

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 21, 2010

A. John Voelker
Acting 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. 2010AP509-CR

Cir. Ct. No. 2009CM695

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD MARTIN KUBAT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for St. Croix County:
HOWARD W. CAMERON, JR., Judge. *Affirmed; attorneys sanctioned.*

¶1 HOOVER, P.J.¹ Richard Kubat appeals a judgment of conviction for misdemeanor battery. Kubat argues the trial court should have granted his

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

motion for a directed verdict of acquittal following presentation of the State's case and should not have instructed the jury on provocation. Kubat further asserts he was denied due process. We reject Kubat's arguments and affirm.

BACKGROUND

¶2 At trial, Marion Belcher testified he entered a truck stop and waited in line at the fuel island behind another truck driven by Kubat. After about ten minutes, Kubat pumped fuel into his truck for ten to fifteen minutes. However, Kubat did not then move his truck. Belcher knocked on the door of Kubat's truck and politely asked him to move up. Kubat replied, "Okay," and Belcher went back to his truck, released his brake lock, and waited. When Kubat still did not move his truck, Belcher walked back and again asked him to move.

¶3 Kubat responded, "Fuck you," and gave Belcher the finger. Belcher replied in like kind, and continued, "Why don't you come out here and say [that] You sitting up there talking that shit." Belcher eventually detached the air hose from Kubat's truck, stating, "Now your punk ass got to get out and get it."² Belcher then turned and began walking back to his truck. Kubat exited his truck with a tire knocker, approached Belcher, and pushed him. Belcher pushed back, Kubat swung the tire knocker at Belcher, and they fought with each other on the ground. Belcher testified he was unsure when Kubat struck him in the face with the tire knocker because he recalled blocking the first swing with his arm. Belcher explained, "[A]ll during that time, he was swinging; so I'm not sure exactly when

² Kubat explained the air hose is the connection between the tractor and the trailer that transports air to the brakes. When the hose is detached the truck cannot move.

he hit me, from the beginning or when he was on the ground, but he was swinging that thing real wild at me trying to hit me.”

¶4 At the close of the State’s case, Kubat moved for a directed verdict of acquittal based on Belcher’s testimony that he was unsure when he was struck with the tire knocker. The court denied the motion, and Kubat testified in his defense. The jury convicted Kubat and he now appeals.

DISCUSSION

¶5 Kubat first argues the circuit court erroneously denied his motion for a directed verdict of acquittal following presentation of the State’s case. Kubat contends the State could not disprove self-defense because the victim stated he did not know who struck first. Our supreme court has explained:

[W]here a defendant moves for a dismissal or a directed verdict at the close of the prosecution’s case and when the motion is denied, “... the introduction of evidence by the defendant, if the *entire* evidence is sufficient to sustain a conviction, waives the motion to direct.” In the present case, after the defendant’s motion to dismiss was denied, he proceeded to put in his defense. Therefore, on review, the appellate court must examine all the evidence in determining whether it is sufficient to sustain the conviction.

State v. Kelley, 107 Wis. 2d 540, 544, 319 N.W.2d 869 (1982) (citations omitted). Indeed, Kubat’s brief relies extensively on Kubat’s testimony, which was not provided until *after* the State had rested.

¶6 Furthermore, Kubat’s brief inadequately sets forth the trial testimony, fails to develop a coherent argument, and ignores the proper standard of

review.³ For instance, Kubat relies on his own testimony, suggesting Belcher’s conflicting testimony was untrue. In reviewing a sufficiency of the evidence claim, however, we must view the evidence in the light most favorable to the State. *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). Kubat also ignores and mischaracterizes evidence. While Kubat would have us believe Belcher could not recall who initiated the fight, Kubat completely disregards pertinent facts, including: those leading up to the physical confrontation, that Kubat pushed Belcher first, that Kubat was the first to swing, and that it was merely the blow to the face with the tire knocker that Belcher was unsure of.

¶7 Kubat also fails to explain how Belcher’s testimony concerning the tire knocker blow precluded the State from disproving self-defense. Instead, Kubat asserts, in conclusory fashion: “The State, through the admission of its own witness has clearly indicated that guilt, beyond a reasonable doubt, is not possible in a situation where the alleged victim is not sure who hit whom first, or who initiated the altercation.”⁴ Because he fails to develop a properly supported,

³ Kubat’s appendix contains only the judgment of conviction and the criminal complaint. These documents tell us nothing about the issues raised on appeal. Contrary to rule and counsel’s certification to this court, Kubat’s appendix failed to include the circuit court’s findings or those portions of the record essential to an understanding of the issues. *See* WIS. STAT. RULE 809.19 (2)(a)-(b). “Filing a false certification with this court is a serious infraction” justifying the imposition of sanctions. *State v. Bons*, 2007 WI App 124, ¶¶23-25, 301 Wis. 2d 227, 731 N.W.2d 367. Counsel also falsely certified that his electronically filed brief was identical in both content and format to the printed brief. While we have not compared the content, the format of Kubat’s electronic brief differs substantially from that of his written brief. Additionally, Kubat provides improper record citations, which provide page numbers but omit the record number. *See* WIS. STAT. RULE 809.19(1)(d)-(e).

The State similarly fails to provide proper record citations, omitting the record number.

⁴ Kubat alternatively states his conclusory argument: “As soon as the alleged victim, the State’s primary witness, indicated that he was unsure who initiated the altercation, the State was no longer able to prove beyond a reasonable doubt that Appellant was guilty of battery and thus Appellant’s motion for directed verdict should have been granted.”

(continued)

rational argument, we reject Kubat’s challenge to the sufficiency of the evidence. *See State v. Flynn*, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994) (“We will not decide issues that are not, or inadequately, briefed.”). In any event, construing the facts most favorably to the State, there is more than adequate evidence supporting the conviction.⁵

¶8 Kubat next argues the court erroneously instructed the jury on provocation. A trial court has broad discretion in deciding which jury instructions to provide the jury. *State v. Coleman*, 206 Wis. 2d 199, 212, 556 N.W.2d 701 (1996). However, the trial court must exercise its discretion so as “to fully and fairly inform the jury of the rules of law applicable to the case and to assist the jury in making a reasonable analysis of the evidence.” *Id.*⁶

¶9 As part of the self-defense instructions, the trial court instructed the jury on provocation as follows: “You should also consider whether [the] defendant provoked the attack. A person who engages in unlawful conduct of a type likely to provoke others to attack and who does provoke an attack is not allowed to use or threaten force in self-defense against that attack.” Kubat contends:

These instructions were clearly inappropriate and a miscarriage of justice as no allegations of provocation had

We observe Kubat’s repeated references to “appellant” throughout his brief violate WIS. STAT. RULE 809.19(1)(i), which requires reference to the parties by name, rather than by party designation.

⁵ Kubat did not file a reply brief.

⁶ The State cites *State v. Herriges*, 155 Wis. 2d 297, 300, 455 N.W.2d 635 (Ct. App. 1990), for a proposition of law that cannot be found in that case. This impedes our ability to accurately and efficiently resolve cases and violates WIS. STAT. RULE 809.19(1)(e), as well counsel’s ethical duties to the court.

been made throughout the trial. Provocation, as stated by Appellant's Counsel, requires the act of illegal conduct by the defendant to negate a self-defense argument. The testimony of both the Appellant and the alleged victim states that Appellant was sitting in his truck, no illegal conduct can be inferred from this that would merit provocation instructions.

¶10 Once again, Kubat ignores evidence and fails to develop a coherent legal argument. Belcher testified that before he engaged Kubat in the fight, Kubat had refused to move his truck so Belcher could use the fuel pump, cursed at Belcher, pursued Belcher with a tire knocker, pushed Belcher, and then swung the tire knocker at Belcher when he pushed Kubat back. These facts could reasonably support a finding of provocation. The trial court therefore did not err by giving the instruction.

¶11 Finally, Kubat contends the preceding two assertions of error deprived him of due process. This undeveloped assertion, unsupported by legal authority, adds nothing to Kubat's arguments. We therefore do not address it further. *See Flynn*, 190 Wis. 2d at 39 n.2.

¶12 We sanction Kubat's appellate counsel \$250 for his filing of two false certifications and rules violations. We also sanction the State's counsel \$50 for her rules violations. Counsel shall pay their respective forfeitures to the clerk of this court within thirty days of this decision. *See WIS. STAT. RULE 809.83(2)*.

By the Court.—Judgment affirmed; attorneys sanctioned.

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

