STATE OF MINNESOTA
IN COURT OF APPEALS
A09-902

State of Minnesota,
Respondent,

vs.

Carl Michael Campbell,
Appellant.

Filed April 27, 2010
Reversed and remanded
Klaphake, Judge
Dissenting, Shumaker, Judge

Ramsey County District Court
File No. 62-CR-08-14098

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

Susan Gaertner, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Klaphake, Judge; and Shumaker, Judge.

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

KLAPHAKE, Judge

Appellant Carl Michael Campbell challenges his convictions for third-degree assault, Minn. Stat. § 609.223, subd. 1 (2008), and gross-misdemeanor violation of a

domestic abuse no-contact order, Minn. Stat. § 518B.01, subd. 22(e) (2008). The convictions arose out of his domestic altercation with L.R. in their apartment on October 1, 2008, and his conduct after the altercation that included contacting L.R. in violation of a no-contact order. The district court erroneously instructed the jury that appellant had a duty to retreat in order to assert a valid claim of self-defense, even though the altercation occurred in appellant's and L.R.'s home. Although appellant failed to object to the erroneous instruction, we conclude that the instruction constituted plain error that deprived appellant of a fair trial. We therefore reverse and remand for a new trial.

D E C I S I O N

The district court properly instructed the jury on the general law of self-defense in accordance with 10 *Minnesota Practice,* CRIMJIG 7.06 (2006), which states, in part:

> It is lawful for a person who is being assaulted and who has reasonable grounds to believe that bodily injury is about to be inflicted upon the person, to defend from such attack, and in doing so the person may use all force and means which the person believes to be reasonably necessary and which would appear to a reasonable person, in similar circumstances to be necessary to prevent the injury which appears to be imminent.

See State v. Johnson, 310 N.W.2d 96, 97 (Minn. 1981) (approving the use of self-defense instructions that are modeled on standard jury instructions, including CRIMJIG 7.06).[1]

[1] We note that the case law and standard jury instructions differ with regard to the lawful amount force that may be used by a person who claims self-defense. The jury instructions distinguish between whether a person is subject to imminent death or great bodily harm, or is subject merely to bodily injury, in determining the reasonable amount of force that a person may use in self-defense. *Compare* CRIMJIG 7.06 (permitting a person who is being assaulted and is subject only to imminent bodily injury to use reasonable force necessary to prevent injury) *with* 10 *Minnesota Practice,* CRIMJIG 7.05 (2006) (permitting a person subject to imminent death or great bodily harm to use deadly

Part of the district court's charge to the jury also included the following instruction that "[t]he legal excuse of self-defense is available only to those who act honestly and in good faith. This includes the duty to retreat to avoid the danger if reasonably possible." Under normal circumstances, a person claiming self defense has a duty to retreat to avoid an assault, if reasonably possible, but "there is no duty to retreat in one's own home." *State v. Johnson*, 719 N.W.2d 619, 629 (Minn. 2006); *State v. Glowacki*, 630 N.W.2d 392, 402 (Minn. 2001). Respondent concedes that this instruction was erroneous because it required appellant to retreat from an assault initiated by L.R., even though the altercation occurred in their home. *Id.*; *see generally State v. Pendleton*, 567 N.W.2d 265, 268 (Minn. 1997) (stating, in case involving dispute over self-defense jury instruction, that "a jury instruction must not materially misstate the law").

As appellant did not object to the erroneously given jury instruction, we review the unobjected-to error to determine whether it constitutes plain error affecting appellant's substantial rights. Minn. R. Crim. P. 31.02; *see State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998) (requiring appellant to establish plain error by showing (1) error, (2) that was plain, and (3) which affected appellant's substantial rights). Substantial rights are affected when "there is a reasonable likelihood that giving the instruction in question had

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force to take the life of another). However, a line of Minnesota cases suggests that the deadly force rule of CRIMJIG 7.05 applies in non-lethal cases, thus apparently requiring every person to be in "imminent danger of death or great bodily harm" before responding in self defense. *See, e.g., State v. Basting*, 572 N.W.2d 281, 285 (Minn. 1997); *State v. Soukup*, 656 N.W.2d 424, 428 (Minn. App. 2003), *review denied* (Minn. Apr. 29, 2003). We will rely on the standard jury instructions on general self-defense law, as did the district court.

a significant effect on the jury verdict." *State v. Vance*, 734 N.W.2d 650, 659 (Minn. 2007) (quotation omitted).

Appellant testified that he and L.R. argued in their bedroom after she refused to lend him her car to go to a friend's birthday party. He left the room for about twenty minutes when the argument became heated, and when he returned, he asked her if she was suspicious that he intended to meet another woman rather than to go to the party. In response to her suggestion that she drive him to the party, he stated that she was in no condition to drive because she had consumed three-quarters of a bottle of tequila. She responded by "jump[ing] in [his] face." When he told her to stop and pushed her away, she said, "You don't tell me what to do. You ain't going to do nothing." As they continued to argue, she chest-bumped him, and he pushed her away again and told her to desist. Then, she "came swinging" and he "hit her, boom, boom, like two or three times." The record also shows that appellant weighs 141 pounds and that L.R. is a stout woman.

We conclude that the district court's failure to properly instruct the jury affected appellant's substantial rights under the plain error test because, based on appellant's testimony, a jury could have found plausible his claim of self-defense. *See State v. Penkaty*, 708 N.W.2d 185, 207 (Minn. 2006) (stating that "a party is entitled to a particular jury instruction if evidence exists at trial to support the instruction."). This is not a case where the defendant's story was so "wholly unbelievable" that it was "unlikely that any erroneous instruction significantly affected the verdict." *Griller*, 583 N.W.2d at 742. Rather, given the two plausible factual scenarios set forth by the opposing testimony of L.R. and appellant, the erroneous instruction had the prejudicial effect of

removing from the jury's consideration appellant's self-defense claim. In reaching this decision, we emphasize that it is the jury's task, not the task of the reviewing court, to make credibility determinations and to resolve conflicting testimony. *State v. Lloyd*, 345 N.W.2d 240, 245 (Minn. 1984); *see State v. Ring*, 554 N.W.2d 758, 760 (Minn. App. 1996) (weight and credibility of witness testimony for fact-finder), *review denied* (Minn. Jan. 21, 1997).

We further conclude that the erroneous self-defense instruction deprived appellant of a fair trial and mandates reversal of appellant's conviction to ensure the integrity of the judicial proceedings. Because we reverse appellant's assault conviction, we decline to reach the other two issues raised by appellant concerning the district court's refusal to give a lesser-included jury instruction on fifth-degree assault and the effect of appellant's incomplete waiver of his right to a jury trial on aggravating sentencing factors.

Finally, we note that the dissent focuses in part on the harm suffered by L.R. in assessing whether appellant was entitled to a self-defense instruction. The consequences of appellant's use of force alone do not explain whether appellant's basis for using force was legally justified in the first instance. In *Soukup*, we enumerated a non-exclusive list of factors to consider in determining whether the amount of force used by a person claiming self-defense was reasonable. 656 N.W.2d at 429. Those factors include (1) the relative ages and sizes of the victim and the defendant; (2) the victim's reputation for violence, if any; (3) previous threats or fights between the parties; (4) the defendant's level of aggression; and (5) provocation by the victim. *Id.* Here, examination of the *Soukup* factors, as well as appellant's testimony that he responded to L.R.'s attack in an

isolated manner, would allow a jury to find appellant's response was reasonable. *See Glowacki*, 630 N.W.2d at 402-03 (stating that reasonableness of individual's use of force must be "based upon the circumstances of the situation").

Reversed and remanded.

SHUMAKER, Judge (dissenting)

I respectfully dissent because I believe that no rational jury could find that appellant Campbell used only the kind and degree of force necessary to defend himself against imminent bodily injury. A person who is threatened with an assault and "has reasonable grounds to believe that bodily injury is about to be inflicted" may "use all force and means that the person reasonably believes to be necessary and that would appear to a reasonable person, in similar circumstances, to be necessary to prevent an injury that appears to be imminent." 10 *Minnesota Practice*, CRIMJIG 7.06 (2006).

On direct examination Campbell described his physical contact with L.R. during their argument and after L.R. had consumed substantial alcohol:

> Q. . . . Did she do anything physical to you?
> A. No. She bumped up into my chest. Was talkin' to me about what was going on. Expressing her point. I'm expressing my point. We both screaming back and forth.
> Q. Okay. And then what happened?
> A. Then I tell her to get out of my face again. And pushed her back. Then she came swingin. And before I knew it I hit her, boom, boom, like 2 or 3 times.

In his brief, Campbell states that he "ducked [L.R.'s] blow and threw his own . . . ." On cross-examination, in response to the prosecutor's question of whether L.R. had attacked him, Campbell testified: "Well, she came over barely in my face, like aggressive, like someone, like she was going to hit me. She did swing off and hit me. I hit her." The prosecutor asked how many times Campbell hit L.R.:

> Q. Three times?
> A. Yes, ma'am.

Thus, Campbell contradicted himself in his testimony, but the position he adopts and argues on appeal as being supported by the facts is that he "ducked [L.R.'s] blow." The majority holds that the erroneous instruction deprived Campbell of the jury's consideration of self-defense when his story was not "'wholly unbelievable.'" (Quoting *State v. Griller*, 583 N.W.2d 736, 742 (Minn. 1998). Even if we accept Campbell's story as entirely believable, the record shows that he responded to L.R.'s aggressiveness with tremendous force. By his own version on direct examination and on appeal, L.R. swung and missed and he hit her three times hard enough to knock her to the floor. Furthermore, it is undisputed that he directed his blows to L.R.'s face and head. The damage Campbell inflicted required 18 stitches to repair and a prolonged recovery period. On the undisputed facts, I believe no rational jury, even having heard a proper self-defense instruction, could have concluded that Campbell used reasonable force to protect himself against L.R.'s attempt to strike him. His election to defend himself in the manner he did was excessive and unreasonable and could not be considered self-defense. *See* CRIMJIG 7.06 (stating that an unreasonable use of force in defense of an assault "is regarded by the law as excessive").

The jury heard the testimony of both L.R. and Campbell. They saw the photographs showing L.R.'s injuries. The jury had sufficient evidence to conclude that, considering all circumstances, there was no reasonable basis for concluding that the type and degree of force Campbell used was reasonably necessary to protect himself.

Thus, in my view, the plain error that occurred in the jury instructions was harmless error and the verdict was, beyond a reasonable doubt, not attributable to that error. I would

affirm on this issue. Because the majority has not reached the other two issues, I will not comment on them.

Finally, I would add a postscript to footnote 1 in the majority opinion. If the cases cited are taken to correctly state Minnesota law—and I strongly urge that they do not—then Minnesota does not recognize the right of self-defense except when a person is reasonably in imminent fear of death or substantial bodily harm. Applying that principle to the instant case, Campbell had absolutely no right at all to defend himself. Extending the principle beyond this case, a person would not have the legal privilege of defending himself against a slap, or a single punch, or a kick to a non-vital area. In other words, the cited cases have overturned an entire history of self-defense law and have negated self-defense except in the most extreme circumstances. I believe the cases did this unwittingly and that they should not be followed as precedent in the ordinary, nonlethal circumstances.