

IN THE UTAH COURT OF APPEALS

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State of Utah,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellee,)	
)	Case No. 20080781-CA
v.)	
)	F I L E D
Roger Allen Malcolm,)	(December 31, 2009)
)	
Defendant and Appellant.)	2009 UT App 399

Third District, Salt Lake Department, 071909592
The Honorable Paul G. Maughan

Attorneys: Linda M. Jones, Rudy J. Bautista, and Stephen W. Howard, Salt Lake City, for Appellant
Mark L. Shurtleff and Laura B. Dupaix, Salt Lake City, for Appellee

Before Judges Greenwood, Bench, and Thorne.

THORNE, Judge:

Defendant Roger Allen Malcolm appeals from a conviction of murder, arguing that the trial court erred when it refused to give Defendant's two proposed instructions: (1) an instruction on a person's use of force to make a citizen's arrest and (2) an instruction on a person's use of force to protect property.¹ We

¹Defendant's proposed jury instructions were as follows:

Any person is justified in using reasonable force, except deadly force, which he reasonably believes to be necessary to effect an arrest. However, the person does so at his own peril inasmuch the arrest must be legal. If the arrest is determined to be invalid or is without legal justification, the person making the arrest loses this justification and may be subject to criminal prosecution for, amongst other charges, unlawful detention and assault. Depending on the circumstance[s], the person making the

(continued...)

review a trial court's refusal to give a proposed jury instruction for correctness. See State v. Hamilton, 827 P.2d 232, 238 (Utah 1992) ("Whether the trial court's refusal to give a proposed jury instruction constitutes error is a question of law, which we review for correctness.").

Defendant argues that the proposed jury instructions were necessary for the jury to consider (1) Defendant's two lesser included offenses of imperfect legal justification manslaughter and extreme emotional distress manslaughter, see Utah Code Ann. § 76-5-203(4) (Supp. 2009), and (2) the defense theory that the security guard, Vern Jenkins, unjustifiably attacked Defendant as Defendant was trying to peaceably leave the store and that this unprovoked attack induced either an extreme emotional disturbance or a reasonable belief that Defendant was entitled to defend himself. Defendant asserts that without the proposed jury instructions the jury was unable to determine whether Jenkins unlawfully provoked Defendant, and requests this court reverse Defendant's conviction and remand the case for a new trial with the proper jury instructions. We disagree and affirm the conviction.

Defendant's proposed jury instructions on the lawfulness of Jenkins's actions were not central to the issue of whether Defendant had imperfect legal justification or was under the influence of extreme emotional distress. Neither affirmative defense turns on the lawfulness of Jenkins's actions. Instead, the relevant inquiry for both defenses involves Defendant's reasonableness given the circumstances. Under the defense of extreme emotional distress the inquiry is regarding the reasonableness of Defendant's explanation or excuse for his actions, see id. § 76-5-203(4)(a)(i). Under the defense of imperfect legal justification the inquiry involves whether the

¹(...continued)

illegal arrest could be charged with aggravated assault.

A person is justified in using reasonable force, other than deadly force, against another when and to the extent that he reasonably believes that force is necessary to prevent or terminate criminal interference with real property or personal property: (1) lawfully in his possession; or (2) belonging to a person whose property he has a legal duty to protect. However, a person may only use force to remove a person from real property if the person to be removed refuses to leave[.]

circumstances provided a legal justification or excuse for Defendant's conduct, see id. § 76-5-203(4)(a)(ii). Whether Jenkins's actions were lawful or not does not necessarily shed light on Defendant's reasonableness under either affirmative defense. For example, even a lawful act by Jenkins, if reasonably viewed by Defendant as unlawful, may provide a legal justification or excuse for Defendant's conduct. Similarly, an unlawful act by Jenkins would not necessarily provide a legal justification or excuse for Defendant's conduct unless it was reasonable for Defendant to view Jenkins's act as justification under the circumstances. Thus, the legality of Jenkins's actions was not conclusive, and Defendant could only defend himself if the circumstances justified such action.

In the instant case, Jenkins was deemed to be like any other person and the jury was instructed that "[a] security guard who is not a certified peace officer has only the same rights and privileges afforded to any ordinary person." The jury was also instructed on self-defense, extreme emotional distress, imperfect legal justification, and negligent homicide. These instructions, taken as a whole, properly instructed the jury on when Defendant may and may not have used force under the circumstances. As a result, we conclude that the trial court did not err by excluding Defendant's proposed instructions contemplating the legality of Jenkins's actions.² Accordingly, we affirm the trial court's judgment and conviction of Defendant for murder.

William A. Thorne Jr., Judge

WE CONCUR:

Pamela T. Greenwood,
Presiding Judge

Russell W. Bench, Judge

²We note that although Defendant's proposed instructions were not necessary for a determination of the issues, it would not, however, have been error to include those instructions.