STATE OF NEBRASKA, APPELLEE, V. JORGE CORTES-LOPEZ, APPELLANT.

789 N.W.2d 522

Filed June 8, 2010. No. A-09-840.

1. **Jury Instructions.** Whether jury instructions given by a trial court are correct is a question of law.
2. **Judgments: Appeal and Error.** When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
3. **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.
4. **Jury Instructions: Pleadings: Evidence.** Whether requested to do so or not, a trial court has the duty to instruct the jury on issues presented by the pleadings and the evidence.
5. **Jury Instructions.** The trial court is required to give an instruction where there is any evidence, which could be believed by the trier of fact, in support of a legally cognizable theory of defense.
6. **Judgments: Appeal and Error.** A proper result will not be reversed merely because it was reached for the wrong reason.
7. **Jury Instructions: Appeal and Error.** A jury instruction which directs the attention of the jury to, and unduly emphasizes, a part of the evidence is erroneous and should be refused.
8. **Trial: Motions for Mistrial: Waiver: Appeal and Error.** When a party has knowledge during trial of irregularity or misconduct, the party must timely assert his or her right to a mistrial. One may not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable result, assert the previously waived error.

Appeal from the District Court for Madison County: JAMES G. KUBE, Judge. Affirmed.

Mark D. Albin, of Albin Law Office, for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

INBODY, Chief Judge, and MOORE and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

After the district court instructed the jury in this criminal case, the jury requested a dictionary definition of "terroristic

threat." Instead, the court provided a supplemental instruction which amended the original instruction on the elements of terroristic threats to add that it could also be committed "in reckless disregard of the risk of causing such terror." Because there was evidence to support a theory that Jorge Cortes-Lopez committed the crime recklessly and the amended instruction did not prejudice Cortes-Lopez, we affirm.

BACKGROUND

The State charged Cortes-Lopez in an amended information with terroristic threats and assault in the third degree based upon events occurring on September 13, 2008, while Rafael Perez and Cortes-Lopez were working at a packing plant.

Perez testified that while he was cutting hams on the "loin line" and Cortes-Lopez was learning how to cut hams on the training table, Cortes-Lopez kept staring at Perez, which made Perez nervous. Perez testified that Cortes-Lopez then approached Perez, said he was going to kill Perez with the knife that he had at his side, and put his finger on Perez' throat. Perez testified that he was scared and that he reported the incident to his trainer when Cortes-Lopez walked away. Perez testified that later that day, Cortes-Lopez came up to him in the cafeteria, Cortes-Lopez slapped him a couple of times, and then Perez got up and ran. While Perez was running away, he noticed that Cortes-Lopez threw Perez' hardhat at Perez. Other witnesses in the cafeteria similarly testified that Cortes-Lopez yelled at Perez, slapped Perez two or three times, and picked up a hardhat and threw it toward the area where Perez was.

The interpreter who translated the conversations of a deputy sheriff and Cortes-Lopez between Spanish and English on the day of the incident recalled that Cortes-Lopez denied threatening Perez but admitted talking to him and poking him in the chest "to kind of back off." The interpreter testified that Cortes-Lopez denied hitting Perez. The deputy sheriff testified that Cortes-Lopez told him that when Cortes-Lopez went to speak with Perez about Perez' staring at Cortes-Lopez, Perez "got into like a fighting type of stance, and [Cortes-Lopez] was afraid that . . . Perez was going to attack him so he said

he slapped him a couple times and then threw a [hardhat] at him."

When the State rested, Cortes-Lopez moved for a directed verdict. The prosecutor asked the court to overrule the motion, stating that "there certainly was testimony by . . . Perez that statements were made that it was a threat to kill. The jury can infer from the evidence that was meant to terrorize or recklessly made. And that's enough to make a prima facie case." The court overruled the motion.

Cortes-Lopez testified that he spoke with Perez a number of times about why Perez was staring at him. Cortes-Lopez explained that he did not "know whether [Perez was] gay or not" and that Cortes-Lopez felt his "honor as a man was being offended." Cortes-Lopez denied threatening to kill Perez. He admitted slapping Perez, but testified that it was not his intent to slap him. Cortes-Lopez testified that while they were in the cafeteria, it looked as though Perez was going to throw his hardhat at Cortes-Lopez, so when the hardhat slipped out of Perez' hand, Cortes-Lopez hit Perez with his left hand and then grabbed the hardhat. Cortes-Lopez denied poking Perez in the chest.

After the evidence had been adduced, the court conducted a jury instruction conference and neither party had any objections to the proposed instructions or requested additions. Following closing arguments—which are not in the record—the court read the jury instructions to the jury. Jury instruction No. 4 provided in part as follows:

> The elements of the crime of **Terroristic Threats** (Count I) are:
>
> (1) That [Cortes-Lopez] threatened to commit a crime of violence;
>
> (2) That [Cortes-Lopez] did so with intent to terrorize . . . Perez; and
>
> (3) That [Cortes-Lopez] did so on or about September 13, 2008, in Madison County, Nebraska.

Instruction No. 5 provided in part: "The crime of terroristic threats does not require an intent to actually execute the threat made or that the recipient of the threat actually feel terrorized.

A threat may be written, oral, physical, or any combination thereof."

The court submitted the case to the jury at 11:24 a.m. At 12:45 p.m., the court advised the parties that the jury had sent a question asking if it may have the dictionary definition of "terroristic threat." The court stated:

> Initially my response was going to be simply to refer to Instruction No. 4. Instruction No. 4 gave them the elements of the crime, and that is essentially the definition of terroristic threats, when a person threatens to commit any crime of violence with the intent to terrorize another, which is the element that we gave them in Instruction No. 4.
>
> The problem is when I went to review this, it also states that it could be in reckless disregard of the risk causing such terror. In Instruction No. 5 we told them that the crime of terroristic threats did not require an intent to actually execute the threat. We did not include anything in there about reckless.
>
> So my proposed response that I will ask each of you to respond to is to amend Instruction No. 4, and specifically that portion of the elements of terroristic threats contained in . . . subparagraph 2 which says that [Cortes-Lopez] did so with the intent to terrorize . . . Perez, and the additional language is, "or in reckless disregard of the risk causing such terror", which is pursuant to statute and it's also pursuant to the language in the Complaint. It was simply my error in not including that reckless disregard of causing such terror language.
>
> So my intent is to amend Instruction No. 4, submit that to them, with a response to their question that says, you are to refer to Amended Instruction No. 4.

The prosecutor agreed with the court and its proposed amended instruction. Cortes-Lopez' counsel, however, stated:

> I would not be in agreeance . . . only for the mere fact that the instruction that was given to them was, and is basically at the time it was given, the definition per the statute. I would agree that it was minus the reckless disregard of causing such terror part. However, I don't know if

> that would necessarily answer the question the jury has as to what the definition of terroristic threat is. I think rather answering the question, not with an amended instruction, but rather terroristic threat is defined in the instructions by the elements and by how it is worded in Instruction No. 4 as it stands.
>
> I would hate to jeopardize especially confusing the jury more by adding another term to the definition trying to define it better for them. I think that would possibly cause more jury misunderstanding or cause more questions.
>
> So at this time I would object to the amendment and simply answer that defined in Instruction 4, as Instruction 4 was given to them by the Court, and I don't think the instruction needs to be amended.

The court stated that "[t]he instructions as we gave them says [sic] that [Cortes-Lopez] did so with the intent to terrorize . . . Perez. If you look at Instruction No. 5, it says that the crime of terroristic threats does not require an intent to actually execute the threat. That's contradictory." Cortes-Lopez' counsel renewed the objection to allowing the amended instruction. At 1 p.m., the court provided the jury with supplemental instruction No. 1, which instructed the jury to refer to the amended instruction No. 4. The only difference between the original and amended instructions is that the amended instruction added to (2) "or in reckless disregard of the risk of causing such terror." By 1:40 p.m., the jury had reached a unanimous verdict of guilty on each count. The court subsequently sentenced Cortes-Lopez.

Cortes-Lopez timely appeals.

ASSIGNMENT OF ERROR

Cortes-Lopez assigns that the district court erred in giving a supplemental jury instruction which was an incorrect statement of law as applied to the facts of the case, was not offered by the prosecution, and was given over his objection.

STANDARD OF REVIEW

[1,2] Whether jury instructions given by a trial court are correct is a question of law. *State v. Bormann*, 279 Neb. 320, 777

N.W.2d 829 (2010). When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below. *Id.*

[3] 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. *State v. Vela*, 279 Neb. 94, 777 N.W.2d 266 (2010).

ANALYSIS

[4] Whether requested to do so or not, a trial court has the duty to instruct the jury on issues presented by the pleadings and the evidence. *State v. Contreras*, 268 Neb. 797, 688 N.W.2d 580 (2004). Thus, even though neither party requested the instruction at issue, we find no merit in Cortes-Lopez' argument that "the trial judge overstepped his judicial role and acted in fact in a prosecutorial manner." Brief for appellant at 9.

The State charged Cortes-Lopez with the crime of terroristic threats as defined by Neb. Rev. Stat. § 28-311.01(1) (Reissue 2008):

> (1) A person commits terroristic threats if he or she threatens to commit any crime of violence:
>
> (a) With the intent to terrorize another;
>
> (b) With the intent of causing the evacuation of a building, place of assembly, or facility of public transportation; or
>
> (c) In reckless disregard of the risk of causing such terror or evacuation.

The information charged Cortes-Lopez with terroristic threats, using the statutory language and stating all three alternatives. Thus, the issue of reckless disregard was presented by the pleadings. Therefore, if the evidence supported the reckless disregard alternative, the trial judge was required to instruct the jury on the issue.

Initially, in instructing the jury as to the elements of the crime of terroristic threats, the court included only the language from § 28-311.01(1)(a). In response to the jury's question seeking a

dictionary definition of "terroristic threat," the court amended its instruction to add the language of § 28-311.01(1)(c) (with the exception of the words "or evacuation"). Generally, in giving instructions to the jury, it is proper for the court to describe the offense in the language of the statute. *State v. Davlin*, 272 Neb. 139, 719 N.W.2d 243 (2006). Even though the amended instruction was a correct statement of the law, two issues are presented: (1) whether the evidence supported a "reckless disregard" theory and (2) whether the amended instruction unduly emphasized this theory so as to cause prejudice.

[5] The trial court is required to give an instruction where there is any evidence, which could be believed by the trier of fact, in support of a legally cognizable theory of defense. *State v. Nesbitt*, 264 Neb. 612, 650 N.W.2d 766 (2002). Here, a reasonable jury could conclude that Cortes-Lopez did not intend to terrorize Perez, but, rather, intended only to act in a way demonstrating that he was "a man a hundred percent." If the jury accepted this version of the events, the jury would have been required, under the charge asserted in the operative information, to consider whether Cortes-Lopez did so in reckless disregard of the possibility that Perez would be terrorized. However slight this evidence may have been, it justified the giving of the amended instruction to include "reckless disregard."

[6] We note that when the trial court explained its reasons to counsel for giving the proposed amended instruction, the court did not mention that the evidence warranted the "reckless disregard" language. Rather, the court stated that the statutory language states the crime could be committed "in reckless disregard of the risk causing such terror" and that instruction No. 5 stated "the crime of terroristic threats did not require an intent to actually execute the threat. We did not include anything in there about reckless." We find nothing contradictory about the original instructions Nos. 4 and 5. The pertinent language of the original instruction No. 4 described the requisite intent where the threat is made intentionally—i.e., that the actor intended to terrorize the victim. The pertinent sentence of instruction No. 5 elaborated on this in two ways, both of which are correct and supported by case law. First, it explained that

the actor does not have to intend to actually carry out the threat. See *State v. Saltzman*, 235 Neb. 964, 458 N.W.2d 239 (1990) (crime of terroristic threats does not require intent to execute threats made). It also informed the jury that the victim does not have to actually be terrorized. See *id.* Although we disagree with the district court's stated reason for giving the amended instruction, the evidence supported doing so. A proper result will not be reversed merely because it was reached for the wrong reason. *In re Trust Created by Cease*, 267 Neb. 753, 677 N.W.2d 495 (2004).

Cortes-Lopez also argues that "the instruction was prejudicial because the Court did not answer the question and the Court so acted in a quasi prosecutorial manner by pursuing a tactic or strategy not pursued by trial prosecution." Brief for appellant at 10. We observe that the giving of additional instructions after the jury has begun deliberations is authorized by statute. See Neb. Rev. Stat. § 25-1116 (Reissue 2008). See, also, *State v. Hudson*, 277 Neb. 182, 761 N.W.2d 536 (2009) (if it becomes necessary to give further instructions to jury during deliberations, proper practice is to call jury into open court and to give any additional instructions in writing in presence of parties or their counsel).

[7,8] 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. *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009). A jury instruction which directs the attention of the jury to, and unduly emphasizes, a part of the evidence is erroneous and should be refused. *State v. Nesbitt*, 264 Neb. 612, 650 N.W.2d 766 (2002). Here, the court read to the jury the entirety of the amended instruction No. 4, which included the elements of assault in the third degree and the effect of the jury's findings. We cannot say that the amended instruction unduly emphasized part of the evidence. Further, although Cortes-Lopez objected to the proposed amended instruction, he never moved for a mistrial. When a party has knowledge during trial of irregularity or misconduct, the party must timely assert his or her right to a mistrial. One may not waive an error, gamble on a favorable result, and,

upon obtaining an unfavorable result, assert the previously waived error. *State v. Hudson*, 268 Neb. 151, 680 N.W.2d 603 (2004). We conclude that Cortes-Lopez has failed to establish that he was prejudiced by the amended instruction.

CONCLUSION

We conclude that under the circumstances presented in the instant case, the court did not err in giving an amended instruction during the jury's deliberations.

AFFIRMED.