

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 26, 2002

Cornelia G. Clark
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. 01-2300-CR

Cir. Ct. No. 00 CM 9599

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JESSE L. JOLLIE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Affirmed.*

¶1 WEDEMEYER, P.J.¹ Jessie L. Jollie appeals from a judgment entered after a jury found him guilty of battery, contrary to WIS. STAT. § 940.19(1) (1999-2000).² He also appeals from an order denying his postconviction motion.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (1999-2000).

² All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

Jollie argues that the trial court erroneously advised him regarding the substance of the closing argument and such advice precluded him from presenting a more persuasive closing argument. Because the trial court did not err, this court affirms.

I. BACKGROUND

¶2 On October 27, 2000, Jollie and his girlfriend, Erica L. Hommel, got into an argument. The verbal argument led to a physical confrontation and resulted in bruising, swelling and scratches on Hommel. Hommel reported the incident to the police and Jollie was charged with battery.

¶3 Jollie decided that he wanted to represent himself and did not want a lawyer. The trial court advised Jollie of the disadvantages of such a choice, but Jollie decided to proceed *pro se*.

¶4 At the trial, Jollie testified as to his version of the facts. He conceded that he caused the injuries that Hommel suffered, but he stated that she had instigated the physical confrontation and he was simply trying to calm her down and keep her from hurting him. He stated that he did not intend to cause her injury. At the close of the case, the trial court asked Jollie whether he wanted the court to give the standard battery instruction or the self-defense battery instruction. Jollie indicated he would like the self-defense battery instruction given and then the following exchange occurred:

THE COURT: Any objection from the state?

[THE STATE]: I leave it to the court's discretion. I would just note that from a legal perspective the defendant can't argue that he didn't commit the crime of battery and then argue that he committed the crime of self-defense in his closing arguments, if that's the case.

THE COURT: That's true, and so you understand, Mr. Jollie. If you're going to argue to the jury that you

caused these, this bodily harm to her but you did it in the context of self-defense, then by giving that instruction I think is very appropriate. But if I give a version of the battery instruction and then you get up in the closing arguments and say I never caused any injuries or bodily harm to her, then we have a problem; do you understand?

MR. JOLLIE: Okay.

THE COURT: That's not my sense of what you're going to do. What I heard you on the witness stand [sic], this was self-defense. That any injuries you caused were inadvertent ... or as a result of you trying to restrain her from coming at you.

MR. JOLLIE: Correct.

¶5 The trial proceeded with closing arguments. During Jollie's closing, he admitted that he caused injury, but argued that he did not intend to hurt Hommel and that the State failed to prove that he intended to hurt her. Jollie asserted that all he was trying to do was keep Hommel from hurting him—to restrain her until she calmed down. The trial court instructed the jury, including the self-defense instruction. The jury found Jollie guilty.

¶6 Jollie filed a postconviction motion alleging that the trial court's advice regarding closing prevented him from presenting additional argument to the jury. The trial court denied the motion. Jollie now appeals.

II. DISCUSSION

¶7 Jollie contends that the trial court's advice regarding the substance of his closing argument prevented him from arguing self-defense to the jury. He argues that if the trial court would not have so advised him, that he would have presented the self-defense theory to the jury.

¶8 The record belies Jollie's assertion. A complete review of the trial transcript demonstrates that Jollie's defense theory was self-defense. He told the

jury during opening statements that he admitted to causing the injury, but that it was done in self-defense. During his testimony, he admitted that he caused the injury, but claimed it was done in self-defense:

Q. We saw the injuries and you told us earlier that you caused them; correct?

A. Correct.

Jollie also testified:

She came at me and started swinging. I did not know if she was trying to punch me or slap me or scratch me or what she was doing. As she approached me I was approximately five feet away from her and she was on the couch. She got up off the couch and she came at me. I pushed her back

... I then grabbed her by the arms. I pushed her back on the couch. I crossed her arms in front of her and then put my knee across her leg so she couldn't kick her legs at me. And I screamed at her, calm the fuck down. Just chill out, calm down. And she spit at me and then tried biting my arms for me to free her arms.

At the instruction conference, Jollie indicated that he wanted the self-defense instruction given. Moreover, during closing argument, he argued that the State failed to prove that he *intended* to cause the injuries. He stated that he did not mean to hurt Hommel, he did not intend to hurt Hommel, and that all he was doing was trying to protect himself and calm her down. Thus, his argument on appeal that he was precluded from arguing self-defense to the jury is somewhat ingenuous.

¶9 Although Jollie never used those particular words, it is clear from a review of his closing argument that he was making both points—one, that the State failed to prove he committed the battery because his acts were not

intentional; and two, that he caused the injuries in an attempt to defend himself against Hommel's attack.

¶10 This court acknowledges that it is a possibility that Jollie may have chosen not to use the words "self-defense" because he interpreted the trial court's advice as to the substance of the closing to mean that he could not argue alternative theories. Nevertheless, this court cannot conclude that the trial court's advice was erroneous or prejudicial.

¶11 First, the State's comment was clearly wrong. A defendant is free to present alternate consistent theories to the jury and certainly could argue both that the State did not prove an element of battery and that, even if battery was proven, the defendant acted in self-defense. *See, e.g., State v. Gomaz*, 141 Wis. 2d 302, 314 n.7, 414 N.W.2d 626 (1987). However, if the statement of the State is reviewed in the context of the entire proceeding, it is clear that the State did not intend to foreclose those alternate theories. Rather, as confirmed by the trial court, which used more precise language, both were attempting to advise Jollie that after an entire trial where Jollie repeatedly conceded that he had caused the injuries, but only in self-defense, he could not now argue in closing that he never touched Hommel or that the physical confrontation never occurred.

¶12 Second, even if Jollie misinterpreted the comments made by the trial court, he was not prejudiced by them. In his closing argument, he attempted to convince the jury of two things—that he did not intend to hurt Hommel and that his conduct was simply a reaction to Hommel's attack on him. This was consistent with both his opening statement, his own testimony, and his theory of defense throughout the entire trial. Moreover, if his misunderstanding somehow softened the defense theory during his closing argument, he has no one to blame

but himself. The trial court advised Jollie of the disadvantages of proceeding *pro se*. He made a knowing and voluntary decision to proceed *pro se* despite those disadvantages.

¶13 Third, closing argument is not evidence and the jury was advised to base its decision solely on the evidence. The evidence clearly presented the self-defense theory, which Jollie claims he was precluded from addressing during his closing argument. Moreover, the jury was instructed on the self-defense theory. Accordingly, this court cannot find error based on the trial court's advice and Jollie's resulting closing argument.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

