IN THE COURT OF APPEALS OF IOWA

No. 7-588 / 06-1232
Filed September 19, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MARK EMERSON WILLEY,
Defendant-Appellant.

Appeal from the Iowa District Court for Jackson County, John A. Nahra, Judge.

Mark Willey appeals following his convictions of assault with intent to inflict serious injury, first degree burglary, and willful injury causing serious injury. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and David Adams, Assistant State Appellate Defender, for appellant.

Mark Emerson Willey, pro se.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, and Phil Tabor and John Kies, County Attorneys, for appellee.

Considered by Huitink, P.J., and Vogel and Baker, JJ.

VOGEL, J.

Mark Willey appeals from his convictions of burglary in the first degree, willful injury causing serious injury, and assault with intent to inflict serious injury. Through appellate counsel, Willey asserts, among other issues, that there was insufficient evidence to sustain his convictions and the district court erred by not instructing the jury on the defense of self defense. Willey raises additional issues pro se. We affirm.

I. Facts Presented to the Jury.

Willey's sister, Emelie Harmon, ended her shift at work at nine o'clock in the morning and walked home. Upon arriving home, she unlocked and opened the back doors, and stood in the doorway trying to coax her cat into the house. As Harmon was standing in the doorway, Willey jumped out of the butler's pantry in the kitchen and rushed at Harmon, pointing a stun gun towards her head. Harmon attempted to flee but was attacked by Willey on the patio outside the back door. Willey stabbed Harmon multiple times, covered her with a tarp, then took her keys and locked her house. Harmon made her way to the street where a motorist stopped to assist. After being driven by ambulance to a nearby emergency room, Harmon was taken by air ambulance to the University Hospital in Iowa City. Shortly after the incident occurred, Willey was arrested. He had a knife in his pocket and was carrying a bag that contained a stun gun, Harmon's keys, a screwdriver, a pry bar, rope, plastic wrap, and other incriminating items. Willey also had multiple blood stains on his clothes.

Willey was charged with attempted murder, burglary, and willful injury causing serious injury. He pled not guilty and the case went to trial. The jury

found Willey guilty of the lesser-included offense of assault with intent to inflict serious injury in violation of Iowa Code section 708.2(1) (2005), first-degree burglary in violation of section 713.3, and willful injury causing serious injury in violation of section 708.4(1). After merging assault with intent to inflict serious injury with willful injury causing serious injury, the district court sentenced Willey to consecutive sentences of twenty-five years on the burglary conviction and ten years on the willful injury conviction

II. Sufficiency of the Evidence.

Willey argues that sufficient evidence does not support his burglary and willful injury convictions. We review challenges to the sufficiency of the evidence for correction of errors at law. Iowa R. App. P. 6.4; *State v. Bash*, 670 N.W.2d 135, 137 (Iowa 2003) (citing *State v. Webb*, 648 N.W.2d 72, 75-76 (Iowa 2002)). A jury verdict is upheld if it is supported by substantial record evidence, which is evidence that could convince a rational jury that the defendant is guilty of the crime charged beyond a reasonable doubt. *State v. Nitcher*, 720 N.W.2d 547, 556 (Iowa 2006); *Bash*, 670 N.W.2d at 137 (citing *Webb*, 648 N.W.2d at 75-76). Substantial evidence must do more than raise suspicion or speculation; it must raise a fair inference of guilt. *Bash*, 670 N.W.2d at 137 (citing *Webb*, 648 N.W.2d at 75-76). When reviewing the sufficiency of the evidence, we review the entire record in the light most favorable to the state, including all legitimate inferences that may be reasonably deduced from the record. *State v. Corsi*, 686 N.W.2d 215, 218 (2004). "Inherent in our standard of review of jury verdicts in criminal cases is the recognition that the jury was free to reject certain evidence, and

credit other evidence." *Nitcher*, 720 N.W.2d at 556 (quoting *State v. Anderson*, 517 N.W.2d 208, 211 (Iowa 1994)).

A. Burglary.

Willey first argues that sufficient evidence does not support his conviction for first-degree burglary. The Iowa Code defines first-degree burglary as the following:

> A person commits burglary in the first degree if, while perpetrating a burglary in or upon an occupied structure in which one or more persons are present, any of the following circumstances apply:
> . . . .
> b. The person has possession of a dangerous weapon
> c. The person intentionally or recklessly inflicts bodily injury on any person

Iowa Code § 713.3.

Willey contends the State did not offer sufficient evidence that (1) he entered the house, (2) Harmon was present in the house, and (3) he was armed with a dangerous weapon in the house or he inflicted any bodily injury in the house. As to the first argument, the jury heard testimony that Willey had previously lived in Harmon's house for twelve years and that the house had fifty-seven windows. Harmon also testified that she believed she had left some windows open that were only secured by a screen. Additionally, Willey was later found with a screwdriver and pry bar in his possession. From this testimony, the jury could have determined that Willey gained access to the house.

The record also supports the jury's finding that Harmon was present in the house. Harmon testified that she arrived home from work, opened the storm door, and unlocked and opened the kitchen door that swung into the kitchen. She further stated that her keys were in the door and she had her "left foot in the

house" when Willey jumped out of the kitchen pantry at her. Harmon specifically testified:

> Q. You have opened your door? A. Yes.
> Q. Have you stepped into your home yet? A. I would have had my left foot in the house.
> Q. You had your left foot in the house? A. Yes.

Willey argues that Harmon's testimony on cross-examination contradicts her statements that her left foot was inside the house. Willey points to the following testimony:

> Q. You never actually went inside your house. Is that actually correct, ma'am? A. That's correct.
> Q. What do you consider a threshold? A. The portion between the doorjambs.
> Q. Did you pass the threshold at all? A. My left foot would have been inside the house.
> . . . .
> Q. And did you step a foot at all *past* the threshold of your house? A. I don't think so.

(Emphasis added.)

However, it is the jury's duty to evaluate the evidence and resolve any conflicts in the evidence. *See State v. Musser*, 721 N.W.2d 758, 761 (Iowa 2006) ("It is not the province of the court . . . to resolve conflicts in the evidence, to pass upon the credibility of witnesses, to determine the plausibility of explanations, or to weigh the evidence; such matters are for the jury."); *State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993) ("The jury is free to believe or disbelieve any testimony as it chooses and to give weight to the evidence as in its judgment such evidence should receive." (citing *State v. Blair*, 347 N.W.2d 416, 419 (Iowa 1984))). Based on the evidence presented, the jury could have determined that Harmon was standing in the doorway with her foot in the house,

and therefore was present in the house. *See State v. Pace*, 602 N.W.2d 764, 773 (Iowa 1999) ("[E]ntry includes breaking the plane of the threshold of a house."); *State v. Sinclair*, 622 N.W.2d 722 (Iowa Ct. App. 2000) (finding a person present in a house when the victim escaped out of the back door as the defendant was breaking down the front door).

The record also supports the jury's finding that Willey possessed a dangerous weapon while committing the burglary. Iowa Code section 702.7 defines a dangerous weapon to include "any instrument or device of any sort whatsoever which is actually used in such a manner as to indicate that the defendant intends to inflict death or serious injury upon the other." The jury heard testimony that Willey was armed with a stun gun when he jumped out of the kitchen pantry and used the stun gun by pointing it at Harmon's head and neck. Later while Willey was struggling with Harmon, a knife fell out of Willey's clothing. During the attack, Harmon saw the stun gun go off, and Willey used the knife to stab Harmon several times. The stun gun and knife were also in Willey's possession when he was arrested. From the evidence, the jury could have determined that Willey possessed the stun gun and knife while inside the house, and therefore was armed with a dangerous weapon. *See State v. Green*, 709 N.W.2d 535, 58 (Iowa 2006) (stating that steel shards held in a defendant's hand during a confrontation is a dangerous weapon because they would have been used in a manner indicating an intent to injure or kill); *State v. Geier*, 484 N.W.2d 167, 171 (Iowa 1992) (finding that a stun gun is a dangerous weapon). Our review of the entire record leads us to conclude that substantial evidence supports Willey's conviction for first-degree burglary.

B. Willful Injury.

Willey next argues that sufficient evidence does not support his conviction for willful injury causing serious injury because the State did not offer sufficient evidence that he caused a serious injury to Harmon. A serious injury is a "[b]odily injury that does any of the following: (1) Creates a substantial risk of death, (2) Creates serious permanent disfigurement, [or] (3) Causes protracted loss or impairment of the function of any bodily member or organ." Iowa Code § 702.18(b). After reviewing the record, we conclude there was substantial evidence for the jury to conclude that the injuries suffered by Harmon were serious injuries, and specifically that the injuries created a substantial risk of death.

"[A] substantial risk of death means more than just any risk of death but does not mean that death was likely. If there is a 'real hazard or danger of death,' serious injury is established." *State v. Hilpipre*, 395 N.W.2d 899, 904 (Iowa Ct. App. 1986) (quoting *State v. Phams*, 342 N.W.2d 792, 796 (Iowa 1983)). In determining whether a victim has suffered serious injury, the risk of death may be assessed before the victim receives treatment for their injuries. *Id.* (citing *State v. Anderson*, 308 N.W.2d 42, 47 (Iowa 1981)). In this case, Harmon testified that Willey attacked her, stabbed her multiple times, and concealed her body by covering her with a tarp when the attack was over. Harmon, fearing she was bleeding to death, struggled to get herself out to the street to find help. Witnesses testified that it was difficult to determine precisely where Harmon was injured because of the amount of blood visible on her body and running down the

curb. After the ambulance arrived, Harmon was taken to the emergency room where doctors found injuries to Harmon's eye, chin, neck, ear, arms, and abdomen. The stab wound in her neck penetrated her skin proceeding down to her trachea. The stab wound in her abdomen required surgery to determine if internal organs had been affected. An emergency room doctor testified that if Harmon's injuries were left untreated, she could have bled to death. He further testified that the injuries to Harmon's eye, neck, and abdomen required that Harmon be transported to the University of Iowa Hospital by air ambulance in order to be treated by trauma team specialists. At the University of Iowa Hospital, Harmon underwent exploratory surgery to her abdomen and spent eight days in the hospital, three of which were in the intensive care unit. Based on this evidence, the jury could have concluded that a substantial risk of death existed for Harmon from the injuries inflicted upon her. *See Hilpipre*, 395 N.W.2d at 905 (discussing that substantial risk of death existed for the victim without proper treatment).

III. *Self-Defense Instruction.*

Willey next argues that the district court erred in failing to give a self-defense instruction. We review challenges to the district court's refusal to submit a jury instruction for errors at law. *State v. Ceaser*, 585 N.W.2d 192, 193 (Iowa 1998) (citing *State v. Rains*, 574 N.W.2d 904, 915 (Iowa 1998)). If substantial evidence exists demonstrating that a justification defense applied, the district court must instruct on the justification defense. *Rains*, 574 N.W.2d at 915. Substantial evidence triggering the district court's duty to submit a justification defense instruction to the jury may come from any source. *Id*. Although the

burden to disprove a justification defense rests with the State, the defendant bears the initial burden of demonstrating that the record contains substantial evidence to support the instruction. *Ceaser*, 585 N.W.2d at 194 (citing *State v. Lawler*, 571 N.W.2d 486, 489 (Iowa 1997)). Self defense is statutorily designated as a defense of justification. *State v. Dunson*, 433 N.W.2d 676, 677 (Iowa 1988). The Iowa Code 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." Iowa Code § 704.3.

On cross-examination Harmon admitted that she injured Willey in 2003 during a fight with him. However, her unrefuted testimony in this case is that Willey startled her as she was entering her home, aggressively lunging at her with a stun gun. Willey did not present any evidence to suggest that self defense was applicable, namely that he had a reasonable belief the force he used was necessary, that it was reasonable, or that he was not the initial aggressor. From our review of the record, we conclude the district court did not err in declining to instruct the jury on self defense. *See State v. Shanahan*, 712 N.W.2d 121, 141 (Iowa 2006) ("A court should not submit an instruction on an issue for which there is not substantial evidence to support that issue." (citing *Seaway Candy, Inc. v. Cedar Rapids YMCA*, 283 N.W.2d 315, 316 (Iowa 1979))).

Willey raises three additional arguments, that the district court erred: (1) in responding to a question asked by the jury, (2) by "impermissibly pyramiding counts I and III," and (3) by seating a tainted jury. We find that error was either waived or not preserved on these arguments. However, even if error had been preserved, we find them to be without merit.

We therefore affirm Willey's convictions and the judgment of the district court.

AFFIRMED.