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STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1360

State of Minnesota,
Respondent,

vs.

Ricky John Lucken,
Appellant.

Filed June 22, 2010
Affirmed
Muehlberg, Judge[*]

Hennepin County District Court
File No. 27-CR-07-123407

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

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, Minneapolis, 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 Stoneburner, Presiding Judge; Connolly, 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.

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

MUEHLBERG, Judge

On appeal from his conviction of first-degree assault, appellant argues that an additional instruction given to the jury in response to a question during deliberation denied him his right to present a complete defense. He makes several additional arguments in a pro se supplemental brief. We affirm.

FACTS

Appellant Ricky Lucken went to a bar in Plymouth on the night of November 8, 2007, with his girlfriend S.W. and her parents. The group arrived at 9:00 p.m. They were drinking before going to the bar and had three or four pitchers of beer while there.

B.H. was also drinking at the bar that night with some friends. When B.H. and his friends left in the early morning of November 9, B.H. got into the passenger seat of one of his friends' cars. The driver started to drive out of the parking lot but stopped at the end of the driveway leading to the street. The driver had his window down because he was smoking a cigarette. As the car pulled up, S.W. and her mother were just leaving the parking lot on foot for their walk home. Appellant and S.W.'s father had left the bar earlier, but appellant was still outside the bar when S.W. and her mother left. According to appellant, S.W., and her mother, someone in the car was shouting at them. But according to B.H., a male outside the car made a comment first, and the driver responded with "an F you or whatever type of thing." Appellant then approached the driver's side of the car.

What happened after appellant approached the car was disputed at trial. According to appellant, the driver told him he had a gun. Appellant asked the driver to show him the gun, and the driver tried to open the car door. Appellant said "you don't want no trouble, nobody wants any trouble," and tried to hold the door shut. Then the passenger, B.H., got out "real aggressively and he started coming towards the back." Appellant felt threatened and swung at the driver, but missed. Appellant then ran to the back of the car and yelled for help, and B.H. hit him in the head. The next thing he remembered was "getting hit over and over and over again" until he "was pretty much in a fetal position."

B.H. testified to a different course of events. According to B.H., appellant "came through" the driver's window, punched the driver, and attempted to open the door, while the driver was defending himself and trying to hold the door closed. A woman then approached the driver's side of the car as well. B.H. got out of the car and went around to the driver's side, where appellant was leaning in through the window, grabbed appellant "by the back," and pulled him out of the window and away from the car. The woman then began hitting B.H. in the back of the head. B.H. was defending himself any way that he could, including "[p]ush, pull, run . . . try[ing] to run, run out of the situation." He also hit appellant. He remembered trying to get away and not being able to do so.

The driver did not testify at trial. S.W. and her mother testified only that appellant approached the car to see what the occupants were shouting about, and the next thing they knew B.H. and the driver were out of the car beating appellant.

It is undisputed that appellant stabbed B.H. during the fight. Plymouth police arrived on the scene almost immediately after the stabbing. B.H. was conscious and identified appellant as the person who stabbed him. Police identified and arrested appellant after he told them where they could find the knife. Appellant told the police he had used the knife after being in a fight with two people.

B.H. suffered a collapsed right lung and was on a breathing pump in the hospital for four or five days, and required a machine to help him breathe for six months after he was released.

Respondent State of Minnesota charged appellant with one count of first-degree assault, inflicting great bodily harm in violation of Minn. Stat. § 609.221, subd. 1 (2006), and one count of second-degree assault with a dangerous weapon in violation of Minn. Stat. § 609.222, subd. 1 (2006). A jury trial commenced on March 4, 2009, and testimony wrapped up on March 5. In his closing argument, appellant focused primarily on the parties' credibility, the proportionality of the force used, and the feasibility of retreat; he did not address who initiated the assault.

Following closing argument, the district court gave the jury the following instructions with respect to self defense:

> Now, the defendant is not guilty of a crime if he used reasonable force against [B.H.] to resist an offense against a person, and such an offense was being committed or the defendant reasonably believed that it was.
>
> 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 that person, to defend from an attack. In doing so, the person may use all force and means

> that a 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. An assault is the intentional infliction of bodily harm upon another or an intentional attempt to inflict bodily harm upon another, or an act done with an intent to cause fear of immediate bodily harm or death of another.
>
> The kind and degree of force that a person may lawfully use in self-defense is limited by what a reasonable person in the same situation would believe to be necessary. And use of force beyond that is regarded by the law as excessive.
>
> The state has the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense.
>
> The rule of self-defense does not authorized one to seek revenge, or to take into his own hands the punishment of an offender.
>
> The legal excuse of self-defense is available only to those who have acted honestly and in good faith. This includes the duty to retreat or avoid the danger if reasonably possible.

Although there had been substantial testimony with respect to how the fight began, neither party requested, and the district court did not give, CRIMJIG 7.07, which provides:

> If the defendant began or induced the assault that led to the necessity of using force in the defendant's own defense, the right to stand the defendant's ground and thus defend [himself] is not immediately available to [him]. Instead, the defendant must first have declined to carry on the assault and have honestly tried to escape from it, and must clearly and fairly have informed the adversary of a desire for peace and of abandonment of the assault. Only after the defendant has done that will the law justify the defendant in thereafter

> standing [his] ground and using force against the other person. An "assault" is (1) an act done with intent to cause fear in another of immediate bodily harm or death; or (2) the intentional infliction of or attempt to inflict bodily harm upon another.

10 *Minnesota Practice*, CRIMJIG 7.07 (2008).

While deliberating, the jury sent the following question to the court: "Does initiating the first act of aggression negate the defense of self-defense?" Over appellant's objection, the district court gave the jury the following instruction, based on CRIMJIG 7.07:

> All right. I further instruct you that if the defendant began or induced the assault that led to the necessity of using force in the defendant's own defense, the right to stand the defendant's ground and thus defend himself is not immediately available to him. Instead, the defendant must first have declined to carry on the assault and have honestly tried to escape from it, and must clearly and fairly have informed the adversary of a desire for peace and of abandonment of the assault. Only after the defendant has done that will the law justify the defendant in thereafter standing his ground and using force against the other person.

The district court did not read the definition of assault contained in the last sentence of CRIMJIG 7.07, but had previously given that definition in its initial self-defense instructions. It is never error to correctly state the law, but appellant did not ask the district court to give the definition again.

On March 9, 2009, the jury returned a verdict of guilty on both counts. This appeal follows.

D E C I S I O N

Appellant's primary argument on appeal is that the additional jury instruction deprived him of his right to present a complete defense, because he would have made different arguments in closing had he had notice that CRIMJIG 7.07 would be included in the instructions. He makes several additional arguments in his pro se supplemental brief.

Additional Instruction

The Minnesota Rules of Criminal Procedure provide that the district court "shall give appropriate additional instructions" in response to a deliberating jury's request "to be informed on any point of law." Minn. R. Crim. P. 26.03, subd. 19(3). A district court's decision to give additional instructions in response to a question from a deliberating jury is reviewed for an abuse of discretion. *State v. Laine*, 715 N.W.2d 425, 434 (Minn. 2006).

Appellant argues that the additional instruction was not appropriate, and that his conviction should be reversed and his case remanded for a new trial, because the additional instruction without notice prior to closing arguments deprived him of his constitutional right to present a complete defense. "[E]very criminal defendant has the right to be treated with fundamental fairness and afforded a meaningful opportunity to present a complete defense." *State v. Profit*, 591 N.W.2d 451, 463 (Minn. 1999) (quotations omitted). This generally "means that the defendant has the right to present the defendant's version of the facts through the testimony of witnesses." *State v. Richardson*, 670 N.W.2d 267, 277 (Minn. 2003). But it also includes the right at closing argument "to make all legitimate arguments on the evidence, to explain the evidence, and

to present all proper inferences to be drawn therefrom." *State v. Atkinson*, 774 N.W.2d 584, 589 (Minn. 2009) (quotation omitted).

A defendant has a constitutional right to present closing argument. *Herring v. New York*, 422 U.S. 853, 864, 95 S. Ct. 2550, 2556 (1975). While a trial "is in the end basically a factfinding process, no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment." *Id.* at 862, 95 S. Ct. at 2555. Closing argument allows the parties to "sharpen and clarify the issues for resolution" by the jury, "to present their respective versions of the case as a whole," to "argue the inferences to be drawn from all the testimony," and to "point out the weaknesses of their adversaries' positions." *Id.* Closing argument is also the defendant's "last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt." *Id.* "[I]t is a denial of due process and full and fair benefit of counsel to deny a criminal defendant the right to have his counsel give a closing argument in his behalf." *State v. Tereau*, 304 Minn. 71, 74, 229 N.W.2d 27, 28 (1975).

These rights were afforded appellant at trial. He had the opportunity to call witnesses supporting his version of who initiated the assault, and did so by testifying on his own behalf. He also had the opportunity to present closing argument. Notwithstanding the lack of notice that CRIMJIG 7.07 would be given to the jury, appellant could have presented an argument directing the jury's attention to his testimony about how the fight began, and discrediting B.H.'s version. He apparently chose not to do so, instead focusing on the circumstances surrounding the stabbing itself. Whether

this was a strategic decision or an oversight on the part of his counsel, the timing of the additional instruction did not deprive appellant of the opportunity to present a full defense.

Appellant briefly also argues that, when giving the additional instruction, the district court should have reiterated its earlier instruction on the definition of "assault" to the jury to remind them that "assault" includes an act done with intent to cause fear in another of immediate bodily harm or death, even if no such harm actually results. When the district court read the additional instruction, without the definition of "assault" in the last sentence of CRIMJIG 7.07, appellant did not object. Therefore, appellant waived this argument on appeal. *See State v. LaForge*, 347 N.W.2d 247, 251 (Minn. 1984) (stating that "if a defendant fails to object to the jury instructions at trial, his right to contest them on appeal is waived"). Moreover, repeating the definition of assault was not necessary because the district court had provided the definition as part of its initial self-defense instruction. Therefore, the district court's omission of the definition when reading the additional instruction was not plain error.

Pro Se Arguments

In his pro se supplemental brief, appellant makes the following additional arguments: (1) that the district court should have allowed evidence that the driver had been involved in another fight at the bar earlier that evening; (2) that a Ramsey County Sheriff's detective who was a former ATF agent should have been excluded from the jury; (3) that appellant received ineffective assistance of counsel because his public defender was overworked; (4) that pictures of appellant's injuries should have been

admitted at trial; (5) that testimony corroborating appellant's testimony that he held the car door shut after the driver threatened him with a gun should have been admitted; (6) that even if appellant threw the first punch, B.H. and the driver had no right "to give someone such an aggressive beating that it may endanger their life," that appellant had no doubt that they were going to kill him, and that what he did "was a matter of self preservation"; and (7) that following the fight appellant had "head trauma that was not diagnosed," that his memory of what happened when he spoke to the police later that night was not clear, and that he "tried to come up with what [he] thought would work to fill in the blanks." After carefully considering these arguments in light of the applicable legal standards, we conclude that they do not entitle appellant to relief.

Affirmed.