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STATE OF NEBRASKA, APPELLEE, V. DANIEL C. MILLER, APPELLANT.

798 N.W.2d 827

Filed April 15, 2011. No. S-10-582.

1. **Jury Instructions: Appeal and Error.** Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision.
2. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
3. **Jury Instructions: Appeal and Error.** All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal.
4. **Self-Defense.** To successfully assert the claim of self-defense, a defendant must have a reasonable and good faith belief in the necessity of using force.
5. ____. The force used in self-defense must be immediately necessary and must be justified under the circumstances.
6. ____. A defendant's use of deadly force in self-defense is justified if a reasonable ground existed under the circumstances for the defendant's belief that he or she was threatened with death or serious bodily harm, even if the defendant was actually mistaken about the extent of the danger.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Reversed and remanded for a new trial.

Greg Abboud, of Abboud Law Firm, and A. Michael Bianchi for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

A jury found the appellant, Daniel C. Miller, guilty of first degree murder and use of a deadly weapon to commit a felony. The district court sentenced him to life in prison on the murder conviction and 10 years in prison on the use of the deadly weapon conviction, with the sentences to be served consecutively. Miller appeals, claiming that the court erred

in instructing the jury on self-defense, in granting the State's *Batson* challenge, in allowing inadmissible testimony, and in refusing to grant a mistrial because of prosecutorial misconduct. Because the court erred in instructing the jury on self-defense, we reverse, and remand for a new trial.

BACKGROUND

The facts are not in serious dispute. The parties do not dispute that Miller was entitled to a self-defense instruction, and there is no dispute that NJI2d Crim. 7.3 was the correct instruction. The dispositive issue is whether the language added to the self-defense instruction by the trial judge misstated the law or likely would have confused the jury.

The charges in this case stemmed from a confrontation between two rival gangs. The rivalry was central to Miller's defense, and Miller does not dispute that he was affiliated with a gang. In June 2008, Miller and some friends, many of whom were gang members, drove to a gas station in Millard, Nebraska, to fight a rival gang. Miller was carrying a gun that he had retrieved earlier that day. The gangs were meeting to fight because one of Miller's friends had a dispute with Julius Robinson, one of the rival gang's members, over money.

When Miller's group arrived at the gas station, they did not see the rival gang, so they turned onto Deauville Drive, a street that fronted the gas station. As they were driving down the street, the rival gang emerged in what some witnesses described as an ambush. There is a dispute as to how many rival gang members emerged and what kind of weapons they had. Miller testified that the attackers had guns and baseball bats, while others stated that they just had bats. Still others claimed there were no weapons at all. As the attackers approached, Miller fired two shots. Robinson was hit in the chest and later died.

At Miller's trial, the court adopted the State's proposed jury instruction on self-defense without substantial change. Miller objected to the instruction. Miller argued that the proposed instruction contained a sentence that was not part of any instruction within the Nebraska Jury Instructions and that this sentence misstated the law. The State countered that this

sentence came from the comments to one of the self-defense instructions and argued that *State v. Eagle Thunder*[1] supported the sentence. The court, noting that the challenged language came from a comment to NJI2d Crim. 7.1, ultimately gave the instruction. We set out the court's instruction below in our analysis.

Miller complained of the instruction again when he moved for a new trial. Miller argued that neither *Eagle Thunder* nor the self-defense statute supported the instruction given. The court denied the motion for a new trial.

ASSIGNMENTS OF ERROR

Miller assigns, restated and renumbered, that the district court erred in

(1) giving a self-defense instruction that misstated the law and confused the jury;

(2) granting the State's *Batson*[2] challenge when Miller had stated valid, race-neutral reasons for striking the juror;

(3) admitting improperly elicited testimony from Miller about his involvement in other crimes;

(4) allowing the State to question a police officer about whether Miller had contacted the police after the crime; and

(5) failing to grant a mistrial because of prosecutorial misconduct during the State's closing argument.

STANDARD OF REVIEW

[1] Whether jury instructions are correct is a question of law, which we resolve independently of the lower court's decision.[3]

ANALYSIS

[2,3] Miller contends that the jury instructions regarding self-defense were incorrect and likely confused the jury. In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction

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[1] *State v. Eagle Thunder*, 201 Neb. 206, 266 N.W.2d 755 (1978).

[2] See, *Georgia v. McCollum*, 505 U.S. 42, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992); *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

[3] See *State v. Bormann*, 279 Neb. 320, 777 N.W.2d 829 (2010).

was prejudicial or otherwise adversely affected a substantial right of the appellant.[4] All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal.[5]

The court gave the following instruction on self-defense:

> The Defendant . . . Miller acted in self-defense if:
>
> (1) . . . Robinson and others threatened or attempted to kill or cause serious bodily harm to the Defendant and other occupants of the vehicle;
>
> (2) The Defendant and the other occupants of the vehicle did not provoke any such threat or use of force against them with the intent of using deadly force in response;
>
> (3) Under the circumstances as they existed at the time, the Defendant reasonably believed that his use of deadly force was immediately necessary to protect him and the others against death or serious bodily harm; and
>
> (4) Before using deadly force the Defendant and the others either tried to get away or did not try because they reasonably did not believe that they could do so in complete safety.
>
> "Deadly force" means force used with the intent to cause death or serious bodily harm or force used with the knowledge that its use would create a substantial risk of death or serious bodily harm.
>
> The fact that the defendant may have been wrong in estimating the danger does not matter so long as there was a reasonable basis for what he believed and he acted reasonably to that belief.
>
> To raise the defense of self-defense, a defendant cannot have been the aggressor in the unlawful use of force. A defendant who is not the initial aggressor but responds to force with more force than is necessary to repel the attack becomes the aggressor at this new and more serious level of force.

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[4] *State v. France*, 279 Neb. 49, 776 N.W.2d 510 (2009).

[5] *State v. Young*, 279 Neb. 602, 780 N.W.2d 28 (2010).

> The State has the burden of proof beyond a reasonable doubt in disproving the elements of self defense.

Miller objects only to the part of the instruction that states, "A defendant who is not the initial aggressor but responds to force with more force than is necessary to repel the attack becomes the aggressor at this new and more serious level of force." Miller argues that this sentence is a misstatement of the law and cannot be read harmoniously with the sentence that states that Miller could have been wrong in estimating the danger so long as there was a reasonable basis for his belief and he acted reasonably on that belief.

As mentioned, there is no dispute over whether the court should have given a self-defense instruction; the State did not object to the instruction. But the challenged sentence is not part of NJI2d Crim. 7.3, which may be given if a defendant uses deadly force. Nor is it a part of any other jury instruction. Instead, the language is found in the comments to NJI2d Crim. 7.1, which is the self-defense instruction that may be given when the defendant uses nondeadly force.

The State argued that *Eagle Thunder*[6] supports the challenged sentence, but we do not read *Eagle Thunder* to state such a rule. In *Eagle Thunder*, the defendant had been attacked but had escaped to safety. Although he was under no present threat, he picked up a pipe and returned to assault those who had previously attacked him. In addition to assaulting those who had attacked him, he also hit a man who had not been involved in the attack. We affirmed the trial court's refusal to instruct the jury on self-defense, stating, "[The] defendant was the aggressor in this instance and therefore the trial court was correct in refusing to instruct the jury" on self-defense.[7] *Eagle Thunder* thus stands for the rule that a defendant who is the initial aggressor is not entitled to a self-defense instruction; it does not hold that one who uses more force than is necessary loses his privilege of self-defense. In sum, the challenged comment finds no support in *Eagle Thunder*.

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[6] *Eagle Thunder, supra* note 1.

[7] *Id.* at 211, 266 N.W.2d at 757.

[4-6] We have consistently stated that to successfully assert the claim of self-defense, a defendant must have a reasonable and good faith belief in the necessity of using force.[8] Further, the force used must be immediately necessary and must be justified under the circumstances.[9] A defendant's use of deadly force in self-defense is justified if a reasonable ground existed under the circumstances for the defendant's belief that he or she was threatened with death or serious bodily harm, even if the defendant was actually mistaken about the extent of the danger.[10] This statement of the law is reflected in the jury instructions, which state that a defendant may have been wrong in estimating the danger so long as there was a reasonable basis for that belief and he acted reasonably in response to that belief.

As we have stated, a person is justified in using deadly force in self-defense if the person reasonably believes he is threatened with death or serious bodily harm. Conversely, if the evidence shows that such a belief was unreasonable, the defendant loses the protection of the defense.[11] At that point, his use of force is unlawful. But the challenged sentence does not state that the defendant loses his justification when his belief is unreasonable. Instead, it states that if the defendant responded with more force than was necessary, he or she became the aggressor at this new and more serious level of force.

As we read this challenged sentence, it allows the jury to determine whether the force used was necessary, even if a reasonable ground existed under the circumstances to support Miller's belief that he was imminently threatened with

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[8] E.g., *France, supra* note 4; *State v. Goynes*, 278 Neb. 230, 768 N.W.2d 458 (2009); *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006); *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999); *State v. Marshall*, 253 Neb. 676, 573 N.W.2d 406 (1998); *State v. Kinser*, 252 Neb. 600, 567 N.W.2d 287 (1997). See, also, Neb. Rev. Stat. § 28-1409 (Reissue 2008).

[9] E.g., *Kinser, supra* note 8.

[10] See, *Iromuanya, supra* note 8; *State v. Thompson*, 244 Neb. 375, 507 N.W.2d 253 (1993); § 28-1409.

[11] See, *Iromuanya, supra* note 8; 2 Wayne R. LaFave, Substantive Criminal Law § 10.4(c) (2d ed. 2003).

death or serious bodily harm. The challenged sentence is thus an incorrect statement of the law. It conflicts with the jury's duty to determine whether Miller reasonably believed, in the light of the circumstances known to him at the time, that the use of deadly force was necessary to prevent death or serious bodily injury. If the jury finds that the defendant did have such a reasonable belief, the killing was justified. What the jury believes is actually necessary in response to such a threat with the benefit of calm hindsight is not the inquiry, because "[d]etached reflection cannot be demanded in the presence of an uplifted knife."[12]

Jury instructions are not prejudicial if they, when taken as a whole, correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence.[13] Here, the instruction did not correctly state the law. That alone results in prejudice requiring reversal. Moreover, when all the jury instructions are read as a whole, they are at best confusing. At worst, the challenged sentence effectively negates the court's instruction that Miller could be mistaken so long as reasonable grounds for the belief existed. We cannot read these two provisions harmoniously. The instruction was prejudicial error. Because we find that the trial court's erroneous jury instructions require reversal, we decline to consider Miller's other assignments of error.

REVERSED AND REMANDED FOR A NEW TRIAL.

MOORE, Judge, participating on briefs.

WRIGHT, J., not participating.

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[12] *Brown v. United States*, 256 U.S. 335, 343, 41 S. Ct. 501, 65 L. Ed. 961 (1921).

[13] See, *Young, supra* note 5.