

IN THE COURT OF APPEALS OF IOWA

No. 0-437 / 89-1447

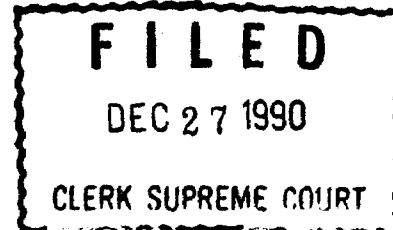
STATE OF IOWA,

Appellee,

vs.

DANIEL S. GRIES,

Appellant.



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

Daniel S. Gries appeals his conviction, following a
jury trial, for the crime of assault causing injury.
AFFIRMED.

Jon M. Kinnamon, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett,
Assistant Attorney General, J. Patrick White, Johnson
County Attorney, Anne Lahey, Assistant County Attorney, for
appellee.

Considered by Oxberger, C.J., and Schlegel and Hayden,
JJ.

HAYDEN, J.

Dan Gries intervened in an altercation involving his friend and two employees at a parking garage. Gries ultimately struck and injured one of the employees. He claimed he did this only to protect himself and his friend from an impending assault.

Gries was charged with the crime of assault causing bodily injury, a violation of Iowa Code section 708.2(2). A jury found him guilty of that crime, and he has appealed the resulting conviction.

Gries contends the district court erred by refusing to submit his requested instructions on his justification theory of defense. Gries also contends the instructions on justification which the district court used were erroneous. He claims the district court erred by refusing to submit his requested instruction on specific intent. Finally, he claims a particular instruction anticipated only a guilty verdict and suggested to the jury only a guilty verdict was likely.

Our review is on assigned errors of law. Iowa R. App. P. 4. Gries's appeal centers on the trial court's jury instructions. Therefore, we review in brief the law surrounding criminal trial jury instructions.

Jury instructions are designed to explain the applicable law to the jurors so the law may be applied to the facts proven at trial. State v. Freeman, 267 N.W.2d 69, 71 (Iowa 1978). However, the trial court's ruling

regarding instructions will not be disturbed absent an abuse of discretion. State v. Christensen, 323 N.W.2d 219, 222 (Iowa 1982); State v. Lewis, 391 N.W.2d 796, 798 (Iowa App. 1986).

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." Id. The burden of proving abuse of discretion lies with the defendant. Id. To preserve error, objections to the jury instructions must be made to the trial court. Conner v. State, 362 N.W.2d 449, 457 (Iowa 1985).

[T]he trial court is not bound to any model or form in wording instructions. A requested instruction may be properly refused if the point raised is otherwise substantially covered. Instructions must be considered as a whole and not in isolation.

State v. Tensley, 249 N.W.2d 659, 662 (Iowa 1977)
(citations omitted).

Ordinarily a defendant is entitled to have instructions presented relating to any theory of defense for which there is foundation in the evidence if he or she makes a timely request and it sets out a correct declaration of law.

State v. Stewart, 445 N.W.2d 418, 421 (Iowa App. 1989); see also United States v. Brown, 540 F.2d 364, 380 (8th Cir. 1976).

An accused may present diverse and inconsistent theories of defense. State v. Broughton, 425 N.W.2d 48, 50 (Iowa 1988). However, the trial court is "not obligated to express [the requested instruction] in the defendant's

words so long as it [is] adequately conveyed to the jury." State v. Spargo, 364 N.W.2d 203, 211 (Iowa 1985). "There is no error in denying an instruction where the substance of the requested instruction is included in other instructions." Freeman, 267 N.W.2d at 70.

We turn now to Gries's specific objections.

I. Proposed Instructions

The trial court denied Gries's proposed jury instructions number 1 and number 2. Number 1 contained a definition of battery relating to the particular incident and other persons involved. As the other persons are not on trial here and the other instructions adequately cover Gries's defense theory of justification, the trial court was within its discretion in refusing this instruction.

The trial court also denied Gries's proposed jury instruction number 2. This proposed jury instruction is somewhat similar to Iowa Criminal Jury Instruction 200.33. We set out both instructions below for purpose of comparison. We have underlined the altered portions.

Gries's Proposed Jury Instruction number 2 with alterations emphasized:

Evidence has been received about other alleged transactions involving other individuals and the defendant. These other individuals and the defendant are not on trial for those transactions. However, the law permits such evidence when the other transactions form an inseparable part of the whole act. If they are so closely associated with each other that they form a continuous transaction, the other transactions may be considered in determining the guilt or innocence of the defendant.

Iowa Criminal Jury Instruction 200.33 with alterations emphasized. Gries deleted the emphasized portions in his instruction number 2 shown above.

Evidence has been received about other alleged transactions involving the defendant. The defendant is not on trial for those transactions.

However, the law permits such evidence when the other transactions and the crime charged form an inseparable part of the whole act. If they are so closely associated with each other that they form a continuous transaction, the other transactions may reasonably help to establish the crime charged.

At first glance, Gries's proposed instruction number 2 appears to present a viable theory of defense. Basically, Gries seems to be arguing everyone was so intertwined in the melee, his own actions could be excused due to the chaos and confusion. However, a closer examination reveals the flaw in Gries's instruction number 2 as presented.

Gries's altered instruction forces a lumping of the whole series of events into a single act without distinguishing the crime charged from the other facts. This is most noticeable in his deletion of "and the crime charged" in the first sentence of the second paragraph of Iowa Criminal Jury Instruction 200.33.

Essentially, the proposed instruction could be read to say either the whole transaction was criminal, and if the the defendant is guilty, all involved are guilty. Conversely, it could be read to say if the others' acts were non-criminal, the defendant's acts, because they were part of the whole, must be non-criminal.

Neither of these results are correct on the law. Therefore, we determine the trial court was within its discretion in refusing this instruction. We affirm on this issue.

II. Specific Intent

Gries contends the trial court abused its discretion in refusing a specific intent instruction on assault. Consequently, he argues, he was denied due process.

This question has already been answered by both the Iowa Supreme Court and by this court. See State v. Redmon, 244 N.W.2d 792, 797 (Iowa 1976); State v. Brown, 376 N.W.2d 910, 912-15 (Iowa App. 1985). In both those cases, assault was defined to be a general intent crime. Further, in Brown the court of appeals determined assault causing bodily harm was a general intent crime. Brown, 376 N.W.2d at 914-15.

Brown is controlling in the present case. The trial court did not abuse its discretion in refusing the specific intent instruction. We affirm on this issue.

We determine the trial court's jury instructions, read as a whole, were adequate to satisfy Gries's other objections. We affirm the trial court on all issues.

AFFIRMED.