IN THE COURT OF APPEALS OF IOWA

No. 1-336 / 00-0709
Filed July 18, 2001

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CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

SHAWN EDWIN RIDENOUR,
Defendant-Appellant.

Appeal from the Iowa District Court for Jasper County, Thomas W. Mott, District Associate Judge.

Shawn Ridenour appeals from his conviction for simple assault. **AFFIRMED.**

David Pargulski and Tiffany Koenig, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Darrel L. Mullins, Assistant Attorney General, Steve Johnson, County Attorney, and James W. Cleverley, Jr., Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Huitink and Streit, JJ.

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HUITINK, J.

I. Background Facts and Proceedings.

Shawn Ridenour was charged with two indictable misdemeanors, assault causing bodily injury and interference with official acts, following an altercation with his stepfather, Eugene Porter. At trial, Ridenour claimed he struck Porter in self-defense. He testified that after he felt Porter tap him on the shoulder and heard Porter yell "Shawn" he turned and swung at Porter "without even thinking."

The district court declined to submit Ridenour's requested jury instructions on self-defense citing insufficient evidence that Ridenour "feared there was going to be any force used against him." Ridenour was convicted of the lesser offense of simple assault, a nonindictable misdemeanor.

On appeal Ridenour argues the district court erred by refusing to submit a self-defense instruction to the jury. The State contends we should treat Ridenour's direct appeal as an application for discretionary review and deny it because substantial justice has been accorded in the district court. The State alternatively argues that the district court properly declined to submit Ridenour's requested self-defense instruction.

II. Jurisdictional Issue.

Ridenour was charged with an indictable offense but was convicted of a nonindictable offense. His appellate remedy was therefore limited to an application for discretionary review rather than a direct appeal. *See Tyrrel v. Iowa Dist. Court*, 413 N.W.2d 674, 675-76 (Iowa 1987) (where defendant charged with indictable offense and given access to the protections of district

court practices and procedures but ultimately convicted of a nonindictable offense, any further review by an appellate court is purely discretionary).

Iowa Rule of Appellate Procedure 304 provides:

> If any case is brought by appeal, certiorari, or discretionary review, and the appellate court is of the opinion that another of these remedies was the proper one, the case shall not be dismissed, but shall proceed as though the proper form of review had been sought. Any one of the foregoing remedies may under this rule be treated by the appellate court as the one it deems appropriate.

We accordingly consider Ridenour's direct appeal an application for discretionary review and proceed accordingly.

III. Standard of Review.

We review the trial court's determination regarding jury instructions for errors at law. *See* Iowa R. App. P. 4; *State v. Breitbach*, 488 N.W.2d 444, 449 (Iowa 1992).

IV. The Merits.

Self-defense is statutorily denominated as a defense of justification. The defense is codified in Iowa Code section 704.3 (1999), which provides: "A person is justified in the use of reasonable force when the person reasonably believes that such force is necessary to defend oneself or another from any imminent use of unlawful force." Substantial evidence of self-defense from any source justifies submission of a self-defense instruction. *State v. Rains*, 574 N.W.2d 904, 915 (Iowa 1998). If substantial evidence exists, the district court has a duty to give the requested instruction. *Id.*

The record in the present case does not contain substantial evidence to generate a jury issue on self-defense. Ridenour's own testimony was devoid of suggestion that he believed force was necessary to protect himself. Instead, he stated that upon hearing Porter behind him he swung at him "without thinking." His mother testified that Ridenour and Porter had a turbulent relationship and that Ridenour had always been afraid of Porter. She also testified, however, that their prior disputes were verbal and that she did not believe Ridenour was afraid that Porter would physically harm him. We accordingly find that the theory of self-defense was not supported by substantial evidence and that the district court properly refused to instruct the jury on the issue of justification. The district court decision is affirmed in full.

AFFIRMED.