

IN THE COURT OF APPEALS OF IOWA

No. 7-193 / 06-0527
Filed June 13, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LUIS ALBERTO GOMEZ-RODRIGUEZ,
Defendant-Appellant.

Appeal from the Iowa District Courts for Muscatine and Scott Counties,
Bobbi M. Alpers, Judge.

Luis Alberto Gomez-Rodriguez appeals his conviction for two counts of
first-degree murder. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Shellie L. Knipfer, Assistant
Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney
General, William E. Davis, Scott County Attorney, Gary Allison, Muscatine
County Attorney, and Kerrie L. Snyder and Alan Ostergren, Assistant County
Attorneys, for appellee.

Heard by Vogel, P.J., and Zimmer and Miller, JJ.

ZIMMER, J.

Luis Alberto Gomez-Rodriguez appeals his conviction for two counts of first-degree murder and one count of interference with official acts.¹ He claims ineffective assistance of counsel due to his trial counsel's failure to argue the defense of imperfect self-defense. We affirm.

I. Background and Facts

Gomez-Rodriguez immigrated to the United States from Cuba. He worked with his companion of seven and one-half years, Maria Rivero, buying, selling, and remodeling homes in Florida. They accumulated approximately \$120,000 to \$150,000. In mid-2004, while Gomez-Rodriguez was away on a business trip, Rivero and Julio Sarol took the money and disappeared.

Between June 2004 and February 2005, Gomez-Rodriguez made many attempts to locate Rivero and Sarol to obtain his share of the money that he and Rivero had accumulated. He contacted Sarol's brother, two private investigators, an attorney, and the Ottumwa Police Department. He also conducted his own investigation. At some point, Gomez-Rodriguez was told that Julio Sarol had offered two people \$10,000 to kill Gomez-Rodriguez. This information was also reported to the Ottumwa police.

Gomez-Rodriguez eventually tracked Rivero and Sarol to Muscatine, Iowa. During the late afternoon on February 23, 2005, Gomez-Rodriguez parked his van in a yard near a duplex where Rivero and Sarol were living. Armed with

¹ Although Gomez-Rodriguez's notice of appeal states he "appeals every adverse ruling entered against him in this cause," his argument on appeal focuses on the murder convictions.

a six-shot .38 caliber revolver and a ten-shot 9mm semiautomatic pistol, Gomez-Rodriguez waited for the pair to return home.

Shortly after 5:00 p.m., Rivero and Sarol arrived at their residence in their pickup truck and parked the vehicle behind their home. At that point, Gomez-Rodriguez approached the truck and shot Sarol several times. Rivero got out of the truck and ran away screaming. Gomez-Rodriguez chased her down the street, repeatedly shooting at her. After Rivero fell, he caught up with her, stood over her, and shot her once in the back. He then returned to the truck and shot Sarol two more times. Both Rivero and Sarol died of their injuries.

Gomez-Rodriguez left the scene in his van. He was pursued by police and, after a short standoff, surrendered and was taken into custody. At the police station, Gomez-Rodriguez told an officer that he had tried to talk to Sarol and Rivero, but Sarol pulled a red-colored gun,² and he got scared. A flare gun, loaded with a flare, was found near Sarol's body.

Gomez-Rodriguez was charged with two counts of first-degree murder in violation of Iowa Code sections 707.1 and 707.2 (2005) and one count of interference with official acts in violation of section 719.1. A jury found him guilty of all three counts. He was sentenced to a life sentence for each of the murders, and a five-year sentence for the interference charge, to run concurrently. Gomez-Rodriguez appeals.

² The record shows that, when looking down the barrel of a flare gun, it is red.

II. Merits

Gomez-Rodriguez contends he was denied the effective assistance of counsel by his counsel's failure to argue the defense of imperfect self-defense and to request an instruction explaining the concept.

A claim of ineffective assistance of counsel requires a de novo review because the claim is derived from the Sixth Amendment of the United States Constitution. *State v. Wills*, 696 N.W.2d 20, 22 (Iowa 2005). Typically, ineffective assistance of counsel claims are preserved for possible postconviction proceedings to enable a complete record to be developed. *State v. Truesdell*, 679 N.W.2d 611, 616 (Iowa 2004). "However, they may be resolved on direct appeal when the record adequately addresses the issues." *State v. Kone*, 557 N.W.2d 97, 102 (Iowa Ct. App. 1996). Here, we find the record is adequate to resolve Gomez-Rodriguez's claim.

"A defendant is entitled to effective assistance of counsel." *State v. Artzer*, 609 N.W.2d 526, 531 (Iowa 2000) (citing *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063, 80 L. Ed. 2d 674, 692 (1984)). "The benchmark for judging any claim for ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process the trial cannot be relied on as having produced a just result." *Kone*, 557 N.W.2d at 102.

To prevail on an ineffective assistance claim, Gomez-Rodriguez must demonstrate (1) his counsel failed to perform an essential duty and (2) the ineffective assistance prejudiced him. See *Ledezma v. State*, 626 N.W.2d 134, 142-43 (Iowa 2001). To prove the first prong, he must overcome the presumption counsel was competent. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa

1994). He must show counsel's performance, considering the entire record and totality of the circumstances, was not within the range of normal competency. *Artzer*, 609 N.W.2d at 531. To prove the second prong, he must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.* We may dispose of Gomez-Rodriguez's claim if he fails to prove either breach of duty or prejudice. *State v. Query*, 594 N.W.2d 438, 445 (Iowa Ct. App. 1999).

A. Breach of Duty

Gomez-Rodriguez contends his trial counsel breached his duty when he failed to argue imperfect self-defense because it "was an argument worth making to the court in light of the evidence presented at trial."³

Under Iowa law, self-defense is the justified use of force "when the person *reasonably* believes that such force is necessary to defend oneself or another from any imminent use of unlawful force." Iowa Code § 704.3 (emphasis added). The doctrine of imperfect self-defense, on the other hand, recognizes a defendant's *honest but unreasonable belief* that deadly force is necessary. See, e.g., *State v. Jones*, 8 P.3d 1282, 1287 (Kan. Ct. App. 2000) ("Imperfect self-defense is an intentional killing committed with an unreasonable but honest belief that circumstances justified deadly force."); *State v. Faulkner*, 483 A.2d 759, 769 (Md. 1984) ("[W]hen evidence is presented showing the defendant's subjective belief that the use of force was necessary to prevent imminent death

³ Gomez-Rodriguez's trial counsel argued that the defendant flew into a "sudden, violent, irresistible passion for self-preservation" when Sarol pointed a flare pistol at him. He contended the slayings of both victims constituted voluntary manslaughter, rather than murder.

or serious bodily harm, the defendant is entitled to a proper instruction on imperfect self defense.”). “The theory underlying the doctrine is that when a defendant uses deadly force with an honest but unreasonable belief that it is necessary to defend himself, the element of malice, necessary for a murder conviction, is lacking.” *State v. Catalano*, 750 A.2d 426, 429 (R.I. 2000). In states where the doctrine of imperfect self-defense has been adopted, proof of an imperfect self-defense does not exonerate the accused but mitigates the homicide to voluntary manslaughter. *See, e.g., People v. Vasquez*, 39 Cal. Rptr. 3d 433, 435 (Cal. Ct. App. 2006) (“When imperfect self-defense applies, it reduces a homicide from murder to voluntary manslaughter because the killing lacks malice aforethought.”).

Gomez-Rodriguez contends his trial counsel had a duty to argue the doctrine of imperfect self-defense as an alternative to self-defense because his belief that deadly force was necessary was unreasonable despite the fact that he had reason to fear Sarol and Rivero. *See State v. Westeen*, 591 N.W.2d 203, 210 (Iowa 1999) (a defendant’s attorney had a duty to raise an undecided issue if a normally competent attorney would conclude the issue was worth raising). For the reasons which follow, we conclude Gomez-Rodriguez’s trial attorney had no duty to present a defense based on the doctrine of imperfect self-defense.

While a valid defense in some jurisdictions, the doctrine of imperfect self-defense has not been adopted in Iowa. Moreover, the doctrine has been expressly rejected in several other states. *See, e.g., State v. Buchanan*, 431 N.W.2d 542, 549 (Minn. 1988) (resisting “the invitation to fashion a new defense which the legislature has not seen fit to mandate”); *State v. Branch*, 714 A.2d

918, 924 (N.J. 1998) (“In New Jersey, there is no such defense as imperfect self-defense.”); *Catalano*, 750 A.2d at 429 (declining to accept the doctrine of imperfect self-defense in Rhode Island); *State v. Finley*, 290 S.E.2d 808, 809 (S.C. 1982) (holding imperfect self-defense “is not the law in South Carolina”); *State v. Shaw*, 721 A.2d 486, 492 (Vt. 1998) (“[I]f the doctrine of imperfect self-defense is adopted in Vermont, it should be done by the Legislature.”); *State v. Hughes*, 721 P.2d 902, 909 (Wash. 1986) (“We decline to adopt the doctrine of so-called ‘imperfect’ self-defense.”).

We believe the doctrine also plainly conflicts with Iowa statutory law. Iowa Code section 704.3 provides that “[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.” (emphasis added). In essence, Gomez-Rodriguez is asking us to judicially create a new non-statutory defense. See *State v. Khouri*, 503 N.W.2d 393, 395 (Iowa 1993) (declining to adopt the doctrine of emotional disturbance in the absence of legislative action).

We decline Gomez-Rodriguez’s invitation to find his trial counsel breached any duty by failing to argue a defense that has not been adopted in this state, has been rejected in several other states, and is contrary to Iowa statutory law. Cf. *Westeen*, 591 N.W.2d at 210 (finding counsel ineffective for failing to raise an issue of first impression where statute would have supported the argument, caselaw from other jurisdictions uniformly supported the argument, and the legislature had instructed courts to construe the statute as other states did).

Additionally, while an imperfect self-defense argument may have been beneficial to Gomez-Rodriguez in defending the murder of Sarol, his trial counsel was also faced with defending the shooting of Rivero. The record reveals Gomez-Rodriguez shot an unarmed Rivero in the back as she was trying to run away from him. It is improbable a reasonable jury would believe that Gomez-Rodriguez, even *unreasonably*, thought he was in imminent danger from Rivero. See *People v. Lewis*, 22 P.3d 392, 416 (Cal. 2001) (stating an imperfect self-defense occurs when a defendant kills “in the actual but unreasonable belief that he or she was in imminent danger”). The failure of trial counsel to argue a defense that was unlikely to succeed is not outside the range of normal competence. We conclude Gomez-Rodriguez has not overcome the presumption that his trial counsel was competent. See *Wissing*, 528 N.W.2d at 564 (“Courts generally presume that counsel is competent.”).

B. Prejudice

We also conclude Gomez-Rodriguez suffered no prejudice when his trial counsel failed to present a defense based on the doctrine of imperfect self-defense.

To prove prejudice, a defendant must show a reasonable probability that, but for counsel’s errors, the result would have been different. *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. For the above-stated reasons, an imperfect self-defense argument would not have been effective in defending the killing of Rivero. It would also likely not have been effective with regard to Sarol.

An imperfect self-defense argument will fail if the State proves the defendant (1) initiated the incident, (2) did not actually believe in the need to use force, (3) used more force than necessary, (4) failed to avoid the confrontation when an alternative course of action was available, or (5) the danger was not imminent. Iowa Code §§ 704.1, 704.3, 704.6; *State v. Rubino*, 602 N.W.2d 558, 565 (Iowa 1999); see also *State v. Marr*, 765 A.2d, 645, 648 (Md. 2001) (holding the elements of the doctrines of self-defense and imperfect self-defense are the same). In this case, Gomez-Rodriguez tracked the victims to their home and waited for them with loaded weapons. He returned to the truck and fired two additional shots at Sarol, who was disabled and helpless, and Gomez-Rodriguez could have avoided the confrontation by staying away from Sarol. It is highly likely the State would have proved beyond a reasonable doubt at least one of the facts necessary to defeat the defense of imperfect self-defense. See *Rubino*, 602 N.W.2d at 565 (“When [self-]defense is raised, the burden rests upon the State to prove beyond a reasonable doubt that the alleged justification did not exist.”). We find no reasonable probability that Gomez-Rodriguez would not have been convicted of both murders if his counsel had argued the defense of imperfect self-defense. See *Artzer*, 609 N.W.2d at 531.

III. Conclusion

Gomez-Rodriguez has failed to establish either a breach of duty or prejudice. His trial counsel’s conduct fell well within the range of competent professional assistance. Upon careful review of the record, we find no reason to believe the outcome of the case would have been different if his trial counsel had

argued the defense of imperfect self-defense. Because we find no merit to Gomez-Rodriguez's ineffective assistance claim, we affirm his convictions.

AFFIRMED.