COURT OF APPEALS
DECISION
DATED AND RELEASED

June 26, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

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No. 97-0400

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

IN RE THE INTEREST OF LEVI J.D., A PERSON UNDER THE AGE OF 18:
STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

LEVI J.D.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: GERALD C. NICHOL, Judge. *Affirmed.*

VERGERONT, J.[1] Levi J.D., date of birth May 25, 1984, was charged in a delinquency petition with committing battery contrary to § 940.19(1),

[1] This appeal is decided by one judge pursuant to § 752.31(2)(e), STATS. This appeal has been expedited. RULE 809.107(6)(e), STATS.

STATS. The jury found that Levi had committed battery and the court granted judgment on the verdict, adjudging him delinquent. The court's dispositional order placed Levi under the supervision of Dane County Department of Human Services for one year. Levi appeals from the judgment of delinquency, contending: (1) the trial court erroneously exercised its discretion and violated his right to present a defense by refusing to allow him to testify concerning prior violent conduct by the victim in support of the defense of self-defense, and (2) the trial court erroneously denied a jury instruction on self-defense. We conclude the trial court did not erroneously exercise its discretion with respect to either the evidentiary or the jury instruction ruling and did not violate Levi's right to present a defense. We therefore affirm.

The incident giving rise to the charges occurred on the playground during recess at Stoughton Middle School, where Levi was a sixth grader. Another boy pushed Tony P. into Levi. Levi fell forward with his knee touching the ground. Because Levi was facing away from Tony, he did not know at the time that Tony was pushed into him. He believed Tony had hit him. Levi pushed Tony, causing Tony to fall to the ground on his stomach. Tony and other children testified that after Tony was on the ground, Levi kicked him and elbowed or hit him a number of times. Levi testified that after Tony was on the ground, he kicked Tony once and "punched him—well, kind of punched him. I punched him in the back." There was no evidence that, after Levi pushed Tony to the ground, Tony threatened Levi or hit or kicked him or fought back in any way.

Levi testified that, after he turned around and saw that it was Tony who, Levi believed, had hit him from behind, Tony balled his fists and held them at his sides, at waist level, and glared at him. Levi testified that he thought Tony was going to hit him again and that is why he hit him back. However, Levi also

testified that he was mad when he was first hit by Tony, as he perceived it, and "he hit me so I pushed him back." Levi answered "yes" to the questions whether he thought if someone hit him first he had a right to hit him back and whether that is what happened in this case. When asked whether he felt the need to defend himself, he answered "yes" and explained "because whenever you get hit, you feel like that's what—that you have to defend yourself."

Levi acknowledged that, after Tony was shoved into him from behind and he turned and saw Tony glaring at him, he could have turned around at that point and walked away but he did not. He "kind of" thought that Tony could have got up and hit him after Tony was on the ground. However, he acknowledged that Tony did not do that and, as did all the other witnesses, testified that Tony did not make any verbal threats or efforts to hit or kick him once Levi pushed Tony to the ground.

Levi through counsel tried before and during the trial to admit evidence of other fights between Tony and Levi. Defense counsel's offer of proof was that Levi and Tony had fought with each other since second grade and had been in several physical fights, with sometimes one and sometimes the other initiating the fights; based on Levi's experience with Tony, Tony had attacked him from behind before and that was what Levi was afraid Tony would do this time--get up off the ground and attack him again. The court did not allow the defense to present this evidence. The court decided that there was not a sufficient factual basis to put self-defense at issue. The court reasoned that, once Levi had pushed Tony to the ground, there was no evidence of a threat of actual or imminent unlawful interference and therefore no basis for a reasonable belief that the kick and punch Levi admitted to was necessary to prevent or terminate any unlawful interference. The court also considered the testimony of the prior fights to be

"other acts" evidence and to have little probative value, which was outweighed by potential prejudice.

During the jury instructions conference, the trial court determined that the evidence did not warrant the self-defense instruction requested by Levi, for much the same reasons it had determined in its evidentiary ruling that there was an insufficient factual basis for the defense.

Levi first contends that the trial court erroneously exercised its discretion in excluding his testimony about prior fights with Tony, and that this error was also a violation of his constitutional right to present evidence in his defense. We consider first whether the trial court erroneously exercised its discretion in excluding this evidence. The decision whether to admit evidence is committed to the trial court's discretion, and we reverse only upon an erroneous exercise of discretion. ***State v. Evans,*** 187 Wis.2d 66, 77, 522 N.W.2d 554, 557 (Ct. App. 1994). A trial court properly exercises its discretion if it makes its determination according to accepted legal standards and the facts of record. ***Id.***

Levi argues that the evidence of prior violent contact with Tony was relevant to establish his state of mind, a critical element to the defense of self-defense. Section 939.48(1), STATS., provides:

> **Self-defense and defense of others**. (1) A person is privileged to threaten or intentionally use force against another for the purpose of preventing or terminating what the person reasonably believes to be an unlawful interference with his or her person by such other person. The actor may intentionally use only such force or threat thereof as the actor reasonably believes is necessary to prevent or terminate the interference. The actor may not intentionally use force which is intended or likely to cause death or great bodily harm unless the actor reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself.

The jury instruction on self-defense provides in relevant part:

> The law allows the defendant to act in self-defense only if the defendant believed that there was an actual or imminent unlawful interference (footnote omitted) with the defendant's person and believed that the amount of force he used or threatened to use was necessary to prevent or terminate the interference.
>
> In addition, the defendant's beliefs must have been reasonable. A belief may be reasonable even though mistaken. (Footnote omitted.) In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense. (Footnote omitted.) The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of his acts and not from the viewpoint of the jury now.

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Levi cites to a number of cases for the proposition that a defendant may testify about specific prior acts of violence by the victim to establish the defendant's state of mind regarding the danger posed by the victim. *See* ***State v. Daniels,*** 160 Wis.2d 85, 465 N.W.2d 633 (1991); ***McAllister v. State***, 74 Wis.2d 246, 246 N.W.2d 511 (1976); ***McMorris v. State***, 58 Wis.2d 144, 205 N.W.2d 559 (1973). However, a predicate for the relevance of such testimony is a sufficient factual basis for the defense of self-defense. *See e.g.,* ***McMorris***, 58 Wis.2d at 152, 205 N.W.2d at 563. The trial court here determined that there was not a sufficient factual basis because, even according to Levi's own testimony, Tony was lying on the ground on his stomach and was not threatening Levi, or making any motion directed at him, or kicking him, when Levi kicked and hit Tony.

The trial court applied the proper legal standard to the evidence and reached a reasonable conclusion—based on the evidence viewed most favorably to Levi, regardless of any past conduct of Tony, Levi could not reasonably have believed that it was necessary to kick and hit Tony, once Tony was lying on the ground, in order to prevent or terminate an actual or imminent threat of unlawful interference by Tony.

We do not agree with Levi that the trial court based its ruling on an error of law. In particular, we do not agree that, instead of considering reasonableness from the standpoint of Levi, the court applied its own standard of reasonableness when it stated: "I might tolerate that, but you are talking about him then going and punching him and kicking him." This statement followed the sentence, "And you got a kid; he pushed him back." The court was referring to its view that, if Levi had only pushed Tony, the court might view that as a sufficient factual basis for the defense of self-defense—that is, evidence that Levi reasonably believed that the push was necessary to prevent or terminate an actual or imminent unlawful interference with Levi's person. The court was indicating what a sufficient factual basis might be as a legal proposition, not what it personally believed was reasonable. Similarly, when the court stated, "I'm saying state of mind has nothing to do with it," the court was stating its legal conclusion that the testimony was inadmissible, after already having ruled that there was an insufficient factual basis for the defense of self-defense. This was not, as Levi contends, a disregard of the established rule that state of mind may be relevant if there is a factual basis for the defense.

After determining that there was an insufficient factual basis for the defense of self-defense, the trial court considered that the proffered testimony, if admitted, would be viewed as evidence that Tony was acting in conformity with

prior violent conduct on this occasion. The trial court correctly noted that use of evidence for such purpose is not permitted under § 904.04(2), STATS.[2] And the trial court properly weighed the prejudicial effect of such testimony against any probative value it might have, *see* § 904.03, STATS.,[3] and concluded that the prejudice resulting from its admission outweighed any probative value.

We conclude the trial court did not erroneously exercise its discretion in excluding the testimony.

Levi also contends that the exclusion of this evidence impermissibly limited his constitutional right to present a defense. The right to present evidence is rooted in the confrontation and due process clauses of the United States and the Wisconsin Constitutions. ***Evans***, 187 Wis.2d at 82-83, 522 N.W.2d at 560.

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[2] Section 904.04(2), STATS., provides in part:

> (2) **Other crimes, wrongs, or acts**. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[3] Section 904.03, STATS., provides:

> **Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time**. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

If evidence is not relevant, or not admissible because of § 904.04(2), STATS., then the court may exclude it for that reason and there is no need to engage in the weighing under § 904.03, STATS. We understand the court to have assumed, for purposes of argument that the evidence might have some probative value for some permissible purpose, and to have undertaken the weighing in that context.

However, that right is not absolute. ***Id***. at 83, 522 N.W.2d at 560. While a trial court may not "deny a defendant a fair trial or the right to present a defense by the 'mechanistic application of the rules of evidence,'" these constitutional provisions grant only the right to present relevant evidence not substantially outweighed by its prejudicial effect. ***Id***. (quoting ***State v. DeSantis***, 155 Wis.2d 774, 793, 456 N.W.2d 600, 609 (1990)).

We agree with the trial court that there was not a sufficient factual basis for the defense of self-defense. Therefore, Levi's state of mind is not relevant to a defense and Tony's past conduct, insofar as it explains Levi's state of mind, is not relevant. Insofar as Tony's past conduct is relevant to whether he acted in conformity with it in this incident, its inadmissibility under § 904.04(2), STATS., is based on the need to prevent potentially prejudicial evidence of little probative value from reaching the jury. *See* ***Evans***, 187 Wis.2d at 84, 522 N.W.2d at 560. The proper application of § 904.04 to exclude prejudicial low-probative value evidence from reaching the jury does not violate the constitutional right of the defendant to present a defense. *See* ***id***. at 84, 522 N.W.2d at 561. Because the trial court properly excluded the proffered testimony as not relevant insofar as it went to Levi's state of mind and properly excluded it under § 904.04(2) insofar as it went to Tony's character and propensity to act in particular ways, there was no violation of Levi's constitutional right to present a defense.

We next consider Levi's claim that the trial court erred in not giving a jury instruction on self- defense. Our conclusion that the trial court did not err is based on an analysis similar to that which we have already employed.

The trial court need give only those instructions the evidence reasonably requires, ***State v. Amundson***, 69 Wis.2d 554, 564, 230 N.W.2d 775,

781 (1975), and the decision whether the evidence reasonably requires a particular instruction is a discretionary one. *See* ***State v. Dyleski***, 154 Wis.2d 306, 310-11, 452 N.W.2d 794, 796-97 (Ct. App. 1990).[4] In determining whether the evidence reasonably requires a particular instruction, the trial court is to view the evidence in the light most favorable to the accused. ***State v. Jones***, 147 Wis.2d 806, 816, 434 N.W.2d 380, 383 (1989). Levi points out that the determination of whether the accused reasonably believed his actions were necessary to prevent or terminate unlawful interference is "peculiarly within the province of the jury," citing ***Jones***, 147 Wis. at 816. That is true, but the ***Jones*** court goes on to say that the critical inquiry in deciding whether that issue should go to the jury is "whether a reasonable construction of the evidence … viewed in the most favorable light it will reasonably admit from the standpoint of the accused will support the defendant's theory that [his belief was reasonable]." ***Id.*** When a defendant's own testimony of what happened does not support that theory, the trial court acts properly in not giving a self-defense instruction. *See* ***Thomas v. State***, 53 Wis.2d 483, 488-89, 192 N.W.2d 864, 866-67 (1972).

The trial court here considered the requested jury instruction in light of the evidence viewed most favorably to Levi and concluded there was no evidence supporting a reasonable belief that there was an actual or imminent threat of unlawful interference when Levi kicked and hit Tony after he pushed Tony to the ground. This is a proper exercise of the court's discretion.

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[4] We agree with the State that in ***State v. Anthuber***, 201 Wis.2d 512, 549 N.W.2d 477 (Ct. App. 1996), our de novo review of the trial court's decision not to give an instruction was based on the fact that the parties in that case had submitted a stipulation of fact. We specifically noted that, for that reason, we "departed from the general rule that affords trial courts discretion to determine what instructions the evidence reasonably requires." ***Id.*** at 518, 549 N.W.2d at 479.

Although there was much testimony that Levi hit and kicked Tony multiple times while Tony was on the ground, the trial court accepted Levi's testimony that he had kicked Tony only once and hit him only once. The trial court based its decision on Levi's version of the encounter. However, even according to Levi, after Tony hit him, Levi could have walked away, but he did not. Beyond glaring at Levi with balled fists held at his side at waist level, Tony did and said nothing else to Levi before Levi pushed him to the ground. And Tony did nothing in the way of verbal or physical threats to Levi once Tony was on the ground.

It is true that Levi testified that he thought Tony might hit him again and that is why he hit Tony and pushed him to the ground, and he "kind of" thought Tony could have gotten up and hit him after Tony was on the ground. However, in view of Levi's own testimony of what actually happened, that testimony is not sufficient to reasonably require the self-defense instruction. We reach this conclusion even without considering Levi's testimony that he pushed Tony because he was mad that Tony hit him and because if someone hits him first he has a right to hit back.

Levi repeats in this context his argument that the trial court applied incorrect legal standards because of the court's statements that "I might tolerate that, but …" and "I'm saying state of mind has nothing to do with it." For the reasons we have explained above, we conclude these statements do not show that the trial court made errors of law in denying the requested instruction.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.