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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1676**

State of Minnesota,
Respondent,

vs.

Montrell Shief,
Appellant.

**Filed August 31, 2010
Affirmed
Lansing, Judge**

Hennepin County District Court
File No. 27-CR-08-64501

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

Michael O. Freeman, Hennepin County Attorney, Paul R. Scoggin, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

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

Considered and decided by Stauber, Presiding Judge; Lansing, Judge; and Peterson, Judge.

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

LANSING, Judge

A jury found Montrell Shief guilty of possession of a firearm by an ineligible person and receiving stolen property. In this appeal, Shief challenges the district court's denial of a jury instruction on the defense of necessity and the inclusion of an instruction from the criminal jury instruction guide that distinguishes between motive and intent. Because the district court properly instructed the jury on the applicable law, we affirm.

F A C T S

In response to a neighbor's 911 report of fired shots, police officers from Maple Grove and other jurisdictions went to Montrell Shief's home on December 27, 2008. The police testified at trial that Shief was outside his house as they approached but ran back into his house. Shief permitted the police to enter and told them that when he had walked from his detached garage to his house a short time earlier, he was confronted by a long-time acquaintance named Jonathan. Shief and Jonathan were not on good terms and, when Shief asked him to leave, Jonathan pointed a rifle or a long gun at Shief and fired three shots.

The officers saw three shotguns and a rifle leaning against the kitchen counter. After inspecting the guns, the officers processed the serial numbers and confirmed that the guns had not been reported stolen. As a result, they left the guns in Shief's home. Shief testified at trial that he remained alone in his home with the guns and later left to spend the night at a friend's house. Shief was the only occupant of his house because his girlfriend, SS, who shared the house, and Shief's two children were out of town.

The next morning, Corcoran police received a report of a burglary that included the theft of four firearms. The burglary and gun theft had occurred at the home of SS's father, LS, during LS's extended absence from his home. When LS's girlfriend stopped by LS's house on the morning of December 28, she saw that his basement door had been kicked in and that four of LS's long guns were missing. One of the Corcoran officers who responded to the burglary report at LS's house had also been part of the police team who had been at Shief's house the previous evening. When the officer asked LS for the names of people who knew that he was away from home, he supplied, among others, Shief's name and address. The Corcoran officer remembered the guns at Shief's house and suspected that they were the guns that had been stolen from LS.

The police returned to Shief's house and saw the firearms, along with two ammunition magazines and various loose pieces of ammunition, in the same place where they had been the previous evening. Shief volunteered that the guns belonged to LS but said that LS knew that he had them. He then qualified that statement by saying SS knew that he had them. The police arrested Shief and, after a record check showed that he had previously been convicted of a felony and was prohibited from possessing firearms, the state charged him with firearm possession by an ineligible person and receiving stolen property.

Shief told police that when Jonathan had confronted him outside Shief's house the previous evening, Shief had seen the four guns in the hatchback area of Jonathan's car. He said he recognized the guns because LS had shown them to him in the past. Shief seized the guns because he was "not going to allow Jonathan to do this to the family."

At the beginning of the trial, Shief filed a written notice, asserting that these circumstances justified his illegal possession of the guns and requesting a jury instruction on the defense of necessity. The district court reserved a decision on the requested instruction until after the presentation of evidence.

In addition to police testimony, SS and LS testified for the state. Shief testified in his defense. He recounted his version of the shooting incident, stated that Jonathan was dangerous, and explained that he took the guns from Jonathan so he could return them to LS.

After both sides rested, the district court concluded that the evidence was not sufficient to support the elements of a necessity defense and denied Shief's requested instruction. On its own initiative, and over Shief's objection, the district court included CRIMJIG 7.11 to instruct the jury on the proper use of motive evidence. *See* 10 *Minnesota Practice* CRIMJIG 7.11 (2006) (distinguishing between intent and motive and stating that good motive alone does not constitute defense).

The jury found Shief guilty of both charges. Shief appeals the district court's denial of his requested instruction on the defense of necessity and the addition of the instruction on the proper use of motive evidence.

D E C I S I O N

District courts have considerable latitude in choosing jury instructions. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). On appeal we view the instructions in their entirety to determine whether they fairly and adequately state the law governing the case. *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988). We apply an abuse-of-discretion

standard and focus on whether the refusal to give a requested instruction resulted in error. *State v. Kuhnau*, 622 N.W.2d 552, 555 (Minn. 2001).

I

“Minnesota courts have acknowledged and applied the common law defense of necessity.” *State v. Hanson*, 468 N.W.2d 77, 78 (Minn. App. 1991), *review denied* (Minn. June 3, 1991). The necessity defense “applies only in emergency situations where the peril is instant, overwhelming, and leaves no alternative but the conduct in question.” *State v. Johnson*, 289 Minn. 196, 199, 183 N.W.2d 541, 543 (1971). To defeat a criminal charge by invoking a necessity defense, a defendant must show that: (1) he had no legal alternative to violating the law, (2) the harm to be prevented was imminent, and (3) a direct, causal connection existed between violating the law and preventing the harm. *State v. Rein*, 477 N.W.2d 716, 717 (Minn. App. 1991), *review denied* (Minn. Jan. 13, 1992). A defendant is entitled to an instruction on the necessity defense if the evidence produced at trial amounts to a prima facie showing on each of the required elements. *State v. Hall*, 722 N.W.2d 472, 477 (Minn. 2006); *State v. Brodie*, 532 N.W.2d 557, 557 (Minn. 1995).

Shief requested a jury instruction on the defense of necessity, based on his claim that he had taken the guns from Jonathan to prevent imminent harm or to return them to LS. The record, however, shows that the evidence is insufficient on each of the three elements. The insufficiency is most pronounced on the first element, which requires that the person who asserts the defense show that he had no alternative to violating the law. Shief had clear legal alternatives to illegal possession of the firearms. His justification

argument focuses narrowly on the time period during which the shots were fired. But whether or not the jury would have accepted that explanation, his illegal possession continued after Jonathan left. According to his own testimony, Shief carried the guns into his house and remained there with the guns under his possession and control. *See State v. Florine*, 303 Minn. 103, 105, 226 N.W.2d 609, 610 (1975) (stating that possession is shown when defendant “at one time physically possessed [the item] and did not abandon his possessory interest . . . but rather continued to exercise dominion and control over it”). When police arrived, Shief again had an obvious legal alternative: surrendering the firearms to the police. He chose not to avail himself of this legal alternative or to tell the police that the guns were stolen and, instead, continued to possess the guns after the police left his house. Shief’s argument about his reluctance to choose the legal alternative is not legally significant because the element requires that he show “instant, overwhelming” peril that leaves “no alternative.” *Johnson*, 289 Minn. at 199, 183 N.W.2d at 543. A reasonable jury would not believe that Shief had no legal alternative. *See Rein*, 477 N.W.2d at 718 (reviewing denial of instruction on necessity defense).

The necessity defense is not sufficiently established to warrant a jury instruction if any one of the three elements is unmet. It is therefore unnecessary to address the remaining elements. We note, however, that the second element—imminent harm—was also lacking because Shief continued to possess the guns even after the police secured the area and no threat remained. The evidence also failed to establish the third element—the direct causal connection between violating the law and preventing the harm. Shief

testified that Jonathan brandished his own firearm after Shief took the four stolen firearms. Consequently, Shief's illegally taking possession of the firearms triggered the harm rather than prevented it.

The evidence presented would not permit a reasonable jury to find any of the elements of a necessity defense. The district court did not abuse its discretion by denying an instruction on the defense of necessity.

II

The district court included in its jury instructions, over Shief's objection, an instruction distinguishing between intent and motive. The instruction provides:

“Intent and motive should not be confused. Motive is what prompts a person to act or fail to act. Intent refers only to the state of mind with which the act is done or omitted.

Personal advancement, financial gain, political reasons, religious beliefs, or moral convictions are recognized as motives for human conduct. Those motives may prompt one person toward voluntary acts of good and another toward voluntary acts of crime.

Good motive alone is not a defense where the act done or omitted is a crime. Thus, the defendant's motive is immaterial, except insofar as you may consider evidence of motive in determining the element of intent.”

CRIMJIG 7.11. The district court also instructed the jury on the charged crimes and provided additional CRIMJIG instructions on mens rea elements, defining “to know,” “intentionally,” and “with intent.” Shief argues that the instruction negated his defense and interfered with his right to a fair trial.

Jury instructions in a criminal prosecution must include all elements of the charged offense. *See State v. Mahkuk*, 736 N.W.2d 675, 682 (Minn. 2007). The district court has discretion to provide additional instructions or definitions to help explain the

elements. *See Peterson v. State*, 282 N.W.2d 878, 881 (Minn. 1979) (recognizing that detailed definitions may be needed if instructions otherwise could mislead jury or allow speculation about meaning of elements). “An instruction is in error if it materially misstates the law.” *Kuhnau*, 622 N.W.2d at 556.

Taken as a whole the district court’s instructions properly stated the law. The instruction on firearm possession by an ineligible person correctly included the element of “knowing possession” of the firearm. *See 10A Minnesota Practice*, CRIMJIG 32.17 (2006), (stating that first element of firearm possession by an ineligible person is that “the defendant knowingly shipped, transported, possessed or received a firearm”). And the instruction on possession of stolen property correctly included the element that the defendant “knew or had reason to know” the property was stolen. *See 10 Minnesota Practice*, CRIMJIG 16.48 (2006) (stating that third element of receiving stolen property is that “the defendant knew or had reason to know” that the property was stolen). Shief’s assertion of the necessity defense resulted in the admission of testimony relating to his motive in possessing the firearms. When the evidence failed to establish an adequate basis for a jury instruction on that defense, the district court recognized that the jury could reasonably be confused about the significance of the expanded testimony on motive. To avoid the misuse of the testimony on motive, the district court instructed the jury on the proper use of motive testimony by including CRIMJIG 7.11. The instruction properly states the law and was not an abuse of discretion. To the extent it negated Shief’s defense, that limitation was consistent with the district court’s proper

determination that Shief had not shown that he was entitled to an instruction on the necessity defense.

Finally, we reject Shief's claim that including CRIMJIG 7.11 deprived the jury of its inherent power of lenity. Courts acknowledge a jury's inherent power to return a verdict that is contrary to the law. *State v. Perkins*, 353 N.W.2d 557, 561 (Minn. 1984). But the district court is not required to inform jurors of that power. *Id.* at 562. To exercise lenity, the jury essentially ignores the instructions that are provided by the district court. *See id.* (defining lenity as "power to bring in a verdict of not guilty despite the law and the facts"). The district court's first instruction stated to jurors, "You must follow and apply the rules of law as I give them to you, even if you believe the law is or should be different." 10 *Minnesota Practice* CRIMJIG 3.01 (2006). This is a correct statement of the law as it applies to every case. The district court's duty is to inform jurors of the law, not to enable them to disregard the law. The district court's jury instruction properly stated the law and cannot form a basis for reversal under a claim that the jury's power of lenity was constricted.

Affirmed.