COURT OF APPEALS
DECISION
DATED AND FILED

May 1, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2005AP1735-CR **Cir. Ct. No. 2004CF2529**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH KEEPERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: MARSHALL B. MURRAY, Judge. *Affirmed*.

Before Fine, Curley and Kessler, JJ.

¶1 PER CURIAM. Joseph Keepers appeals from a judgment of conviction for second-degree recklessly endangering safety while armed and for possessing an electric weapon. The issues relate to the reckless endangering conviction: he challenges the sufficiency of the evidence, and the trial court's

refusal to instruct the jury on self-defense. We conclude that there was sufficient evidence to support the jury's guilty verdict, but not to establish a sufficient basis to instruct the jury on self-defense. Therefore, we affirm.

¶2 The charges arose from an altercation among Keepers and his stepchildren, Ladaska and Antonio Brown. Keepers was playing chess with Antonio who had won two games. While Keepers tried to persuade Antonio to continue playing, Ladaska ridiculed Keepers and called him a "loser." Keepers became angry and made a threatening gesture toward Ladaska, prompting Antonio to warn Keepers that if he fought with Ladaska he would also have to fight with Antonio. Keepers left the room and returned armed with a bowie knife. Keepers asked Ladaska to leave; she refused. A physical altercation ensued. Keepers grabbed Ladaska by the arm, jerking her towards the door to throw her out of the house. Ladaska pushed Keepers against the wall. When Ladaska looked up, she saw Keepers's knife coming towards her. Ladaska's head was bleeding, as was her left hand, which required twelve stitches.[1] Ladaska then announced, "I got you now."

¶3 The case was tried to a jury. Keepers testified that he returned to the room with a bowie knife (although he was not brandishing or threatening to use the knife) because "I wanted [Ladaska] to leave, and I thought if I got the knife she would leave." He claims that Ladaska escalated the conflict by refusing to leave, and by becoming physically aggressive, thereby exposing herself to the

[1] Keepers testified that he did not touch Ladaska with the knife; he believed she must have cut herself when she tried to take the knife away from him.

knife. He requested a jury instruction on self-defense. The trial court denied the request because it was not warranted by the evidence.

¶4 The jury found Keepers guilty of second-degree recklessly endangering safety while armed and possessing an electric weapon, in violation of WIS. STAT. §§ 941.30(2), 939.63, and 941.295(1) (amended Feb. 1, 2003).[2] The trial court imposed two concurrent three-year sentences, comprised of two one- and two-year respective concurrent periods of confinement and extended supervision. Keepers appeals, challenging the sufficiency of the evidence and the refusal to instruct the jury on self-defense relating to the recklessly endangering conviction; he does not challenge the electric weapon conviction.[3]

¶5 To find the defendant guilty of second-degree recklessly endangering safety, the State must prove beyond a reasonable doubt that: (1) the defendant endangered another's safety, (2) by criminally reckless conduct, which requires the defendant to be aware that he created an unreasonable and substantial risk of death or great bodily harm to another. *See* WIS. STAT. § 941.30(2); WIS JI—CRIMINAL 1347.

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite

[2] The referenced statutory sections were amended February 1, 2003.

[3] After arresting Keepers, police searched part of the house for the knife when they discovered a "stun gun," which Keepers admitted belonged to him.

> guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990) (citation omitted).

¶6 Keepers challenges the sufficiency of the evidence, contending that the State did not prove that he created an unreasonable and substantial risk of great bodily harm simply by holding a knife. He claims the fact that Ladaska cut herself while allegedly provoking a struggle with Keepers, who happened to be holding a bowie knife, is insufficient to implicate him. Keepers claims that he was in fear for his safety because of Ladaska's physical aggressiveness and Antonio's expressed support for his sister.

¶7 The jury interpreted the totality of the evidence differently than Keepers urged it to do. It is the jury's obligation to evaluate the credibility of the witnesses and to weigh the evidence. *See* ***id.*** at 503. It is the jury's prerogative to "reject evidence and testimony suggestive of innocence." ***Id.*** On appeal, our obligation is limited to reviewing the evidence to ensure that there is sufficient credible evidence to support the jury's verdict. *See* ***id.*** at 507-08. We conclude that there is.

¶8 After "trading words" with Ladaska, Keepers left the room and returned with a bowie knife. Keepers, while holding the bowie knife, insisted that Ladaska leave; she refused. By holding a bowie knife while engaging in a war of words that went awry, Keepers created an unreasonable and substantial risk of great bodily harm. The evidence is sufficient to support the jury's verdict that Keepers was guilty of second-degree recklessly endangering Ladaska's safety. *See* WIS. STAT. § 941.30(2); WIS JI—CRIMINAL 1347.

¶9 Keepers also challenges the trial court's refusal to instruct the jury on self-defense. He claims that he armed himself with a bowie knife as a measured and reasonable response to Ladaska's and Antonio's threats. As Ladaska resisted his demand for her to leave, telling him that she "ain't scared of [him] or [his] knife," she swung at him, hit him with a beer can, shoved him against the wall, and then he thought Antonio was approaching him from behind. It was during this time, while Keepers was still holding the knife, when Ladaska cut her head and her hand, the latter requiring twelve stitches, which occurred, according to Keepers, because she was trying to take the knife away from him. Consistent with his defense theory, he requested that the jury be instructed on self-defense. The trial court ruled, however, that the evidence did not justify a self-defense instruction.

¶10 Preliminarily, Keepers contends that he did not waive this issue by failing to identify the precise self-defense instruction he sought. We agree. The parties argued the propriety of a self-defense instruction and the trial court ruled on that issue. The record provides Keepers's instructional request, the State's response, and the trial court's ruling and reasoning for us to review.

¶11 To validly claim self-defense, Keepers must show that he actually believed that his conduct was necessary to prevent or terminate a real or apparent unlawful interference, and that his belief was reasonable. *See* ***State v. Jones***, 147 Wis. 2d 806, 814-15, 434 N.W.2d 380 (1989). The defendant's actual belief is subjective, whereas the reasonableness of that belief is objective. *See* ***State v. Giminski***, 2001 WI App 211, ¶13, 247 Wis. 2d 750, 634 N.W.2d 604 (citation omitted). "[C]riminal recklessness or criminal negligence and lawful actions in self-defense cannot coexist." WIS JI—CRIMINAL 801 n.1.

¶12

> To support a requested jury instruction on a statutory defense to criminal liability, the defendant has the initial burden of producing evidence to establish [that] statutory defense. That burden may be satisfied, however, from evidence adduced by either the prosecution or the defense…. 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*.

Giminski, 247 Wis. 2d 750, ¶11 (citations and text omitted).

¶13 Keepers maintained that the stabbing injury was accidental on his part insofar as it was caused by Ladaska; he happened to be holding a knife, he did not use it against her. Consistent with his theory of accidental injury, he cannot show that he actually believed that his conduct was necessary to prevent or terminate Ladaska's unlawful interference since he claimed not to intend the conduct.[4] ***Id.***, ¶13. Moreover, Keepers's subjective belief that he needed to arm himself with a bowie knife for protection from an unarmed woman and her unarmed brother, whose intervention was limited to protecting his sister, was not objectively reasonable. *See* ***id.*** Keepers was charged with, and convicted of, recklessly endangering safety. Self-defense is not applicable to a claim of criminal recklessness. *See* WIS JI—CRIMINAL 801 n.1. Keepers's insistence that Ladaska's injury from his knife was accidental negated the applicability of self-defense. *See* ***id.***; *cf.* ***State v. Kramar***, 149 Wis. 2d 767, 794-95, 440 N.W.2d 317 (1989) (affirming the denial of the defendant's requested instruction when it

[4] In his reply brief, Keepers emphasizes that the fact that he never announced that he was afraid for his safety does not negate his subjective belief. We do not reject his self-defense claim for that reason.

conflicted with his version of the evidence).[5] The trial court's refusal to instruct the jury on self-defense was factually and legally appropriate.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2003-04).

[5] The State also counters Keepers's self-defense claim with WIS. STAT. § 939.48(2)(a), which cautions that, provocation, by the one seeking to claim self-defense, may negate the privilege altogether. *See* ***Root v. Saul***, 2006 WI App 106, ¶28, 293 Wis. 2d 364, 718 N.W.2d 197. Our rejection of Keepers's self-defense claim on other bases does not require us to address the claim of provocation, or "whether self-defense is available as an affirmative defense to one who was provoked by words." ***Id.***, ¶23 (addressing ***Crotteau v. Karlgaard***, 48 Wis. 2d 245, 250-51, 179 N.W.2d 797 (1970) ("oral abuse … is not sufficient to justify an assault and battery.")).