STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1562

State of Minnesota,
Respondent,

vs.

Lloyd McKenzie,
Appellant.

Filed January 6, 2009
Affirmed
Schellhas, Judge

Rice County District Court
File No. CR-06-1188

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

G. Paul Beaumaster, Rice County Attorney, 218 Northwest Third Street, Faribault, MN 55021 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Bradford S. Delapena, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Minge, Presiding Judge; Schellhas, Judge; and Johnson, 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 fourth-degree assault against a corrections officer, arguing that the jury should have been instructed on self-defense. Because we agree with the district court that there is no evidence that appellant held a reasonable belief of bodily injury, we affirm.

FACTS

Appellant Lloyd McKenzie, an inmate at a correctional facility in Faribault, Minnesota, was charged with one count of attempted assault and three counts of assault following an incident at the facility. Appellant was tried before a jury on three of the counts: fourth-degree assault for causing demonstrable bodily harm to J.A., fourth-degree assault for causing demonstrable bodily harm to N.W., and fifth-degree assault against N.W. Appellant was convicted of fourth-degree assault against J.A. and fifth-degree assault against N.W. He appeals his fourth-degree assault conviction.

After appellant's assaultive incident with N.W., a nurse at the facility, correctional officers took appellant to a segregation unit and videotaped the ensuing events.[1] Once in the segregation unit, Kim Clifford, a sergeant on the prison's security squad, asked appellant if he intended to comply with a strip search. Although appellant initially complied, when Clifford instructed him to open his mouth and do other tasks to complete the search, appellant indicated that he would not comply. When inmates refuse to comply, the security squad conducts a "staff-assisted unclothed body search" and puts

[1] The videotape was admitted at trial as Exhibit 3.

"hands on." When officers put "hands on," they act very quickly to grab hold of inmates. Clifford directed the staff to "go hands on" after appellant refused to comply with the search.

Appellant struggled as the officers placed him on a bed and attempted to gain control of him. Clifford observed appellant scratching and trying to bite J.A., and he used "pressure points at that time to gain compliance from [appellant]." The "pressure point" is a wrist lock, and it generally causes pain. J.A. testified that it burned where appellant scratched him and that he could feel appellant's teeth on his leg. J.A. bled from his left arm and his gloves were shredded as a result of the scratches. Shortly after, the officers gained control, appellant calmed down, and the officers left the cell.

Clifford testified that he used the "pressure point" in response to appellant's behavior toward J.A., determining that the infliction of pain upon appellant was appropriate because he was struggling forcefully and yelled something threatening about "giving you what I got." Officer Robert Thies used a different pain technique on appellant. Thies crossed appellant's legs and pushed them up toward his back area, which, according to Thies, "gives a person very limited mobility." Thies testified that this technique is "technically pain compliance." Officer Troy Hodgkins assisted with appellant's legs, using the leg hold because appellant was struggling and trying to straighten his legs out on Hodgkins. The record does not reflect whether the leg hold was used before or after appellant scratched and attempted to bite J.A.

Although appellant did not testify that he acted in self-defense, he requested a self-defense jury instruction. Appellant argued that the videotape provided enough evidence

to support his contention that he acted in self-defense after being physically assaulted by staff during the strip search. The district court denied appellant's request for a self-defense instruction, concluding that neither the testimony nor the videotape constituted evidence that appellant had reasonable grounds to believe that bodily injury would be inflicted on him during the strip search. Appellant was convicted and sentenced. This appeal follows.

D E C I S I O N

"The refusal to give a requested jury instruction lies within the discretion of the district court and no error results if no abuse of discretion is shown." *State v. Cole*, 542 N.W.2d 43, 50 (Minn. 1996). "[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).

Reasonable force used in self-defense is allowed when a person is, or reasonably believes himself to be, resisting "an offense against the person." Minn. Stat. § 609.06, subd. 1(3) (2006). Here, the parties agree that prison security officers are authorized to use force against an inmate to enforce obedience or discipline, when an inmate resists the lawful authority of a correctional officer, or when an inmate refuses to obey reasonable demands. Minn. Stat. § 243.52 (2006). And the parties agree that the authorization to use "reasonable force" is found in Minn. Stat. §§ 609.06-.066 (2006). Finally, the parties agree that in appellant's case, the officers' actions constitute the offense of assault against appellant only if the officers used unreasonable force.

The elements of self-defense are generally described as: (1) an absence of aggression or provocation; (2) an actual and honest belief that imminent death or great bodily harm would result; (3) the existence of a reasonable basis for this belief; and (4) an absence of reasonable means to retreat or avoid the physical conflict. *State v. Soukup*, 656 N.W.2d 424, 428 (Minn. App. 2003), *review denied* (Minn. Apr. 29, 2003). These elements are sometimes referred to as the *Basting* elements. *See State v. Basting*, 572 N.W.2d 281, 285 (Minn. 1997) (listing elements of self-defense). Appellant argues that he was entitled to resist the offense of assault; thus, here, the second *Basting* element should be modified to require only an actual and honest belief that bodily harm would result. *See State v. Hare*, 575 N.W.2d 828, 833 (Minn. 1998) (modifying second element to a reasonable belief of bodily injury in an unintentional homicide case); *State v. Pendleton*, 567 N.W.2d 265, 268, 270-71 (Minn. 1997) (requiring only expectation of bodily harm for defense-of-dwelling argument where the defendant only had to expect "a felony" and the felonies expected involved only bodily harm, not great bodily harm).

Appellant argues that the district court erred (1) in denying the instruction because appellant had not testified and (2) by focusing on whether appellant expected imminent harm in the future as opposed to "whether appellant reasonably believed that the officers were *currently using excessive force*" and whether that gave appellant "a reasonable basis to fear *present bodily injury*." Both arguments are unavailing.

A defendant has the burden of producing evidence to satisfy the elements of self-defense. *State v. Penkaty*, 708 N.W.2d 185, 207 (Minn. 2006). Appellant argues that the district court incorrectly required his testimony because a defendant need not testify and

provide direct evidence of his state of mind in order to be entitled to a self-defense instruction. While appellant is correct that evidence in favor of a self-defense instruction need not be in the form of the defendant's testimony, *State v. Johnson*, 719 N.W.2d 619, 630 (Minn. 2006), he is incorrect in suggesting that the district court required him to testify. The district court merely concluded that appellant's expectation of bodily harm was not established by testimony or any other evidence, including the videotape.

Appellant next argues that the district court used an incorrect standard when it asked if there was evidence that appellant reasonably believed that bodily harm "was about to be inflicted on him." The elements of self-defense refer to harm that is imminent. *See Soukup*, 656 N.W.2d at 428 (stating that self-defense requires actual and honest belief of imminent harm). Imminent harm is equivalent to harm that is "about to be" inflicted. *See The American Heritage College Dictionary* 877 (4th Ed. 2006) (defining "imminent" as "[a]bout to occur; impending"). No meaningful difference exists between harm that is "about to be" inflicted and the fear of "present bodily injury." Both standards refer to harm that has not yet happened but is imminent. We conclude the district court correctly required evidence of a belief that bodily harm was "about to be" inflicted, i.e. imminent.

Affirmed.