

IN THE COURT OF APPEALS OF IOWA

FILED

MAY 31 1988

CLERK SUPREME COURT

STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed May 31, 1988

vs.

)

308

KHOAY VAN NONG,

)

8-71
87-413

Defendant-Appellant.

)

Appeal from the Iowa District Court for Crawford County (No. 28387),
Richard F. Branco, Judge.

Defendant appeals his conviction on three charges of assault with intent
to inflict serious injury and one charge of simple assault. **AFFIRMED.**

Charles L. Harrington, Chief Appellate Defender, and John P. Messina,
Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Bruce Kempkes, Assistant Attorney
General; and Thomas E. Gustafson, Crawford County Attorney, for plaintiff-
appellee.

Considered by Oxberger, C.J., and Donielson and Hayden, JJ.

HAYDEN, J.

Defendant, Khoay Van Nong, appeals his conviction on three charges of assault with intent to inflict serious injury and one charge of simple assault. He asserts the evidence presented at trial was not sufficient to establish he intended to inflict serious injury. He also asserts the trial court committed reversible error by instructing the jury on a police officer's general authority to effect an arrest by force. He contends the instruction was not supported by the evidence. We affirm.

On October 12, 1986, a family quarrel occurred between defendant and his common-law wife, Lin Tran, and her father, Kim Tran. The quarrel escalated, ultimately culminating in the shooting of Kim Tran by defendant. Shortly after the shooting, the police arrived at the scene. Defendant then locked himself alone in his house. The police surrounded the house and repeatedly ordered defendant to come out. Defendant responded by telling them to stay out or he would kill them. The police then broke down several doors and entered the residence. Defendant confronted them, pointing a large caliber handgun at them. He then fled into the bathroom of the home. The police again requested that he come out. Defendant again threatened to shoot them if they came in. The police attempted to kick the bathroom door ajar sufficiently to toss a tear gas grenade into the bathroom. However, defendant threw his body against the door, forcing it shut. The tear gas grenade fell in the hallway outside the bathroom, so the police exited the house. The effect of the tear gas led defendant just minutes later to break out of the house through a bedroom window. He made his way to the front yard after repeatedly pointing his gun at several of the officers.

In the front yard, defendant was effectively surrounded by the officers and a standoff ensued. He continued to point his gun at them, as they pointed

theirs at him. His gun, a semi-automatic, was loaded and cocked. As the officers moved closer, defendant threatened to shoot himself and not the officers. Finally, when one of the officers distracted him, another officer tackled him. He was then promptly disarmed.

Defendant was charged with one count of attempted murder and five counts of assault with intent to inflict serious injury. He was acquitted on the charge of attempted murder and on one of the charges of assault with intent. He was convicted on three counts of assault with intent and on one lesser-included charge of simple assault.

I. Sufficiency of evidence. Defendant's first contention on appeal is the trial court erred by failing to grant his motion for judgment of acquittal as to the counts of assault with intent. He asserts the evidence was not sufficient to prove beyond a reasonable doubt he had the requisite intent.

Our review is governed by the following:

[T]his court views the evidence in a light most favorable to the State. All legitimate inferences that may reasonably be deducted therefrom will be accepted. All of the evidence must be considered when determining evidentiary sufficiency. A trial court should submit a charged crime to the jury and should not direct a verdict, and a refusal to direct a verdict will be upheld, if there is any substantial evidence in the record reasonably tending to support the charge. Substantial evidence mean such evidence as could convince a rational trier of fact that the defendant is guilty of the crime charged beyond a reasonable doubt.

State v. Rich, 305 N.W.2d 739, 741 (Iowa 1981) (citations omitted).

Although intent is rarely capable of direct proof and must usually be shown by circumstantial evidence, State v. Delay, 320 N.W.2d 831, 835 (Iowa 1982), in this case direct proof of defendant's intent exists. Defendant repeatedly threatened to shoot the police officers in the course of the tense confrontation in and around his house. It was only toward the end of the incident defendant repudiated those threats and said, "Me no shoot police, me shoot myself." He

then pointed the gun at his head. By that time, however, the assaults charged had already been committed.

We conclude defendant's repeated threats to shoot the officers, made before and after he had pointed his gun at a number of them, provided evidence sufficient to prove he had the requisite intent. The trial court was correct to deny his motion for acquittal.

II. Jury instruction. Defendant also asserts the trial court erred by instructing the jury on a police officer's general authority to effect an arrest by force. He contends the instruction was not supported by the evidence.

Although a defendant is entitled to a fair trial, he is not necessarily entitled to a perfect one. State v. Gansz, 376 N.W.2d 887, 891 (Iowa 1985). When an error in instructing the jury is found, prejudice is presumed unless the contrary is affirmatively established. Id. However, such an error does not necessitate reversal unless it is prejudicial. State v. Seiler, 342 N.W.2d 264, 268 (Iowa 1983). A jury instruction not supported by the evidence is generally prejudicial. State v. Mays, 204 N.W.2d 862, 865 (Iowa 1973).

The following instruction was given over the objection of defendant's counsel:

A peace officer may make an arrest without a warrant for a public offense committed or attempted in the officer's presence, or where the peace officer has reasonable ground for believing that an indictable public offense has been committed and has reasonable ground for believing that the person to be arrested has committed it.

A peace officer, while making a lawful arrest, is justified in the use of any force which the peace officer reasonably believes to be necessary to effect the arrest or to defend any person from bodily harm while making the arrest.

The person making an arrest must inform the person to be arrested of the intention to arrest the person, the reason for arrest, and that the person making the arrest is a peace officer, except where the person to be arrested is actually engaged in the commission of or attempt to commit an offense, or escapes, so that there is no time or opportunity to do so.

A person is not authorized to use force to resist an arrest which the person knows is being made by a peace officer, even if the person believes that the arrest is unlawful or the arrest is in fact unlawful.

If a law enforcement officer has reasonable cause to believe that a person whom the officer is authorized to arrest is present on any private premises, the officer may, upon identifying himself as an officer, demand that he be admitted to such premises for the purpose of making an arrest. If such demand is not promptly complied with, the officer may thereupon enter the premises to make the arrest, using such force as is reasonably necessary.

At trial, defendant's counsel objected that the instruction was "not necessary and would only confuse the jury and would perhaps mislead the jury thinking that the officers had a right to do whatever they felt like doing at the time" We are persuaded, however, the instruction was justified under the facts of this case. We conclude the trial court did not err by submitting it to the jury.

AFFIRMED.