COURT OF APPEALS
DECISION
DATED AND FILED

November 6, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-3180-CR **Cir. Ct. No. 99-CF-1011**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH F. COLE-BEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: WAYNE J. MARIK, Judge. *Affirmed.*

Before Nettesheim, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Joseph F. Cole-Bey has appealed from a judgment convicting him of aggravated battery while using a dangerous weapon in violation

of WIS. STAT. §§ 939.63(1)(a)2 and 940.19(5) (1999-2000),[1] reckless injury to a child in violation of WIS. STAT. § 948.03(3)(c), and criminal damage to property in violation of WIS. STAT. § 943.01(1). All convictions were as a repeat offender. Cole-Bey has also appealed from an order denying his motion for postconviction relief. We affirm the judgment and order.

¶2 On appeal, Cole-Bey challenges only the aggravated battery conviction, which was based upon evidence that he intentionally cut his ex-girlfriend, Wendy Harris, in the face. Cole-Bey contends that the conviction should be reversed because he was not provided with effective assistance of counsel. Alternatively, he argues that he is entitled to a new trial in the interest of justice because the real controversy related to the aggravated battery count was not fully tried. Both arguments are based on claims that the jury should have been instructed on the privilege of self-defense.

¶3 Cole-Bey's defense counsel requested a self-defense instruction at trial. However, after the State argued that the evidence did not support giving the instruction, defense counsel withdrew the request. Cole-Bey argues that his counsel's withdrawal of the request constituted deficient performance and was prejudicial to his defense.

¶4 To establish a claim of ineffective assistance, a defendant must show that counsel's performance was deficient and that it prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show that his or her counsel made errors so serious

[1] All references to the Wisconsin Statutes are to the 1999-2000 version.

that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment. ***Id.*** "Even if deficient performance is found, judgment will not be reversed unless the defendant proves that the deficiency prejudiced his defense." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Strickland***, 466 U.S. at 694.

¶5 It is not ineffective assistance to fail to make a motion or a request which would have failed. *See* ***State v. Simpson***, 185 Wis. 2d 772, 784, 519 N.W.2d 662 (Ct. App. 1994). Determining whether there has been ineffective assistance of counsel presents a mixed question of law and fact. ***State ex rel. Flores v. State,*** 183 Wis. 2d 587, 609, 516 N.W.2d 362 (1994). A trial court's findings of fact concerning the circumstances of the case and counsel's conduct and strategy will not be overturned unless they are clearly erroneous. ***State v. Knight***, 168 Wis. 2d 509, 514 n.2, 484 N.W.2d 540 (1992). However, the final determinations of whether counsel's performance was deficient and prejudicial are questions of law which this court decides without deference to the trial court. ***Id.***

¶6 The defendant has the initial burden of producing evidence to establish self-defense. ***State v. Giminski***, 2001 WI App 211, ¶11, 247 Wis. 2d 750, 634 N.W.2d 604, *review denied*, 2002 WI 2, 249 Wis. 2d 581, 638 N.W.2d 591 (Wis. Nov. 27, 2001) (No. 00-3073-CR). That burden may be satisfied from evidence adduced by either the prosecution or the defense. ***Id.*** If, viewed in the light most favorable to the defendant, the evidence would support the defendant's theory that he or she was acting in self-defense, he or she is entitled to a self-defense instruction. *See* ***State v. Mendoza***, 80 Wis. 2d 122, 153, 258 N.W.2d 260

(1977). When a defendant requests a self-defense instruction, the issue of whether the evidence establishes a sufficient basis for the instruction presents a question of law which this court reviews de novo. ***Giminski***, 2001 WI App 211 at ¶11.

¶7 Cole-Bey contends that he was entitled to a self-defense instruction based on WIS. STAT. § 939.48, which provides:

> **(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.
>
> ….
>
> **(6)** In this section "unlawful" means either tortious or expressly prohibited by criminal law or both.

¶8 Cole-Bey contends that the evidence, viewed in the light most favorable to him, permitted an inference that he reasonably believed he was the victim of the tort and crime of battery by Harris, and that his actions were necessary to prevent imminent death or great bodily harm to himself from being stabbed by Harris or pulled by her over a porch railing. He contends that because the jury could infer that he intentionally used force against Harris to prevent or terminate what he reasonably believed to be an unlawful interference with his person, he was entitled to an instruction on the privilege of self-defense under WIS. STAT. § 939.48(1).

¶9 We conclude that even if counsel had not withdrawn the request for a self-defense instruction, the instruction could not properly have been given.

Consequently, there can be no prejudice and no ineffective assistance of counsel. *See* ***Simpson***, 185 Wis. 2d at 784.

¶10 The evidence at trial indicated that Cole-Bey had previously lived with Harris.[2] According to Harris's testimony, Cole-Bey came to the apartment at 3:00 a.m. on November 6, 1999, yelling that he wanted his VCR. Harris let him in and told him to take the VCR. Harris testified that she was watching television in her bedroom with an old acquaintance when Cole-Bey arrived. According to Cole-Bey, Harris and the other man were smoking rock cocaine. Harris testified that upon entering the apartment, Cole-Bey started grabbing things that belonged to her and knocking them down, including the television set, a mirror, and tables. She testified that there was broken glass all over the place. Cole-Bey himself admitted that he became enraged when he entered the apartment, and that he began arguing with Harris. He admitted to breaking things and throwing them around the apartment, and asserted that he put the other man out of the house.

¶11 The testimony at trial diverges as to what happened next. Harris testified that she told her fifteen-year-old son to go upstairs to the neighbor's apartment to call the police.[3] She testified that she told Cole-Bey to leave, and that a pushing match ensued. She testified that she then exited the front door of her apartment and went around to the back of the building, where the staircase to the neighbor's apartment was located. Harris testified that she intended to go upstairs to the neighbor's apartment, but that Cole-Bey came out the back door of

[2] Cole-Bey testified that he still lived in Harris's apartment at the time of these offenses. Harris testified that he did not live there, but came by often and stayed for up to a week at a time.

[3] The testimony at trial indicated that Harris's apartment was the lower level of a duplex.

her apartment and accosted her on the back porch. She testified that Cole-Bey would not let her get away or go upstairs, and that they began struggling and hitting each other. She further testified that she tried to push Cole-Bey off the back porch railing to get away, and that as they struggled she became aware that her face was bleeding. She testified that she then got a towel from the bathroom and went upstairs to the neighbor's apartment. Ultimately, Harris needed approximately 100 stitches to close the wound on her face. Harris denied ever using a weapon against Cole-Bey.

¶12 Cole-Bey's version of the events was that after throwing things in Harris's apartment and physically fighting with her inside the apartment, he attempted to leave by going out the back door. He testified that Harris grabbed a knife from the kitchen dish rack and, along with her son, attacked him by the back door and porch as he attempted to leave.[4] He testified that Harris was swinging the knife, and that it stabbed him in the chest. He testified that "[i]f I cut her, it was due to the, trying to protect myself."

¶13 Cole-Bey contends that this testimony supports a determination that he was entitled to an instruction on self-defense under WIS. STAT. § 939.48(1). Specifically, he contends that the evidence supports a determination that he was entitled to use self-defense to terminate what he reasonably believed was Harris's unlawful attack on him.

[4] Cole-Bey gave conflicting testimony as to how Harris and her son attacked him, initially stating that Harris went out the front door and attacked him at the back door as he tried to leave, and subsequently that Harris and her son attacked him inside the apartment and followed him out onto the back porch.

¶14 As pointed out by the State in its respondent's brief, this argument fails based upon WIS. STAT. § 939.48(2), which provides:

> Provocation affects the privilege of self-defense as follows:
>
> (a) A person who engages in unlawful conduct of a type likely to provoke others to attack him or her and thereby does provoke an attack is not entitled to claim the privilege of self-defense against such attack, except when the attack which ensues is of a type causing the person engaging in the unlawful conduct to reasonably believe that he or she is in imminent danger of death or great bodily harm. In such a case, the person engaging in the unlawful conduct is privileged to act in self-defense, but the person is not privileged to resort to the use of force intended or likely to cause death to the person's assailant unless the person reasonably believes he or she has exhausted every other reasonable means to escape from or otherwise avoid death or great bodily harm at the hands of his or her assailant.
>
> (b) The privilege lost by provocation may be regained if the actor in good faith withdraws from the fight and gives adequate notice thereof to his or her assailant.

¶15 Cole-Bey's acts upon entering Harris's apartment, including smashing Harris's personal property and engaging in loud, boisterous conduct intended to drive her male guest from the residence, was conduct which was likely to provoke her to attack him. *See* ***State v. Bougneit***, 97 Wis. 2d 687, 696, 294 N.W.2d 675 (Ct. App. 1980).[5] Cole-Bey therefore was not entitled to claim the privilege of self-defense as set forth in WIS. STAT. § 939.48(1).

¶16 We recognize that a limited privilege of self-defense remains even when a defendant, like Cole-Bey, has engaged in unlawful conduct of a type likely

[5] In addition, because Cole-Bey attacked Harris and her property in Harris's apartment, Harris had no duty to retreat, and was entitled to stand her ground and defend herself. *See* ***State v. Herriges***, 155 Wis. 2d 297, 302-03, 455 N.W.2d 635 (Ct. App. 1990).

to provoke others to attack him. *See* WIS. STAT. § 939.48(2)(a), (b). However, we need not consider or address whether Cole-Bey was entitled to an instruction on the privilege of self-defense remaining or regained after provocation because he never requested such an instruction during trial, postconviction proceedings, or on appeal.[6] His requests for a self-defense instruction relied solely on the privilege of self-defense as set forth in WIS. STAT. § 939.48(1).

¶17 We also recognize that the effect of provocation on Cole-Bey's privilege of self-defense was not raised by the prosecutor at trial when he argued that the self-defense instruction requested by defense counsel was unwarranted. The effect of provocation was first raised by the State in its respondent's brief and was not relied on by the trial court when it denied postconviction relief. However, an appellate court may uphold a trial court's ruling on a theory or reasoning not presented in the trial court. ***State v. Holt***, 128 Wis. 2d 110, 125, 382 N.W.2d 679 (Ct. App. 1985). On appeal, the respondent may raise issues which provide an alternative basis for upholding the trial court's order or judgment. ***Id.*** at 124-25. Because Cole-Bey's provocative conduct deprived him of the privilege of self-defense as set forth in WIS. STAT. § 939.48(1), we may affirm the trial court's determination that he is not entitled to a new trial based upon the failure to give a self-defense instruction. *See* ***Holt***, 128 Wis. 2d at 124.

¶18 Cole-Bey also asks this court to exercise its discretion under WIS. STAT. § 752.35 and order a new trial in the interest of justice. However, because we reject Cole-Bey's argument that he was entitled to a self-defense instruction

[6] We also note that in his reply brief, Cole-Bey fails to reply to the State's argument that he was not entitled to the self-defense instruction because he provoked the attack.

under WIS. STAT. § 939.48(1), we also reject his contention that the real controversy was not fully tried.

By the Court.—Judgment and order affirmed.

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