

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**February 16, 2005**

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. 04-0214-CR  
STATE OF WISCONSIN**

**Cir. Ct. No. 02CF000055**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**MICHAEL J. WEBER,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Waukesha County: JAMES R. KIEFFER, Judge. *Reversed and cause remanded.*

Before Brown, Nettesheim and Snyder, JJ.

¶1 NETTESHEIM, J. Michael J. Weber appeals from a judgment of conviction for substantial battery and disorderly conduct, both as a habitual offender. Weber contends that the trial court erred in denying his request that the jury receive a self-defense instruction. Because there was evidence presented at Weber's trial which would arguably support a theory of self-defense, we conclude

that the trial court erred in denying Weber's request.<sup>1</sup> We therefore reverse Weber's judgment of conviction and remand for a new trial.

### **FACTS**

¶2 On January 18, 2002, the State filed a criminal complaint against Weber alleging one count of substantial battery as a habitual offender contrary to WIS. STAT. §§ 940.19 and 939.62(2) (2003-04),<sup>2</sup> and one count of disorderly conduct as a habitual offender contrary to WIS. STAT. §§ 947.01 and 939.62(2). The complaint alleged that on January 3, 2002, at approximately 11:13 p.m., the police were dispatched to meet with a victim of a domestic dispute that had occurred earlier in the evening.

¶3 According to the complaint, the victim, Debra Hausch, reported that she had suffered injuries as a result of being struck by Weber, her "ex-live-in boyfriend." Hausch told the police that the incident occurred after she and Weber had returned to his apartment after being out at a bar. Hausch claimed that Weber had made a comment to her that she was unable to hear. When Hausch asked Weber what he had said, he turned around, shoved her, threw her to the ground and began to kick her numerous times in the face and the head. After the

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<sup>1</sup> Weber also appeals from a trial court order denying his postconviction motion requesting the trial court to reclassify his substantial battery conviction from a Class E felony to a Class I felony to reflect changes in felony classifications that occurred after his conviction. Although we need not reach this issue given our reversal of the judgment of conviction, we nevertheless note that Weber's request is governed by *State v. Gallion*, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197. There, the supreme court clarified that the reclassification applies only to offenders who commit their crimes on or after February 1, 2003. *Id.*, ¶74. Because Weber's alleged offense was committed on January 3, 2002, he is not entitled to reclassification of the crime.

<sup>2</sup> All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

defendant shoved her, Hausch attempted to grab Weber's arm. Hausch denied striking the defendant at any time with the exception of trying to free herself from his assault.

¶4 On July 9, 2002, the matter proceeded to a three-day jury trial. On the first day of trial, Hausch testified in detail regarding the incident, maintaining that Weber had assaulted her as she was getting ready to leave his apartment. In addition to the testimony of other witnesses, the jury heard from Officer Dean Zastrow who was assigned to investigate the domestic abuse incident involving Weber. Zastrow testified that on January 4, 2002, the day following the incident, he took the following statement from Weber, which Zastrow read at trial:

On 1/3 of '01 [sic], at approximately 3 o'clock p.m. while at my place of employment, I received a telephone call from Debra Hausch. Debra and I have known each other for seven or eight years. The relationship had been bad.

....

I do not want any contact with her. Anyway, she called wanting to get together for the Rose Bowl. I said no. That was the last I heard till 11 o'clock p.m. I was home alone on 1/3/02 around 11 o'clock p.m. Debra was pounding on the door. She wanted to talk. I didn't. I told her to leave. I believe she had been drinking. I told her to leave repeatedly. She was very persistent. She broke through the door. Debra began to physically assault me. I was slapped, kicked and punched.

You would have to see her. Debra is five foot five, 125 pounds.... Debra was in a very assaulting manner which was annoying.

In the process of defending myself and attempting to persuade her to leave, I pushed her away. Debra fell. Her head hit the corner of the wall. At that time, we were in the kitchen. I could see Debra was bleeding. She got up, ran towards me, pushing me against the refrigerator. Debra took my cell phone which was resting on the counter. She said something about getting me. Debra left the apartment.

¶5 Weber did not testify at the trial. However, based on the above statement, he requested a self-defense instruction. In support, he argued “the jury does have to know that there is a legal defense to someone invading your apartment and pushing, kicking, and punching you, and that pushing someone away, even if they fall into a wall would be the exercise of a valid privilege.” The trial court denied Weber’s request finding that the defense had failed to show that Weber believed there was any “actual or imminent unlawful interference with his person which would then allow him to act in self-defense.” The trial court’s decision was based in part on testimony from Weber’s friend, Kurt D. Becker, that contradicted Weber’s statement. According to Becker, Weber had told him that Hausch injured herself when she tripped and fell into a T.V. or into a wall.

¶6 On July 11, 2002, the jury returned verdicts finding Weber guilty of both substantial battery and disorderly conduct. Weber appeals.

### ***DISCUSSION***

¶7 Weber contends that the trial court erred in denying his request for a self-defense instruction. A trial court has broad discretion in deciding whether to give a particular jury instruction and the court must exercise its discretion 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.” *State v. Coleman*, 206 Wis. 2d 199, 212, 556 N.W.2d 701 (1996). However, we will independently review whether a jury instruction is appropriate under the specific facts of a given case. *State v. Groth*, 2002 WI App 299, ¶8, 258 Wis. 2d 889, 655 N.W.2d 163, *review denied*, 2003 WI 32, 260 Wis. 2d 752, 661 N.W.2d 100 (Wis. Mar. 13, 2003) (No. 01-3000-CR).

¶8 A defendant is entitled to a self-defense instruction if: (1) the defense relates to a legal theory of a defense, as opposed to an interpretation of evidence, (2) the request is timely made, (3) the defense is not adequately covered by the other instructions, and (4) the defense is supported by sufficient evidence. *State v. Coleman*, 206 Wis. 2d at 212-13. At issue in this case is whether the defense is supported by sufficient evidence. When assessing this question, we are required to view the evidence in a light most favorable to the defendant. *State v. Mendoza*, 80 Wis. 2d 122, 153, 258 N.W.2d 260 (1977). The trial court is not permitted to weigh the evidence, but instead simply asks whether a reasonable construction of the evidence, viewed favorably to the defendant, supports the requested instruction. *Id.* It is for the jury, not for the trial court or this court, to determine whether to believe the defendant's version of events. *Id.*

¶9 Here, although Weber did not testify, his statement was read into evidence by Zastrow. In that statement, Weber asserts that Hausch's injuries resulted from him pushing her away in an attempt to defend himself. The State cites to the self-defense instruction, *see* WIS JI—CRIMINAL 1222A,<sup>3</sup> in support of its contention that Weber's statement does not provide a sufficient evidentiary foundation to justify the instruction. Specifically, the State argues that the

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<sup>3</sup> WIS JI—CRIMINAL 1222A addresses the elements of substantial battery. That portion of the instruction pertaining to self-defense provides:

The law of self-defense allows the defendant to threaten or intentionally use force against another only if: [1] the defendant believed that there was an actual or imminent unlawful interference with the defendant's person; and [2] the defendant believed that the amount of force the defendant used or threatened to use was necessary to prevent or terminate the interference; and [3] the defendant's beliefs were reasonable.

*Id.* (footnote omitted).

evidence fails to demonstrate a reasonable belief in the existence of an unlawful interference and a reasonable belief that the amount of force the person intentionally used was necessary to prevent or terminate the interference. *See id.* We disagree.

¶10 Weber’s statement alleged that Hausch broke into his apartment and “physically assault[ed]” him and that he was “slapped, kicked, and punched.” Weber stated that in response to Hausch’s actions and in an attempt to defend himself and persuade her to leave, he “pushed her away,” causing her to fall. The State points to Weber’s characterization of Hausch as being “in a very assaulting manner which was annoying,” as evidence that Weber’s response to Hausch’s alleged conduct did not satisfy the “reasonable belief” criteria for giving a self-defense instruction. While Weber did characterize Hausch’s alleged conduct as “annoying,” evidence remains that Hausch broke into Weber’s apartment, assaulted him and fell while Weber attempted to defend himself. This evidence provides a sufficient basis for finding that Weber reasonably believed that there was unlawful interference by Hausch and that it was necessary to push her away to terminate that interference. *See WIS JI—CRIMINAL 1222A.*

¶11 The State additionally cites to testimony from Hausch and other witnesses which refutes portions of Weber’s statement. However, it is for the fact finder, not this court or the trial court, to decide which account of the incident is to be believed—Hausch’s or Weber’s. *See Mendoza*, 80 Wis. 2d at 153; *State v. Schuman*, 226 Wis. 2d 398, 407-08, 595 N.W.2d 86 (Ct. App. 1999) (“Because [the defendant’s] testimonial account of that participation, if true, established an issue of fact, it was for the jury, not the trial judge—and not this court—to assess his credibility or the believability of his story, and to resolve any conflicts in the evidence.”).

¶12 In *Schuman*, the court of appeals addressed a situation in which the trial court rejected a defendant's request for a jury instruction based on the defense of entrapment. *Schuman*, 226 Wis.2d at 402. Acknowledging that the defendant's "story stretches the imagination," the court of appeal nonetheless reversed. *Id.* at 407. The court stated that there need only be "slight evidence" to create a factual issue and put the defense before the jury. *Id.* at 404 (citation omitted). The court stated, "The evidence may be 'weak, insufficient, inconsistent, or of doubtful credibility,' but the defendant is entitled to the instruction unless the evidence is rebutted by the prosecution to the extent 'that no rational jury could entertain a reasonable doubt'" as to the elements in question. *Id.* (citations omitted).

¶13 Given Weber's statement and viewing the evidence in the light most favorable to Weber, we can only conclude that there is a reasonable construction of the evidence which supports a self-defense instruction.

### *CONCLUSION*

¶14 We conclude that the trial court erred in denying Weber's request for a self-defense instruction. A reasonable construction of the evidence at trial

including Weber’s statement, viewed favorably to the defense, supports the requested instruction.<sup>4</sup>

*By the Court.*—Judgment and order reversed and cause remanded.

Not recommended for publication in the official reports.

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<sup>4</sup> Although the State does not make a harmless error argument, we nevertheless note that we have considered whether the trial court’s failure to give the instruction was harmless error. A court errs when it fails to give an instruction on an issue raised by the evidence. *State v. Head*, 2002 WI 99, ¶44, 255 Wis. 2d 194, 648 N.W.2d 413. “If we determine that a circuit court has committed an error in failing to give a jury instruction, we must assess whether the substantial rights of the defendant have been affected. WIS. STAT. § 805.18(2). An error does not affect the substantial rights of a defendant if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.” *Head*, 255 Wis. 2d 194, ¶44. Here, we are not convinced beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. Weber and Hausch were the only people present at the time of the incident. Weber and Hausch have conflicting versions of the incident, which occurred at Weber’s apartment. Although Weber’s version is brief and unsupported by other evidence in the record, it nevertheless is evidence that contradicts Hausch’s version of events. As an appellate court, we properly decline to act as a “super jury” in such a setting.



