STATE OF MINNESOTA
IN COURT OF APPEALS
A07-318

State of Minnesota,
Respondent,

vs.

Charles Lee Makidon,
Appellant.

Filed April 15, 2008
Affirmed
Worke, Judge

Ramsey County District Court
File No. T9-06-11544

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

John J. Choi, St. Paul City Attorney, K. Meghan Kisch, Assistant City Attorney, 500 Ramsey County Courthouse, 15 West Kellogg Boulevard, St. Paul, MN 55102 (for respondent)

Nathan M. Hansen, 2440 Charles Street, Suite 224, North St. Paul, MN 55109 (for appellant)

Considered and decided by Worke, Presiding Judge; Hudson, Judge; and Harten, 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

WORKE, Judge

On appeal from convictions of reckless use of a dangerous weapon and attempted discharge of a firearm, appellant argues that he is entitled to a new trial because the district court refused to give a self-defense or defense-of-home jury instruction. We affirm.

D E C I S I O N

Following a confrontation with a neighbor, appellant Charles Lee Makidon was convicted of reckless use of a dangerous weapon and attempted discharge of a firearm. Appellant argues that the district court erred in denying his request for a self-defense jury instruction. "Defendants are entitled to an instruction on their theory of the case if there is evidence to support that theory. . . . An instruction need be given only if it is warranted by the facts and the relevant law." *State v. McCuiston*, 514 N.W.2d 802, 804 (Minn. App. 1994) (citations omitted), *review denied* (Minn. June 15, 1994). 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 discretion. *State v. Cole*, 542 N.W.2d 43, 50 (Minn. 1996). The focus of the analysis is on whether the refusal resulted in error. *State v. Kuhnau*, 622 N.W.2d 552, 555 (Minn. 2001).

Reasonable force may be used "by any person in resisting or aiding another to resist an offense against the person." Minn. Stat. § 609.06, subd. 1(3) (2004).

> Self-defense requires a showing of 1) the absence of aggression or provocation on the part of the defendant; 2) the

> defendant's actual and honest belief that he or she was in imminent danger of death or great bodily harm; 3) the existence of reasonable grounds for that belief; and 4) the absence of a reasonable possibility of retreat to avoid the danger.

State v. Vazquez, 644 N.W.2d 97, 99 (Minn. App. 2002) (quotation omitted). "The degree of force used in self-defense must not exceed that which appears to be necessary to a reasonable person under similar circumstances." *State v. Basting*, 572 N.W.2d 281, 286 (Minn. 1997). "The defendant [] has the burden of going forward with evidence to support his claim of self-defense." *State v. Columbus*, 258 N.W.2d 122, 123 (Minn. 1977). The supreme court has upheld the refusal to give a requested self-defense instruction when the defendant was the aggressor and he did not actually and in good faith withdraw from the conflict. *See State v. Robinson*, 427 N.W.2d 217, 227-28 (Minn. 1988); *Bellcourt v. State*, 390 N.W.2d 269, 272 (Minn. 1986).

In denying appellant's request for a self-defense instruction, the district court found "that the testimony offered to support [] the alleged self defense is absolutely and clearly insufficient for any rational jury to come to the conclusion that the use of a weapon [under] the circumstances" surrounding the incident was justified. The evidence shows that appellant was the aggressor. Appellant initiated the interaction with his neighbor by confronting the neighbor's children about their barking dogs, and when the neighbor went over to appellant's home to speak with him, appellant retrieved a revolver and pointed it at the neighbor. Appellant testified that the neighbor told appellant, "I'm threatening you"; however, appellant admitted that the neighbor did not threaten him with a gun or knife, did not swing or lunge at him, or even attempt to approach appellant or

enter his home. Appellant failed to present any evidence to show that the neighbor presented an imminent danger of death or great bodily harm. Additionally, appellant's threat of deadly force based on an alleged vague or indefinite verbal threat was unreasonable. Finally, while appellant correctly argues that there is "no duty to retreat from one's own home when acting in self-defense in the home," "the lack of a duty to retreat does not abrogate the obligation to act reasonably when using force in self-defense." *State v. Glowacki*, 630 N.W.2d 392, 402 (Minn. 2001). The facts show that when appellant retreated into his home, rather than simply closing and locking the door, he returned with a revolver, an act of aggression. Because the relevant facts and law do not support a self-defense instruction, the district court's denial of appellant's request was not an abuse of discretion.

Appellant also argues that the district court erred in denying his request for a defense-of-dwelling instruction. "[S]elf-defense in the home and defense of dwelling are often intertwined." *Id.* at 401. "When [Minn. Stat. § 609.06, subd. 1(4) (2004) regarding authorized use of force in resisting a trespass] is read in conjunction with Minn. Stat. § 609.065 [regarding the justifiable taking of a life], it is clear that the defense of dwelling defense anticipates an unauthorized intrusion into the defendant's dwelling." *State v. Hare*, 575 N.W.2d 828, 832 (Minn. 1998). To support a defense-of-dwelling claim, the defendant must present evidence showing

> (1) whether the [threat of deadly force] was done to prevent the commission of a felony in the dwelling, (2) whether the defendant's judgment as to the gravity of the situation was reasonable under the circumstances, and (3) whether the defendant's election to defend his or her dwelling was such as

> a reasonable person would have made in light of the danger to be apprehended.

State v. Carothers, 594 N.W.2d 897, 904 (Minn. 1999). The district court denied appellant's request for a defense-of-dwelling instruction based on the finding that there was "absolutely no evidence" regarding the duration of time between appellant's first request that the neighbor leave his property and the neighbor's departure. The district court found, based on the testimony from both appellant and the neighbor, that the time period was very short. The district court ruled that appellant failed to establish a basis for his argument that the neighbor went from a visiting neighbor to a trespasser, allowing appellant to resort to the threat of deadly force.

Appellant failed to present evidence to support the theory that he used the revolver to prevent the commission of a felony in his dwelling. Appellant also exhibited unreasonable judgment regarding the gravity of the situation. Finally, appellant's threat of deadly force to defend his dwelling was unreasonable under the circumstances. Appellant failed to present any evidence that would support his decision to threaten deadly force. Because the evidence does not support a defense-of-dwelling instruction, the district court's denial of appellant's request was not an abuse of discretion.

Affirmed.