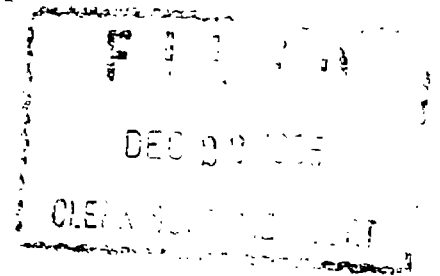


IN THE COURT OF APPEALS OF IOWA

No. 5-566 / 94-1745



STATE OF IOWA,

Appellee,

vs.

RONALD HAROLD HUMMER,

Appellant.

Appeal from the Iowa District Court for Johnson County, John R. Sladek,
Judge.

Defendant appeals from judgment and sentences, following jury trial, entered upon his convictions of assault causing injury, in violation of Iowa Code sections 708.1 and 708.2(2) (1993), and fourth-degree criminal mischief, in violation of sections 716.1 and 716.6. **AFFIRMED.**

Clemens Erdahl, Iowa City, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, J. Patrick White, County Attorney, and Rod Reynolds, Assistant County Attorney, for appellee.

Heard by Habhab, P.J., and Cady, J., and Schlegel S.J.*

*Senior judge from the Iowa Court of Appeals serving on this court by order of the Iowa Supreme Court

CADY, J.

Ronald Harold Hummer appeals his conviction for assault causing injury and criminal mischief contending the trial court abused its discretion in refusing to permit a police dispatch audiotape to be admitted into evidence. We affirm the conviction.

Hummer was driving his truck on Highway 218, with his wife as a passenger, when he was nearly run off the road by a black Ford Escort operating at a high rate of speed with one headlight out. While attempting to get the car's license plate number, Hummer followed the Escort and made a call to the police on his cellular telephone. Hummer continued to follow the Escort as it exited the highway and entered Iowa City, eventually ending up in a parking lot. Hummer continued to maintain contact with the police department by phone.

As he entered the parking lot, Hummer positioned his truck to block the Escort from leaving. He then got out of his truck to speak to the driver of the Escort. As Hummer approached, the Escort moved toward him, almost pinning Hummer between the two vehicles and then attempted to maneuver around Hummer's truck. Hummer pulled out a leaf spring from his truck, ran forward and broke the Escort's remaining headlight, then went back to his truck. He once again approached the Escort and the driver leaned out the window reaching for Hummer. Hummer then struck the driver and informed him the police would soon arrive. Hummer's wife remained in the truck and maintained contact with the police dispatch during the incident.

Hummer was subsequently charged with assault causing injury and criminal mischief. Prior to trial, he filed a notice of self-defense or justification. At trial, defense counsel attempted to introduce a police dispatch audiotape tape of the cellular phone call in order to bolster the testimony of witnesses and to show the fear and urgency in Hummer's voice. The State objected on relevancy grounds and that the evidence was cumulative. The court refused to admit the tape on direct examination of Hummer or his wife, but indicated it could be used on redirect examination if the accuracy of their testimony was challenged on cross-examination. The tape was never admitted and Hummer was subsequently convicted and sentenced to seven days in jail on the assault charge.

Hummer appeals contending the trial court abused its discretion by refusing to admit the police dispatch tape into evidence. The State argues no abuse of discretion occurred and, alternatively, its exclusion did not prejudice Hummer.

I. Standard of Review

We generally review a trial court's ruling on admissibility of evidence for an abuse of discretion. *State v. Jones*, 490 N.W.2d 787, 789 (Iowa 1992). In order to show an abuse of discretion, one generally must show that the court exercised its discretion "'on grounds or for reasons clearly untenable or to an extent clearly unreasonable.'" *State v. Blackwell*, 238 N.W.2d 131, 138 (Iowa 1976) (quoting *Weeks v. Burnor*, 326 A.2d 138, 140 (Vt. 1974)).

II. Police Dispatch Tape

Relevant evidence consists of “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Iowa R. Evid. 401; *State v. Thorton*, 498 N.W.2d 670, 675 (Iowa 1993). A trial court has discretion to exclude otherwise admissible evidence if the evidence would result in needless presentation of cumulative evidence or if its prejudicial effect outweighs its probative value. Iowa R. Evid. 403; *State v. Hastings*, 466 N.W.2d 697, 701 (Iowa App. 1990).

A defendant bears the burden of coming forward with evidence to show the applicability of a defense. *State v. Moorhead*, 308 N.W.2d 60, 63 (Iowa 1981). Relevant evidence must be produced to show the applicability of the defense to the defendant’s situation. *Id.* The State, however, bears the burden of proving each element of the crime beyond a reasonable doubt and negating any elements of applicable defenses. *State v. Allen*, 293 N.W.2d 16, 20 (Iowa 1980). *See State v. Dunson*, 433 N.W.2d 676, 677 (Iowa 1988) (State bears the burden of proving beyond a reasonable doubt the defendant was not acting in self-defense).

Here the relevant evidence on the tape is not only the factual occurrences, but also the fear and urgency in the voice of Hummer. *See* Iowa R. Evid. 401; *State v. Williams*, 367 N.W.2d 310, 312 (Iowa 1985) (evidence may be relevant for one purpose but not for another). Hummer claimed he acted in self-defense when he

struck the driver of the Escort, and as such, he must produce relevant evidence to show the applicability of this defense. The tape allows the jury to hear the emotion and concern in the voice of Hummer and his wife, which could not be easily duplicated through testimony. These inflections are highly probative in illuminating the reasons for Hummer's actions and his state of mind at the time of the events. While some danger of unfair prejudice exists concerning Hummer's account of the driver's behavior, we find the probative value of the tape outweighs its prejudicial effect.

Even though the audiotape evidence may have been properly excluded as it pertains to the circumstances of the events, we find the trial court abused its discretion in not admitting the tape with respect to Hummer's self-defense and justification defense.

III. Error

Trial court error, which is not of a constitutional magnitude, requires resulting prejudice to the defendant in order for a conviction to be reversed. *State v. Traywick*, 468 N.W.2d 452, 454 (Iowa 1991). The test for prejudice is “whether it sufficiently appears ~~that the rights~~ of the complaining party have been injuriously affected or that the party has suffered a miscarriage of justice.” *Id* at 454-55 (quoting *State v. Massey*, 275 N.W.2d 436, 439 (Iowa 1979)).

Hummer argued a justification defense, which required the State to prove any one of the following: (1) Hummer started or continued the incident which resulted in

injury, (2) an alternative course of action was available to Hummer, (3) Hummer did not believe he was in imminent danger of death or injury and the use of force was not necessary to save himself from death or injury, (4) Hummer did not have reasonable grounds for his belief, or (5) the force used by Hummer was unreasonable. *See Iowa Crim. Jury Instruction 400.2.*

Here, Hummer continued to return to the dangerous situation which resulted in the injury by getting out of his car, approaching the Escort twice, and not waiting until the police arrived. Hummer also admitted he could have just waited until the police arrived, instead of confronting the driver of the Escort. Moreover, Hummer's physical act of punching the driver in the face was unreasonable under the circumstances, as the Escort was at a complete stop, the driver remained in the car, and the police were on their way.

We find Hummer's rights have not been injuriously affected nor has he suffered a miscarriage of justice as a result of the exclusion of the audiotape evidence. We affirm the conviction.

AFFIRMED.