FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed August 30, 1983
vs.	)	3-128/67779
JESSE LEE HARVEY,	)	
Defendant-Appellant.	)	

Appeal from Polk District Court, Louis A. Lavorato, Judge.

Defendant appeals from his conviction of second-degree robbery, asserting trial court erred in giving certain confusing instructions to the jury. AFFIRMED.

Charles L. Harrington, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Roxann M. Ryan, Assistant Attorney General, for plaintiff-appellee.

Heard by Donielson, Snell, Schlegel, and Hayden, JJ. Oxberger, C.J., takes no part.

SNELL, J.

Defendant, Jesse Lee Harvey, was accused of robbery in the second degree for attempting to steal money from a 7-11 store in Des Moines. The defendant admitted at trial that he had attempted to take the money. He diverted the clerk's attention by asking for merchandise which had to be fetched from a back room; while the clerk was in the storeroom, defendant removed a money bag from the open safe. The clerk returned and saw defendant with the money bag.

At this point, the clerk and defendant differ as to what occurred next. The clerk asserts that defendant attempted to escape from the store, and fought back when the clerk attempted to stop him. Defendant, on the other hand, asserts that he peaceably gave up the money bag when apprehended and was then assaulted by the clerk.

Defendant presented a justification defense: that he fought with the clerk only in response to an unprovoked attack upon him. Defendant admitted the taking of the money but denied that he committed an assault in the process.

The court instructed the jury that an "assault" was defined as an act "without justification" which "is intended to cause pain or injury. . . ." A person was explained to be justified in the use of reasonable force "when he reasonably believes that such force is necessary to defend himself from any imminent use of unlawful force." Once the defendant claimed justification as a defense, the burden of proof was on the State to prove that the defendant was not acting with justification. One way which the State could prove defendant was not justified in using force was by showing that he was participating in a forcible felony. Robbery in the second degree is a forcible felony. Thus, the court instructed that justification was not an available defense if the jury found defendant "was participating in the forcible felony of Robbery in the Second Degree."

The elements of robbery were described as follows: (1) defendant intended to commit a theft; (2) at the time of the intended theft, the defendant committed an assault on the clerk; and (3) that he did so to assist or further his escape from the scene.

The jury returned a verdict of guilty of robbery in the second degree. Defendant was sentenced to confinement for up to ten years.

On appeal, defendant asserts that the trial court should not have instructed the jury that the assault was not "justified" if it was committed in the course of a forcible felony; the question of whether a forcible felony was committed is the very thing at issue in the case. According to defendant, if assault is an element of robbery, a forcible felony, the occurrence of the forcible felony cannot be presumed so as to bar defendant's use of the justification defense. Defendant contends that the instructions thus were circular: the assault was not justified (and his defense of justification was invalid) if he was participating in a forcible felony but the felony in which he was participating was forcible only if the assault was unjustified.

Our scope of review is on error. State v. Cullison, 227 N.W.2d 121, 126-27 (Iowa 1975). Courts are required to tailor instructions to the evidence. State v. Kern, 307 N.W.2d 22, 27 (Iowa 1981). If instructions are erroneous, they must be prejudicial to defendant before reversal will be ordered. See id., State v. Gibb, 303 N.W. 2d 673, 686 (Iowa 1981). We feel that the instructions given by the trial court in this case were sufficiently tailored to the case and thus are not erroneous.

The Iowa Supreme Court stated in State v. Delay:

> Justification is an affirmative defense to assault, rather than an element of that crime. The significance of the distinction between an element and an affirmative defense

> is that with regard to an element, the State has the burden of going forward with the evidence as well as the ultimate burden of persuasion. By contrast, it is the defendant who has the burden of going forward with evidence of an affirmative defense. There is no burden on the State to negate an affirmative defense unless the defendant meets his initial burden of producing sufficient evidence that the defense applies.

320 N.W.2d 831, 834 (Iowa 1982).

Therefore, once the jury is satisfied that the defendant intended to commit a theft and that he assaulted a person to assist in or escape from the scene, the forcible felony of robbery has been shown to an extent sufficient to preclude defendant from using justification as an affirmative defense. If the jury had believed defendant had not intended to commit a theft or that the assault had not occurred "to assist or further the commission of the intended theft or the defendant's escape from the scene thereof," Iowa Code § 711.1, then the justification defense would have been allowable, defendant could have utilized it, and the State would have had the ultimate burden of persuasion of the crime of assault. If the jury was not persuaded beyond a reasonable doubt that defendant was not justified in using force, it could have found defendant not guilty of either crime. There was no error in the court's instructions.

The jury in this case had three alternative verdicts from which they could choose: (1) defendant was guilty of robbery in the second degree; (2) defendant was not guilty of robbery in the second degree but guilty of assault; or (3) defendant was not guilty. No instructions were given for the crime of theft and that omission was not an alleged error. Therefore we must assume that, in finding defendant guilty of second-degree robbery, the jury believed the State had demonstrated the necessary elements and therefore the defendant was not

justified in using force. Although the instruction might have been clearer on this point, where the instruction is correct as given but not as explicit as a party may desire, the party must request an additional instruction before the jury is charged in order to preserve any claimed error as a basis for appeal. State v. Hraha, 193 N.W.2d 484, 486 (Iowa 1972). Defendant did not request an additional instruction; defendant's claim of error is without merit.

AFFIRMED.