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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Plaintiff-Appellee,) Filed November 30, 1983
vs.)
DANIEL MAX BERKENBILE,) 3-269/69003
Defendant-Appellant.)

Appeal from Scott District Court - Margaret S. Briles, Judge.

Defendant appeals from his conviction of assault resulting in bodily injury. AFFIRMED.

Fern S. Schupeck, Assistant Appellate Defender, for defendant-appellant.

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

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

SACKETT, J.

Defendant appeals from his conviction of assault resulting in bodily injury. We affirm.

On the night of September 10, 1982, the defendant, Daniel Berkenbile, and a friend entered the grocery store. The acting store manager, Kenneth Lansing, testified that he noticed the defendant after a store stockboy told him that a man had walked up a store aisle with some film and was pulling his shirt out. The stockboy testified that he did not see the defendant taking store merchandise.

Lansing observed the defendant and his companion without any merchandise emerge from a store aisle. Lansing testified that both the defendant and his companion retreated down an aisle as Lansing approached them and that he observed one of the men remove merchandise from under his shirt and place it on a shelf. Lansing was not sure who had the film. He confronted the men about two feet from the shelf on which the merchandise had been placed and told them that he had observed them with store merchandise. The defendant told Lansing that he did not take any store merchandise. Lansing indicated that he didn't think the defendant had any store merchandise on him after he stopped the defendant. He told him that concealment was against the law and that he wanted to read them the Iowa Code. Lansing requested that the defendant and his companion accompany him and they proceeded to the deli section of the store.

When they arrived at the deli counter, Lansing requested that they all step behind the counter. The defendant resisted. The defendant testified that he refused on the basis that he wanted witnesses available. Lansing again requested that the defendant step behind the counter and gestured toward the deli area. Subsequently the defendant struck him in the mouth, causing an injury that required five stitches. The defendant testified that he thought Lansing was raising his hand to strike him. Subsequently the defendant and his companion fled the store. After the incident, Lansing and the stockboy found film and batteries

or a flash bar on the shelf where he observed the defendant or his companion place store merchandise.

At the close of the state's case, and again at the close of the evidence, the defendant moved for a judgment of acquittal on the basis that there was insufficient evidence that the defendant was not justified in the assault. The trial court overruled the motion.

The jury was instructed that the state was required to prove beyond a reasonable doubt that the defendant was not acting with justification, and was specifically instructed on what the state was required to prove to negate the justification defense.

During the jury's deliberations, the jury asked the trial court for a distinction between the offense of assault and assault resulting in bodily injury. The jury also asked the court if it could find the defendant guilty of assault resulting in bodily injury if it found justification for the bodily injury. The court indicated that it would respond that the only difference between the assault and the offense of assault resulting in bodily injury was the element of bodily injury, and that the issue of justification was the same in the separate instructions on the two offenses. The defendant objected to the proposed answer and requested that the jury be instructed to acquit the defendant upon finding justification for the assault. The trial court overruled the request. The jury subsequently found the defendant guilty of assault resulting in bodily injury. On August 9, 1982, the defendant was sentenced. On August 17, 1982, the defendant filed a notice of appeal.

On appeal, Berkenbile argues: (1) that there was insufficient evidence to warrant a finding that no justification existed for the assault; and (2) that the trial court erred in refusing to give the requested instruction that a finding of justification for an assault required his acquittal.

I. **Sufficiency of the Evidence.** Where, as here, the sufficiency of the evidence is challenged in an appeal from a criminal conviction based on a jury verdict, all evidence is considered in the light most favorable to the verdict. State v. Robinson, 288 N.W.2d 337, 338 (Iowa 1980). If there is substantial support for the verdict in the record, the jury verdict is conclusive. Id.

The existence or nonexistence of justification was a question of fact for the jury to decide. When a defense of self-defense is offered, and the evidence is such that conflicting or differing inferences could be drawn, it is for the jury to determine the circumstances that existed at the time of the confrontation. State v. Beyer, 258 N.W.2d 353, 356 (Iowa 1977).

The jury in this case was properly instructed:

> A person is 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.
>
> Reasonable force is that force which a reasonable person, in like circumstances, would judge to be necessary to prevent any injury and no more.

The state was required to negate the justification defense by proving beyond a reasonable doubt any of the following five elements: (1) the defendant was the provocator; or (2) an alternative course of action was available; or (3) defendant did not believe that he was in imminent danger of death or injury and the use of force was not necessary; or (4) defendant did not have reasonable grounds for such belief; or (5) the force used by defendant was unreasonable. Viewing the evidence in the light most favorable to the verdict, the jury could have found that an alternative course of action (such as ducking or stepping aside) was available; or that Berkenbile did not believe he was in danger; or that Berkenbile had no reasonable grounds for such belief; or, finally, that in any event the force used by Berkenbile was unreasonable. There was clearly sufficient evidence to support any of those findings. It cannot be said that the jury's rejection of Berkenbile's

justification defense was without substantial support or clearly against the weight of the evidence.

II. Jury Instructions. *Berkenbile argues on appeal that* the trial court erred in refusing to give the requested instruction that a finding of justification for an assault required his acquittal.

The jury was specifically instructed that "the burden is on the state to prove by evidence beyond a reasonable doubt that defendant was not acting with justification." During its deliberations, the jury submitted the following questions to the court:

> May we find the defendant guilty of Assault #2 [assault with bodily injury] if we find justification for the bodily injury?
>
> May we please have a clarification of the difference of #1 [assault] & #2 [assault with bodily injury]
>
> We need to know if we find justification could we find form #2 even thow [sic] we agree there was bodily injury.

The court responded that (1) the only difference between the offense of assault resulting in bodily injury and the offense of assault is the element of bodily injury and that (2) the issue of justification is the same in both Instruction No. 12 and No. 13. Defense counsel objected and offered the following instruction: "If you find justification you must find the defendant not guilty and return verdict #3." Berkenbile argues that the court's refusal to so instruct the jury constituted prejudicial error requiring a reversal of his conviction. We disagree.

We find this case to be substantially similar to State v. Dvorsky, 322 N.W.2d 62 (Iowa 1982). In Dvorsky, after the jury began deliberating, the jury requested a supplemental definition of "willful and wanton." Id. at 66. The court answered:

> I have received your request for a further definition of willful or wanton.
>
> The definition of those words applicable to this case is contained in Instruction 6.

Id. Defense counsel requested an amplification of the definition, which was

refused. Id. The supreme court on appeal noted that Iowa Rule of Criminal Procedure 18(7)(g) leaves it "in the discretion of the trial court" whether additional instructions will be given. Since the trial court's definition was as clear as those proposed by defense counsel, the supreme court found no abuse of trial court discretion in refusing to expand on its definition of "willful and wanton." Id.

We find the trial court's determination not to submit defendant's additional instruction was not an abuse of discretion. The requested instruction was substantially covered by those already submitted and was therefore properly refused. See State v. Johnson, 243 N.W.2d 598, 604 (Iowa 1974). Where, as here, the jury instructions are otherwise adequate, failure to submit a requested instruction is not reversible error. State v. Lott, 255 N.W.2d 105, 108-09 (Iowa 1977).

Because we find Berkenbile's arguments to lack merit, we affirm the conviction and sentence of the trial court.

AFFIRMED.