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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1764**

State of Minnesota,
Respondent,

vs.

Ronald James Savino,
Appellant.

**Filed July 16, 2012
Affirmed
Muehlberg, Judge*
Dissenting, Ross, Judge**

Washington County District Court
File No. 82-CR-10-4784

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Pete Orput, Washington County Attorney, Imran S. Ali, Assistant County Attorney,
Stillwater, Minnesota (for respondent)

Robb L. Olson, Christopher L. Olson (certified student attorney), Geck, Duea & Olson,
PLLC, , White Bear Lake, Minnesota (for appellant)

Considered and decided by Wright, Presiding Judge; Ross, Judge; and Muehlberg,
Judge.

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

UNPUBLISHED OPINION

MUEHLBERG, Judge

Appellant challenges his conviction of misdemeanor domestic assault, arguing that he is entitled to a new trial because the district court denied his request to instruct the jury on self-defense. Because the district court did not abuse its discretion by refusing to give the requested instruction, we affirm.

FACTS

The state charged appellant Ronald James Savino with one count of felony domestic assault by strangulation, one count of felony terroristic threats, and one count of misdemeanor domestic assault, all stemming from an October 31, 2010 incident involving appellant's wife, S.S.

S.S. testified that she and appellant argued in the early hours of October 31 about S.S.'s desire for a divorce. The argument became physical when appellant choked S.S. on a couch on the main level of the couple's residence, telling her, "I told you I'd kill you before I ever gave you a divorce." S.S. was "[v]ery scared" and could not breathe.

After approximately ten seconds, appellant released S.S.'s throat, ripped her sweatshirt, "scooped [her] off the couch," and began to carry her toward the front door. S.S. was afraid that appellant would lock her out of the residence. She began to "fight back" by "trying to get away" from appellant, grabbing a banister, and screaming. As she struggled with appellant, he was "pulling" her and trying to open the front door. S.S. called out to her and appellant's teenage son for help. When their son came out of his bedroom, appellant abruptly "dropped" S.S. on the floor.

Appellant's testimony presents a different version of events. According to appellant, S.S. physically attacked him after he informed her she would have to pay half of the household bills if they were to divorce. S.S. hit appellant, pulled his hair, and called him names. She also threw a stapler at appellant, striking him in the face.

Appellant testified that then he put his arms around S.S.'s arms, picked her up, and "took her over to the door and . . . tried to open the door to get her out of the house." Appellant testified that when he restrained S.S., his intent was to halt her attack, "settle her down," and remove her from the residence. S.S. struggled with appellant and screamed, waking their son. Appellant then let go of S.S., who "flopped on the floor." Appellant also testified that S.S.'s "whole body went limp and she just kind of fell." Appellant denied strangling S.S., threatening to kill her, dragging her, or attempting to "throw" her out the door.

Appellant eventually telephoned S.S.'s mother, who contacted police. Photographs taken by police on the morning of October 31 show a mark on the side of appellant's face and scratches on his chest, neck, and arms. Appellant testified that the scratches were "probably" sustained in his struggle with S.S. When shown the photographs that police had taken of her, S.S. testified that "maybe" two of the photographs showed marks on her neck. S.S. also testified that appellant caused no redness or bruising to her neck.

Appellant requested that the district court instruct the jury using the model jury instruction on self-defense where death did not result from the defendant's use of force.

10 *Minnesota Practice*, CRIMJIG 7.06 (2006). The district court denied the request because it found that appellant's testimony was inconsistent with a theory of self-defense:

I listened very carefully and took a lot of notes of [appellant's] testimony, he has . . . clearly denied any kind of assaultive behavior.

. . . .

And then even on cross-examination when asked questions about throwing someone out the door, he made it clear he did not throw anyone out. He made it clear he did not drag her. He basically said he put his arms around her and carried her to the door. So we don't have any testimony by [appellant] that he did anything assaultive.

. . . .

I heard nothing in the testimony . . . that would create a theory of defense that "I did these things but I did them in self-defense."

. . . What I heard was, "My wife assaulted me. I did nothing assaultive in response. I did nothing but restrain her slightly and carry her to the door."

There has been no admission of wrongdoing by [appellant] and as a result no testimony that [he] had to do certain things to defend [himself].

(Quotation marks added.)

The jury found appellant guilty of misdemeanor domestic assault and acquitted him of the other charges. The district court convicted appellant and placed him on probation for two years. This appeal follows.

DECISION

Appellant argues that he is entitled to a new trial because the district court improperly refused to instruct the jury on self-defense using CRIMJIG 7.06. We disagree.

“The refusal to give a requested jury instruction lies within the discretion of the district court” and will not be reversed absent an abuse of that discretion. *State v. Cole*, 542 N.W.2d 43, 50 (Minn. 1996). To be entitled to a new trial, a defendant must show (1) that he was entitled to the requested instruction and (2) that the district court’s failure to give the instruction was not harmless. *State v. Pendleton*, 567 N.W.2d 265, 270 (Minn. 1997). A defendant is entitled to an instruction on his theory of the case only if there is evidence to support it. *State v. Coleman*, 373 N.W.2d 777, 781 (Minn. 1985). When reviewing whether a specific jury instruction should have been given, this court views 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).

A district court does not abuse its discretion by denying a requested instruction on self-defense if the defendant’s own testimony is inconsistent with a theory of self-defense. *State v. Jensen*, 448 N.W.2d 74, 76 (Minn. App. 1989). Here, appellant was convicted of violating Minn. Stat. § 609.2242, subd. 1 (2010), which provides:

Whoever does any of the following against a family or household member . . . commits an assault and is guilty of a misdemeanor:

(1) commits an act with intent to cause fear in another of immediate bodily harm or death; or

(2) intentionally inflicts or attempts to inflict bodily harm upon another.

Appellant testified that he used physical force to restrain S.S. and to move her toward the door and that he let go of her, causing her to fall to the floor. He also testified that he used force only after S.S. violently attacked him. Appellant contends that his testimony is consistent with a theory of self-defense because he admitted to committing misdemeanor domestic assault against S.S. but did so using reasonable force to resist S.S.'s assault against him. *See* Minn. Stat. § 609.06, subd. 1(3) (2010) (“[R]easonable force may be used upon or toward the person of another without the other’s consent . . . when used by any person in resisting or aiding another to resist an offense against the person.”).

Although appellant admitted to using physical force against S.S., he did not admit to acting with the requisite criminal intent to commit misdemeanor domestic assault—that is, the intent to cause fear in S.S. or the intent to inflict bodily harm upon her. *See* Minn. Stat. § 609.2242, subd. 1. Appellant’s testimony is therefore inconsistent with a theory of self-defense, and the district court did not abuse its discretion by refusing to instruct the jury with CRIMJIG 7.06.¹ *See State v. Peterson*, 411 N.W.2d 518, 521-22 (Minn. App. 1987) (holding that district court did not abuse its discretion by refusing to give self-defense instruction where defendant’s testimony indicated that he did not intend

¹ Having been acquitted of the charges of felony domestic assault by strangulation and felony terroristic threats, appellant seeks a new trial only on the charge of misdemeanor domestic assault. We note that appellant’s trial testimony was inconsistent with a theory of self-defense related to the two felony charges because appellant did not admit to strangling or threatening S.S. *See* Minn. Stat. §§ 609.2247, .713, subd. 1 (2010).

to cause fear and, consequently, did not admit to committing an assault), *review denied* (Minn. Oct. 21, 1987); *State v. Pacholl*, 361 N.W.2d 463, 465 (Minn. App. 1985) (concluding, in assault case, that district court did not err in denying requested self-defense instruction because theory of self-defense was inconsistent with defendant's testimony that he accidentally struck victim in the face); *cf. State v. Prtine*, 784 N.W.2d 303, 313-14 (Minn. 2010) (distinguishing defendant's claim of self-defense from claim that killing was unintentional).

Affirmed.

ROSS, Judge (dissenting)

I respectfully dissent. I would reverse the misdemeanor assault conviction to allow a retrial during which Ronald Savino could assert his theory to a jury instructed on self-defense.

I think today's decision is at odds with a basic due process principle for criminal trials: "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. 1977), *cert. denied*, 435 U.S. 996, 98 S. Ct. 1648 (1978). It invites the cynical gripe, "Damned if you do, damned if you don't." Or in this case, convicted if you do, convicted if you don't. Evidence clearly supports Savino's self-defense theory of the case as to the allegation of misdemeanor assault, and so the district court abused its discretion by refusing to give the requested self-defense instruction on that charge.

The majority's mistake flows from a misreading of precedent, resulting in a logical fallacy and an impracticality. The majority reasons that Savino's trial testimony is inconsistent with a theory of self-defense simply because he asserted that his intent behind his admitted physical contact with his wife was to defend himself from her attack, not to cause her fear or injury. Identifying the implied steps in the majority's reasoning illuminates the flaw:

- Committing an assault in self-defense requires committing an assault;
- Committing an assault requires having the intent to injure or frighten;
- Denying the intent to injure or frighten denies having committed an assault;
- Denying having committed an assault denies having committed an assault in self-defense.

Taken to its logical end, the majority's approach means that no one can both deny criminal assault and claim self-defense; unless one admits to the intent-to-frighten-or-injure element of the crime, he cannot escape liability for it. This puts the defendant onto a dizzying course, requiring him to assert that his *real* purpose was to injure the other person before he will be allowed to claim that his *real* purpose was to prevent being injured by the other person.

An illustration reveals the impossibility that arises from the majority's flaw. Take, for example, a man reacting immediately to an onrushing attacker charging toward his children. The man forcefully throws his elbow into the attacker, felling him. According to the majority's reasoning, that father, once accused of assaulting the other man, would not be entitled to a self-defense instruction after he testifies as follows: "Yes, I elbowed that man as accused, but no, I definitely did not intend to hurt him; I just tried to stop him from hurting me and my kids using whatever force I could muster. In fact, I'm sorry I broke his jaw." Under the majority's approach, this testimony is "inconsistent with a theory of self-defense" because it denies the assault element of intent to injure, and the majority would hold that the district court may withhold the self-defense instruction.

This case is materially similar to the hypothetical. Savino admitted to the conduct (*actus reus*) that formed the basis of the misdemeanor assault, but he denied intending to injure or frighten his wife (*mens rea*), and he also denied the conduct that formed the basis of the more serious assaults (of which he was acquitted). Savino testified that his wife struck him in the face with a stapler, hit him with her hand, and pulled his hair. He testified that he responded to her attack by picking her up and attempting to carry her

from the house, intending specifically only to end her attack, not to injure her. Other evidence supported his testimony about his motive. His wife testified, “[Savino was] [t]rying to open the front door and *to get me out of the house*. He was pulling me and *trying to carry me out*.” (Emphasis added.) The physical evidence of injuries to Savino was also consistent with this testimony that he was attempting to remove his wife.

The jury’s guilty verdict on the one offense of which it found Savino guilty depended on its answer to an essential fact question: What was Savino’s intent when he forced his wife to the door? If Savino’s intent was to injure her, that is assault. If his intent was to protect himself, that is self-defense. If his primary intent was to protect himself and in doing so he also harbored some willingness that she become fearful of injury or actually injured, that too is self-defense provided that his force was reasonable in light of the harm against which he sought to defend himself. But we cannot know the jury’s answer to this question because it was never instructed to apply Savino’s self-defense theory to the parties’ conduct. And this is because the district court was mistakenly convinced that the trial evidence did not support a self-defense theory.

The district court did not make this mistake for the same reason the majority make’s its mistake today. The record reveals that the district court’s mistake was in assessing the self-defense theory as applied to only some, but not all, of the prosecutor’s theories of assault. The district court was focused mainly on the most serious allegations and how the self-defense theory might relate to the conduct necessary to support those allegations of felony assault (that Savino threatened to kill his wife and violently choked her, conduct that Savino denied). But it did not assess the defense as applied to the

conduct that would support only misdemeanor assault (that Savino apprehended his wife and forced her toward the door, conduct that Savino admitted).

We know this from the district court's explanation and choice of authority. The district court gave the following explanation for refusing to give the self-defense instruction: "[Savino] made it clear [in his testimony] he did not drag her. He basically said he put his arms around her and carried her to the door. So we don't have any testimony by Mr. Savino that he *did anything assaultive*." (Emphasis added.) For legal support, the district court cited our unpublished decision in *State v. Hernandez*, No. A09-486, 2010 WL 2265570 (Minn. Jun. 8, 2010). The claims of assault in *Hernandez*, like only the more serious assault claims that the district court focused on here, were based on violent assaultive conduct that the defendant emphatically denied ever participating in. *Id.* at *7 (affirming district court's refusal to give a self-defense instruction for assault claim that required proof that defendant inflicted harm using a dangerous weapon because defendant denied hitting the victim with the object he was accused of using as a weapon). The district court here emphasized, "So, like the court in *Hernandez*, I can't see giving the jury a self-defense instruction, which means that it would be misplaced and very confusing to them when [Savino] has not admitted *doing any kind of conduct* that would amount to anything close to *the alleged offenses here*." (Emphasis added.)

The district court was clearly considering "the alleged offenses here" to be only the more violent offenses that Savino denied and of which he was later found not guilty, not the pushing or carrying and dropping that he admitted as they applied to form the basis of his only conviction. The district court appropriately denied the instruction as

applied to the claim that Savino choked his wife and threatened to kill her, because Savino denied that any of that conduct had occurred. The district court was correct in recognizing that Savino's denials were inconsistent with a self-defense theory on those claims. Its error was in failing to consider that Savino admitted to conduct that could form the basis of a misdemeanor assault conviction and that this admission was consistent, rather than inconsistent, with his self-defense theory.

The state's argument attempts unsuccessfully to bridge the logic gap between what the district court actually did (appropriately rejected the self-defense instruction for reasons that apply only to the more serious assault theories) and what the state wants us to construe the district court as having done (rejected the self-defense instruction for reasons that apply to the misdemeanor assault theory). The state does so by including not just the defendant's denied conduct, but also his denied intentions, as a supposed ground to reject the instruction. It contends, "A defendant's testimony denying assaultive conduct *or assaultive intent* is inconsistent with a theory of self-defense." (Emphasis added.) The majority accepts this argument, but the state's contention as to "assaultive intent" is illogical and impractical for the reasons already discussed.

In addition to being illogical, the argument is unsupported by the caselaw that the state relies on. The state offers our unpublished *Hernandez* opinion, already outlined, and three other cases: *State v. Pacholl*, *State v. Johnson*, and *State v. Jensen*. None of these stand for the proposition that a defendant is disqualified from receiving a self-defense instruction by his denying that he intended his conduct to cause fear or injury. Rather, they all stand for the logically compelled proposition that a defendant who denies that he

intentionally engaged in conduct that constitutes the alleged assaultive act cannot then assert that he, in order to defend himself, intentionally engaged in the conduct that constitutes the assaultive act.

Pacholl involved a defendant father accused of third-degree assault for intentionally punching his 14-year-old stepson in the face. 361 N.W.2d 463, 464–65 (Minn. App. 1985). At trial the father denied intentionally hitting his son, claiming that he was innocently reaching for his son’s shoulder when his son ducked and sustained the injury. *Id.* We held that he was properly denied the self-defense instruction because his claim that he *accidentally struck* his son contradicted a theory that he *intentionally struck* his son in defense of his other son. *Id.* at 465 (“[T]his theory was inconsistent with Pacholl’s own testimony that the incident was an accident.”).

Johnson involved a defendant accused of fifth-degree assault for charging after his neighbor and intentionally striking her in the face. 392 N.W.2d 357, 357–58 (Minn. App. 1986). At trial he maintained that he was not even present at the scene of the attack. *Id.* at 358. We held that he was properly denied the self-defense instruction because his claim that he was not present to intentionally strike his neighbor contradicted his theory that he intentionally struck her in defense of himself. *Id.* (“Given . . . that appellant maintained an alibi posture at trial that he was not involved in the incident, there was not sufficient evidence to support a self-defense instruction.”).

Jensen involved a defendant accused of intentionally obstructing a law-enforcement officer by forcefully resisting arrest and pushing the arresting officer into a ditch. 448 N.W.2d 74, 75–76 (Minn. App. 1989). At trial the defendant maintained that

he never used force of any kind against the officer. *Id.* at 76. We held that he was properly denied the self-defense instruction because his assertion that he used no force contradicted his assertion that he used force intending to defend himself. *Id.* (“In fact, the theory is inconsistent with appellant’s own testimony.”).

The majority adds *State v. Peterson*, 411 N.W.2d 518 (Minn. App. 1987). The *Peterson* case comes slightly closer than the state’s cases to the proposition that a defendant should not receive a self-defense instruction if he denies the intent element of an assault accusation, but it does not reach it or change my assessment that the notion is wrong. In *Peterson*, the defendant was accused of assaulting his sister specifically by trying to terrify her with an axe. *Id.* at 520. The defendant allegedly confronted his sister with an axe, threatened to kill her with it, and swung it at her. *Id.* At trial the defendant testified instead that he picked up the axe intending to use it in self-defense based on his claimed fear that his sister wanted to kill him with a gun, but he denied swinging it at her and said that he merely “walked around the corner,” saw that “[s]he didn’t have a gun,” and “took the axe and set it down.” *Id.* The district court reasoned that if the jury believed that the defendant put the axe down in that fashion, “he would not have the intent to cause the fear[] and no assault was committed.” *Id.* at 521. The district court was again focused on the fact that *the conduct* the defendant testified to was contrary to *the conduct* that he allegedly engaged in to effect the assault. Additionally, although we affirmed the district court’s decision not to include a self-defense instruction, we specifically observed that “it would not have been improper to submit a self defense instruction to the jury for whatever weight the jury might choose to give it.” *Id.* at 522. We held only that, “on

these facts,” the district court’s ruling was not erroneous. *Id.* Neither the district court nor this court reasoned that the instruction was inappropriate simply because the defendant asserted that he had a self-defense intent for engaging in the offending conduct rather than an illegal intent to cause fear.

In my view, our precedent holds only that a person who denies having intentionally engaged in the conduct that forms the basis of the assault charge against him cannot also make the inconsistent, contradictory claim that he intentionally engaged in that conduct to defend himself. But a defendant logically seeking to justify potentially injurious intentional conduct on self-defense grounds will claim exactly what Savino claimed, which is that he intentionally engaged in the conduct motivated exclusively or at least primarily to defend, not to injure or frighten. If the majority is correct, the theory of self-defense is instead reserved only for those assault defendants who declare that they intended to injure or frighten their alleged victims—a requirement not supported by the caselaw.