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IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Plaintiff-Appellee,) Filed January 29, 1985
vs.)
MARCELINO D. VASQUEZ,) 4-477
Defendant-Appellant.) 84-312

Appeal from the Iowa District Court for Scott County - James E. Kelley, Judge.

Defendant appeals from conviction and sentence for attempted murder in violation of Iowa Code section 707.11 (1983), asserting that he received ineffective assistance of counsel by trial counsel's failure to object to the jury instructions regarding alternative course of action. AFFIRMED.

Charles H. Harrington, Chief Appellate Defender, and LuAnn White, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Rebecca L. Claypool, Assistant Attorney General, for plaintiff-appellee.

Heard by Donielson, P.J., and Hayden and Sackett, JJ.

Defendant appeals from his conviction for attempted murder in violation of Iowa Code section 707.11, asserting that he received ineffective assistance of counsel. We affirm.

On August 2, 1983, Marcelino Vasquez and a friend were drinking at a bar when they were approached by three men, Michael Kroeger, Kenny Gile, and Doug Newton, who claimed they had been using the bar stools on which Vasquez and his friend were sitting. Apparently, the bartender told the defendant and his friend to sit elsewhere. Following the bartender's advice, they moved to another table.

Later in the evening, the defendant and the three men had a confrontation outside the bar at which time the defendant stabbed Michael Kroeger. The circumstances surrounding the stabbing are disputed. According to the defendant, he was confronted by the three men who blocked his path. An altercation ensued during which defendant claims he was struck repeatedly. Defendant further testified that Michael Kroeger sat on him and started beating him and the other two men kicked him. The defendant eventually pulled out a knife and stabbed Kroeger.

Kroeger, Gile, and Newton all testified that the defendant followed them outside. Kroeger said that he turned around, saw the defendant, and the next thing he remembered he was bleeding. According to Gile, the defendant lunged at Kroeger and Kroeger hit the defendant. Gile claimed he kicked the defendant, trying to break the two apart.

Defendant was arrested and charged with attempted murder. At trial, the court submitted an instruction to the jury which read as follows:

> . . . if a person is confronted with the use of unlawful force against himself, he is required to avoid the confrontation by seeking an alternative course of action. Thus, if there is evidence that, as a reasonable person, the defendant, . . . could have avoided the use of unlawful force, he must have taken or used the alternative course of action before he is justified in repelling any force used against him.

Defense counsel objected to the instruction on the ground that there was no evidence that an alternative course of action was available. The objection was overruled by the court. Defendant was convicted as charged and has appealed.

Defendant's sole claim on appeal is that the aforementioned jury instruction deprived him of a critical element of his defense of justification. The instruction did not include the statutory exception to the requirement that an alternative course of action must be pursued when a person is confronted by unlawful force. Defendant argues that trial counsel was ineffective in failing to object to this omission. We decline to decide this claim.

When examining a claim of ineffective assistance of counsel, we must consider the totality of the circumstances and determine whether counsel's performance was within the normal range of competence. Meier v. State, 337 N.W.2d 204, 206 (Iowa 1983). The record before this court is not adequate for making this determination. We are hesitant to make what would amount to an ex parte decision. "Even a lawyer is entitled to his day in court, especially when his professional reputation is impugned." State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978); see also State v. Whitsel, 339 N.W.2d 149, 157 (Iowa 1983).

Trial counsel may have had a legitimate reason for failing to make an objection to the jury instruction. There is nothing so obviously wrong with his conduct that would justify a determination at this time.

AFFIRMED.