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IN THE
COURT OF APPEALS OF INDIANA

RANDY M. SWISHER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 64A03-0810-CR-514
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE PORTER SUPERIOR COURT
The Honorable William Alexa, Judge
Cause No. 64D02-0801-FB-203

July 9, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Randy Swisher appeals his conviction for Class B felony aggravated battery. We affirm.

Issues

Swisher raises several issues, which we consolidate and restate as:

I. whether the trial court abused its discretion by denying his request to use a State owned computer during the trial; and

II. whether the trial court properly instructed the jury.

Facts

On January 1, 2008, Swisher was home alone while his son Josh, daughter-in-law Megan, their baby, and their friends, Chad and Amber, went to lunch. Earlier that day, Swisher overheard the group talking about him behind a closed door. The group was discussing Swisher's recent erratic behavior and considering obtaining mental help for him. Swisher was convinced they were hashing out a "plot to kill him." Appellant's Br. p. 4.

As the group pulled into the driveway after lunch, Swisher came outside with a shotgun. He was yelling that they should call 911. Thinking that there had been a home invasion, Josh and Chad ran into the house. Chad grabbed a handgun from his glove compartment before entering the house. The women stayed behind with the baby and called 911.

Once Josh got inside, Swisher asked for his cell phone and then told Josh to sit on the couch. When Josh refused, Swisher pointed the shotgun at him. Chad walked in, and

Swisher asked him for his cell phone. Chad refused, and Swisher pointed the shotgun at him. Chad raised his own gun. Swisher fired, and hit Chad in the arm and shoulder. Chad fired back and hit Swisher in the midsection. Josh got down and went to get a gun from his bedroom. Josh returned to room to find Chad crouched on the floor. Josh ordered Swisher to drop the shotgun. He refused, and Josh fired. Swisher went to his knees and dropped the shotgun, but was still holding a 9mm Glock handgun. Josh continued to yell for Swisher to drop the weapon. When Swisher did, Josh pinned Swisher against the stove in the kitchen. Josh noticed all the stove burners were on without flames and assumed the home was filling with gas.

The State charged Swisher with Class B felony aggravated battery and Class C felony battery with a deadly weapon. Swisher represented himself at the four day trial. The jury found him guilty of both counts. The trial court sentenced him to twenty years for the aggravated battery and merged the other count. This appeal followed.

Analysis

I. Use of the Computer

Swisher contends the trial court should have granted him use of a computer owned by the Porter County Sheriff's Department. He argues this act was a "stifling of critical evidence." Appellant's Br. p. 13. Prior to trial, Swisher issued a subpoena to the Porter County's Sheriff Department, demanding the use of a department computer. The Department had apparently previously allowed Swisher to use the computer to view taped statements and he transcribed those statements. He acknowledged that having the computer during trial was for the "purposes of saving time and reference." Tr. p. 352. In

his reply brief, Swisher abandons this position and insists he needed the computer at trial to enter the statements into evidence. Swisher does not identify the statements on this computer. The trial court has broad discretion when ruling on discovery matters and a decision to enforce, modify, or quash a subpoena duces tecum will not be disturbed unless clearly arbitrary. Dylak v. State, 850 N.E.2d 401, 406 (Ind. Ct. App. 2006), trans. denied.

The statements on the computer apparently included Megan and Amber's videotaped interview with Porter County Sheriff's Deputy Tim Mantueffel. Deputy Mantueffel wrote a report, which he later discovered contained an error regarding the women's statements. He testified that according to his report, after Josh went into the house, he came back out and asked Chad to grab a gun. After review, Deputy Mantueffel admitted his report was incorrect on this point and the women did not say that in the videotape. Deputy Mantueffel had no idea why he included that inaccurate detail. Both the prosecutor and Swisher asked Deputy Mantueffel about this inaccurate portion of his report and he admitted the mistake. It is unclear if this was the error Swisher wished to play for the jury or if he was interested in other portions of the statements.

Swisher claims the statements on the computer should have been admitted for the jury and he was denied an opportunity to admit them because he was denied the computer. We fail to see the connection. Both Megan and Amber testified at trial and Swisher had ample opportunity to cross-examine each of them. At no point did he express an interest or a need to reference their videotaped statements. Swisher also argues that not having this computer prevented him from addressing Chad's credibility.

This argument is without merit because during Swisher's cross-examination of Chad, Swisher pointed out inconsistencies between Chad's statement to police and his testimony. Swisher made no attempt to introduce statements, either in videotape or transcribed form. To the extent that Swisher claims his due process rights were violated, we reject such claims because he admitted at trial that use of the computer was merely a method to save time. The trial court did not abuse its discretion by declining to order the Sheriff's Department to turn over the computer.

II. Jury Instructions

Swisher contends the jury was improperly instructed. Specifically, he argues the trial court wrongly refused two of his proposed instructions and improperly modified a third. The purpose of jury instructions is to inform the jury of the law applicable to the facts without misleading the jury and to enable it to comprehend the case clearly and arrive at a just, fair, and correct verdict. Buckner v. State, 857 N.E.2d 1011, 1015 (Ind. Ct. App. 2006). Instructing the jury generally is within the trial court's discretion and we review its decisions only for an abuse of that discretion. Id. A defendant is entitled to a reversal only if he or she demonstrates that an instructional error prejudiced his or her substantial rights. Id.

If a trial court refuses an instruction, we must consider: (1) whether the instruction correctly states the law; (2) whether there is evidence in the record to support the giving of the instruction; and (3) whether the substance of the tendered instruction is covered by other instructions that are given. Jackson v. State, 890 N.E.2d 11, 20 (Ind. Ct. App.

2008). Instructions are to be read together as a whole and we will not reverse for an instructional error unless the instructions, as a whole, mislead the jury. Id.

A. Mistake of Fact

The trial court refused to instruct the jury on a mistake of fact defense. Under the statutory definition, "it is defense that the person who engaged in the prohibited conduct was reasonably mistaken about a matter of fact, if the mistake negates the culpability required for commission of the offense." Ind. Code § 35-41-3-7. Swisher proposed a mistake of fact instruction, but the trial court rejected it. His proposed instruction contained the verbatim statutory language.

"When the State has made a prima facie case of guilt, the burden is upon the defendant to establish an evidentiary predicate of his mistaken belief of fact which is such that it could create a reasonable doubt in the jury's mind that the accused had acted with the requisite mental state." Hoskins v. State, 563 N.E.2d 571, 575 (Ind. 1990). Swisher contended the "mistake" at issue was his own misconception that his family was plotting to kill him, when actually they only wanted to get him mental help. Even if this was Swisher's mistaken belief, and even if facts actually existed to support his adoption of such a belief, it did not excuse his actions. Nothing about this supposedly mistaken belief would excuse or negate Swisher's commanding the young men into the home, pointing a shotgun at both of them, firing it, and injuring Chad. Because the instruction was not supported by the substance of the record, the trial court properly refused it.

B. Necessity

Swisher argues the trial court abused its discretion in refusing his proposed necessity instruction. He did not cite to or include this proposed instruction in the record on appeal. The State argues that without this inclusion, Swisher's argument for a necessity instruction must be waived. See Wingate v. State, 900 N.E.2d 468, 475 (Ind. Ct. App. 2009) (stating that a party waives an issue if it fails to develop cogent argument or provide adequate citation to the record). Waiver notwithstanding, Swisher contends his proposed instruction matched the pattern instruction on necessity and we review it accordingly.

Indiana courts have outlined six prerequisites in establishing a necessity defense: 1) the act charged as criminal was done to prevent a significant evil; 2) there was no adequate alternative to the commission of the act; 3) the harm caused by the act was not disproportionate to the harm avoided; 4) the accused must entertain a good faith belief that his act was necessary to prevent greater harm; 5) such belief must be objectively reasonable under all circumstances; and 6) the accused must not have substantially contributed to the creation of the emergency. Patton v. State, 760 N.E.2d 672, 675 (Ind. Ct. App. 2002).

Even assuming Swisher's proposed instruction correctly outlined the applicable law, the facts in his case did not support giving such an instruction. In this instance, confronting Josh and Chad with a shotgun was not the only alternative for Swisher. Even if Swisher believed they were intending to harm him, such a belief was not objectively reasonable. More importantly, it was his own irrational action that created the emergency

situation. The facts here fail to meet multiple prerequisites. A necessity defense could not be established, and the trial court properly declined giving such an instruction.

C. Reasonable Force

Swisher argues the trial court's instruction on reasonable force was misleading, even though it was based on a pattern instruction.[1] The instruction provided:

> It is an issue whether the Defendant acted in self defense.
>
> A person may use reasonable force against another person to protect himself from what the Defendant reasonably believes to the imminent use of unlawful force.
>
> A person is justified in using deadly force only if he reasonably believes deadly force is necessary to prevent serious bodily injury to himself.
>
> However, a person may not use force if:
>
> 1. he is committing a crime that is directly and immediately connected to the confrontation; or
>
> 2. he has willingly entered into a fight with another person or started the fight, unless he withdraws from the fight and communicates to the other person his intent to withdraw and the other person nevertheless continues or threatens to continue the fight.
>
> The State has the burden of proving beyond a reasonable doubt that the Defendant did not act in self-defense.

[1] A large part of Swisher's argument in this section is irrelevant and lacks cogency. We reject Swisher's notion that the court reporter intentionally altered the transcript or misrepresented his statements and that the trial judge was biased against him. We also remind Swisher that accusing a trial court of bias is a serious matter and not a tactic used simply because the verdict was not in his favor. See Pitman v. Pitman, 717 N.E.2d 627, 634 (Ind. Ct. App. 1999) ("We have the plenary power to order a brief stricken from our files for the use of impertinent, intemperate, scandalous, or vituperative language on appeal impugning or disparaging this court, the trial court, or opposing counsel.").

App. p. 48.

Swisher argues that an omission of the statement "no person in this state shall be placed in legal jeopardy of any kind whatsoever for protecting himself or his family by reasonable means necessary" misled the jury. Appellant's Br. p. 33. This statement is implicit in the instruction and unnecessary. He also contends that inclusion of additional language from another pattern instruction regarding an initiation of fight misled the jury and prejudiced him. The additions are reflective of the statute on self defense and applicable to the facts. See I.C. § 35-41-3-2(e). The instruction as given is not an incorrect statement of the law and did not prejudice Swisher. The trial court did not abuse its discretion in crafting and giving this instruction.

Conclusion

The trial court did not abuse its discretion when it denied Swisher the use of the State owned computer. The trial court did not abuse its discretion by denying two of Swisher's proposed instructions and slightly modifying the reasonable force instruction. We affirm.

Affirmed.

BAKER, C.J., and MAY, J., concur.