

DA 19-0660

IN THE SUPREME COURT OF THE STATE OF MONTANA

2021 MT 263

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STATE OF MONTANA,

Plaintiff and Appellee,

v.

ALVIAN ERREVY MARQUEZ,

Defendant and Appellant.

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APPEAL FROM: District Court of the First Judicial District,  
In and For the County of Lewis and Clark, Cause No. CDC 2018-596  
Honorable Kathy Seeley, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Appellate Defender, Moses Okeyo, Assistant Appellate  
Defender, Helena, Montana

For Appellee:

Austin Knudsen, Montana Attorney General, Tammy K Plubell, Appellate  
Services Bureau Chief, Jonathan M. Krauss, Assistant Attorney General,  
Helena, Montana

Leo J. Gallagher, Lewis and Clark County Attorney, Fallon Stanton, Deputy  
County Attorney, Helena, Montana

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Submitted on Briefs: July 21, 2021

Decided: October 12, 2021

Filed:

  
Clerk

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Chief Justice Mike McGrath delivered the Opinion of the Court.

¶1 Alvian Errevy Marquez (Marquez) appeals a September 30, 2019 amended judgment from the First Judicial District Court in Lewis and Clark County. A jury convicted Marquez of felony assault on a peace officer, and Marquez challenges the District Court's decision not to instruct the jury on the defense of justifiable use of force.

¶2 We restate the issue on appeal as follows:

*Did the District Court abuse its discretion when it determined that the defense had not raised evidence sufficient to warrant the proposed jury instruction on justifiable use of force?*

¶3 We affirm.

#### **FACTUAL AND PROCEDURAL BACKGROUND**

¶4 Marquez was in custody on November 5, 2018, facing other charges. The toilet in his cell had flooded over, and water had entered the hallway. Detention center officers planned to remove Marquez from his cell while they cleaned up the overflow.

¶5 One officer, Ryan Juers, entered the cell and handcuffed Marquez. Officer Juers then emptied items from Marquez's shirt pocket. Officer Juers testified that Marquez jerked forward and tried to headbutt him. Officer Juers pushed him up against a wall and then took Marquez out of the cell with one hand on his handcuffs and one hand on his hair.

¶6 Outside the cell, Officer Juers pushed the struggling Marquez down on a bench in a corner of the detention center hallway. He kept a hand on Marquez's chest to hold him down. Marquez fidgeted with his legs.

¶7 Marquez's knee hit Officer Juers in the chest, contacting his body camera. In his trial testimony, Officer Juers described the pain he felt. He reacted by holding one hand

on Marquez's knee while pushing Marquez's torso down on the bench with his other arm. Marquez continued to struggle and complained that the position hurt his neck.

¶8 After about a minute and twenty seconds on the bench, two other officers had finished addressing the flooding in the cell. With the assistance of one of them, Officer Juers pulled Marquez back into the cell. With Marquez on his stomach on the cell bed, the three officers worked to hold the struggling Marquez still to remove the handcuffs. This took about another minute and twenty seconds. The officers hurriedly left the cell and shut the door.

¶9 Later that month, a Deputy County Attorney for Lewis and Clark County charged Marquez by information with felony assault on a peace officer. The District Court held a jury trial on June 24, 2019.

¶10 Trial was brief. The State called Officer Juers as a witness to describe the incident and to authenticate the video from his body camera. The jury watched the video. The State also called a deputy sheriff who had investigated the incident to authenticate another video showing the view from a camera mounted in the booking floor hallway.

¶11 Marquez had submitted proposed jury instructions to the District Court. Before instructing the jury prior to closing arguments, the parties conferred with the judge on the instructions she would give. Marquez had earlier given notice that he might rely on affirmative defenses including justifiable use of force, and three of his proposed jury instructions addressed this defense.

¶12 As the judge ticked through the relevant instructions to give and reached those proposed on justified use of force, she asked Marquez's attorney to clarify that Marquez

planned to rest after the State’s presentation of the case. He confirmed this plan, and the judge said that since there would not be evidence to warrant the justifiable use of force instructions, she would not use them.

¶13 The jury found Marquez guilty. He now appeals and contends that those instructions should have been given.

### STANDARD OF REVIEW

¶14 We review a district court’s decisions regarding jury instructions for abuse of discretion. *State v. Daniels*, 2011 MT 278, ¶ 38, 362 Mont. 426, 265 P.3d 623. Our review considers “whether the instructions, taken as a whole, fully and fairly instructed the jury on the law applicable to the case.” *State v. Cybulski*, 2009 MT 70, ¶ 34, 349 Mont. 429, 204 P.3d 7. A district court’s mistake regarding jury instructions can constitute reversible error if it prejudicially affects the defendant’s substantive rights. *State v. Archambault*, 2007 MT 26, ¶ 14, 336 Mont. 6, 152 P.3d 698.

### DISCUSSION

¶15 *Did the District Court abuse its discretion when it determined that the defense had not raised evidence sufficient to warrant the proposed jury instruction on justifiable use of force?*

¶16 Justifiable use of force (JUOF) is an affirmative defense defined by Montana law. *See* § 45-3-115, MCA. The statute provides that use of force is justified “when and to the extent that the person reasonably believes that the conduct is necessary for self-defense . . . against the other person’s imminent use of unlawful force.” Section 45-3-102, MCA. The defense is not available to someone who is the initial aggressor and provokes the use of force, unless the force being responded to “is so great

that the person reasonably believes that the person is in imminent danger of death or serious bodily harm.” Section 45-3-105, MCA.

¶17 When a criminal defendant has offered evidence of JUOF, the effect is to create for the State an additional burden of “proving beyond a reasonable doubt that the defendant’s actions were not justified.” Section 46-16-131, MCA. Thus, the duty of the district court is to correctly instruct the jury on JUOF if it applies. *State v. Kaarma*, 2017 MT 24, ¶ 25, 386 Mont. 243, 390 P.3d 609; *State v. Erickson*, 2014 MT 304, ¶ 35, 377 Mont. 84, 338 P.3d 598; *State v. King*, 2013 MT 139, ¶ 25, 370 Mont. 277, 304 P.3d 1. If the theory is “supported by evidence presented at trial,” even if conflicting evidence is also presented, then the district court must give the instruction. *Kaarma*, ¶ 25. This is true whether the support comes from direct evidence or from “some logical inference from the evidence presented.” *Erickson*, ¶ 35 (quoting *State v. Hudson*, 2005 MT 142, ¶ 17, 327 Mont. 286, 114 P.3d 210); *Kaarma*, ¶ 25.

¶18 Marquez did not make a defense presentation at trial and instead rested after the prosecution’s case-in-chief. Marquez made no attempt to articulate this defense to the jury; he did not, for example, admit to the violence or point out evidence indicating why his actions were justified. He instead denied the act. Marquez’s attorney generally tried to guide the jury to an inference that Marquez acted automatically, squirming to get out of a painful position and not purposefully or knowingly trying to knee Officer Juers.

¶19 We have previously noted that JUOF is a defense that admits doing an act but seeks to justify it. *Daniels*, ¶ 15 (quoting *State v. Nicholls*, 200 Mont. 144, 150, 649 P.2d 1346, 1350 (1982)); *King*, ¶ 26. And we have said that “[i]f the defendant offers no evidence,

then he fails to satisfy his initial burden and the defense fails.” *Daniels*, ¶ 15. Given that Marquez offered no evidence of his own and did not admit to a forceful act, our inquiry could end here.

¶20 Marquez argues, however, that this incident was simple enough that the State’s case-in-chief provided evidence adequate for his defense, too. He points out that the jury watched the incident on video and notes that he challenged Officer Juers’s account on cross-examination; Marquez questions what more affirmative evidence he could have brought. If we give this posture the benefit of the doubt, our inquiry thus becomes whether the State’s evidence, on its own, sufficiently supports an apparent logical inference that JUOF applied, such that the District Court erred and prejudiced Marquez by not offering his proposed jury instructions.

¶21 However, Marquez made no attempt to demonstrate to the jury, or to the judge during the instruction settlement conference, that the evidence showed unlawful force by Officer Juers. It is the defendant’s burden to raise JUOF before being entitled to instructions on the State’s additional burden in response. *Daniels*, ¶ 15. Here, the State’s evidence included Officer Juers’s testimony that Marquez tried to headbutt him, which helps explain his hand on Marquez’s head as they left the cell. The State’s evidence also showed Marquez’s obvious scuffling as Officer Juers tried to move him to the bench. On its own, the State’s evidence does not make apparent any deliberate attempt by Officer Juers to jeopardize Marquez’s safety.

¶22 Nor was it self-evident that Marquez could reasonably think defensive force was necessary in response. In the videos, Officer Juers forces the wriggling Marquez onto the

bench and keeps one hand on Marquez's chest while gesticulating towards the other officers. Eight or nine seconds later, Marquez's knee hits Officer Juers's chest, and Marquez laughs. Only after this, with Officer Juers's hands on Marquez's legs and chest, does Marquez protest about the pain in his neck. He then continues to struggle for the minute or so while they wait for other officers to clean the cell.

¶23 Moreover, the State's evidence demonstrated that Marquez initiated the fracas. The video showed Marquez jerking violently away from Officer Juers after being handcuffed, and Officer Juers testified that Marquez tried to headbutt him. This precipitated the struggle that followed, and Marquez actively resisted all the way to his position on the bench. Marquez is asking that we view the applicability of JUOF as self-evident in the video and testimony, yet Marquez made no attempt at trial to contradict his appearance as the instigator. The apparent effect of the evidence is to portray him as the initial aggressor.

¶24 The evidence presented did not demonstrate unlawful force by the officer that would justify self-defense. Therefore, denial of Marquez's proposed JUOF instructions was not an abuse of discretion.

### **CONCLUSION**

¶25 The District Court's September 30, 2019 judgment and commitment order is affirmed.

/S/ MIKE McGRATH

We Concur:

/S/ JAMES JEREMIAH SHEA

/S/ BETH BAKER

/S/ DIRK M. SANDEFUR

/S/ INGRID GUSTAFSON