

IN THE COURT OF APPEALS OF IOWA

No. 9-162 / 98-0253

Filed April 30, 1999

STATE OF IOWA,

Plaintiff-Appellee,

vs.

JONATHAN PAUL TULLIS,

Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, K. D. Briner,
Judge.

Defendant appeals from his conviction for second-degree burglary.

AFFIRMED.

Linda Del Gallo, State Appellate Defender, and John P. Messina, Assistant
State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon Hall, Assistant Attorney General,
Thomas J. Ferguson, County Attorney, and D. Raymond Walton, Assistant County
Attorney, for appellee.

Heard by Sackett, C.J., and Vogel and Schlegel,* JJ.

* Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

SACKETT, C.J.

Defendant-appellant Jonathan Paul Tullis appeals seeking a new trial following his conviction of burglary. Defendant advanced the claim of self-defense and the jury was instructed on the defense of justification. Defendant contends his trial attorney should have objected to the instructions the district court gave on justification and was ineffective in failing to do so. We affirm.

Defendant and several others were fighting with another group of men. Defendant's group drove by the other group's apartment building twice making threats and throwing things. Finally, defendant's group surrounded the apartment building and someone inside a second floor apartment fired a gun, injuring a member of defendant's group. There followed shooting and fighting. Defendant and another man subsequently broke open the door of the second floor apartment and forced their way inside.

As a result of these actions, defendant was charged with first-degree burglary but was ultimately convicted of second-degree burglary in violation of Iowa Code section 713.5 (1995).¹

¹ Iowa Code section 713.5 provides:

A person commits burglary in the second degree in either of the following circumstances:

1. While perpetrating a burglary in or upon an occupied structure in which no persons are present, the person has possession of an explosive or incendiary device or material, or a dangerous weapon, or a bodily injury results to any person.
2. While perpetrating a burglary in or upon an occupied structure in which one or more persons are present, the person does not have possession

Defendant first contends the marshaling instruction given by the district court did not correctly advance his justification defense. The marshaling instruction said:

Instruction No. 18

The State must prove against each defendant all of the following elements of burglary in the second degree:

1. On or about December 6, 1996, the defendant entered Apartment 3 at 845 West 6th Street, Waterloo, Iowa; and
2. The defendant did so with the specific intent to commit an assault; and
3. The defendant did not have permission or authority to enter into or remain in Apartment 3; and
4. One or more persons were present in Apartment 3.

If the State has proved all of these elements, the defendant is guilty of burglary in the second degree. If the State has failed to prove any one or more of these elements, the defendant is not guilty of burglary in the second degree.

Defendant contends subparagraph 2 of the instruction should have been modified by adding the word "unjustified" before "assault" so the instruction read, "The defendant did so with the specific intent to commit an unjustified assault." Defendant argues he intended to assault someone, namely the person with the gun, but the key to his defense was he intended a justified assault. He advances he entered the apartment believing he needed to perform an act of defense.

The State contends defendant's challenge to Instruction No. 18 has no basis because there was not substantial evidence to even support a justification defense, and if there were, the instructions taken as a whole adequately support his defense.

of an explosive or incendiary device or material, nor a dangerous weapon, and no bodily injury is caused to any person.

Burglary in the second degree is a class "C" felony.
Iowa Code § 713.5 (1), (2).

Defendant denies the instructions taken as a whole support his defense and advances, in looking at the instructions as a whole, we should find the justification instructions given were flawed. Those instructions said:

Instruction No. 25

Each defendant claims that he acted with justification.

A person may use reasonable force to prevent injury to the person's self or to another person. Using such reasonable force is called acting with justification.

Reasonable force is only the amount of force a reasonable person would find necessary to use under the circumstances to prevent death or injury.

To prove each defendant guilty, the State must prove that he did not act with justification.

Instruction No. 26

A person is justified in using reasonable force if he reasonably believes the force is necessary to defend himself from any imminent (immediately likely) use of unlawful force.

If the State has proved any one or more of the following facts against a defendant, then that defendant was not justified in using force:

1. The defendant started or continued the incident which resulted in injury.
2. An alternative course of action was available to the defendant which did not place the defendant's life or safety at risk and did not require the defendant to retreat from or abandon his dwelling.
3. The defendant did not believe he was in imminent danger of death or injury and the use of force was not necessary to save him from death or injury.
4. The defendant did not have reasonable grounds to believe he was in imminent danger of death or injury.
5. The force used by the defendant was unreasonable.

Instruction No. 27

Concerning element number 4 of Instruction No. 26, the defendant claims that danger of injury or death existed. Consider the danger or apparent danger from the viewpoint of a reasonable person under the circumstances which existed at the time.

It is not necessary that there was actual danger, but the defendant must have acted in an honest and sincere belief that the danger actually existed.

Apparent danger with knowledge that no real danger existed does not provide justification for using force.

Instruction No. 28

Concerning element number 5 of Instruction No. 26, the defendant was not required to act with perfect judgment. However, he was required to act with the care and caution a reasonable person would have used under the circumstances which existed at the time.

The defendant's belief was reasonable if both of the following are true:

- a. In the defendant's mind the danger of injury or death was actual, real, imminent or unavoidable, even if it did not actually exist; and
- b. A reasonable person would have seen it in the same light.

Instruction No. 29

Concerning element number 2 of Instruction No. 26, if a defendant is confronted with an unlawful force against him, he was required to avoid the confrontation by seeking an alternative course of action before he was justified in repelling the force used against him. However, there is an exception to this general rule:

The defendant was not required to take or use the alternative course of action to avoid the confrontation and he could repel the force with reasonable force if all of the following are true:

- a. The alternative course of action involved a risk to his life or safety or the life or safety of another person; and
- b. He reasonably believed that the alternative course of action involved such risk.

In challenging the justification instructions, defendant advances his act of assault was not justified under the law of justification but rather he actually intended an act of defense, which is a different issue. Defendant argues, to the extent the jury did apply the justification instructions in considering the intent element of burglary, the instructions were not correct. Defendant contends the jury was instructed his

belief his act was justified had to be reasonable. He contends the reasonable belief requirement is not applied in the specific intent crime of burglary. Defendant reasons where the question is not the underlying act but the underlying intent, the law is not concerned with the reasonableness of a defendant's thought process. Rather, the only question is whether the defendant had the specific intent required to commit the crime.

Defendant contends he was prejudiced by these errors because they deprived him of a defense to the burglary charge.

The State claims defendant's trial attorney had no duty to object to the instructions he now challenges because the justification defense was not supported by substantial evidence. The State further claims defendant's trial attorney did not breach a duty to defendant because the jury instructions correctly stated the applicable law. The State further advances if defendant's trial attorney had a duty to object, defendant failed to establish prejudice because the State's evidence refuted his claim of justification.

Because defendant's ineffective assistance of counsel claims involve constitutional questions, our review is de novo. *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987). In order to show ineffective assistance of counsel, defendant must establish that counsel failed to perform an essential duty and prejudice resulted. *Taylor v. State*, 352 N.W.2d 683, 684-85 (Iowa 1984). Prejudice may be established by showing "there is a reasonable probability that, but for counsel's unprofessional

errors, the result of the proceeding would have been different." *Id.* at 685 (citing *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984)).

The district court should instruct the jury on a defendant's theory of defense if it is a valid defense under the law and there is substantial evidence to support the defense. *See State v. Broughton*, 425 N.W.2d 48, 51-52 (Iowa 1988); *State v. Johnson*, 534 N.W.2d 118, 124 (Iowa App. 1995). If an error is made in instructing a jury that has the effect of negating a defendant's theory of defense, then a defendant does not receive a fair trial. *See State v. Lawler*, 571 N.W.2d 486, 490 (Iowa 1997).

Justification is a defense to a charge of unlawful force against another. Iowa Code § 704.3 (1997). Second-degree burglary does not require the actual use of force against another as an element of the offense. Iowa Code §§ 713.1, 713.5. The crime of burglary is complete when one breaks or enters with the intent to use unlawful force against another. Iowa Code § 713.1.

Defendant argues justification is a defense to second-degree burglary only in the sense that one who acts with a justification intent lacks the assault intent required for conviction; in other words, if one breaks or enters with the intent to defend himself or others, then the person does not act with the intent to commit assault. Defendant advances this is because "assault" is defined under Iowa Code section 708.1 as an unjustified use of force; consequently, one does not intend an assault if one intends a justified assault.

We agree with defendant if there is evidence his intended purpose in entering the apartment was to do what was necessary to take the gun in defense of himself or others, then there was evidence to support the giving of a justification instruction.

Defendant did not testify; consequently, we look to the evidence of the events and the testimony of others to determine whether evidence supported the giving of the instruction. A gun was being fired from the apartment and at least one person had been injured. One man in the group testified he personally entered the apartment to defend himself and others. He and two of the others testified they had no earlier plan to enter the apartment. Defendant was a part of the group. There is no specific evidence as to his actions or whereabouts prior to his entry into the apartment. This is evidence that would support a finding defendant entered the apartment with the intent to assault the person yielding the gun for the purpose of defending himself and others from gunfire. We agree with defendant and the district court there was evidence to support a justification defense, although as the State points out, there also was evidence which would support a contrary conclusion.

Having determined there was evidence to support a justification defense, we must decide if Instruction No. 18 correctly presented this defense. We agree with defendant the instruction would have more clearly presented his defense had it included the word "unjustified" before "assault." Having so decided, we need to address the State's claim that any error was corrected by the other instructions. In assessing defendant's challenge to this single instruction, we do not consider it in

isolation, but look at it in concert with the other instructions on the charge. *See State v. Liggins*, 557 N.W.2d 263, 267 (Iowa 1996). We believe the instructions on justification, as a whole, adequately define defendant's justification defense. We do not find under the facts of this case defendant has shown the necessary prejudice to succeed on his claim of ineffective assistance of counsel. We affirm.

AFFIRMED.

No. 98-0253. [9-162] STATE v. TULLIS

Appeal from the Iowa District Court for Black Hawk County, K. D. Briner, Judge. **AFFIRMED.** Heard by Sackett, C.J., Vogel, J., and Schlegel, S.J. Opinion by Sackett, C.J. (9 pages \$3.60)

Defendant appeals his conviction of burglary. Defendant advanced the claim of self-defense and the jury was instructed on the defense of justification. Defendant contends his trial attorney should have objected to instructions the district court gave. We affirm. Defendant and several others were fighting with another group of men. Defendant's group surrounded an apartment building and someone inside a second floor apartment fired a gun. Defendant broke open the door of the apartment and forced his way inside. Defendant was convicted of second-degree burglary. Defendant contends the marshaling instruction did not correctly advance his justification defense. The instruction said, " * * * (1) On or about December 6, 1996, the defendant entered Apartment 3 at 845 West 6th Street, Waterloo, Iowa; and (2) The defendant did so with the specific intent to commit an assault; and" Defendant contends subparagraph 2 of the instruction should have been modified by adding the word "unjustified" before "assault." Defendant argues he intended to assault the person with the gun, but his defense was that he intended a justified assault. The State contends there was not substantial evidence to even support a justification defense, and if there were, the instructions taken as a whole adequately support his defense. Defendant contends the justification instructions given were flawed. We agree with defendant if there is evidence his intended purpose in entering the apartment was to take the gun in defense of himself or others, there was evidence to support a justification defense. We agree with defendant the instruction would have more clearly presented his defense had it included the word "unjustified" before "assault." Having so decided, we need to address the State's claim that any error was corrected by the other instructions. We believe the instructions on justification, as a whole, adequately define defendant's justification defense. We do not find under the facts of this case defendant has shown the necessary prejudice to succeed on his claim of ineffective assistance of counsel.