

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 9, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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

Appeal No. 2008AP1543-CR

Cir. Ct. No. 2006CF1317

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICKEY L. ESCAMEA,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Brown County:
PETER NAZE, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Mickey Escamea appeals from his convictions for battery to an emergency medical care provider and disorderly conduct. The sole issue involves Escamea's claim that the circuit court improperly denied his requested self-defense jury instruction. We conclude that any perceived error in

refusing to give a self-defense instruction was harmless. Therefore, we affirm the judgments of conviction.

¶2 The charges arose from Escamea's conduct in the emergency room at St. Vincent Hospital in Green Bay, where Escamea became very agitated and combative. He spit in the mouth of a nurse when she attempted to take his blood pressure, told a nurse who asked him to give a urine sample to suck his penis, poured the urine sample on the floor of the exam room, and kicked a nurse and three security officers.

¶3 Under WIS. STAT. § 939.48(1)¹, a defendant who claims self-defense must show: (1) that the defendant had an actual and reasonable belief that there was an actual or imminent unlawful interference with the defendant's person; (2) that the defendant had the actual and reasonable belief that the threat or use of force was necessary; and (3) that the defendant only used such threat or force as he actually and reasonably believed was necessary. See *State v. Nollie*, 2002 WI 4, ¶19, 249 Wis. 2d 538, 638 N.W.2d 280. The privilege of self-defense is unavailable to a defendant who has provoked an attack, unless the defendant reasonably believes he is in imminent danger of death or great bodily harm, or in good faith withdraws with adequate notice to the assailant. See WIS. STAT. §§ 939.48(2)(a) and (b). A defendant is not entitled to a new trial on an erroneous failure to give a self-defense instruction if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. See *State v. Peters*, 2002 WI App 243, ¶29, 258 Wis. 2d 148, 653 N.W.2d 300. When a defendant requests a self-defense instruction, the issue of whether the evidence

¹ Reference to Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

establishes a sufficient basis for the instruction presents a question of law which this court reviews de novo. See *State v. Giminski*, 2001 WI App 211, ¶11, 247 Wis. 2d 750, 634 N.W.2d 604.

¶4 Here, we need not decide if the circuit court erred by failing to give the self-defense instruction because we conclude it is clear beyond a reasonable doubt that Escamea's jury would have found him guilty even if it had been given the instruction. The emergency room doctor, several nurses and three security guards testified consistently about Escamea's provocative and aggressive conduct in the emergency room. One of the nurses testified that she was standing at the end of the stretcher when Escamea lifted his head, looked at her, and kicked her in the chest with his boot so hard that she flew backward into glass doors, breaking them away from their frames. A security guard testified that when he entered the examination room, Escamea was "swinging and kicking and started spitting." As he attempted to restrain Escamea, he saw Escamea kick the nurse in the chest and also kick another security guard. The guard testified that Escamea kicked him so hard in the arm that it "turned real black and blue" the next day. The witnesses also testified that Escamea's provocative and agitated behavior continued to escalate, requiring the hospital staff to increase its response, from attempting to talk calmly to Escamea, to using medications, and finally using restraints to protect both the staff and Escamea as he increasingly became a danger to himself and others. There is no reasonable possibility that the jury would have failed to find that Escamea's conduct provoked the hospital's response.

¶5 There is also no reasonable possibility that the jury would have credited Escamea's version of what occurred in the emergency room. He told the jury he felt his "life was in jeopardy at the time" and that "they were trying to kill me ... with the needles and stuff and [the] way they were grabbing me."

However, there was not the remotest possibility the jury would find that belief reasonable. Escamea also denied kicking anyone, asserting he was pushing them “[j]ust hard enough to get them away from me.” Yet, Escamea’s testimony conflicted with all the hospital staff witnesses, who testified he fought with the medical care providers, kicked three security officers and kicked the nurse so hard that she went flying into the doors of the examination room, knocking them off their tracks.

¶6 We also note Escamea did not deny he spit in the nurse’s face, requiring her to leave the examination room, wash her mouth out and return wearing a splash shield. He simply claimed he did not remember and suggested that he may have been having a seizure, which none of the medical staff in the room noticed. And while Escamea denied saying anything about sucking his penis, he admitted he dumped his urine on the floor and laughed “at the expression of the staff” as he did so. The evidence demonstrated overwhelmingly that it was not reasonable for Escamea to believe that the use of force was necessary or that Escamea only used such force as he reasonably believed was necessary.

¶7 Escamea insists he reasonably believed that the hospital’s actions were unlawful because individuals have the right to refuse medical treatment. The emergency room doctor testified that patients may refuse emergency medical treatment if they have the capability to make the decision and are aware of the risks and benefits, but he also testified he believed that Escamea did not have that capability that night. The doctor explained to the jury why this was an emergency situation that required Escamea be treated promptly. He testified that it was his professional responsibility, given Escamea’s mental status and combative acts, to determine whether there were underlying medical emergencies such as trauma, hypoglycemia, poisons, or drug abuse that needed immediate treatment. Escamea

himself testified that he had suffered a head injury and was in a dreamlike state. There was no reasonable possibility the jury would have found that Escamea was competent to refuse medical treatment and that he reasonably believed the medical staff was acting unlawfully by forcefully restraining him so they could administer medications against his will.

¶8 Escamea's version of events conflicted with the testimony of all of the prosecution witnesses. The testimony of those witnesses was consistent and there was no reasonable possibility that the jury would have believed Escamea's testimony over theirs. We conclude it is clear beyond a reasonable doubt that if the jury had been given the self-defense instruction, it still would have convicted Escamea. Any perceived error was therefore harmless.

By the Court.—Judgments affirmed.

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

