

IN THE COURT OF APPEALS OF IOWA

No. 0-629 / 09-1862
Filed October 20, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

HERBERT HENRY BROWN,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Eliza J. Ovrom,
Judge.

A defendant appeals from his conviction for assault against a peace
officer. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Thomas J. Gaul, Assistant
Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Trout, Assistant Attorney
General, John P. Sarcone, County Attorney, and Andrea Diaz, Assistant County
Attorney, for appellee.

Considered by Vogel, P.J., and Doyle and Mansfield, JJ. Tabor, J., takes
no part.

VOGEL, P.J.

Herbert Henry Brown appeals from his conviction for assault against a peace officer in violation of Iowa Code section 708.3A(3) (2009). He argues the district court erred in instructing the jury on resisting arrest. We affirm.

I. Background Facts and Proceedings.

On September 14, 2009, Brown was charged with assault against a peace officer (Officer Becirovic) in violation of Iowa Code section 708.3A(4), and assault against a peace officer (Officer Willis) causing injury in violation of Iowa Code section 708.3A(3).¹ On November 10, 2009, Brown filed a notice of his intent to rely on the defenses of self defense and defense of property.

Trial was held on November 18, 2009. According to the testimony, the Des Moines Police Department received a complaint of loud music coming from an apartment on September 5, 2009. Officer Cody Willis and Officer Sidik Becirovic, on routine patrol in separate vehicles, both responded to the call. Brock Goslar, who was training to become a reserve officer and was not wearing a uniform, was also riding with Officer Willis. Shortly after midnight, the officers and Goslar arrived at the apartment, but did not hear any music coming from the apartment. They knocked on the door and Stephanie Lomax and Brown answered by opening the door. The testimony diverged as to what happened next.

According to the officers' testimony, Officer Willis stood in the doorway, with Officer Becirovic directly behind him and to his right and Goslar five to six

¹ Brown was also charged with interference with official acts in violation of Iowa Code section 719.1(1)(A). This charge was tried to the court, and Brown was found not guilty.

feet behind him to his left. Lomax told the officers she had turned off the music because it was late and the apartment had a policy of no loud music after midnight, and that she and Brown were going to bed. While talking to Lomax, Brown was "irate," saying "F*** you rookies" and yelling at the officers that they had no right to be there. Brown then told the officers to get away from the door and that he was closing the door, but the officers did not move and Brown slammed the door.² The door made contact with Officer Willis, although at trial Officer Willis could not specify where on his body the door struck him.

Officer Willis pushed open the door and reached for Brown's right arm, believing he had just been assaulted and intending to arrest Brown. Brown pulled back and the officers entered the apartment. Officer Willis testified that shortly after he pushed the door in, he told Brown that he was under arrest. A struggle ensued, during which Brown swung and hit Officer Willis in the face and pushed Officer Becirovic up against the kitchen counter. Goslar, perceiving the dangerousness of the situation, entered the apartment, found and turned on the light switch. Goslar testified that he saw Brown "punching" Becirovic. Goslar then pushed Brown up against the wall, Brown threw an elbow at him, and Goslar slid his hand up to Brown's throat and said, "Stop resisting or I'm going to

² Officer Becirovic initially testified that Brown did not tell the officers he was going to close the door. However, when confronted on cross-examination with his report made shortly after the incident, he testified that Brown told the officers to get away from the door and that he was going to close the door. He further testified,

Q. The question is, did you and Officer Willis get away from the door after being asked to do so? A. We did not.

Q. And, in fact, Officer Willis was standing in the doorway, is that correct? A. That's correct, ma'am.

Q. And that's how he was touched by the door when the door was shut, is that correct? A. That is correct, ma'am.

Q. Any question in your mind that Officer Willis was standing in the doorway? A. No, ma'am.

have to choke you out.” Shortly thereafter, the officers handcuffed Brown. Officer Becirovic testified that the entire stop was five minutes long, and the struggle inside the apartment lasted two minutes.

In his report immediately following the incident, Officer Becirovic described Officer Willis’s injuries as fingernail scrapes that only caused minor bleeding, but later testified that Officer Willis also had a fat lip. Officer Willis testified that he “had bruising and swelling on both my cheeks and swelling on my lip and a laceration on my right cheek.” Several photographs were admitted into evidence for the jury to consider.

Brown and Lomax testified to a slightly different version of events. Brown testified that after the officers informed them about the report of loud music, he questioned the officers about whether they had the correct apartment. One of the officers told him to “shut up” and Brown responded by telling the officer to “shut up.” Brown and Lomax both testified that the officer told Brown to step out into the hallway, but Brown refused. Brown told the officers he was shutting the door, but Officer Willis stuck his foot in the door to prevent him from closing it and then pushed the door back open. Brown testified that Officer Willis tried to pull him into the hallway, but he pulled back and the officers wound up coming into the apartment. Lomax testified that the officers “burst in” and “attacked” Brown, in their attempt to arrest him. A scuffle ensued, as Brown resisted the handcuffs, but Lomax testified that Brown did not swing and hit Officer Willis. Both Brown and Lomax testified they never heard the officers tell Brown that he was under arrest.

At the close of the State's case, Brown moved for a judgment of acquittal and, renewing his motion at the close of the evidence, also moved for a directed verdict. Both motions were based upon the assertion that Officer Willis illegally entered into Brown's home. The State resisted, asserting that a person is not authorized to use force to resist an arrest, even if the arrest is unlawful. The district court found that Brown's Fourth Amendment rights had been violated and explained,

[T]he officer is in violation of the Fourth Amendment by entering the doorway, by having either his foot or his body in it. There's no warrant here. There was no evidence of a crime occurring. There are no exigent circumstances, no evidence of consent. . . . [T]hat is established under the undisputed facts.

However, the only legal remedy I'm aware of for that is exclusion of evidence, not dismissal of charges for things that happened subsequently to it. . . . I suppose the defendant might have some sort of civil remedy, but I don't think the remedy is dismissal of the charges.

See United States v. Crews, 445 U.S. 463, 474, 100 S. Ct. 1244, 1251, 63 L. Ed. 2d 537, 547 (1980) ("An illegal arrest, without more, has never been viewed as a bar to subsequent prosecution, nor as a defense to a valid conviction."). Consequently, the district court denied Brown's motions.

The district court instructed the jury,

A person is not authorized to use force to resist an arrest, either of the person's self, or another, which the person knows is being made by a peace officer, even if the person believes that the arrest is unlawful or the arrest is in fact unlawful.

This jury instruction is nearly identical to Iowa Code section 804.12, which provides,

A person is not authorized to use force to resist an arrest, either of the person's self, or another which the person knows is being made either by a peace officer or by a private person summoned and

directed by a peace officer to make the arrest, even if the person believes that the arrest is unlawful or the arrest is in fact unlawful.

Brown objected to the instruction, arguing that the violation of his Fourth Amendment rights gave rise to him being able to defend his home and himself, that the instruction provided that he had to submit to an unlawful arrest and that was in “direct contradiction” to the Fourth Amendment, and therefore, giving the instruction would confuse the jury. The State replied that regardless of whether an arrest is lawful or unlawful a person may not resist arrest. The district court found that in this case there was a factual dispute over whether there was an arrest, specifically whether the officers told Brown he was under arrest, which was an issue for the jury to decide. Further, there was no conflict between the Fourth Amendment and Iowa Code section 804.12. Therefore, the district court overruled Brown’s objection.

The jury found Brown not guilty of assault against a peace officer (Officer Becirovic) and not guilty of assault against a peace officer (Officer Willis) causing injury, but guilty of the lesser included offense of assault against a peace officer (Officer Willis). Brown appeals, challenging the resisting arrest jury instruction.

II. Standard of Review.

We review challenges to jury instructions for correction of errors at law. Our review is to determine whether the challenged instruction accurately states the law and is supported by substantial evidence. Error in giving a particular instruction does not warrant reversal unless the error was prejudicial to the party.

State v. Spates, 779 N.W.2d 770, 775 (Iowa 2010) (internal quotations and citations omitted).

III. Resisting Arrest Instruction.

The jury was instructed as to the elements of assault against a peace officer causing bodily injury, resisting arrest as noted above, as well as the defenses of justification in the use of reasonable force to defend one's self and one's property. On appeal, Brown only asserts that the district court erred in instructing the jury as to resisting arrest. He argues that the jury instruction was improper because the charges before the jury were assault against a peace officer and not interference with official acts, which was tried to the court, or resisting arrest, for which he was not charged. He further argues that the jury instruction "confuse[d] the issue and dilute[d] the defendant's legitimate instructions about the right to protect oneself or one's property from unlawful action."

As the district court found, the undisputed testimony demonstrated that Officer Willis entered into Brown's home by placing either his body or foot in the doorway and prevented Brown from closing the door, which was a violation of Brown's Fourth Amendment rights. See, e.g., *State v. Johnson*, 501 N.W.2d 876, 879 (Wisc. Ct. App. 1993) (holding that where an officer placed his foot in the threshold of a door so that it could not be closed was a violation of the Fourth Amendment); see also *Kyllo v. United States*, 533 U.S. 27, 37, 121 S. Ct. 2038, 2045, 150 L. Ed. 2d 94, 104 (2001) (stating "any physical invasion of a structure of a home, even by a fraction of an inch" is too much); *Payton v. New York*, 445 U.S. 573, 590, 100 S. Ct. 1371, 1382, 63 L. Ed. 2d 639, 653 (1980) (discussing that police may not cross the threshold of a person's home without consent or exigent circumstances). At trial, the State asserted that regardless of whether

the entry into Brown's home was unlawful or not, when the officers subsequently attempted to arrest Brown, he had no right to resist arrest under Iowa Code section 804.12. The jury was instructed in accordance with the code section. See also *State v. Thomas*, 262 N.W.2d 607, 611 (Iowa 1978) ("We now hold a person may not resist arrest reasonably effected by one whom the arrestee knows or has good reason to know is a peace officer, despite legality or illegality of the arrest."). Brown, however, asserted that he was not under arrest and simply acted in defense of self and property. See Iowa Code § 804.14 (providing that officers must identify themselves as peace officers and tell the person being arrested that they are under arrest and the reason for the arrest). As a result, the jury was also instructed on these asserted defenses. See *id.* § 704.3 ("A person is justified in the use of reasonable force when the person reasonably believes that such force is necessary to defend oneself or another from any imminent use of unlawful force.").

Brown only appeals the narrow issue of whether it was error for the jury to be instructed on resisting arrest. As the district court found, there was a fact question as to whether Brown was under arrest, which was for the jury to decide. If the jury determined Brown was under arrest, the resisting arrest instruction was applicable; but if the jury determined Brown was not under arrest, the self defense and defense of property instructions were applicable.³ In *State v.*

³ In its brief the State asserts, "The fact that the court instructed the jury on self defense and defense of property was a benefit [Brown] was not entitled to receive under the law." The State did not object to the jury instructions. We note that Iowa Code section 804.12 is applicable to an arrest situation. See *State v. Bedard*, 668 N.W.2d 598, 600 (Iowa 2003) (not reaching the issue of whether a person illegally detained by officers was proscribed from using force against the officer under Iowa Code section 804.12, but noting that the statute does not mention investigatory stops); see also 4

Thomas, 262 N.W.2d 607, 610-12 (Iowa 1978), our supreme court discussed the reasoning behind prohibiting self-help resistance efforts regardless of the legality of an arrest, and Iowa code section 804.12 codified this prohibition.⁴ Consequently, if the jury determined there was an arrest, the resisting arrest instruction was relevant to the facts of this case and therefore was properly given. We find no error and affirm.

AFFIRMED.

Charles E. Torcia, *Wharton's Criminal Law* § 569 (15th ed.) (discussing that some jurisdictions that provide that a person may not resist an unlawful arrest do not extend this rule to situations where the officer is using unreasonable force); Andrew P. Wright, *Resisting Unlawful Arrests: Inviting Anarchy or Protecting Individual Freedom*, 46 Drake L. Rev. 383, 399 (1997) ("Even those jurisdictions that have severely undermined the right continue to retain one remnant of the old common law right—the right to resist an arrest when police use excessive force."). The parties disputed whether Brown was under arrest at the time.

⁴ Articulated below was Brown's assertion that Iowa Code section 804.12 should not apply to unlawful arrests in a home. However, even if that would have been raised on appeal, section 804.12 does not contain such an exception.