STATE OF NEBRASKA, APPELLEE, V. DARRELL E. WHITE, APPELLANT.

___ N.W.2d ___

Filed August 21, 2012. No. A-11-515.

1. **Jury Instructions.** Whether jury instructions given by a trial court are correct is a question of law.
2. **Judgments: Appeal and Error.** When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
3. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
4. **Self-Defense.** The use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.
5. ____. The use of deadly force shall not be justifiable unless the actor believes that such force is necessary to protect himself against death, serious bodily harm, kidnapping, or sexual intercourse compelled by force or threat.
6. ____. The use of deadly force is not justifiable if the actor provoked the use of force against himself in the same encounter or the actor knows that he can avoid the necessity of using such force with complete safety by retreating.
7. ____. In the use of deadly force for self-protection, the actor shall not be obliged to retreat from his dwelling or place of work, unless he was the initial aggressor or is assailed in his place of work by another person whose place of work the actor knows it to be.
8. ____. There is no logical basis for requiring one to retreat when attacked in one's home by a cohabitant but not requiring retreat if the attacker is a stranger.
9. ____. When one is attacked within one's dwelling, the right to defend oneself and the privilege of nonretreat should apply equally, regardless of whether the attacker is a cohabitant or an unlawful entrant.
10. **Jury Instructions: Convictions: Appeal and Error.** Before an error in the giving of jury instructions can be considered as a ground for reversal of a conviction, it must be considered prejudicial to the rights of the defendant.
11. **Jury Instructions: Appeal and Error.** All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal.
12. **Constitutional Law: Double Jeopardy: Evidence: Appeal and Error.** The Double Jeopardy Clauses of the federal and state Constitutions do not forbid a retrial after an appellate determination of prejudicial error in a criminal trial so long as the sum of all the evidence admitted by the trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict.

Appeal from the District Court for Sarpy County: MAX KELCH, Judge. Reversed and remanded for a new trial.

Patrick J. Boylan, Chief Deputy Sarpy County Public Defender, and Mandy M. Gruhlkey for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

INBODY, Chief Judge, and IRWIN and SIEVERS, Judges.

IRWIN, Judge.

I. INTRODUCTION

Darrell E. White appeals his convictions in the district court for Sarpy County, Nebraska, on charges of second degree murder and use of a weapon in the commission of a felony. The charges arose from an incident wherein White stabbed a cohabitant of his apartment, resulting in the cohabitant's death. On appeal, White asserts a variety of errors, including that the court erred in failing to instruct the jury White did not have a duty to retreat if he was not the first aggressor (i.e., that he had a privilege of nonretreat) and that there was insufficient evidence to support the convictions. We find that the district court erred in failing to instruct the jury that White did not have a duty to retreat if he was not the first aggressor, as requested by White. Accordingly, we reverse, and remand for a new trial.

II. BACKGROUND

The events giving rise to this case occurred during the late hours of September 21, 2010. A 911 emergency dispatcher received a telephone call from White, during which White indicated that he had just stabbed his roommate, Todd Berg. White indicated to the 911 dispatcher that he had stabbed Berg in the chest because Berg "came after" him. During a later interview, White indicated that Berg had been living with him for approximately 9 months.

Bellevue police officers were dispatched to the location. Officer James Murray was the first officer to make contact with White at the residence. Officer Murray testified that he took White into custody and placed White in handcuffs.

Inside the residence, officers encountered Berg lying in a reclined position on a couch, with his feet on the footrest. Berg was not moving and had labored breathing, taking "one gasping breath about every 10 to 15 seconds." Officers were unable to get a response when speaking to Berg and were unable to get any reaction in Berg's eyes, even when shining lights into the eyes. In addition, Berg's pulse was "very light." Berg ultimately died.

A single knife wound was observed in Berg's chest. Officers located a black butterfly-style knife with blood on the blade, which blood "went all the way up to the handle of the knife." No firearm was located.

Officers Timothy Flohrschutz and Michael Pilmaier also responded to the scene. Officer Flohrschutz testified that White indicated to the officers that Berg "had tried to stab him, so he stabbed [Berg] in return." Officer Pilmaier transported White from the scene to the Sarpy County sheriff's office. Officer Pilmaier testified that White made a variety of statements about the events, including that "his roommate was trying to kill him," that "his roommate was crazy," and that "he was trying to protect himself" because "Berg was coming after him." White also indicated to Officer Pilmaier, on more than one occasion, that he had "nothing to do with" what happened to Berg.

At the Sarpy County jail, White was interviewed by Officer Robert Bailey. During that interview, White initially told Officer Bailey that he did not know what had happened to Berg. He explained that he and Berg had been drinking whiskey, that Berg had gone for a walk, and that he did not remember Berg's returning from the walk or how Berg had died. White denied having killed Berg.

Later during the interview, White indicated that he believed he had called the 911 emergency dispatch service because Berg had told him to do so and that he had thought Berg was playing a practical joke on him. White indicated that Berg started gasping for air and that then "he was gone" and there had been nothing that White could do.

Eventually, White indicated that Berg had come after him and that he had stabbed Berg to defend himself. White told

Officer Bailey that Berg had come after him "like a freight train" and that he had been threatened by Berg's size and weight. White indicated that he had attempted to stab Berg in the arm, but had missed and struck Berg in the chest. White also indicated that Berg had fallen onto the knife while tackling White. White told Officer Bailey that Berg had acted violently toward White, that Berg had a "look in his eyes," that Berg had rushed at him, and that he had stabbed Berg out of defense, not aggression.

On November 8, 2010, White was charged by information with second degree murder and use of a weapon in the commission of a felony. Trial was held on March 8 through 11 and 14, 2011. At the conclusion of the trial, the court's proposed jury instructions included an instruction on self-defense. White requested an instruction to the jury that he "was under no duty to retreat from his dwelling" if he was not the first aggressor. The district court concluded that the privilege of nonretreat is applicable only when a defendant acts in self-defense against an unlawful intruder and that the privilege is not applicable in incidents between cohabitants. As such, the court rejected White's requested jury instruction.

The jury returned verdicts of guilty on both charges. After a motion for new trial was overruled, the court sentenced White to consecutive terms of 50 to 70 years' imprisonment on the second degree murder conviction and 10 to 20 years' imprisonment on the use of a weapon conviction. This appeal followed.

III. ASSIGNMENTS OF ERROR

White has assigned a variety of errors on appeal, including a challenge to the State's use of a peremptory challenge during jury selection, an assertion of prosecutorial misconduct, a challenge to the sentence imposed, and an assertion of cumulative error impacting his right to a fair trial. In addition, White challenges the court's denial of his requested jury instruction on the privilege of nonretreat and asserts that there was insufficient evidence to support the convictions. We find that resolution of these last two assertions of error resolves the appeal, and we decline to further address the remaining assertions.

See *State v. Enriquez-Beltran*, 9 Neb. App. 459, 616 N.W.2d 14 (2000) (appellate court is not obligated to engage in analysis which is unnecessary to adjudicate case and controversy before it).

IV. ANALYSIS

1. PRIVILEGE OF NONRETREAT

White first challenges the district court's refusal to give a requested jury instruction concerning the privilege of nonretreat. White sought to have the jury instructed that he did not have a duty to retreat if he was not the first aggressor. The issue of whether one has a duty to retreat or a privilege of nonretreat when acting in self-defense in the dwelling against another who is a cohabitant is an issue of first impression in Nebraska. We conclude that the rule followed by the majority of other jurisdictions, applying the privilege of nonretreat in this situation, is a better reasoned approach than the minority rule, limiting the privilege of nonretreat to incidents involving unlawful intruders. As such, we conclude that the court erred in denying White's requested jury instruction.

[1-3] Whether jury instructions given by a trial court are correct is a question of law. *State v. Edwards*, 278 Neb. 55, 767 N.W.2d 784 (2009). When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below. *Id*. To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009); *State v. Edwards, supra*.

(a) Correct Statement of Law

The first issue we must address, which is essentially the dispositive point of this appeal, is whether White's proffered jury instruction was a correct statement of the law. White

asserts that the privilege of nonretreat should apply if he was not the first aggressor in the altercation with Berg, regardless of whether Berg was a cohabitant or an unlawful entrant. The State asserts, and the district court found, that the privilege of nonretreat applies only if the other party involved in the altercation is an unlawful entrant. This is an issue of first impression in Nebraska, but we side with the majority of jurisdictions in agreeing with White.

[4-7] Neb. Rev. Stat. § 28-1409 (Reissue 2008) provides that the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion. Section 28-1409(4) provides that the use of deadly force shall not be justifiable unless the actor believes that such force is necessary to protect himself against death, serious bodily harm, kidnapping, or sexual intercourse compelled by force or threat. Section 28-1409(4)(a) and (b) further provides that the use of deadly force is not justifiable if the actor provoked the use of force against himself in the same encounter (i.e., was the first aggressor) or the actor knows that he can avoid the necessity of using such force with complete safety by retreating (i.e., the duty to retreat). Section 28-1409(4)(b)(i) provides that the actor shall not be obliged to retreat (i.e., has a privilege of nonretreat) from his dwelling or place of work, unless he was the initial aggressor or is assailed in his place of work by another person whose place of work the actor knows it to be.

The privilege of nonretreat has not been the subject of any substantial discussion in Nebraska jurisprudence. In *State v. Menser*, 222 Neb. 36, 382 N.W.2d 18 (1986), the defendant requested an instruction including the privilege of nonretreat, but the Nebraska Supreme Court affirmed the trial court's refusal of the instruction, because it was uncontroverted that the altercation between the defendant and the victim did not occur in the defendant's dwelling; the altercation occurred on a sidewalk in front of the defendant's dwelling. The court held that the privilege of nonretreat was inapplicable, given

that the defendant had in fact retreated voluntarily from his dwelling and was on a public sidewalk at the time of the altercation. *Menser* does not provide any insight into the question of whether the privilege of nonretreat should apply when the other party is a cohabitant or should be limited to situations involving unlawful intruders. In the present case, the district court recognized that *Menser* was not insightful on this issue and the court concluded that the statutory language concerning the privilege of nonretreat was intended to apply only in situations involving unlawful intruders.

The briefs of the parties have provided us with less than four pages of discussion, combined, on this issue of first impression. On appeal, White's brief cites no authority from any jurisdiction suggesting that the privilege has ever been applied to altercations between cohabitants; instead, White merely argues that the statutory language does not make a distinction. The State, similarly, does not reveal to the court in its brief that there has ever been application of the privilege concerning altercations between cohabitants; instead, the State indicates that "[o]ther courts have ruled [in accordance with the State's position and the district court's holding]," and cites to a handful of jurisdictions so holding. Brief for appellee at 15. Our research, however, reveals that this is an issue upon which other jurisdictions are split and, moreover, that the approach taken by the State and the district court is in a significant minority. See *State v. Shaw*, 185 Conn. 372, 441 A.2d 561 (1981) (noting that majority of jurisdictions have adopted rule that privilege of nonretreat applies equally to altercations with cohabitants and unlawful intruders). See, also, Annot., Homicide: Duty to Retreat Where Assailant and Assailed Share the Same Living Quarters, 67 A.L.R.5th 637 (1999) (citing 14 jurisdictions holding that privilege of nonretreat is applicable to cohabitants and 7 jurisdictions holding that it is not applicable to cohabitants, one of which (Florida) subsequently receded from that holding).

In *Weiand v. State*, 732 So. 2d 1044 (Fla. 1999), the Florida Supreme Court receded from its prior jurisprudence in *State v. Bobbitt*, 415 So. 2d 724 (Fla. 1982), and adopted the majority view that the privilege of nonretreat was applicable in

situations involving altercations between cohabitants. See, also, *State v. Smiley*, 927 So. 2d 1000 (Fla. App. 2006) (recognizing that subsequent statutory enactment entirely eliminated duty to retreat in Florida). As the court noted in *Weiand v. State, supra*, the privilege of nonretreat has early common-law origins, citing *People v. Tomlins*, 213 N.Y. 240, 107 N.E. 496 (1914). In *Weiand*, the Florida Supreme Court quoted from Judge Cardozo's explanation in *Tomlins* of the historical basis of the privilege:

> "It is not now and never has been the law that a man assailed in his own dwelling is bound to retreat. If assailed there, he may stand his ground and resist the attack. He is under no duty to take to the fields and the highways, a fugitive from his own home. More than 200 years ago it was said by Lord Chief Justice Hale: In case a man 'is assailed in his own house, he need not flee as far as he can, as in other cases of se defendendo, for he hath the protection of his house to excuse him from flying, as that would be to give up the protection of his house to his adversary by flight.' *Flight is for sanctuary and shelter, and shelter, if not sanctuary, is in the home. . . . The rule is the same whether the attack proceeds from some other occupant or from an intruder.*"

732 So. 2d at 1049-50 (emphasis supplied in *Weiand v. State, supra*).

[8] In *Weiand*, the Florida Supreme Court recognized that there was no logical basis for requiring one to retreat when attacked in one's home by a cohabitant but not requiring retreat if the attacker is a stranger. The danger posed and the sanctuary of the dwelling is the same regardless of the status of the attacker. The court further recognized that in addition to creating an illogical rule, denying the privilege of nonretreat in situations involving altercations between cohabitants was contrary to sound public policy, especially in cases of domestic violence. For example, one attacked by a paramour within the confines of one's dwelling would have a privilege of nonretreat, while one attacked by a spouse or family member would not have such a privilege and would have a duty to retreat away from the dwelling if possible. Such a rule, in addition

to providing an illogical distinction based on the identity of the attacker, would undermine public policy concerns about domestic violence in the home.

In *State v. Glowacki*, 630 N.W.2d 392 (Minn. 2001), the Minnesota Supreme Court recognized the competing views espoused by the minority of jurisdictions holding that the privilege of nonretreat is inapplicable to situations involving altercations between cohabitants. The Minnesota Supreme Court noted the jurisdictions taking the minority view generally assert that the value of human life and the importance of resolving disputes without violence support such a distinction and that cohabitants have a heightened obligation to treat one another with tolerance and respect. The Minnesota Supreme Court, while recognizing the minority approach, elected to join the majority of jurisdictions and adopted the rule that the privilege of nonretreat is applicable regardless of whether the aggressor is also rightfully in the home. Although we do not discount the sanctity of life or the notion that cohabitants should treat one another with tolerance and respect, the issue of retreat arises only once a cohabitant has already thrown tolerance and respect out the window and attacked; at such a point, we do not find it a compelling argument that one attacked by a cohabitant should, out of deference for continuing respect and tolerance toward the attacker, flee from the dwelling to seek safety.

[9] We also conclude that the majority rule is the more reasoned approach. We conclude that when one is attacked within one's dwelling, the right to defend oneself and the privilege of nonretreat should apply equally, regardless of whether the attacker is a cohabitant or an unlawful entrant. Such a rule leads to more uniform application than a rule that requires distinctions about the lawful or unlawful status of an attacking occupant. See *State v. Glowacki, supra*. Such a rule avoids the illogical distinction created by a rule that makes the privilege of nonretreat dependent upon both the location of the attack and the identity of the attacker. See *Weiand v. State*, 732 So. 2d 1044 (Fla. 1999). See, also, *State v. Shaw*, 185 Conn. 372, 380-81, 441 A.2d 561, 565 (1981), quoting *Jones v. The State*, 76 Ala. 8 (1884) ("'[w]hy, it may

be inquired, should one retreat from his own house . . . when assailed by a stranger who is lawfully upon the premises? Whither shall he flee, and how far, and when may he be permitted to return? He has a lawful right to be and remain there . . . .'") Such a rule is also in conformity with public policy concerns recognizing the plight of those who are victims of domestic abuse within the home. See, *State v. Glowacki*, *supra*; *Weiand v. State, supra*.

"'[T]he right to fend off an unprovoked and deadly attack is nothing less than the right to life itself, which [the] Constitution declares to be a basic right.'" *Weiand v. State*, 732 So. 2d at 1057, quoting *Perkins v. State*, 576 So. 2d 1310 (Fla. 1991) (Kogan, J., specially concurring). Thus, the privilege of nonretreat instruction should be equally available to anyone who is attacked within his or her dwelling, provided that the other necessary elements for the application of self-defense are present. See *Weiand v. State, supra*. There is no issue before us concerning the propriety of a self-defense instruction in this case, nor is there an issue concerning the reasonableness of White's use of force, which remains a matter for the jury to be properly instructed on. As such, we conclude that the district court erred in finding that White's proposed jury instruction concerning the privilege of nonretreat was not a correct statement of the law.

(b) Warranted by Evidence

Next, we consider whether the requested instruction was warranted by the evidence. Our review of the record reveals that there was sufficient evidence adduced to warrant the giving of the requested instruction about White's privilege of nonretreat.

White did not testify in his own behalf. Nonetheless, there was evidence adduced that White made a number of statements to law enforcement officers responding to the scene and interviewing him after his arrest. Those statements provided sufficient evidence to warrant the requested instruction, because they provided a basis for the jury to find that White was not the initial aggressor in the altercation occurring in White's dwelling.

When White called the 911 dispatcher requesting assistance for Berg, he indicated that he had stabbed Berg in the chest because Berg "came after" him. White indicated to Officer Murray, the first officer to make contact with White, that "his roommate had threatened to shoot him, and that's why he had to stab [Berg]." Similarly, Officer Flohrschutz, another of the early responding officers, testified that White indicated to the officers that Berg "had tried to stab him, so he stabbed [Berg] in return."

Officer Pilmaier transported White from the scene to the Sarpy County sheriff's office. Officer Pilmaier testified that White made a variety of statements about the events, including that "his roommate was trying to kill him," that "his roommate was crazy," and that "he was trying to protect himself" because "Berg was coming after him."

During an interview conducted at the Sarpy County jail, White indicated that Berg had come after him and that he had stabbed Berg to defend himself. White told Officer Bailey, the officer conducting the jail interview, that Berg had come after him "like a freight train" and that he had been threatened by Berg's size and weight. White indicated that he had attempted to stab Berg in the arm, but had missed and struck Berg in the chest. White told Officer Bailey that Berg had acted violently toward White, that Berg had a "look in his eyes," that Berg had rushed at him, and that he had stabbed Berg out of defense, not aggression.

Although White made other statements from which the jury might have rejected his claim of self-defense, the evidence adduced concerning these statements made by White would have supported a finding that he was not the initial aggressor and that Berg was the initial aggressor in the altercation in their dwelling. We note that while the State objected to the requested instruction, the State did not assert that there was no evidence to support a finding that White was not the initial aggressor and the State did not generally oppose the giving of a self-defense instruction. We conclude that the instruction was warranted by the evidence adduced.

(c) Prejudice

Finally, we must consider whether the court's refusal to give White's requested instruction about the privilege of nonretreat resulted in prejudice. We conclude that the instructions given did not correctly state the law, because they informed the jury that White had a duty to retreat if possible and that, accordingly, the failure to give the instruction concerning the privilege of nonretreat resulted in prejudice.

[10,11] Before an error in the giving of jury instructions can be considered as a ground for reversal of a conviction, it must be considered prejudicial to the rights of the defendant. *State v. Smith*, 282 Neb. 720, 806 N.W.2d 383 (2011). All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal. *State v. Schmidt*, 276 Neb. 723, 757 N.W.2d 291 (2008).

Instruction No. 7 given to the jury in this case was the court's instruction concerning self-defense. That instruction informed the jury that among the other findings required to conclude that White acted in self-defense, the jury was required to conclude that "before using deadly force [White] either tried to get away or did not try because he reasonably did not believe he could do so in complete safety." As such, when the court refused to give White's requested instruction about the privilege of nonretreat, the jury was left having been instructed that White had a duty to retreat, even from within his dwelling, before a finding of self-defense would be appropriate.

We conclude that the jury should have been instructed that White was not required to retreat from within his dwelling if Berg was the initial aggressor. There was evidence adduced to support a finding that Berg was the initial aggressor. The instructions given to the jury, without an instruction on the privilege of nonretreat, actually instructed the jury that White did have a duty to retreat. The jury was incorrectly instructed about a fundamental aspect of White's defense of self-defense. We certainly cannot find such error to be harmless.

2. SUFFICIENCY OF EVIDENCE

[12] Having found reversible error, we must consider whether White can be subjected to a retrial. See *State v. Smith*, 19 Neb. App. 708, 811 N.W.2d 720 (2012). The Double Jeopardy Clauses of the federal and state Constitutions do not forbid a retrial after an appellate determination of prejudicial error in a criminal trial so long as the sum of all the evidence admitted by the trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict. *State v. Riley*, 281 Neb. 394, 796 N.W.2d 371 (2011).

White has asserted that there was insufficient evidence to support his convictions. Our review of the record reveals that White made numerous statements acknowledging that he had stabbed Berg. In addition, although White made statements suggesting that he acted in self-defense and that Berg was the first aggressor, there were also many discrepancies in his statements and the jury could have concluded that his statements lacked credibility and that his actions were not in self-defense. Although White alleged that he had acted in self-defense and, as noted above, the jury was not properly instructed about the privilege of nonretreat, there was sufficient evidence adduced to support the convictions for second degree murder and use of a weapon in the commission of a felony. As such, we conclude that White can be retried on the charges.

V. CONCLUSION

We find that there is no duty to retreat (i.e., there is a privilege of nonretreat) when acting in self-defense in the dwelling against another who is a cohabitant. We find that the district court erred in failing to instruct the jury that White did not have a duty to retreat if he was not the first aggressor, as requested by White. We also find, however, that there was sufficient evidence adduced to support the convictions and that the case is appropriately reversed and remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.