IN THE COURT OF APPEALS OF IOWA

No. 0-676 / 10-0081
Filed October 20, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CODY LEE THOMAS,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, George L. Stigler, Judge.

Cody Lee Thomas appeals his conviction for first-degree robbery. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and David Arthur Adams, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Joel Dalrymple, Assistant County Attorney, for appellee.

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

MANSFIELD, J.

Cody Lee Thomas appeals from the conviction and sentence entered upon a jury verdict finding him guilty of first-degree robbery in violation of Iowa Code section 711.2 (2009). Thomas asserts the trial court erred in refusing to submit his compulsion defense to the jury. We agree with the trial court that the defense was not supported by substantial evidence and therefore affirm the judgment below.

I. Background Facts and Proceedings

The trial evidence revealed the following facts: In the early morning hours on August 10, 2009, Thomas, Teijae Scott (Little TJ), and TJ Marquand (Big TJ) were hanging out and smoking marijuana together. The group was sitting in Thomas's black Chevy Lumina parked in the backyard of Thomas's house located at 1804 Franklin Street in Waterloo. As they smoked, the group had a conversation about "going to hit a lick" or committing a robbery. During this conversation, Scott told Thomas to go inside his house and get the SKS rifle (a combat weapon similar to an AK-47) that Thomas owned.

According to Thomas, he refused several times, but Scott said Thomas was "being a bitch." Scott commented to Marquand, "We should mack him, huh, Big TJ?" Marquand responded, "Uh-huh." Thomas testified he felt defenseless and feared they were going to beat him up and seriously injure him. Marquand is substantially taller than Thomas.

Thus, Thomas got out of the vehicle, entered his home, and retrieved the rifle. Meanwhile, Scott and Marquand remained in the car. After retrieving the rifle, which was unloaded, Thomas returned to the car and gave it to Scott.

At approximately 4:20 a.m., Thomas drove his car with Scott and Marquand as passengers to a nearby Kum & Go store located at 1976 Franklin Street. According to Thomas, Scott told him to park on the far west side of the store behind a large storage container and a dumpster. Video surveillance for the Kum & Go revealed Thomas entering the store followed by Marquand. The store's clerk, Matthew Snyder, testified he recognized Thomas and Marquand as "regulars." Marquand and Thomas purchased a drink and a cigar respectively, whereupon Marquand left the store alone and walked to Thomas's car. Marquand testified that when he reached Thomas's vehicle, Scott was no longer there.

A little over a minute later, Thomas and Snyder exited the Kum & Go together. Snyder stopped outside the front door of the store to smoke a cigarette, while Thomas turned to the left and walked toward his car. Cell phone records confirm that Thomas received a phone call from Scott upon arriving at the car. According to Marquand, Thomas told Scott, "He's outside smoking a cigarette," and hung up the phone.

A couple of minutes later, Scott, wearing a brown zip-up hooded jacket with a white t-shirt rolled and tied to cover his face, came around the corner of the east side of the store brandishing the SKS rifle. At this same moment, Thomas's vehicle can be seen on video driving past the store through the parking lot. Snyder testified that Scott told him to open the door. Snyder then flicked away his cigarette, entered the store, and walked behind the cash register. Scott stopped briefly to prop open the door using a bundle of newspapers before entering the store and demanding the money. Snyder grabbed a white plastic

Kum & Go bag and proceeded to place the cash and change from one of the registers into it. Scott then ordered Snyder to open a second cash register, but Snyder said he was unable to do so. Scott called Snyder a liar, but grabbed the white plastic bag and ran off. As Scott fled the store, Snyder grabbed his cell phone and called the police. Snyder then exited the store and watched Scott flee to the south and jump a chain link fence behind the store.

Cory Allspach of the Waterloo Police Department was one of several officers who responded to the robbery call. While panning a nearby alley with his patrol car spotlight, Officer Allspach saw Scott stand up from behind a parked car. Scott then began to walk towards Officer Allspach. Officer Allspach exited his vehicle and asked Scott where he was coming from. Scott responded that he was coming from a friend's house. Officer Allspach then requested a description of the robbery suspect from dispatch and identification from Scott. Scott denied having any identification, and then "just bolted" running down the alley towards the west. Officer Allspach pursued Scott on foot until Scott scaled a fence entering the backyard of 1804 Franklin Street (Thomas's house). As Scott scaled the fence, Officer Allspach attempted to shoot him with a taser. Officer Allspach also radioed for assistance. Scott continued to flee by running through the backyard and into the front yard adjoining Franklin Street. At this time, Scott was tasered by another officer and apprehended.

After Scott was taken into custody, Officer Allspach returned to the parked vehicle where Scott was initially seen. Underneath this vehicle, Officer Allspach discovered Thomas's unloaded SKS rifle wrapped in a white t-shirt and a brown hooded jacket. Scott was also found to have on his person a white plastic Kum &

Go bag with approximately seventy-two dollars in cash inside it and a cell phone. Snyder later identified Scott at the police station as the masked gunman.

While officers were arresting Scott, they noticed two individuals standing in the yard of the residence at 1804 Franklin Street. The officers approached the individuals, who identified themselves as Thomas and Marquand. Given the time of night, their nervous demeanor, and the fact that Scott seemed to be running directly to this residence before his arrest, the officers suspected Thomas and Marquand were possibly involved in the robbery. However, upon initial questioning, Thomas and Marquand repeatedly denied knowing Scott or about the robbery. Since Thomas and Marquand witnessed the arrest, they were asked to come to the police station to provide statements. Thomas and Marquand agreed and were placed into a police car together. Thomas testified that in the police car, Marquand told him not to be "a snitch." Thomas and Marquand were taken to the police station.

At the police station, Thomas continued to deny knowing Scott. However, during the interview, Thomas twice had a slip-of-the-tongue referring to "Little TJ" (Scott's nickname), before correcting himself and saying "Big TJ" (Marquand's nickname). It was also discovered that Thomas had Scott's cell phone number in his phone and that Thomas and Scott had called each other shortly before the robbery. Eventually, Thomas admitted Scott was a friend. Thomas also initially denied any knowledge of the SKS rifle, but later claimed he had let Scott borrow his rifle two days before and had not seen Scott after 4:00 p.m. that night. Following the interrogation, Thomas was arrested and eventually placed into a cell with Scott. At trial, Thomas admitted that while in the cell with Scott, he tried

to get Scott "to take the fall" for the robbery by telling the police he took the gun from Thomas two days prior to the robbery.

During the investigation, the police also discovered a forty-five-second video on Scott's cell phone. The video showed Thomas smiling and cavorting around his bedroom brandishing the SKS rifle and its bayonet.[1] The video ends with Thomas stating, "Somebody gonna get a lick." The video was played for the jury. The record does not indicate when the video was taken.

On August 21, 2009, the State charged Thomas, Scott, and Marquand by trial information with first-degree robbery. On September 8, 2009, Thomas pled not guilty and provided a notice for the defenses of coercion and duress. The case against Thomas proceeded to trial on November 17-20, 2009.

During trial, Thomas testified that he feared getting beaten up or killed if he didn't go along with the robbery. Thomas also testified that Marquand would not let him out of his sight. Defense counsel also had Thomas and Marquand stand side-by-side at one point to accentuate their size difference.

Thomas also offered the testimony of Dr. Marvin Piburn, a psychiatry physician at Black Hawk County Mental Health Center. Dr. Piburn testified that he has known Thomas since 2002 and has diagnosed Thomas with separation anxiety, social anxiety, and attention deficit hyperactivity disorder. As a result of these diagnoses, Dr. Piburn opined that Thomas is "easy to intimidate" and "[v]ery subject to being manipulated."

[1] Thomas did not bring the bayonet with him when he took the rifle out to the car on August 10.

Prior to submission of the case to the jury, Thomas requested a jury instruction on the defense of compulsion. The trial court denied the request. The jury subsequently found Thomas guilty. On January 5, 2010, Thomas was sentenced to twenty-five years incarceration with a seventy percent mandatory minimum. *See* Iowa Code §§ 902.9(2), 902.12(5). Thomas appeals.

II. Standard of Review

The legal validity of a proposed defense is, in the first instance, a question of law for the court. *State v. Allen*, 633 N.W.2d 752, 754 (Iowa 2001). A defendant is entitled to submit a theory of defense if the theory correctly states the law and is supported by substantial evidence. *Id*. We review the trial court's refusal to instruct on a defense for the correction of errors at law. *State v. Hartsfield*, 681 N.W.2d 626, 631 (Iowa 2004). We must only determine whether the trial court accurately determined the requested instruction did not have adequate evidentiary support. *Id*.

III. Analysis

The defense of compulsion is set forth by statute as follows:

> No act, other than an act by which one intentionally or recklessly causes physical injury to another, is a public offense if the person so acting is compelled to do so by another's threat or menace of serious injury, provided that the person reasonably believes that such injury is imminent and can be averted only by the person doing such act.

Iowa Code § 704.10. A defendant has the burden of generating a fact question on the defense of compulsion; thereafter, the State has the burden of disproving compulsion beyond a reasonable doubt. *State v. Walker*, 671 N.W.2d 30, 34 (Iowa Ct. App. 2003); *see also State v. Reese*, 272 N.W.2d 863, 867 (Iowa 1978)

(noting that with various defenses to crimes, the defendant has the initial burden to generate a fact question, after which the burden rests upon the State to disprove the defense beyond a reasonable doubt).

In order to generate a fact question and establish a prima facie case of compulsion, a defendant must present proof on each of the following elements:

> 1. defendant was under an unlawful and present, imminent, and impending threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury;
> 2. that defendant had not recklessly or negligently placed himself in a situation in which it was probable that he would be forced to commit a criminal act;
> 3. that the defendant had no reasonable, legal alternative to violating the law; and
> 4. that a direct causal relationship may be reasonably anticipated between the commission of the criminal act and the avoidance of the threatened harm.

Walker, 671 N.W.2d at 35 (quoting *United States v. Jankowski*, 194 F.3d 878, 883 (8th Cir. 1999)).

Thomas initially re-urges an argument he made below regarding *Walker*. He contends the factors set forth in *Walker* conflict with the plain language of the compulsion statute and are an overcomplicated statement of the law. We need not entertain this argument because regardless of whether *Walker* or the unvarnished statutory language is applied, Thomas failed to generate a fact issue on compulsion. For one thing, Thomas failed to present evidence that serious injury could be averted *only* by aiding in the robbery. *See* Iowa Code § 704.10 ("the person reasonably believes that [serious] injury . . . can be averted only by the person doing such act"); *Walker*, 671 N.W.2d at 35 ("the defendant had no reasonable, legal alternative to violating the law").

Even when viewing the evidence in the light most favorable to Thomas, no reasonable person could believe the only way for Thomas to avoid injury was to retrieve his rifle and then join with Scott and Marquand in an armed robbery of a convenience store. After the alleged threat was made, Thomas exited the car and entered his house alone. At this point in time, Thomas could have avoided participation in the robbery by simply refusing to leave the house, refusing to get the gun, saying the gun was unavailable, or calling the police. In addition, before the robbery occurred, Thomas was with Snyder alone inside the Kum & Go store for over a minute. At this time, he could have averted the robbery by warning Snyder, or again calling the police.[2]

Thomas acknowledged the availability of several of these alternatives during cross-examination.

> Q. The threat, these guys, the fear of them hurting you, you could have called the police for help? A. I could have.
>
> Q. But you didn't? A. No.
>
> Q. You didn't have to come back outside at all, did you? A. No.
>
> Q. You didn't have to actually bring the gun outside, did you? A. No.
>
> Q. And if you did, you would have been the guy with the gun; correct? A. Yes.
>
> Q. We saw the fact your gun had a bayonet to it; right? A. Yes.
>
> Q. You could have affixed the bayonet to it if you wanted to; right? A. Yeah.
>
> . . . .
>
> Q. But nonetheless you chose to come outside and give them the gun; right? A. Right.
>
> Q. You didn't have to drive to the Kum & Go, did you? A. No.
>
> Q. But you chose to go to the Kum & Go? A. I felt like I had to, yes.
>
> . . . .

[2] Although Scott had the rifle, Thomas knew it was unloaded.

> Q. What I am asking you is, what happened that made you have to drive? A. I don't know.
>
> Q. Nothing; right? A. I don't know.
>
> . . . .
>
> Q. If you would have just said [to Snyder], call the police, and then you go back to your car, how would Teijae Scott have known you did something? A. I didn't know I could do that, really.
>
> Q. You didn't think, hey, you're about to get robbed as an option to tell? A. No, I was not thinking like that.

In his briefing, Thomas argues:

> While [Thomas] may have had, when viewed in objective terms, alternative courses of action, he did not reasonably believe such alternatives existed. . . . At no time was [Thomas] ever reasonably confident that these two would not be able to extract punishment or revenge had he failed to cooperate.

However, Thomas's arguments are off base for two reasons. First, we view the reasonable person test in objective terms, and his subjective beliefs are insufficient as a matter of law. *Walker*, 671 N.W.2d at 35. Second, the compulsion statute requires the threat of serious injury to be imminent, and "[a] threat of future injury is not enough." *Id.* at 34 (quoting *State v. Clay*, 220 Iowa 1191, 1202-03, 264 N.W. 77, 83 (1935)); *see also* Iowa Code § 704.10 (stating that the defendant must "reasonably believe[] that such injury is imminent and can be averted only by the person doing such act").[3]

Therefore, we find the trial court did not err in refusing to submit Thomas's requested instruction on compulsion because it was not supported by substantial evidence. *See Walker,* 671 N.W.2d at 36 (noting the failure to offer proof on any

[3] Although Thomas uses the adverb "reasonably" in his briefing, he does not do so in the sense that his understanding had to be objectively reasonable, which is the usual legal connotation of the term. Instead, he is using "reasonably" as a synonym for "really."

one of the compulsion elements is dispositive). Accordingly, we affirm Thomas's conviction for first-degree robbery.

Thomas, who was nineteen years old at the time, made an extremely poor decision to get the SKS rifle and participate in an armed robbery early on the morning of August 10, 2009. Thomas had a good job working at a local restaurant. The robbery netted seventy-two dollars in cash. Thomas received a twenty-five year prison sentence of which he must serve seventy percent before being eligible for parole. *See* Iowa Code §§ 902.9(2) & 902.12(5).

AFFIRMED.