COURT OF APPEALS
DECISION
DATED AND FILED

November 2, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP1405-CR **Cir. Ct. No. 2003CF766**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT J. WALDRON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: JAMES R. KIEFFER, Judge. *Affirmed.*

Before Brown, Anderson and Nettesheim, JJ.

¶1 PER CURIAM. Robert Waldron appeals from a judgment convicting him of second-degree reckless injury with a dangerous weapon

contrary to WIS. STAT. §§ 940.23(2)(a) and 939.63(1)(b) (2003-04)[1] and second-degree recklessly endangering safety with a dangerous weapon contrary to WIS. STAT. §§ 941.30(2) and 939.63(1)(b) after a jury trial. The charges against Waldron arose out of a confrontation between Waldron and two intoxicated individuals. Waldron's fiancée was with him at the time of the confrontation. On appeal, Waldron argues that the circuit court erroneously denied his request to instruct the jury about the privilege of defense of others.[2] We agree with the circuit court that the evidence at trial did not support a defense of others instruction, and we affirm.

¶2 The victims, Zachary Crawford and Tyler Bell, and Waldron's fiancée testified at trial. Waldron's version of events came into evidence via a statement he gave to police.

¶3 Waldron and his fiancée were walking their 200-pound black Labrador/Great Dane dog after midnight on the evening in question. Bell and Crawford were leaving a party in the neighborhood and walking to a friend's house to spend the night. Bell and Crawford were admittedly intoxicated. As the two groups headed for their destinations in the residential neighborhood, they encountered each other in the dark. Waldron and his fiancée were two houses away from their home when they encountered Bell and Crawford.

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] The circuit court gave a self-defense instruction. The jury rejected Waldron's self-defense theory.

¶4 Crawford saw a man and a woman walking towards him and Bell and, thinking that they might be going to the party he and Bell had just left, called out, "what's up bitch," a greeting he would offer a friend. Bell, who was walking ahead of Crawford and also thought he might know Waldron, reached Waldron first. Bell then realized that he did not know Waldron, and he and Waldron stood face to face, but did not speak. Waldron then moved his arm toward Bell, and Bell threw a punch toward Waldron's face. Unbeknownst to Bell, Waldron had a knife in each hand, and he stabbed Bell in the chest. Crawford then ran up to Bell and Waldron. As he tried to punch Waldron, Crawford felt something sharp in his neck and discovered that he was bleeding from a knife wound. Crawford and Bell left the scene to get assistance. Neither Crawford nor Bell was armed, Waldron did not reveal that he was armed, and because it was dark, neither Crawford nor Bell could see that Waldron was armed. Crawford and Bell testified that Waldron initiated the physical contact between them.

¶5 Waldron's fiancée testified that either Crawford or Bell yelled to them and started to move more quickly toward them. As Crawford and Bell approached, Waldron's fiancée moved off to the side because she did not know the individuals, and she was frightened. During the encounter, she stood approximately five to seven feet away, holding the dog. As the men approached, one of the men asked who Waldron was. Waldron responded, "Who do you want me to be?" Thereafter, Crawford and Bell started pushing Waldron around, Waldron did not retaliate, and the men surrounded him and kicked him. Crawford and Bell were not armed and did not threaten Waldron, although they pushed him. After he was pushed, Waldron pulled out the two knives, and clicked open the switchblade knife. One of the men then asked Waldron if he had pulled a knife, but Waldron did not respond. One man backed off, and the other moved toward

Waldron and "walked into the knife." Waldron's fiancée did not realize that the other man had also been stabbed. The men walked away.

¶6 Waldron's fiancée further testified that she was afraid she would be assaulted because two people she did not know had confronted them in the dark. She was worried that Waldron would be beaten and the men would not allow her to walk away.

¶7 In his statement to police, Waldron stated that two men ran up to him after they yelled to him. As the men approached, Waldron pulled out his knives and clicked the switchblade open hoping that the noise would scare them off. The men then starting shoving Waldron. Waldron, who had a knife in each hand, pushed their hands away. As Waldron ducked to avoid Bell's punch, Bell walked into the knife. Waldron did not realize Crawford had also been stabbed.

¶8 The circuit court agreed to instruct the jury on self-defense, but the court concluded that the evidence did not warrant an instruction on defense of others as requested by Waldron. The court noted that when Bell and Crawford approached Waldron and his fiancée, the fiancée moved away to a distance of five to seven feet. Neither Bell nor Crawford was armed or made any threats toward Waldron or his fiancée. The court found no basis to suggest that Waldron's actions were taken in defense of his fiancée.

¶9 A circuit court erroneously exercises its discretion when it fails to give an instruction on an issue raised by the evidence. ***State v. Coleman***, 206 Wis. 2d 199, 212-13, 556 N.W.2d 701 (1996). However, there must be sufficient evidence to support the giving of the requested instruction. ***State v. Giminski***, 2001 WI App 211, ¶8, 247 Wis. 2d 750, 634 N.W.2d 604. "Whether the evidence, viewed in the light most favorable to the defendant and the instruction, establishes

a sufficient basis for the instruction presents a question of law, which we review *de novo*." ***Id.***, ¶11.

¶10 WISCONSIN JI—CRIMINAL 830, privilege of defense of others, states:

> Defense of others is an issue in this case. The law of defense of others allows a person to threaten or intentionally use force to defend another under certain circumstances.
>
> The state must prove by evidence which satisfies you beyond a reasonable doubt that the defendant was not acting lawfully in defense of others.
>
> The law allows the defendant to act in defense of others only if the defendant believed that there was an actual or imminent unlawful interference with the person of [Waldron's fiancée], believed that [Waldron's fiancée] was entitled to use or to threaten to use force in self-defense, and believed that the amount of force used or threatened by the defendant was necessary for the protection of [Waldron's fiancée]. *The defendant may intentionally use or threaten force which is intended or likely to cause death or great bodily harm only if he believed that such force was necessary to prevent imminent death or great bodily harm to* [Waldron's fiancée].
>
> In addition, the defendant's beliefs must have been reasonable. A belief may be reasonable, even though mistaken. 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. 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. (Emphasis added.)

¶11 The principles of self-defense apply to defense of others. ***Giminski***, 247 Wis. 2d 750, ¶12.

> Thus, the privilege of defense of others, like the privilege of self-defense, has two components, both of which must be satisfied by a defendant claiming the privilege: (1) subjective—the defendant must have actually believed he or she was acting to prevent or terminate an

> unlawful interference; and (2) objective—the belief must be reasonable.

Id., ¶13.

¶12 Our analysis turns on whether it was reasonable for Waldron to believe that he had to intentionally use force "intended or likely to cause death or great bodily harm" in order "to prevent imminent death or great bodily harm" to his fiancée. *See* WIS JI—CRIMINAL 830.

¶13 Viewing the evidence in the light most favorable to Waldron and the defense of others instruction, we cannot conclude that Waldron reasonably believed that his fiancée faced imminent death or great bodily harm. Crawford and Bell approached Waldron and his fiancée in the dark, acted aggressively and initiated physical contact with Waldron. However, neither Crawford nor Bell was armed and neither said anything to Waldron's fiancée or approached her. Waldron's fiancée, who had moved away as Crawford and Bell approached, remained standing five to seven feet away from Waldron, Crawford and Bell during the confrontation, all the while in possession of a very large dog. Waldron and his fiancée were two houses from home. It is clear that Waldron and his fiancée were not similarly situated in the confrontation with Crawford and Bell. Under these circumstances, it was not reasonable for Waldron to believe that his fiancée faced imminent death or great bodily harm such that he was justified in employing a level of force against Crawford and Bell which was intended or likely to cause death or great bodily harm to Crawford and Bell.[3] Accordingly, we

[3] Even though Waldron's fiancée testified that she feared being assaulted by Crawford and Bell, the standard to be applied is the reasonableness of Waldron's belief that she faced imminent death or great bodily harm.

conclude that the circuit court properly exercised its discretion when it denied Waldron's request for a jury instruction on the privilege of defense of others.

¶14 Waldron next argues that the circuit court's remarks at sentencing indicate that a defense of others instruction would have been appropriate. Waldron cites the following remarks:

> This is a situation … that could have been completely avoided. Once you saw these individuals approaching you, I'm sure that you knew something wasn't right and I could – If I was in your shoes at that point, I could sense that something wasn't right there either, but I would have left. I would have extricated myself from that situation.

¶15 The court went on to note that the confrontation occurred in Waldron's neighborhood, two houses away from his home. Instead of walking away, Waldron stayed, fought with Bell and Crawford, and inflicted great bodily harm upon them. The court found that Waldron decided to fight Bell and Crawford because he wanted to teach them a lesson. The court concluded that Waldron did not have the right to employ the level of violence he did.

¶16 The circuit court's comments at sentencing related to the severity of the offenses and Waldron's character, both proper considerations at sentencing. *See* ***State v. Jones***, 151 Wis. 2d 488, 495, 444 N.W.2d 760 (Ct. App. 1989). The comments had nothing to do with whether the court should have given the defense of others instruction.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.