STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2065

State of Minnesota,
Respondent,

vs.

Daniel Joseph Devens,
Appellant.

Filed December 9, 2013
Affirmed
Bjorkman, Judge

Waseca County District Court
File No. 81-CR-12-368

Lori Swanson, Attorney General, Robert Plesha, Assistant Attorney General, St. Paul, Minnesota; and

Paul Dressler, Waseca County Attorney, Waseca, Minnesota (for respondent)

Cathryn Middlebrook, Interim Chief Appellate Public Defender, Sharon E. Jacks, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Stauber, Judge; and Bjorkman, Judge.

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

BJORKMAN, Judge

Appellant challenges his third-degree assault conviction, arguing that the district court abused its discretion by declining to give a defense-of-property instruction and instructing the jury that he had a duty to retreat. We affirm.

FACTS

On October 14, 2011, around midnight, appellant Daniel Joseph Devens heard loud knocking coming from the hallway of his secured apartment building in Waseca. Devens opened his door and saw an intoxicated J.P. knocking on the door of L.J.'s apartment down the hall. Devens told J.P. he was too loud, and asked him to leave the building.

J.P. and Devens offered varying accounts of what happened next. According to J.P., when he started to walk down the hallway, Devens jumped him from behind, hitting him in the back and the head. J.P. told Devens to leave him alone and tried to fight back, but found it difficult to defend himself. The two men fell down the stairs toward the building entry and J.P. lost consciousness.

Devens testified that he put his hand on J.P.'s shoulder and asked him to leave the building. J.P. walked about 15 feet, turned around, and took a swing at Devens. Devens grabbed J.P.'s arms and walked him down the hallway. J.P. struggled, broke loose, and took another swing at Devens. Devens hit J.P. back and started walking him down the stairs. But Devens tripped and they both rolled down the stairs, landing at the bottom.

J.P. attempted to hit Devens again, so Devens swung at him. Devens then grabbed J.P. by the shoulders and dragged him out the door of the apartment building.

Two people were standing across the street from the apartment building at the time of the incident. They both saw a man standing in the apartment entry area who appeared to be kicking something and yelling, so they flagged down a passing police car. Devens was in his apartment when the police arrived. When questioned, Devens admitted fighting with J.P. that evening. As a result of the fight, J.P. sustained injuries and was hospitalized for approximately one week. Devens was charged with third-degree assault. The district court instructed the jury on self-defense and the duty to retreat. The jury found Devens guilty. This appeal follows.

D E C I S I O N

District courts have broad discretion when instructing a jury, so long as the jury instructions do not confuse, mislead, or materially misstate the law. *State v. Larson*, 787 N.W.2d 592, 601 (Minn. 2010). If a district court erred in its instructions, this court determines whether the error was harmless. *State v. Pendleton*, 759 N.W.2d 900, 907 (Minn. 2009). A defendant is entitled to an instruction on his theory of the case only if the evidence supports it. *State v. Coleman*, 373 N.W.2d 777, 781 (Minn. 1985). When reviewing whether a particular instruction should have been given, we view the evidence in the light most favorable to the party requesting the instruction. *Turnage v. State*, 708 N.W.2d 535, 545-46 (Minn. 2006).

I. The district court did not abuse its discretion by declining to give a defense-of-property instruction.

A criminal defendant who intends to offer evidence of a defense other than lack of guilt must inform the prosecuting attorney in writing prior to the rule 11 omnibus hearing. Minn. R. Crim. P. 9.02, subd. 1(5). A district court has discretion to grant a continuance or impose sanctions for rule 9 violations. *State v. Lindsey*, 284 N.W.2d 368, 373 (Minn. 1979); *see also* Minn. R. Crim. P. 9.03, subd. 8. In exercising its discretion to impose a discovery sanction, the district court should determine: "(1) the reason why disclosure was not made; (2) the extent of prejudice to the opposing party; (3) the feasibility of rectifying that prejudice by a continuance; and (4) any other relevant factors." *Lindsey*, 284 N.W.2d at 373. Even where there is an abuse of discretion, we will not remand for a new trial if the verdict rendered was "surely unattributable" to the error. *In re Welfare of M.P.Y.*, 630 N.W.2d 411, 419 (Minn. 2001) (quotation omitted).

Devens challenges the district court's refusal to instruct the jury on defense of property as a sanction for failing to disclose the defense until the day before trial. We are not persuaded because the *Lindsey* factors support the district court's decision. First, Devens offers no reason for failing to timely notify the state of his defense-of-property defense. Second, the state would have been prejudiced if Devens had been permitted to advance this new defense. The state prepared its case and selected witnesses based on the defenses Devens timely disclosed—self-defense and lack of guilt. Neither of these defenses turned on whether Devens had a possessory interest in the common stairway or whether J.P. was a trespasser. Third, the fact that Devens did not ask the district court to

continue the trial or waive his speedy-trial demand undermines his argument that a continuance would have rectified any prejudice to the state. And the fact that a trial continuance was possible does not mean the district court abused its discretion by imposing the sanction it did. *See Lindsey*, 284 N.W.2d at 373-74 (precluding witness testimony was appropriate because case was too far into trial for a continuance when, midway into trial, defendant attempted to call six previously undisclosed witnesses).

More importantly, we discern no abuse of discretion because the evidence does not support a defense-of-property instruction. *See State v. Pendleton*, 567 N.W.2d 265, 270 (Minn. 1997). Minnesota law permits a person to use "reasonable force" toward another person "when used by any person in lawful possession of real . . . property . . . in resisting a trespass upon or other unlawful interference with such property." Minn. Stat. § 609.06, subd. 1(4) (2010). Devens cites his testimony that he thought that J.P. was trespassing in the building, and that he used reasonable force to resist the trespass. But Devens did not own the building, was not the apartment manager, and identifies no property interest in the hallway that would allow him to exclude other residents or their guests from that space. Further, J.P. testified that he was in the building at L.J.'s invitation. Because there was no contrary evidence, Devens was not resisting a trespass or unlawful interference with the property.

On this record, we conclude that the district court did not abuse its discretion by denying Devens's request for a defense-of-property instruction.[1]

II. The district court did not abuse its discretion by instructing the jury on the duty to retreat.

Devens next challenges the duty-to-retreat instruction the district court gave after it concluded that the apartment hallway was not part of Devens's home. A person has no duty to retreat when acting in self-defense in their home. *State v. Carothers*, 594 N.W.2d 897, 903 (Minn. 1999). The rule is premised on the special status of the home as a safe place and the view that "[i]f assailed there, [a person] may stand his ground and resist the attack." *State v. Glowacki*, 630 N.W.2d 392, 401-02 (Minn. 2001) (quotation omitted). Conversely, persons defending themselves outside of their home must retreat if reasonably possible "because the law presumes that there is somewhere safe to go—home." *Id.* at 401.

Devens cites no controlling caselaw holding that an apartment hallway is part of a home from which there is no duty to retreat. Although there is no caselaw defining the term "home" in the context of the duty to retreat, we consider how the law treats apartment hallways in other contexts. For example, Minnesota courts have never considered the apartment hallway as part of the curtilage that is protected as part of the home in search and seizure caselaw. *See State v. Davis*, 732 N.W.2d 173, 179 (Minn. 2007) (finding no expectation of privacy in common apartment hallway where defendant

[1] Devens also argues that he was denied effective assistance of counsel and his right to present a defense when his attorney did not give notice of a defense-of-property defense. Because he was not entitled to the defense, his claim of ineffective assistance lacks merit.

presented no evidence that he controlled access to the hallway or that access to the hallway or the apartment building itself was limited by a locked door); *see also United States v. Eisler*, 567 F.2d 814, 816 (8th Cir. 1977) (holding that there is no reasonable expectation of privacy in the hallway of an apartment building even where doors are secured because "common hallways . . . [are] available for the use of residents and their guests, the landlord and his agents, and others having legitimate reasons to be on the premises"). Similarly, hallways are considered common areas or public places for purposes of various prohibitions on conduct in public places as well as property law. Minn. Stat. §§ 144.413, subd. 2 (defining public place to include common areas of rental buildings), 515.02, subd. 7 (defining common areas in condominium to include halls, corridors, lobbies, stairs, and stairways) (2010).

Courts in other jurisdictions have concluded that there is a duty to retreat from an apartment hallway because it is not an area over which the renter has exclusive control or possession. *See State v. Silva*, 684 A.2d 725, 728 (Conn. App. 1996) (holding defendant had duty to retreat from apartment hallway because the duty-to-retreat rule does not encompass common areas such as stairways, hallways, and foyers); *People v. Aiken*, 795 N.Y.S.2d 158, 162 (N.Y. App. 2005) (noting that whether an area is part of a dwelling under New York law for defense of dwelling depends on the extent to which the defendant exercises exclusive possession and control over the area). We find these cases persuasive. Even if access to the apartment building was limited, and Devens had a right to be in the hallway and stair areas, there was somewhere safer for him to go at the time

of the altercation—his own apartment unit. Accordingly, we conclude that the district court did not abuse its discretion by instructing the jury on the duty to retreat.

Affirmed.