

On February 22, 2008, Appellant Johnson stabbed his roommate Maurice Sartor in the abdomen after Sartor accused Johnson of taking money from his wallet.² According to Sartor, he found his empty wallet in the kitchen around 4:30 a.m. and he “got loud and belligerent” to roust Johnson. Johnson and his girlfriend, Malinda Brookey, left the house followed by Sartor, shouting he wanted his money back. Johnson denied taking the money and kept walking. Sartor continued with his demands to return the money and took a swing at Johnson causing Johnson to fall into the bar ditch along the roadway. Sartor explained that Brookey grabbed him from behind and held onto his shirt. As Sartor struggled with Brookey, Johnson stabbed him. Sartor denied having any kind of weapon.

Johnson raised the defense of defense of another and testified to a different version of events at trial. Johnson said that Sartor was drunk when he accused him of taking the money. Johnson was fed up with Sartor’s drunken rants that he had witnessed earlier in the week so he told Sartor’s girlfriend the truth about the missing money, namely that Sartor had spent it on drugs earlier in the week. Johnson claimed the revelation angered Sartor and Sartor came at him in the front yard with a claw hammer in his hand. As Sartor was about to strike Johnson, Brookey pushed Sartor and Sartor struck Brookey in the head with the hammer. Johnson said it was then that he

² Johnson and Sartor worked together and Johnson and girlfriend Malinda Brookey had moved in with Sartor and girlfriend Darci McCants a week prior to the stabbing. Johnson and Brookey were to stay only a couple of weeks until they saved enough money to move into their own place.

stabbed Sartor to protect Brookey. Johnson admitted getting rid of the knife that night and leaving Oklahoma later that day.

The issue before us is whether the district court's submission of a modified defense of property instruction and the definition of aggressor confused the jury and deprived Johnson of his defense.³ The instruction was given to explain the court's belief that Sartor (the victim) was entitled to use force to prevent Johnson from taking his money whether or not Sartor's belief was reasonable.⁴ Johnson claims that by telling the jury Sartor's use of force to recover his allegedly stolen money was justified, the court deprived him of his defense that he had a lawful right to defend his girlfriend from Sartor's

³ The Defense of Property Instruction No. 8-16 OUJI-CR(2d) reads:

A person is justified in using force in preventing or attempting to prevent a trespass or other unlawful interference with real or personal property in **his/her** lawful possession. Defense of property is a defense although the danger to the property defended may not have been real, if a reasonable person, in the circumstances and from the viewpoint of the defendant, would reasonably have believed the danger of interference to be imminent. The amount of force used may not exceed that amount of force a reasonable person, in the circumstances and from the viewpoint of the defendant, would have used to prevent the trespass or unlawful interference.

The instruction in Johnson's case substituted the word person for the word defendant and read:

A person is justified in using force in preventing or attempting to prevent a trespass or other unlawful interference with real or personal property in his lawful possession. Defense of property is a defense although the danger to the property defended may not have been real, if a reasonable person, in the circumstances and from the viewpoint of the **person**, would reasonably have believed the danger of interference to be imminent. The amount of force used may not exceed that amount of force a reasonable person, in the circumstances and from the viewpoint of the **person**, would have used to prevent the trespass or unlawful interference. (O.R.132)

⁴ The court stated: As to the defense of property, it is modified by this Court, but it explains to the jury that under the situation that a person can defend his property, even though it may not have been real . . . Everybody will argue the evidence as necessary to defend or prosecute their case. (Tr.II 6)

attack. He reasons that if Sartor's actions initiating the fight were justified, Sartor was no longer the aggressor. For this reason, the actions undertaken by Johnson and his girlfriend in response to Sartor's attack made them the aggressors and Johnson was denied his defense because defense of another is not available to a defendant when the person on whose behalf the defendant intervened was the aggressor. Defense counsel objected to the instruction at trial, preserving this issue for appeal.

"We review a trial court's rulings on jury instructions for an abuse of discretion." *Cuesta-Rodriguez v. State*, 2010 OK CR 23, ¶ 59, 241 P.3d 214, 234. "Jury instructions are sufficient if when read as a whole they state the applicable law." *Spence v. State*, 2008 OK CR 4, ¶ 8, 177 P.3d 582, 584. This Court will reverse the judgment only where an error in the jury instructions "has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right." 20 O.S.2001, § 3001.1; *Spence*, 2008 OK CR 4, ¶ 8, 177 P.3d at 584.

It was error to give the modified defense of property instruction in this case relating to the victim's actions. Under 21 O.S.2001, § 643 (3), a person who is about to be injured may use force in preventing or attempting to prevent an offense against his person or in preventing or attempting to prevent unlawful interference with personal property in his lawful possession. According to Sartor, he believed Johnson had already stolen his money and was leaving with it. Sartor pursued Johnson and took the first aggressive action by either taking a swing at Johnson or pushing him into the ditch.

Sartor said he intended to get his money back through force if necessary. Because the theft, if any, had already taken place and the property was no longer in Sartor's possession, § 643 did not permit Sartor to use self-help to forcefully take back his property. Thus, Sartor's use of force here was not lawful even accepting his claims of theft as true.

This instructional error prevented Johnson's jury from properly evaluating the evidence. The modified defense of property instruction informed the jury that Sartor was entitled to use force to defend his property when he was not and, consequently, that Sartor was not the aggressor under the circumstances. The modified defense of property instruction denied Johnson his purported defense because he could no longer avail himself of the defense that he acted to defend another because defending the aggressor in an altercation is not protected under the law.⁵ This case is reversed and remanded for a new trial with proper instructions consistent with this opinion.

⁵ In *Black v. State*, 2001 OK CR 5, ¶ 58, 21 P.3d 1047, 1069, this Court found that the defendant was not entitled to an instruction on the justifiable use of non-deadly force as a defense to assault and battery with intent to kill because the defendant used deadly force. The fact that the victim did not die from his wounds made the force no less deadly in that case. There, the defendant stabbed the unarmed victim thirteen times, including wounds to the head and chest. One could argue (the State does not) that Johnson's stabbing of the victim in the abdomen with a six inch knife constituted deadly force and thus Johnson was not entitled to a defense of another instruction under 21 O.S.2001, § 643(3). Johnson testified that Sartor had a claw hammer and twice hit Brookey in the head with it, prompting him to stab Sartor once. Section 643 (3) authorizes the use of force in defense of another person when attempting to prevent an offense against that person provided the force or violence used is not more than sufficient to prevent the offense. Arguably, stabbing the victim once to prevent him from continuing his assault with a hammer was necessary and not more than sufficient to prevent the offense. This case is distinguishable from *Black*; the evidence was disputed whether Sartor had a hammer or was unarmed. It was for the jury to decide what happened and if Johnson used more force than necessary under instructions that did not misstate the law on defense of property.

DECISION

The Judgment and Sentence of the District Court is **REVERSED and the matter REMANDED for a new trial.** Johnson's motion for new trial on newly discovered evidence is **MOOT.** Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2011), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE JERRY D. BASS, DISTRICT JUDGE

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OPINION BY: A. JOHNSON, P.J.

LEWIS, V.P.J.: Concur

LUMPKIN, J.: Dissent

C. JOHNSON, J.: Concur

SMITH, J.: Concur

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LUMPKIN, JUDGE: DISSENT

I cannot agree with the result reached in the opinion. The instructions as given accurately stated the applicable law and did not deprive Appellant of his defense.

The instructions were necessary to explain the rights of all of the parties in this complex issue which arose from a seemingly simple assault and battery. The jury needed to know Sartor's rights under both 21 O.S.2001, § 643 and 76 O.S.2001, § 9 as well as Appellant's right to act in defense of another.

Based upon Sartor's testimony, the evidence supported instruction upon the defense of property. Oklahoma recognizes an individual's right to use reasonable non-deadly force in defense of real or personal property. 21 O.S.2001, § 643 states in relevant part:

To use or to attempt to offer to use force or violence upon or toward the person of another is not unlawful in the following cases:

* * *

3. When committed either by the person about to be injured, or by any other person in such person's aid or defense, in preventing or attempting to prevent an offense against such person, or any trespass or other unlawful interference with real or personal property in such person's lawful possession; provided the force or violence used is not more than sufficient to prevent such offense;

Id. This right is further codified in 76 O.S.2001, § 9, to wit:

Any necessary force may be used to protect from wrongful injury the person or property of one's self, or of a wife, husband, child, parent or other relative, or member of one's family, or of a ward, servant, master or guest.

Id.

The law has long recognized that this right the right to defense of property includes the privilege to use reasonable force to prevent removal or destruction of personal property.

The same degree of nondeadly force, and subject to the same limitations, which is permissible in defense of property may be used to recapture property tortuously taken by another if the recapture takes place at once or upon fresh pursuit.

Perkins on Criminal Law, 2d. Ed.(1969), Pg. 1028. This Court has recognized that:

[a] person may resist . . . removal or destruction of property not feloniously attempted, by the use of any reasonable force, short of taking or endangering life; but, if he is unable to prevent it, and there is not felony attempted, he must suffer the trespass and the loss of property, and seek redress at the hands of the law, rather than commit homicide.

Turpen v. State, 89 Okla.Crim. 6, 16, 204 P.2d 298, 303 (1949) (quotation and citation omitted).

The jury further needed to know that defense of property:

is available although the danger to the property defended may not have been real, if a reasonable person, in the circumstances and from the viewpoint of the defendant, would reasonably have believed the danger of interference to be imminent. The amount of force used may not exceed that amount of force a reasonable person, in the circumstances and from the viewpoint of the defendant, would have used to prevent the trespass or unlawful interference.

OUJI-CR(2d) 8-16 (Supp.2010).

In contrast, the evidence also supported Appellant's request for an instruction upon defense of another. Oklahoma law also recognizes one's right to use non-deadly force in defense of another under § 643(3).

A person is justified in using force in defense of another if that person reasonably believed that use of force was necessary to protect another from imminent danger of bodily harm. Defense of another is a defense although the danger to the personal security of another may not have been real, if a reasonable person, in the circumstances and from the viewpoint of the defendant, would reasonably have believed that another was in imminent danger of bodily harm. The amount of force used may not exceed the amount of force a reasonable person, in the circumstances and from the viewpoint of the defendant, would have used to prevent the bodily harm.

OUI-CR(2d) 8-4 (Supp.2010). An individual may only use deadly force in lawful defense of his/her husband, wife, parent, child, master, mistress, or servant. *Blankenship v. State*, 1986 OK CR 75, ¶ 8, 719 P.2d 829, 831-32; 21 O.S.2001, § 733. The defense of a friend or companion may not support the use of deadly force. *Id.*; *Cowles v. State*, 1981 OK CR 132, ¶ 11, 636 P.2d 342, 345.

It was for the jury to decide whether Sartor reasonably acted in defense of his property. The complained of instruction was necessary so the jury could determine whether Sartor's belief that danger of interference with his property was objectively reasonable or whether the time to prevent removal of property had passed. If Sartor's belief was not reasonable or the time to prevent removal had passed then Sartor would not be entitled to the use of force since the property taken did not amount to a felony offense. In addition, the instruction was necessary so the jury could determine whether the amount of

force Sartor used was objectively reasonable. If Sartor's belief was reasonable but the amount of force he used was not objectively reasonable then Sartor would in-fact be the aggressor.

As the evidence was disputed as to whether Appellant or Sartor was the aggressor, the trial court properly instructed the jury regarding both defense of property and defense of another. *Jones v. State*, 2009 OK CR 1, ¶ 65, 201 P.3d 869, 886 ("When the evidence is disputed as to who was the aggressor, the determination should be made by the jury under appropriate instructions."). The instructions as a whole accurately stated the law and reversal is not required. *Cipriano v. State*, 2001 OK CR 25, ¶ 14, 32 P.3d 869, 873; *Patton v. State*, 1998 OK CR 66, ¶ 49, 973 P.2d 270, 288.

Further, the instruction upon defense of property did not deprive Appellant of his defense. The instruction given to the jury in the present case did not mention Sartor by name. The instruction did not inform the jury that Sartor's actions were justified, state that Sartor was entitled to use force to defend his property, or tell the jury that Sartor was not the aggressor under the circumstances. Instead, the instruction simply set forth the law regarding defense of property. The jury was permitted to reach its own conclusions from the evidence and instructions.

As the jury was properly instructed, I would affirm the judgment and sentence.