STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1421

State of Minnesota,
Respondent,

vs.

Yasin Aboubaker Yoya,
Appellant.

Filed June 29, 2010
Affirmed
Stoneburner, Judge

Ramsey County District Court
File No. 62CR088772

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

Susan Gaertner, Ramsey County Attorney, Mark Nathan Lystig, Assistant County Attorney, St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Stoneburner, Judge; and Connolly, Judge.

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

STONEBURNER, Judge

Appellant challenges his conviction of second-degree assault, arguing that: (1) the district court committed plain error by failing to instruct the jury on defense-of-dwelling and (2) in the alternative, he received ineffective assistance of counsel due to counsel's failure to request a defense-of-dwelling instruction. Because the evidence does not support a defense-of-dwelling defense, we affirm.

FACTS

Appellant Yasin Aboubaker Yoya was forty-six years old and was receiving disability benefits due to a 1987 brain injury when he encountered M.K.M., a seventeen-year-old woman who was applying for supplemental-security income due to an unspecified disability. The parties have very different accounts of how they met and what ensued: each gave inconsistent statements to investigating officers.

According to M.K.M., she met Yoya at the Work Force Center in Minneapolis where she was applying for benefits, and Yoya offered to let her charge her cellular telephone at his apartment. Yoya denied being at the Work Force Center and said that he saw M.K.M. in his neighborhood while he was in his car. She approached him, asked to talk to him, and got into his car. She asked for some water, and Yoya allowed her to come up to his apartment for a glass of water.

M.K.M. said that Yoya asked her for sex, and they had voluntary intercourse. Yoya denies that they engaged in sex. At some point, Yoya accused M.K.M. of taking $150 from his shirt pocket.[1]

According to M.K.M., Yoya took a knife out of his pocket and walked toward her, saying, "Give me my money." M.K.M. denied taking his money. Yoya ripped M.K.M.'s shirt with the knife, and M.K.M. began screaming and running around the apartment. She said that, at some point, Yoya got a larger knife. Attempting to put some distance between herself and Yoya, M.K.M. knocked over Yoya's television set and table, causing her to fall down: she remembers her right leg going numb after she fell.

Yoya said that after he accused M.K.M. of stealing his money, she began screaming and running around the apartment, knocked over the television set and dining room table, and broke a chair. She grabbed his shirt and ripped it. He grabbed her shirt and it also ripped. Yoya said M.K.M. then went into the kitchen and returned with a knife and ran at him. He jumped up and kicked the knife from her hand and took a smaller knife out of his pocket. Yoya said he told M.K.M. that she could not leave until she returned his money. He said M.K.M. then took the money out of her bra and threw it on the floor. Yoya said M.K.M. took the larger knife and ran out of the apartment. Yoya said he did not have any idea how M.K.M. received stab wounds.

[1] M.K.M. told responding police officers that Yoya accused her of taking $20,000. In another statement, she said he accused her of taking $2,000. Yoya testified that M.K.M. took $150 from his shirt pocket.

M.K.M. ran to a synagogue across the street. Yoya returned M.K.M.'s purse and sandals to her while she was outside the synagogue. M.K.M. screamed and told a boy to call 911. She then waited outside the synagogue for an ambulance.

The emergency physician who treated M.K.M. said that M.K.M. had a couple of lacerations on her leg which were four to five centimeters in length, and she had some superficial minor wounds on her arms and hands. The physician believed that the wounds were caused by a knife and that the cut on her hand was a defensive wound. Blood samples taken from the larger knife's blade and from a stain near Yoya's apartment door matched M.K.M. and not Yoya. A blood sample from the handle of the larger knife matched Yoya and not M.K.M.

Yoya was arrested and charged with assault with a dangerous weapon under Minn. Stat. § 609.222, subd. 1 (2008). At trial, he claimed self-defense and the jury was instructed on self-defense. The jury found Yoya guilty. He was sentenced to an executed term of 21 months and now appeals his conviction.

D E C I S I O N

Yoya argues that the district court committed reversible error by failing to instruct the jury on the defense-of-dwelling defense even though the instruction was not requested. "A defendant's failure to propose specific jury instructions or to object to instructions before they are given generally constitutes a waiver of the right to challenge the instructions on appeal." *State v. Hersi*, 763 N.W.2d. 339, 342 (Minn. App. 2009). Unobjected-to error is reviewed under a plain-error analysis. *See State v. Earl*, 702

N.W.2d 711, 720 (Minn. 2005); *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001).

Under the plain-error test, an appellant must show that there was (1) an error; (2) that is plain; and (3) that affects the appellant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). An error is plain if it is clear and obvious; usually this means an error that violates or contradicts case law, a rule, or an applicable standard of conduct. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). The third prong (i.e., affects appellant's substantial rights) is satisfied if the error was prejudicial and affected the outcome of the case. *Griller*, 583 N.W.2d at 741. If all three prongs of the test are met, this court then determines whether it "should address the error to ensure fairness and the integrity of the judicial proceedings." *Id*. at 740.

The district court is granted "considerable latitude" in the selection of language for jury instructions. *State v. Traxler*, 583 N.W.2d 556, 560 (Minn. 1998). "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) (citation omitted), *review denied* (Minn. June 15, 1994). "[J]ury instructions must be viewed in their entirety to determine whether they fairly and adequately explained the law of the case." *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988).

In Minnesota, reasonable force may be used to resist a trespass or other unlawful interference with real property by the person in lawful possession of the property. Minn. Stat. § 609.06, subd. 1(4) (2008). The defense-of-dwelling concept is a version of self-

defense with some differences. Ordinarily, a person claiming self-defense must retreat if possible and may use lethal force only if the defender reasonably believes that he or another is exposed to great bodily harm or death, but a person claiming defense-of-dwelling has no duty to retreat and may use lethal force to prevent the commission of a felony in the defender's home. Minn. Stat. § 609.065 (2008); *State v. Carothers*, 594 N.W.2d 897, 901, 903 (Minn. 1999). The party claiming defense-of-dwelling must nevertheless act reasonably and use the level of force appropriate under the specific circumstances. *State v. Glowacki*, 630 N.W.2d 392, 402 (Minn. 2001).

The defendant has the burden of presenting evidence to support a defense-of-dwelling claim. *Griller*, 583 N.W.2d at 741. To do this, Yoya needed to establish three factors: (1) he believed he was preventing the commission of a felony in his home; (2) his belief was reasonable under the circumstances; and (3) the use of deadly force was reasonable under the circumstances.[2] *See id*.

But Yoya presented *no* evidence to support that he believed he was preventing the commission of a felony—second-degree assault or otherwise—in his home. To the contrary, Yoya specifically testified that he waved the knife at M.K.M. after he had disarmed her and blocked the door, preventing her from leaving his apartment, in an attempt to force M.K.M. to return the $150 that she allegedly stole from him.[3] Theft of less than $500 constitutes a misdemeanor, not a felony. *See* Minn. Stat. § 609.52, subd. 3(5) (2008).

[2] Yoya does not dispute the state's implicit argument that he used deadly force.
[3] Yoya claimed not to know how M.K.M. received her knife wounds.

And, contrary to his argument on appeal that he was trying to prevent M.K.M. from trespassing in his apartment, which alone would justify the use of reasonable force, Yoya did not establish that M.K.M. was trespassing because Yoya admitted that he invited M.K.M. into his apartment. Yoya argues that "although [he] allowed [M.]K.M. into h[is] apartment, she became a trespasser when she took [his] money, attacked [him] with a knife, and ransacked his apartment." But Yoya's testimony does not demonstrate that he revoked his permission for M.K.M. to be in his apartment until he told her to leave after she stole his money, whereupon she left. In fact, Yoya testified that he *prevented* M.K.M. from leaving while he demanded that she return his money.

Because the evidence does not support a defense-of-dwelling defense in this case, the district court did not commit plain error by failing to sua sponte instruct the jury on defense-of-dwelling. Therefore, Yoya's argument that he received ineffective assistance of counsel due to counsel's failure to request a defense-of-dwelling instruction is without merit.

Affirmed.