This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2006).

STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0770

State of Minnesota,
Respondent,

vs.

Kevin Daniel Nelson,
Appellant.

Filed June 17, 2008
Affirmed
Crippen, Judge[*]

Clay County District Court
File No. K4-05-2337

Lori Swanson, Attorney General, Peter R. Marker, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Brian J. Melton, Clay County Attorney, 807 North Eleventh Street, P.O. Box 280, Moorhead, MN 56560 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant State Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Peterson, Judge; and Crippen, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

CRIPPEN, Judge

Appellant Kevin Nelson challenges his assault conviction, arguing that the district court erred in refusing to give jury instructions on voluntary intoxication and self-defense. We affirm.

FACTS

Appellant spent the evening of November 11, 2005, with his friend Eugene Bates, first at Bates's apartment, then in some bars for several hours. Others joined them when they returned to Bates's apartment at about 10:30 p.m., including appellant's girlfriend, who dropped off appellant's seven-month-old child and left. Appellant decided to leave the apartment and walk to his destination, taking his child with him. Appellant testified that everyone in the apartment tried to talk him out of leaving because it was cold outside and unsafe for the child. Appellant stated that at this point he was drunk.

As Bates tried to stand in appellant's way, the two pushed one another and a fight ensued; at some point Bates bit appellant's thumb. Appellant then left with the child, and Bates followed him. Appellant saw Bates approaching, set the child down, and took his knife out of his pocket. Appellant testified that he waved the knife back and forth at chest level, but that he did not think Bates saw the knife because it was dark. Appellant testified that he was waving the knife around in an effort to scare Bates, but that Bates came toward him and fell into the knife. Bates's life was endangered by the stab wound, but he recovered after surgery.

Appellant fled after the stabbing, but police apprehended him a short time later. Without prompting, appellant told the officer that he stabbed Bates, that "[i]t was self-defense." The police officer testified that he noted several signs of intoxication in appellant, including glassy eyes, slurred and deliberate speech, and a strong odor of alcohol. Early the next morning when police interviewed him, appellant stated that Bates followed him out of the apartment and punched him twice, and that appellant "cut" Bates. The police officer rephrased appellant's statement as "So, he was punching you and you felt the need to defend yourself so then you cut him" to which appellant responded, "Yeah, I'm not, I'm not a fighter. My whole life I've got in one fight."

Appellant was charged with first-degree assault. Prior to trial, he gave notice of the defenses of self-defense and voluntary intoxication. Before appellant testified, the district court ruled that it would not give the voluntary-intoxication instruction because caselaw indicates assault is a general intent crime and the voluntary-intoxication instruction can only be given for specific intent crimes.

The court indicated that it probably would give a self-defense instruction. Appellant testified that the stabbing was an accident—that he did not intentionally stab Bates or drive the knife into him, but that he was holding the knife and Bates came at him and inadvertently fell into the knife. Appellant stated that he did not tell the police that it was an accident because he "was scared."

Because of appellant's accident testimony, the district court determined it would not give a self-defense instruction. Appellant argued that he should receive the self-defense instruction because he held the knife out to scare Bates. The court rejected this

argument, observing that appellant was not charged with second-degree assault for brandishing a weapon. The court also rejected appellant's renewed request for a voluntary-intoxication instruction.

The jury returned a guilty verdict on the charged offense. The court denied appellant's motion for a downward durational departure and sentenced appellant to 134 months in prison.

D E C I S I O N

We review the district court's refusal to issue a requested jury instruction for abuse of discretion, focusing on whether the refusal resulted in error. *State v. Kuhnau*, 622 N.W.2d 552, 555 (Minn. 2001).

1.

A defendant is entitled to a voluntary-intoxication jury instruction when he is charged with a specific-intent crime, the evidence shows the defendant's intoxication, and he testifies that this explains his conduct. *State v. Torres*, 632 N.W.2d 609, 616 (Minn. 2001). The district court did not dispute that there was evidence of intoxication, but instead denied the instruction based on its conclusion that assault is a general intent crime. But because appellant is unable to demonstrate that he offered intoxication as an explanation for his actions, we need not address the other two factors.

The record shows that appellant did not establish a link between his intoxication and the stabbing. As the district court observed, appellant's testimony suggests that "the whole thing was an accident caused by Mr. Bates not seeing the knife and approaching

[appellant] in some fashion that caused him to fall or stumble into the knife in some fashion."

Appellant argues that the evidence of intoxication was so strong that it constituted an "effective offer" of intoxication as an explanation, citing a statement in *Torres* that evidence may be "so overwhelming as to constitute the effective offer of intoxication as an explanation for the defendant's actions." *Torres*, 632 N.W.2d at 617. In *Torres*, the supreme court concluded that the defendant had not made an "effective offer" of intoxication despite his statement that he was "all . . . coked up." *Id.* at 616. Part of the court's determination relied on the fact that the defendant "described the actions of all participants lucidly and precisely, without any reference to his own intoxication." *Id.* at 617. Appellant was similarly lucid in his statement to the police a few hours after the stabbing. He was able to recall who was at the party, the timing of events, which bars they visited, his fights with Bates, and the details of the stabbing. In addition, when discussing the stabbing, appellant did not mention intoxication.

In *Torres*, the court found significant one witness's testimony that the defendant was "under control" and "calm" shortly before the murder, tending to show that the defendant was not intoxicated. *Id.* Appellant argues that unlike *Torres*, "there was no evidence at trial countering the testimony that appellant was intoxicated." But one witness testified that when Bates and appellant returned from a bar at around 10:30 p.m., "[t]hey didn't seem too bad . . . Like I assume [appellant] had been—had a little too much to drink, but nothing—you couldn't really tell. They were in pretty good shape, from

what I understand." This witness also testified that she was not sure whether appellant was intoxicated.

Finally, the state correctly observes that evidence of appellant's consumption of six or seven drinks over several hours would not necessarily show that he was significantly impaired. Further, there was no testimony that appellant was passing out or falling down; instead, appellant was apparently able to walk around, converse with others, and fight. Appellant failed to establish that his intoxication was so extreme as to amount to an "effective offer" as an explanation for his actions. This is especially true because appellant offered an entirely different explanation for the stabbing—that it was an accident.

Finally, appellant argues that because the district court denied his request for a voluntary-intoxication instruction before he testified, there was no reason to offer intoxication as an explanation for his actions. Appellant likens his case to *State v. Penkaty*, 708 N.W.2d 185, 205 (Minn. 2006), in which the supreme court found reversible error when the district court excluded testimony that would have supported the defendant's defense theory and the lesser-included offense. But appellant was not precluded from presenting testimony regarding his intoxication; in fact, as discussed earlier, several witnesses, including appellant, testified as to appellant's alcohol consumption and intoxication. And the state persuasively argues that defense counsel did not make an offer of proof to suggest that, had the instruction request been granted, the defense would offer other evidence. Appellant's argument is without merit and the

district court did not abuse its discretion in refusing to give the voluntary-intoxication jury instruction.

2.

Appellant argues that the district court erred in denying his request for a self-defense instruction when the evidence, viewed in the light most favorable to him, warranted the instruction. *See State v. Edwards*, 717 N.W.2d 405, 410 (Minn. 2006) ("In evaluating whether a rational basis exists in the evidence for a jury instruction, the evidence is viewed in the light most favorable to the party requesting the instruction."). "It is beyond dispute that a party is entitled to an instruction on his theory of the case if there is evidence to support it." *State v. Ruud*, 259 N.W.2d 567, 578 (Minn. 1997). But "[n]o error results from a refusal to instruct where the evidence does not support the proposed instruction and no abuse of discretion is shown." *State v. Jensen*, 448 N.W.2d 74, 76 (Minn. App. 1989).

"[A] defendant claiming self-defense carries the burden of going forward with evidence to support his or her claim." *State v. Soukup*, 656 N.W.2d 424, 429 (Minn. App. 2003), *review denied* (Minn. Apr. 29, 2003). "Once a defendant has met this burden, the state must demonstrate that the defendant did not act in self-defense by negating one of the four elements of the defense." *Id.* The elements of self-defense are an absence of the defendant's provocation; his honest belief, reasonably held, that he would suffer imminent death or great bodily harm; and the absence of a reasonable means to avoid the conflict. *Id.* at 428.

Viewed in the light most favorable to appellant, he did not meet his burden of production because his only defense was accident, which is inconsistent with self-defense. Although appellant testified that he brandished the knife in an effort to scare Bates, appellant testified that the actual stabbing (the event giving rise to the first-degree assault charge) was accidental, that Bates came at him and fell into the knife by accident; there is no evidence that appellant lunged at Bates or even approached him. Moreover, appellant's trial testimony explicitly denied the truth of his earlier statement on self-defense. Appellant points to the significance of evidence that Bates had been fighting with him, but this too is rendered insignificant by his own testimony that he did not intend to stab Bates.

This court has recognized that when a defendant's testimony is inconsistent with a defense theory, the district court does not abuse its discretion in refusing to give the requested jury instruction. *See State v. Pacholl*, 361 N.W.2d 463, 465 (Minn. App. 1985) (district court did not err in denying the self-defense instruction when the defendant testified that he had no intent to commit the assault and that the assault was accidental); *Jensen*, 448 N.W.2d at 76 (district court did not err in refusing to give self-defense instruction when appellant claimed he did not commit the alleged acts).[1]

---

[1] Despite the apparent contradiction in defenses and precedent on this issue, appellant directs this court to *State v. Edwards*, 343 N.W.2d 269 (Minn. 1984) for the proposition that he was nonetheless entitled to a self-defense instruction. In *Edwards*, the supreme court determined that "when a defendant claims that he pointed a gun in self-defense but that the shooting was accidental [10 *Minnesota Practice*, CRIMJIG 7.05 (2006) (Justifiable Taking of Life)] clearly does not fit" and that use of 10 *Minnesota Practice*, CRIMJIG 7.06 (2006) (Self-Defense—Death Not the Result) is more appropriate. 343 N.W.2d at 277. But *Edwards* does not mandate that the district court give the self-

As the district court observed, the record shows appellant's theory of accident and includes no evidence that he intentionally hurt Bates in self defense. Appellant did not meet his burden of production, and the district court did not err in denying appellant's request for the self-defense jury instruction.

Finally, the record demonstrates that any error of the district court in withholding a self-defense instruction was harmless. *See State v. Pendleton*, 567 N.W.2d 265, 270 (Minn. 1997) (explaining that an error in jury instructions may not require a new trial if the error was harmless). The jury instruction that appellant now requests—CRIMJIG 7.06—addresses the use of reasonable force to resist an assault that is reasonably believed to threaten injury. The instruction would have confused the issue and diluted appellant's defense that the stabbing was accidental, i.e. that he had no intent and used no force. And given appellant's testimony that the stabbing was an accident, it is difficult to see how the self-defense jury instruction would have helped him.

Appellant maintains that the refusal to give the self-defense instruction "made it so that appellant had no argument to justify the actions of taking the knife out to scare Bates." But again, appellant fails to recognize that he was not charged with second-degree assault for brandishing the weapon; he was charged with first-degree assault based

---

defense instruction when the defendant requests it regardless of the circumstances; it only stated that CRIMJIG 7.06 is more appropriate than CRIMJIG 7.05 in situations when death was not intended. *Id. Edwards* and its progeny do not demand an instruction when the evidence fails to show that any stage of the alleged crime was prompted by self-defense.

on the stabbing. Accordingly, any defense based on brandishing the weapon fails to address the circumstances of the alleged assault.

Affirmed.