FILED
FEB 26 1991
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-693 / 89-1675

STATE OF IOWA,

Appellee,

vs.

CHARLES BASIL ANDERSON,

Appellant.

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Appeal from the Iowa District Court for Polk County, Jack Levin, Judge.

Defendant appeals his conviction of first-degree murder. **AFFIRMED.**

Linda Del Gallo, Acting State Appellate Defender, and Shari Barron, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General; Ann E. Brenden, Assistant Attorney General; James Smith, County Attorney; Odell McGhee and Mark Sandon, Assistant County Attorneys, for appellee.

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

HABHAB, J.

A jury found Charles Anderson guilty of one count of first-degree murder and one count of attempted murder. Anderson has appealed from the resulting convictions.

Anderson contends his trial attorney rendered ineffective assistance by failing to object to certain instructions concerning his defense of justification. He complains that the instructions did not fully explain the concepts of provocation and alternate course of action. We affirm.

The defendant and both victims, Ricky Rollens and Kenneth Hunter, had been drinking and doing a variety of drugs during the evening preceding the shooting. As the night continued, the threesome ran out of money, and the defendant told Hunter and Rollens he had a television set which the three of them could pawn. They did so and bought cocaine.

The three took the cocaine and went driving. At some point an argument ensued. Apparently the defendant was convinced Hunter and Rollens had stolen a gold chain from his neck while he was passed out in the back seat of the car.

Eventually the car ran out of gas, and Hunter and Rollens left to get more. During this time, the defendant got into a car driven by a Duane Smith and he, along with other occupants of the car, drove around. The defendant remained with this group until Mr. Smith's car ran out of

gas. By this time, Hunter and Rollens had returned with gas for their car, and the defendant again joined them.

As the three drove, Rollens and the defendant began arguing again. About this time Smith's car pulled up behind them and began honking. They pulled over and the Smith car parked ahead of them. A man from the Smith car came back and asked the defendant if he still "had the stuff"; the defendant stated he did and gathered his belongings and went to the Smith car. Rollens then pulled his car forward and said something to the defendant. At some point it is alleged Rollens made a statement to the defendant with regard to "putting you (the defendant) in Glendale" which is a cemetery. The defendant proceeded to the victim's car, they argued for a minute or so, and the defendant shot into the car. Rollens was killed and Hunter was injured.

The defendant contends he received ineffective assistance of counsel because his attorney did not request instructions on the two exceptions to the justification defense. To establish ineffective assistance of counsel, the defendant must prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987).

Generally, ineffective assistance of counsel claims are preserved for postconviction to allow trial counsel an opportunity to defend the charge. State v. Mulder, 313

N.W.2d 885, 890 (Iowa 1981); State v. Nebinger, 412 N.W.2d 180, 191 (Iowa App. 1987). The defendant asks us to consider the questions on direct appeal, and the State does not seriously object. Since we find no evidence to support the claim of ineffective assistance of counsel, we will do so.

The trial judge submitted instructions concerning the defendant's justification defense. The defendant lodged no objections. On appeal, defendant contends the trial judge erred in not submitting several instructions which he states are crucial to his defense of justification. The trial judge did not receive any requested instructions on the defendant's present claim of error. It is here that the defendant alleges ineffective assistance of counsel.

The trial judge submitted instruction no. 38 to the jury without objections. That instruction explains when a person is justified in using reasonable force. The instruction further identifies elements under which force by a defendant is not justified. The instruction is as follows:

> A person is justified in using reasonable force if he reasonably believes the force is necessary to defend himself from any immediate use of unlawful force.
>
> If the state had proved any one of the following elements, then the defendant was not justified:
>
> 1. The defendant started or continued the incident which resulted in the death of David Ricky Rollens and injury to Kenneth Hunter.
>
> 2. An alternative course of action was available to the defendant.

> 3. The defendant did not believe he was in immediate danger of death or injury and the use of force was not necessary to save himself.
>
> 4. The defendant did not have reasonable grounds for the belief.
>
> 5. The force used by the defendant was unreasonable.

The defendant now claims the trial court erred when it failed to instruct the jury concerning the exceptions to elements 1 and 2 of instruction no. 38. The exception to element 1 is found in Iowa Code section 704.6(3)(a) (1989). It provides:

> The defense of justification is not available to the following:
>
> * * *
>
> 3. One who initially provokes the use of force against oneself by one's unlawful acts, unless: a. such force is grossly disproportionate to the provocation, and is so great that the person reasonably believes that the person is in imminent danger of death or serious injury . . . .

The defendant now claims the court should have given the uniform instruction. Accordingly, we set it forth here:

> If the defendant provoked the use of force, but (name of victim) used force greatly disproportionate to the provocation and it was so great that the defendant reasonably believed he was in immediate danger of death or injury, he is not considered to have provoked the incident and his acts would be justified.

Iowa Criminal Jury Instruction No. 400.23 (1989).

The question is whether there is substantial evidence that the victims in this case responded to defendant's provocation by using grossly disproportionate force which defendant reasonably believed put him in imminent danger of

death or serious injury. It is clear the defendant shot and killed Rollens and wounded Hunter. As a defense, he claims justification. Under section 704.6 of the Iowa Code, the defense of justification is not available to one who initially provokes the use of force against oneself by one's unlawful acts. We disagree with the defendant's suggestion that there is substantial evidence in the record to require the giving of an instruction relating to the exception.

The record establishes that immediately prior to the shooting, the defendant had left the Rollens car and transferred his belongings to the Smith car. Arguments were still taking place. According to Smith, the defendant pulled out a gun as he was walking back to the Rollens car. A discussion or argument took place; Rollens reached to take the keys from the ignition of his car. There was no gun in sight in the Rollens car. The defendant shot into the Rollens car, killing Rollens and wounding Hunter. This scenario does not support an instruction on disproportionate force.

After reviewing the evidence, we find there was not substantial evidence to support the submission of this instruction. It is well established that trial courts are not required to submit instructions unsupported by substantial evidence in the record. State v. Wagner, 410 N.W.2d 207, 214 (Iowa 1987). In fact, the court "commits error when it instructs on issues having no substantial support in the record." Id.

Defendant also contends the trial court should have furnished an instruction which provided the exception to the alternative course of action instruction. The jury was informed it could not find defendant acted in self defense if he had an alternative course of action available to him. The exception to this rule is where "the alternative entails a risk to life or safety, or the life or safety of a third party." See Iowa Code § 704.1 (1989). The question then is whether there is substantial evidence in the record to indicate that although there was an alternative course of action available, the alternative involved a risk to life or safety.

Defendant is not entitled to this instruction. The defendant contends he had reason to believe the victims were reaching for a gun when their car was next to the car in which the defendant was a passenger. Following this claim, however, the victims put their car in reverse and parked behind the car the defendant was in. At this point it seems evident the defendant had an alternative course of action available to him which would not have involved any risk for he could have driven away from the situation.

The defendant next contends he did not do this because he was frightened the victims would shoot through the back window. This assertion does not aid the defendant for it is without dispute that he walked back to the car occupied by the victims, with at least one witness testifying that he had his gun in hand.

We do not find any evidence to support the suggestion that these instructions should have been submitted to the jury. Thus we reject the defendant's contention of ineffective assistance of counsel for he failed to prove either prong of this claim.

We affirm the trial court in all respects and reject the defendant's claim of ineffective assistance of counsel.

AFFIRMED.