STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1570

State of Minnesota,
Respondent,

vs.

Jason T. McKenzie,
Appellant.

Filed July 29, 2019
Affirmed
Schellhas, Judge

Olmsted County District Court
File No. 55-CR-18-817

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Jason T. Loos, Rochester City Attorney, Brent R. Carlsen, Assistant City Attorney, Rochester, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Abigail H. Rankin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Jesson, Presiding Judge; Schellhas, Judge; and Tracy M. Smith, Judge.

U N P U B L I S H E D O P I N I O N

SCHELLHAS, Judge

Appellant challenges his conviction of misdemeanor domestic assault, arguing that the district court erred by denying his request for a self-defense jury instruction. We affirm.

FACTS

After dating for about six months, appellant Jason McKenzie and A.L. began residing together and eventually bought a house together. About two years later, the couple had an argument on February 3, 2018, that resulted in McKenzie being cited by respondent State of Minnesota for three misdemeanor offenses: domestic assault (fear), domestic assault (harm), and disorderly conduct. The state dismissed the disorderly conduct charge and tried the remaining charges to a jury.

A.L. testified that, on February 3, 2018, she "got up early" and "read for a little bit," and then took a bath. Afterwards, A.L. returned to bed "to snuggle up with" McKenzie with the intention of having "a romantic sexual encounter." But when A.L. began to rub McKenzie's back and kiss him, he "put [her] hand away," "got up, grabbed his glasses, and then . . . forced [her] into the bed, telling [her], 'This is what you want.'" When McKenzie was on top of her, she yelled at him, saying, "No, Jason don't. Stop." A.L. claimed that when she "twisted" herself out from under him, he "let go" and walked out of the room. McKenzie then walked into the bathroom, grabbed a picture off the wall, and threw it, shattering the glass. He then went into the living room, and told A.L., "No," after she asked him to "leave." According to A.L., she again asked McKenzie to leave, but he refused, telling her that he was "not leaving," and that she was "not getting rid of [him]." McKenzie

then went into the kitchen, grabbed a knife, put it across his wrist, and stated that he was "going to kill himself." After McKenzie grabbed the knife, he "punched the bathroom door."

A.L. went "into the bedroom to sit for a little bit," and when she came out, she told McKenzie, "This isn't how people in love act," asked him to leave, and said that she was done. McKenzie then "barrel[ed] down the hall," grabbed A.L., pushed her into the door frame of the hall with "full force." A.L. then grabbed her coat and purse and left.

A.L. claimed that during the ordeal, McKenzie was "angry" and "yelling," and that she was "scared." She drove to a parking lot and cried, before returning to the house about an hour later. When A.L. returned to the house, McKenzie was gone, and she proceeded to change the locks on the house. The next day, she called the police and gave a statement describing the events of the day before, which was recorded on a body camera. A.L. told the officer that she had bruising and revealed some text messages that she received from McKenzie in which he apologized for his actions.

McKenzie testified that the night before the incident, he went "to bed in a bad mood" because the couple had argued, and that when he woke up, A.L. was "making unwanted advances towards" him. McKenzie "asked her to stop," but she persisted and instead "climbed on top" of him. McKenzie "flipped over to [his] back and asked [A.L.] to get off of [him]," and then "pushed her off of [him]," so that he could get up. McKenzie went into the bathroom, and when he got up from using the toilet, he bumped a plaque, causing it to fall and shatter on the floor. While A.L. was getting a broom to pick up the broken glass, she "muttered hurtful things" to him such as "Limp d-ck," and "homosexual." McKenzie

testified that he suffers "some medical problems" because of his "drug use," and that he was "frustrated" by his "inability to perform sexually." He claimed that he vented his frustrations by punching a hole through the door, but that at "no point did [he] intend to cause any fear or harm to [A.L.]."

After the defense rested, McKenzie requested a self-defense jury instruction under Minn. Stat. § 609.06, subd. 1(3) (2016), arguing that the instruction was appropriate because his testimony established that he used reasonable force to resist unwanted and persistent sexual contact. The district court denied the request, concluding that "it was [McKenzie's] testimony that he wasn't threatened by [A.L.'s] advances, he was saddened by those advances." The jury found McKenzie guilty of domestic assault (fear) and not guilty of domestic assault (harm). The court adjudicated McKenzie guilty of domestic assault (fear), stayed imposition of sentence, and placed him on probation.

This appeal follows.

D E C I S I O N

McKenzie challenges the denial of his request for a self-defense jury instruction. "The district court enjoys considerable latitude in selecting jury instructions, including the specific language of those instructions." *State v. Peltier*, 874 N.W.2d 792, 797 (Minn. 2016). This court reviews a district court's decision to give a particular jury instruction for an abuse of discretion. *Id*. We review the jury instructions as a whole to determine if they accurately state the law in a manner that is understandable to the jury. *Id*.

A defendant has the right to present a complete defense. *State v. Profit*, 591 N.W.2d 451, 463 (Minn. 1999). Although a defendant may assert his or her theory of the case at

trial, a district court "has discretion not to instruct the jury on the theory" if no evidence supports the theory. *State v. Vazquez*, 644 N.W.2d 97, 99 (Minn. App. 2002). To merit a new trial, a defendant must show that he or she was entitled to the jury instruction and that the district court's failure to give the instruction was not harmless. *State v. Pendleton*, 567 N.W.2d 265, 270 (Minn. 1997). "If the defense was not prejudiced by a refusal to issue an instruction, there is no reversible error." *State v. Hannon*, 703 N.W.2d 498, 509 (Minn. 2005).

Self-defense permits a person to use a reasonable amount of force against another "when used . . . in resisting or aiding another to resist an offense against the person." Minn. Stat. § 609.06, subd. 1(3). A self-defense claim has four elements: (1) an absence of aggression or provocation by the party claiming self-defense; (2) an actual and honest belief that "imminent danger of bodily harm" would result; (3) a reasonable basis for this belief; and (4) a lack of reasonable means to retreat or avoid the physical conflict.[1] *State v. Devens*, 852 N.W.2d 255, 258 (Minn. 2014) (quotation omitted). The defendant has the initial burden of producing evidence to support a self-defense claim, but the state retains the burden of proving beyond a reasonable doubt that a defendant did not act in self-defense. *Id*. In determining whether the prima facia showing has been made, "the evidence

[1] The parties agree that the fourth element is not applicable because McKenzie was at home and the duty to retreat does not exist if acting in self-defense within the home. *See v. Glowacki*, 630 N.W.2d 392, 402 (Minn. 2001) (adopting rule that "[t]here is no duty to retreat from one's own home when acting in self-defense in the home, regardless of whether the aggressor is a coresident").

is viewed in the light most favorable to the party requesting the instruction." *State v. Edwards*, 717 N.W.2d 405, 410 (Minn. 2006).

McKenzie argues that the district court abused its discretion by failing to instruct the jury on self-defense because, "when viewed in the light most favorable to [him] as the requesting party, the evidence certainly supports [his] claim" that he acted in self-defense to prevent a sexual assault from A.L. We disagree.

The record reflects that on the morning of February 3, 2018, A.L. returned to bed and made sexual advances toward McKenzie by caressing him and then climbing on top of him. But although McKenzie testified that A.L.'s sexual advances were "unwanted," he never testified that he felt threatened by A.L.'s conduct. Instead, as the district court found, McKenzie testified that he felt saddened and frustrated that he "could not satisfy the woman that I love." Moreover, there is no evidence to support a claim that McKenzie felt threatened with bodily harm. The parties were in a romantic relationship and no evidence indicated that A.L. acted aggressively or in a threatening matter. Rather, A.L.'s conduct of returning to bed and attempting to initiate a romantic encounter is consistent with the nature of their relationship. And even if McKenzie felt threatened of bodily harm, such as harm from a sexual assault, no evidence indicated that his belief would be reasonable.

No evidence indicated that A.L. grabbed or attempted to touch McKenzie's intimate body parts. Instead, the evidence reflects that A.L. was caressing and massaging his back and giving him kisses. The record reflects that McKenzie later sent A.L. text messages apologizing for his conduct and stating that she did "not deserve the way I acted." In light of the considerable latitude afforded the district court in the selection of jury instructions,

we conclude that the court did not abuse its discretion by denying McKenzie's request for a self-defense jury instruction.

Even if the district court abused its discretion by denying Mckenzie's request for a self-defense jury instruction, McKenzie is unable to show that the error was not harmless. *See Pendleton*, 567 N.W.2d at 270 ("An error in jury instructions is not harmless and a new trial should be granted if it cannot be said beyond a reasonable doubt that the error had no significant impact on the verdict."). McKenzie was found guilty of domestic assault with intent to cause fear in violation of Minn. Stat. § 609.2242, subd. 1(1) (2016). That statute provides that whoever "commits an act with intent to cause fear in another of immediate bodily harm or death" against a family or household member is guilty of a misdemeanor. *Id*.

Here, McKenzie's claim of self-defense related to A.L.'s conduct of returning to bed and attempting to engage in sexual activity. But after McKenzie got out of bed, the alleged sexual-assault threat no longer existed. A.L. testified that after McKenzie got out of bed, he threw a picture, shattering the glass, held a knife to his wrist, saying he was going to kill himself, and claimed that he was going to burn the house down. A.L. also claimed that McKenzie was "angry" and was "yelling" and that he "was very tense, clenching his fists . . . and irate." A.L. further testified that McKenzie "punched the bathroom door" and later "barrel[ed] down the hall" and pushed A.L. into the door frame. According to A.L., McKenzie's actions made her feel "terrified" and "scared." The jury believed A.L.'s testimony, and her testimony regarding McKenzie's actions after he got out of bed demonstrates beyond a reasonable doubt that any error in the lack of a self-

defense jury instruction had no significant impact on the verdict. McKenzie, therefore, is unable to show that he is entitled to a new trial.

Affirmed.