**IN THE COURT OF APPEALS OF IOWA**

No. 7-465 / 96-1679

000415

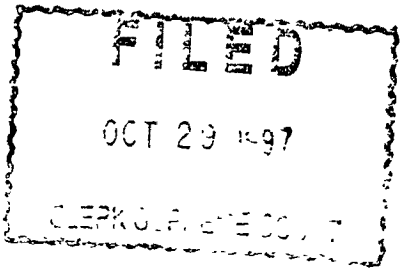
**STATE OF IOWA,**

Plaintiff-Appellee,

**vs.**

**EILEEN JACKSON,**

Defendant-Appellant.




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Appeal from the Iowa District Court for Polk County, George Bergeson, Judge.

Defendant appeals from judgment and sentence entered, following a jury trial, for willful injury. **REMANDED FOR RESENTENCING.**

Linda Del Gallo, State Appellate Defender, and John M. Priester, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, John P. Sarcone, County Attorney, and Frank Severino, Assistant County Attorney, for appellee.

Considered by Sackett, P.J., and Streit and Mahan, JJ.

**MAHAN, J.**

Eileen Jackson appeals her conviction and sentence for willful injury while in immediate possession of a firearm. On June 16, 1995, Eileen Jackson shot Henry Holland, Jr. with a .22 caliber revolver after Holland confronted her regarding a missing refrigerator. Jackson alleged she was justified in shooting Holland because she was in her dwelling. Conflicting evidence was presented at trial as to whether Jackson actually lived in the home and about the circumstances leading up to the shooting.

The court sentenced her to an indeterminate ten-year prison term and ordered Jackson to serve a minimum of five years of that sentence in accordance with Iowa Code section 902.7 (1993).

On appeal, Jackson asserts the trial court erred in failing to give her proposed jury instruction on justification which included the law regarding retreat from one's dwelling. She also argues that insufficient evidence existed to disprove her defense of justification. Jackson finally contends the court failed to exercise its discretion in imposing the mandatory term for possession of a firearm as provided in Iowa Code section 901.10 for first offenders. We affirm the verdict but remand for resentencing as directed.

**I. ISSUES.** (1) Did the district court err when it refused to instruct the jury on the law regarding retreat from one's dwelling? (2) Was there sufficient evidence

to support the court's denial of a motion for judgment of acquittal and the jury's verdict? (3) Did the court abuse its discretion in sentencing Jackson to the five-year minimum imposed by section 902.7?

**II. SCOPE OF REVIEW.** Our review is for correction of errors at law. Iowa R. App. P. 4.

**III. FAILURE TO GIVE JURY INSTRUCTION.** We review the failure to give a requested instruction for an abuse of discretion. Moreover, any error in jury instructions must be prejudicial to warrant reversal. *State v. Holtz*, 548 N.W.2d 162, 164 (Iowa App. 1996). The district court has a duty to instruct fully and fairly on the law regarding all issues raised by the evidence. *State v. Liggins*, 557 N.W.2d 263, 267 (Iowa 1996). We will not find an abuse of discretion unless such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. The burden of proving abuse of discretion lies with the defendant. *State v. Selestan*, 515 N.W.2d 356, 358 (Iowa App. 1994).

The district court refused to give the defendant's following proposed jury instruction regarding justification:

> DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 7
>
> Concerning element number 2 of Instruction No. 2, if a defendant is confronted with the use of unlawful force against herself, she is required to avoid the confrontation by seeking and using an alternative course of action before she is justified in resisting the force used against her.
>
> However, there are exceptions. *If the defendant was in her own home or property which she was legally occupying* and the alternative

> course of action was such that she reasonably believed she had to retreat or leave her position to avoid the confrontation, then she is not required to do so and she may repel force with force including deadly force.
>
> Also, if the alternative course of action involved a risk to her life or safety, and she reasonably believed that, then she was not required to take or use the alternative course of action to avoid the confrontation, and she could repel the force with reasonable force, including deadly force.

(Emphasis added.)

"The doctrine that every man's house, however humble, is his castle and he may protect it against invasions had its origins when the peace of the body politic as well as of individuals depended on the maintenance of the inviolability of houses as castles, and it still exists with equal reason for the maintenance of the inviolability of houses as homes." *State v. Cessna*, 170 Iowa 726, 729, 153 N.W. 194, 196 (1915). Historically, the court has narrowly construed the meaning of "dwelling" in self-defense law. The fact that the defendant slept and kept a satchel in the back portion of a building, while the front part was used as a store, did not show that the place was a dwelling house or private habitation. *State v. Smith*, 100 Iowa 1, 69 N.W. 269 (1896). Also, a person who rents a room in a home cannot claim that the entire building is his dwelling. *State v. Dyer*, 147 Iowa 217, 124 N.W. 629 (1910) "The most that can be said is that he had a room in the house of the deceased which he called his own, and that he made his home there. The alleged assault was not made upon him while he was in his room, but in the dining room or parlor of the house

belonging to the deceased. This was not the defendant's castle." *Dyer*, 147 Iowa at 224, 124 N.W. at 631.

Henry Holland, Jr. testified that the defendant "has never given me a dime for anything." Jackson, herself, admitted in testimony that she did not pay rent for April, May, or half of June, 1995. She further admitted that from May 10 to June 16, 1995, she was only at the residence "less than five" times. She testified she physically stayed and slept at the residence until the last three days of April. After that, she did not stay at the residence, her dog did not stay at the residence, and she did not leave her vehicle parked there. She was simply involuntarily keeping some of her belongings there. It cannot be said that this house was Jackson's home or castle. The district court is not required to give a jury instruction which is not supported by the evidence at trial. *State v. Predka*, 555 N.W.2d 202, 204 (Iowa 1996). The district court acted properly in refusing to give the defendant's requested instruction.

**IV. JUSTIFICATION.** Our standard of review is substantial evidence when the denial of a motion for judgment of acquittal is based on the alleged insufficiency of the evidence. *State v. Coffman*, 562 N.W.2d 766, 768 (Iowa App. 1997). Substantial evidence means evidence that could convince a rational jury that the defendant is guilty of the crime charged beyond a reasonable doubt. If there is substantial evidence of self-defense, the State has the burden of proving the defendant was not justified in her use of force in her defense. *State v. Stallings*, 541 N.W.2d 855, 857 (Iowa 1995).

We consider the evidence in a light most favorable to the State. *Coffman*, 562 N.W.2d at 768. We must consider all of the evidence, not merely the evidence which supports the verdict. *Id.* Provided the evidence raises a fair inference of guilt and does more than create speculation, suspicion or conjecture, direct and circumstantial evidence are equally probative. *Id.*

To prove the criminal charge of willful injury, the State must prove (1) the defendant shot Holland, (2) the defendant specifically intended to cause a serious injury to Holland, (3) Holland sustained a serious injury, and (4) the defendant acted without justification. *Stallings*, 541 N.W.2d at 857. Only the defense of justification is at issue in this case.

Justification is a statutory defense permitting a defendant to use reasonable force when the defendant reasonably believes such force is necessary to defend himself or herself from any imminent use of unlawful force. *Id.*

The burden rests with the State to prove, beyond a reasonable doubt, justification did not exist. The State can meet its burden by proving any one of the following:

1. The defendant started or continued the incident which resulted in injury; or
2. An alternative course of action was available to the defendant; or
3. The defendant did not believe she was in immediate danger of death or injury and the use of force was not necessary to save herself; or

4. The defendant did not have reasonable grounds for the belief; or
5. The force used by the defendant was unreasonable.

*Coffman*, 562 N.W.2d at 768.

From our review of the record we find substantial evidence existed that the shooting lacked justification. The jury could rationally reject Jackson's self-defense claim and find that the State proved she was not justified. The jury could have rationally chosen to believe Henry Holland's testimony over that of Jackson's. The jury could rationally believe the State met its burden by proving all five of the above, even though the State was only required to prove one. Certainly, there was more than sufficient proof for paragraphs one and two. The district court's denial of the defendant's motion for judgment of acquittal on the justification issue was not an abuse of discretion. In addition, there was sufficient evidence presented to uphold the jury's verdict in this case.

**V. FAILURE TO USE DISCRETION IN SENTENCING.** Sentencing decisions of the district court are cloaked with a strong presumption in their favor. *State v. Thomas*, 547 N.W.2d 223, 225 (Iowa 1996). The court has discretion within the applicable statutory framework to determine the sentence which will best meet these goals. *State v. Boltz*, 542 N.W.2d 9, 10 (Iowa App. 1995). When the defendant does not assert that the imposed sentence is outside the statutory limits, the sentence will be set aside only for an abuse of discretion. *Thomas*, 547 N.W.2d at 225. An

abuse of discretion is found only when the sentencing court exercises its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *Id.*

Jackson contends the district court erred in failing to exercise its discretion to reduce her mandatory minimum sentence of five years under Iowa Code section 902.7. Section 901.10 grants the court discretion to reduce the sentence below the mandatory minimum "if mitigating circumstances exist and those circumstances are stated specifically in the record." Iowa Code § 901.10 (1993).

When a sentence is not mandatory, the district court must exercise its discretion in determining what sentence to impose. *Thomas*, 547 N.W.2d at 225. This exercise of discretion must be demonstrated "by stating upon the record the reasons for the particular sentence imposed. The sentencing court, however, is *generally not required to give its reasons for rejecting particular sentencing options.*" (Emphasis added.) *Id.* Section 901.10 does not require a sentencing court to give its reasons for rejecting particular sentencing options. *State v. Russian*, 441 N.W.2d 374, 374 (Iowa 1989).

Jackson argues the language used by the prosecutor and sentencing judge indicates the district court was unaware it had discretion to waive section 902.7 pursuant to section 901.10. The Iowa supreme court in *Thomas* dealt with this issue. In that case, the sentencing judge used the phrase, "which *could* require this court to order that you serve a mandatory minimum of one-third of the sentence in connection with this matter." *Thomas*, 547 N.W.2d at 226.

The supreme court has strongly hinted that the sentencing judge should acknowledge the existence of section 901.10. "We believe that the district court's use of the phrase '*could* require this court' indicates the court was aware that the application of section 124.413 is not mandatory in all cases." *Id.* (defendant asserting district court was unaware that it had discretion to waive the mandatory minimum sentence requirements of section 124.413).

In this case, the trial court made a record regarding Jackson's refusal of a negotiated plea to lesser charges. The prosecutor made the following statement, "Your Honor, the defendant is currently charged with Willful Injury, a Class C felony, and the State is alleging there was a firearm involved, which makes that *mandatory time* in addition to the mandatory time she would have to do with the Willful Injury charge." (Emphasis added.) At sentencing, the district court judge stated, "I'm going to further find that because the . . . jury . . . found that you were in the immediate possession and control of a firearm, that you shall serve a minimum of five years of the sentence as imposed by law." In the sentencing order, the district court judge wrote, "[A]s a result of the jury finding that the defendant was in the immediate possession and control of a firearm, the defendant shall serve a minimum of five (5) years of the sentence imposed by law as provided for by section 902.7 of the Code of Iowa."

No such reference similar to that in the *Thomas* case appeared on the record in this case. While we agree a court need not give specific reasons for rejecting the

sentencing option, the record must reveal the sentencing court was aware of its discretion and, in fact, exercised it in a particular case. There is nothing in the record which would lead us to believe the district court took section 901.10 into account when imposing the mandatory minimum sentence of section 902.7. Conversely, there is nothing in the record to lead us to believe the district court did not take section 901.10 into account. But, we are left to speculation where important rights of the defendant are involved. Following the dicta of *Thomas*, we conclude that a sentencing court should at least make reference on the record to its discretionary options.

Therefore, we conclude the case should be remanded solely for resentencing and application of Iowa Code section 901.10.

**REMANDED FOR RESENTENCING.**