IN THE COURT OF APPEALS OF IOWA

No. 8-406 / 97-1202

STATE OF IOWA,

Appellee,

vs.

ALLEN LEE VAN BEEK,

Appellant.

FILED
NOV 30 1998
CLERK SUPREME COURT

Appeal from the Iowa District Court for Sioux County, Dewie J. Gaul, Judge.

Defendant appeals from the district court's refusal to give a requested jury instruction. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Kevin Cmelik and Shellie L. Knipfer, Assistant State Appellate Defenders, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, and Mark J. Schouten, County Attorney, for appellee.

Considered by Sackett, C.J., and Vogel and Mahan, JJ.

PER CURIAM

Defendant Allen Lee Van Beek appeals the judgment and sentence entered following his conviction of second-degree burglary and assault in violation of Iowa Code sections 713.1, 713.5, 708.1, and 708.2(4) (1997). Defendant contends the district court abused its discretion in denying his request for a jury instruction on a mistake-of-fact defense. We affirm.

Defendant, a resident of a local mental health facility, was charged after he admitted he was walking nude in the apartment of Nellie Drost, who woke to find him in her bedroom. There was evidence he pinned Drost to her bed. He carried a knife from Drost's kitchen. Ultimately defendant went to the living room, put on his jeans, and before walking out of the apartment told Drost he had been "checking doors."

At trial, defendant contended he entered Drost's apartment by mistake. He advanced he intended to enter the apartment of Terry Simms, a woman with whom he had consensual sexual relations. Simms lived in the apartment next door to Drost. Defendant requested a jury instruction on mistake of fact.[1] The court denied the

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[1] Uniform Criminal Jury Instruction 200.39 defines the mistake-of-fact defense:

200.39 Ignorance Or Mistake Of Fact - Defense. The defendant claims that at the time of the [act] [omission] in question, [he] [she] was [ignorant of (element of crime to which ignorance is directed)] [acting under a mistake of fact as to (element of crime to which mistake of fact is directed)]. When an [act is committed] [omission is made] because of [ignorance] [mistake of fact], the [ignorance] [mistake of fact] must be because of a good faith reasonable belief by the defendant, acting as a reasonably careful person under similar circumstances.

The defendant must inquire or determine what is true when to do so would be reasonable under the circumstances.

The State has the burden of proving the defendant was not acting under [ignorance] [mistake of fact] as it applies to the question of (element).

request finding there was no evidence defendant had permission or authority to enter Simms' apartment.

The jury found defendant guilty of second-degree burglary and assault. Defendant contends the district court erred in failing to instruct the jury on the defense of mistake of fact.

Our review of trial court determinations concerning jury instructions is for errors of law. Iowa R. App. P. 4; *State v. Kellogg*, 542 N.W.2d 514, 516 (Iowa 1996). A trial court must instruct on all material issues raised by the evidence so the jury knows what issues it must decide. *See State v. Jenkins*, 412 N.W.2d 174, 177 (Iowa 1987); *State v. Tomlinson*, 243 N.W.2d 551, 553 (Iowa 1976). In order to submit an instruction, substantial evidence must exist to support it. *See State v. Lucas*, 368 N.W.2d 124, 127 (Iowa 1985). "Substantial" evidence means evidence which could convince a rational finder of fact that the defendant has established his affirmative defense. *Cf. State v. McFadden*, 320 N.W.2d 608, 614 (Iowa 1982); *State v. Mulder*, 313 N.W.2d 885, 888 (Iowa), *cert. denied*, 459 U.S. 841, 103 S. Ct. 90, 74 L. Ed. 2d 83 (1981).

Terry Simms did not testify. Defendant introduced no evidence to support a finding he had Simms' permission to enter her apartment. There was insufficient evidence to support defendant's request for the instruction. The trial court did not err in refusing to give the requested instruction.

AFFIRMED.