ORDERED that:

1. A time and date for hearing on posttrial motion(s), if any, and sentencing is hereby set for April 21, 2017, at 9:30 a.m. Defendant shall personally appear at that time.
2. A Presentence Investigation Report was previously prepared by the Third Judicial District Department of Correctional Services and is on file. A supplemental investigation and report will be ordered only upon request of either party.
3. Bail/conditions of release shall continue as previously set.

Copies to the parties, Court Administration, and the Third Judicial District Department of Correctional Services.

## IN THE COURT OF APPEALS OF IOWA

No. 17-0646  
Filed April 4, 2018

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

vs.

**NOEL JERMAINE BENDER,**  
Defendant-Appellant.

Appeal from the Iowa District Court for Plymouth County, Steven J. Andreasen, Judge.

Noel Bender appeals his conviction of domestic abuse assault, third or subsequent offense, as an habitual offender. **AFFIRMED.**

Zachary S. Hindman of Mayne, Arneson, Hindman, Hisey & Daane, Sioux City, for appellant.

Thomas J. Miller, Attorney General, and Tyler J. Buller, Assistant Attorney General, for appellee.

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

**VAITHESWARAN, Judge.**

The State charged Noel Bender with domestic abuse assault, third or subsequent offense, as an habitual offender. See Iowa Code §§ 708.2A(1), 708.2A(4), 902.8, 902.9 (2015). A jury found him guilty, but this court reversed his judgment and sentence and remanded for a new trial. See *State v. Bender*, No. 15-1595, 2016 WL 6396227, at \*3 (Iowa Ct. App. Oct. 26, 2016). On remand, Bender waived his right to a jury trial. Following a bench trial, the district court found Bender guilty and imposed judgment and sentence.

On appeal, Bender challenges the sufficiency of the evidence supporting the district court's finding of guilt. Our review of the district court's fact findings is for substantial evidence. *State v. Abbas*, 561 N.W.2d 72, 74 (Iowa 1997).

The district court set forth the elements of the crime as follows:

1. On or about April 28, 2015, in Plymouth County, Iowa, [Bender] did an act which was intended to:
  - a. Cause pain or injury to [the woman];
  - b. Result in physical contact which would be insulting or offensive to [the woman];
  - c. Place [the woman] in fear of immediate physical contact which would have been painful, injurious, insulting, or offensive to her.
2. [Bender] had the apparent ability to do the act.
3. The act occurred between household members who resided together at the time of the incident or between persons who have been household members residing together within the year prior to the incident but not residing together at the time of the incident.

Bender only challenges the "household member" element. The district court defined this element as follows:

"Household members" are persons cohabiting with each other. "Cohabiting" does not require a sexual relationship; however, it does require more than dwelling or living together in the same place. To determine if [Bender] and [the woman] were cohabiting at the time of

the alleged offense or within the year prior, the Court considers whether they had sexual relations while sharing the same living quarters; whether they shared income or expenses; whether they jointly used or owned property together; whether they held themselves out as husband and wife, the continuity and length of their relationship, and any other facts shown by the evidence bearing on their relationship with each other. Although cohabiting does not have a specific definition, it is something more than persons just living together in the same place ("roommates") and something less than persons living together as spouses.

See *State v. Virgil*, 895 N.W.2d 873, 880 (Iowa 2017); *State v. Kellogg*, 542 N.W.2d 514, 517-18 (Iowa 1996).

The district court made detailed fact findings concerning this element, considering evidence detracting from a finding of cohabitation and including credibility findings where the evidence was conflicting. Preliminarily, the court found "[Bender] and [the woman] were engaged in sexual relations." But the court rejected Bender's assertion that the relationship was purely sexual. The court found: (1) Bender "was staying or otherwise living with [the woman] for at least three weeks, if not more"; (2) the two "were more than just roommates living together at the same place during this time"; (3) the couple was "developing a romantic relationship"; (4) Bender "also was developing a relationship with [the woman's] three children"; (5) Bender "did have . . . personal property items at the apartment," including "phone, tablet, and other such accessories; personal hygiene toiletry items; electronic cigarette/vaporizer items; and prior mail/documents"; (6) "[a]lthough it was not a 50/50 split, [Bender and the woman] also were essentially sharing expenses"; and (7) "there was no other place or location where [Bender] lived or resided." The court determined Bender "spent the majority of his time, including the majority of overnights, at [the woman's]

apartment from mid-February until the day of the assault on April 28, 2015, and was staying at the apartment continuously for approximately three weeks prior to and to the day of the assault." While the court acknowledged the living arrangement may not have been "permanent," the court stated permanency was not required.

The district court's fact findings are supported by substantial evidence. We affirm Bender's judgment and sentence.

**AFFIRMED.**

#9.

IN THE SUPREME COURT OF IOWA

No. 17-0646

Plymouth County No. SRCR016095

**ORDER**

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

vs.

**NOEL JERMAINE BENDER,**  
Defendant-Appellant.

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After consideration by this court, en banc, further review of the above-captioned case is denied.

Copies to:

Zachary S. Hindman  
300 Pioneer Bank Building  
701 Pierce Street  
P.O. Box 1678  
Sioux City, IA 51102-1678

Kevin Cmelik  
Tyler Buller  
Assistant Attorneys General  
Criminal Appeals Division  
Hoover State Office Building, 2nd Floor  
Des Moines, IA 50319-0106



IOWA APPELLATE COURTS.

State of Iowa Courts

**Case Number**  
17-0646

**Case Title**  
State v. Bender

So Ordered

Mark S. Cady, Chief Justice

Electronically signed on 2018-07-12 16:29:17

UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

No: 23-2833

Noel Jermaine Bender

Appellant

v.

State of Iowa

Iowa Department of Corrections, et al.

Appellees

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Appeal from U.S. District Court for the Northern District of Iowa - Western  
(5:20-cv-04045-LTS)

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**ORDER**

The petition for rehearing by the panel is denied.

February 20, 2024

Order Entered at the Direction of the Court:  
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Appendix #D.

Supreme Court of the United States  
Office of the Clerk  
Washington, DC 20543-0001

Scott S. Harris  
Clerk of the Court  
(202) 479-3011

November 25, 2024

Mr. Noel Bender  
Prisoner ID #1133015  
Iowa State Penitentiary  
P.O. Box 316  
Ft. Madison, IA 52627

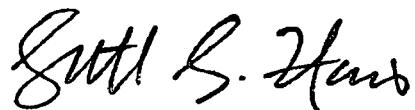
Re: Noel Bender  
v. Iowa Department of Corrections, et al.  
No. 23-7715

Dear Mr. Bender:

The Court today entered the following order in the above-entitled case:

The petition for rehearing is denied.

Sincerely,



Scott S. Harris, Clerk

Appendix # E.