

*Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

**ENTRY ORDER**

**VERMONT SUPREME COURT  
FILED IN CLERK'S OFFICE**

SUPREME COURT DOCKET NO. 2009-098

**JAN 15 2010**

JANUARY TERM, 2010

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 1, Windsor Circuit
	}	
Solomon Griffin	}	DOCKET NO. 853-7-08 Wrcr

Trial Judge: Theresa S. DiMauro

In the above-entitled cause, the Clerk will enter:

Defendant appeals his conviction of simple assault on a correctional officer. Defendant argues that the trial court committed plain error in failing to instruct the jury on self-defense. We affirm.

The injury in this case arose during an incident at the Southern State Correctional Facility where defendant was an inmate. Testimony at trial revealed the following. Defendant was housed at the time in a restrictive unit where inmates are locked in their cells for twenty-three hours a day and allowed one hour of recreation. On April 25, 2008, defendant was out of his cell for recreation. His hands were cuffed in front of him while he spent time in the facility's day room. Defendant asked two officers on duty for some reading material, and his request was denied. Defendant persisted in his requests, and eventually, the officers ordered defendant to return to his cell. Defendant refused, and the officers called for back-up. Complainant, a fellow correctional officer, arrived at the scene in response to this call. He observed that the other officers were cleaning papers out of defendant's cell and defendant was trying to pick the papers up, despite orders to release the materials.

Witnesses varied in their accounts of what next occurred. Complainant testified that he approached defendant from behind and attempted to grab the papers defendant was holding. As complainant reached, defendant lifted his arms and forced complainant's arm toward defendant's face, whereupon defendant bit complainant on the forearm. The bite broke the skin. Complainant then brought defendant down to the floor to restrain him. Because complainant was visibly upset and angry, the other officers took over and separated complainant from defendant. Defendant's version of the events was slightly different. He testified that complainant grabbed his wrist and bent it backwards. He explained that he blacked out after complainant grabbed him and did not actually remember biting complainant. Defendant testified that when he came to, he was being restrained on the floor. Defendant was charged with assaulting a correctional officer.

At the close of the evidence, the court convened a charge conference. Defense counsel requested a jury instruction on self-defense. The court explained its view that such an instruction

was not warranted because defendant had denied harming complainant, and, in the court's view, self-defense is available only in situations when a defendant admits to intentionally doing the harmful act. Eventually, defense counsel withdrew the request. The jury charge did not include an instruction on self-defense, and defendant did not object to the instruction as given. The jury found defendant guilty, and defendant now appeals.

On appeal, defendant argues that it was error to omit an instruction on self-defense. Because defendant did not object to the jury instructions following the charge, defendant did not preserve the objection for our review. V.R.Cr.P. 30; State v. Martin, 2007 VT 96, ¶ 42, 182 Vt. 377. Therefore, reversal is appropriate only if the court committed plain error. State v. Forant, 168 Vt. 217, 219 (1998). "Plain error will be found only in rare and extraordinary cases where the error is obvious and strikes at the heart of defendant's constitutional rights or results in a miscarriage of justice." State v. Hendricks, 173 Vt. 132, 137 (2001) (quotation omitted); see V.R.Cr.P. 52(b). Plain error requires the following: "[f]irst, there must be an error; second, the error must be obvious; and third, it must affect substantial rights and result in prejudice to the defendant." State v. Yoh, 2006 VT 49A, ¶ 39, 180 Vt. 317.

To be entitled to an instruction on self-defense, a defendant must demonstrate that there is a prima facie case for each element of the defense. State v. Knapp, 147 Vt. 56, 59 (1986). Under Vermont law, a person who wounds another is "guiltless" if his actions are taken "[i]n the just and necessary defense" of his own life. 13 V.S.A. § 2305. A defendant must demonstrate he believed that he faced imminent peril and that his use of force to repel the attack was reasonable. State v. Shaw, 168 Vt. 412, 414 (1998). Further, self-defense is available only to repel an aggressor's use of unlawful force. 1 W. LaFave & A. Scott, Jr., *Substantive Criminal Law* § 5.7, at 650-51 (1986); see also Model Penal Code § 3.04 (explaining that use of force is "justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion" (emphasis added)).

In this case, we do not address the trial court's reasoning for declining to instruct on self-defense because, when considering the instructions as a whole, we conclude that defendant was not prejudiced by the omission of a self-defense instruction. See Forant, 168 Vt. at 220 (explaining that reversal for plain error is available only when instruction as a whole is misleading). The trial court instructed the jury that it must find as one of the essential elements of the charge that

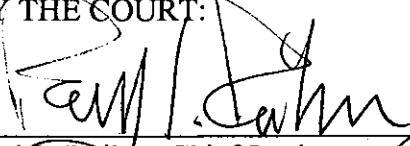
at the time of [defendant's] acts, [complainant] was performing a lawful duty as a correctional officer. The lawfulness of an officer's actions is defined by the scope of the officer's duty and authority. A correctional officer was not performing a lawful duty if he was pursuing his own interests.

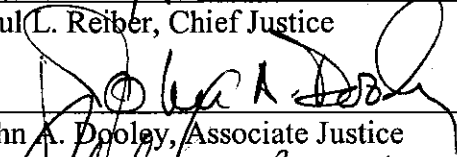
(Emphasis added.) Therefore, the jury was instructed that to convict defendant it must find complainant was acting with lawful force when he restrained defendant, and the jury so found. As outlined above, self-defense is limited to situations where a person is repelling unlawful force. The jury's finding that complainant was acting with lawful force at the time that defendant bit him precluded any entitlement to self-defense. Thus, defendant was not prejudiced by the omission of a self-defense instruction. See State v. McGee, 163 Vt. 162, 167 (1995) (holding that there was no plain error in court's self-defense instruction where jury found that

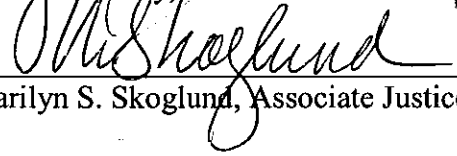
defendant acted in course of robbery attempt and therefore was not entitled to benefit of self-defense instruction).

Affirmed.

BY THE COURT:

  
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Paul L. Reiber, Chief Justice

  
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John A. Dooley, Associate Justice

  
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Marilyn S. Skoglund, Associate Justice