

IN THE COURT OF APPEALS OF IOWA

FILED

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CLERK SUPREME COURT

STATE OF IOWA,	)	Filed November 29, 1982	159
Plaintiff-Appellee,	)		
vs.	)	<u>2-209</u>	
	)	66339	
MICHAEL RAY WILLIAMS,	)		
Defendant-Appellant.	)		

Appeal from Lee District Court, Harlan W. Bainter, Judge.

Defendant appeals from conviction and sentence resulting from jury verdict finding him guilty of crime of attempt to commit murder, a violation of Iowa Code § 707.11 (1979). AFFIRMED IN PART AND REMANDED WITH INSTRUCTIONS.

Shirley G. Steele, Indianola, for defendant-appellant.

Thomas J. Miller, Attorney General, and Shirley Ann Steffe, Assistant Attorney General, for plaintiff-appellee.

Considered en banc.

On April 13, 1980, an altercation occurred between various inmates at the Iowa State Men's Penitentiary at Fort Madison, during which inmate Salvador Sulanke was stabbed. As a result of this stabbing, another inmate, defendant Michael Ray Williams, was charged with attempt to commit murder, a violation of Iowa Code 707.11 (1979). Conflicting evidence regarding the incident was presented at trial. The jury returned a verdict of guilty, and defendant was sentenced to the Iowa State Penitentiary for ten years.

Our scope of review in this case is on assigned error. State v. Cullison, 227 N.W.2d 121, 126-27 (Iowa 1975). Defendant contends that the trial court erred by refusing to give instructions he requested regarding justification and by permitting the prosecutor to impeach him on cross-examination by reference to an oral confession which was given without benefit of Miranda warnings, was allegedly involuntary, and had allegedly not been properly disclosed by the State during pretrial discovery proceedings.

L Initially we note that a criminal defendant is entitled to a "theory of defense" instruction if the instruction is timely requested, if it correctly states the law, and if it is supported by the evidence. United States v. Brake, 596 F. 2d 337, 339 (8th Cir. 1979); see State v. Fuhrmann, 261 N.W.2d 475, 479 (Iowa 1978)(court must instruct on legal principles which are supported by the evidence). Clearly defendant's requested justification instructions fulfilled the first two requisites. The essential issue is whether the theory of justification, or self-defense, was supported by the evidence. We find that it was not.

Iowa Code § 704.3 provides, "A person is justified in the use of reasonable force when he or she reasonably believes that such force is necessary to defend himself or herself from any imminent use of unlawful force." Defendant claims that the court should have instructed on self-defense, yet nowhere in his

testimony does he allege that it was necessary to resort to the type of force in question, stabbing, in order to defend himself. In fact, in a conversation with a criminal investigation agent, defendant confessed that the reason he stabbed Sulanke was "because he robbed him [Sulanke]." Under these circumstances, we agree that an instruction on self-defense was unwarranted, and we therefore affirm the trial court's denial of the requested instruction. See State v. Humphreus, 270 N.W.2d 457, 463 (Iowa 1978)(self-defense instruction must be based on the evidence in the record, not on an "imaginary and unsupported theory").

II. Defendant contends that the trial court erred in admitting defendant's confession that he stabbed Sulanke without conducting a hearing to determine whether the confession was voluntary. It is clear that the confession may be utilized for impeachment purposes only, if at all, since it was obtained in violation of Miranda requirements. Washington v. Scurr, 304 N.W.2d 231, 233 (Iowa 1981). Furthermore, even where the confession is to be utilized for these limited purposes, the trial court must conduct an evidentiary hearing regarding defendant's objections to the use of the confession. State v. Walton, 247 N.W.2d 736, 739-40 (Iowa 1976). In this case, defendant's counsel adequately voiced objection at trial:

Your Honor, at this time the defendant would raise an objection to the introduction of any further line of questioning in regard to this recorded testimony in that the defendant was in the hospital, and he was under medication, duress, and I would argue that he would be mentally incompetent to know the gist of what was taking place at that time.

In accordance with the United States Supreme Court's opinion in Jackson v. Denno, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964), we therefore remand this case for an evidentiary hearing on the issue of the voluntariness of defendant's confession.

We reserve the ineffective assistance of counsel issue for postconviction relief proceedings. Washington v. Scurr, 304 N.W.2d 231, 235 (Iowa 1981).

AFFIRMED IN PART AND REMANDED WITH INSTRUCTIONS.