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**DISTRICT II**

November 17, 2021

To:

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Circuit Court Judge  
Electronic Notice

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Rebecca Matoska-Mentink  
Clerk of Circuit Court  
Kenosha County  
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You are hereby notified that the Court has entered the following opinion and order:

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2020AP50-CR                      State of Wisconsin v. Nathan A. Kivi (L.C. #2017CF1280)

Before Gundrum, P.J., Neubauer and Reilly, JJ.

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

Nathan A. Kivi appeals from a judgment convicting him of multiple crimes, including two counts of first-degree intentional homicide. He contends that the circuit court erroneously denied his request for a self-defense instruction that incorporated the castle doctrine. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).<sup>1</sup> We affirm.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

This case arises from an altercation in a bar parking lot in November 2017. During the altercation, Kivi was in the driver's seat of his truck while his two passengers argued with a group of other patrons. At some point, Kivi stepped out of his truck, raised a gun, and fired one or two "warning shots" in the air. He then got in his truck and started driving away. Two men jogged after Kivi's truck and one threw a beer bottle, breaking the truck's back window. Kivi stopped the truck, got out, and shot and killed the two men. The State subsequently charged Kivi with two counts of first-degree intentional homicide, two counts of felony bail jumping, and one count of felon in possession of a firearm.

Before trial, Kivi requested a self-defense instruction that incorporated the castle doctrine. The castle doctrine, codified at WIS. STAT. § 939.48(1m), "generally provides that use of force is presumably justified when a person is defending himself or herself against an unlawful and forcible intruder in that person's home," motor vehicle, or place of business. *State v. Chew*, 2014 WI App 116, ¶1, 358 Wis. 2d 368, 856 N.W.2d 541. Under the standard jury instruction for self-defense, the jury is permitted to consider the availability and feasibility of retreat when evaluating the reasonableness of the defendant's use of force. *See* WIS JI—CRIMINAL 810. When the castle doctrine applies, the jury is instructed that it may not consider whether the defendant had an opportunity to retreat. *See* WIS JI—CRIMINAL 805A.

The circuit court did not immediately rule on Kivi's request. Instead, it deferred its decision until the close of evidence at trial. Ultimately, the court agreed to instruct the jury regarding self-defense, but declined to issue the castle doctrine modification. It noted that the evidence presented merely established that a thrown object had "fractured" the window, not that "anything entered" the vehicle. It further noted that, under Kivi's argument, a defendant would potentially be justified in gunning down someone who threw a snowball at his or her car.

In the end, the jury found Kivi guilty on all counts, and the circuit court imposed two life sentences and consecutive terms of imprisonment. This appeal follows.

On appeal, Kivi contends that the circuit court erroneously denied his request for a self-defense instruction that incorporated the castle doctrine. He maintains that he presented sufficient evidence to support such an instruction.

A circuit court has broad discretion in instructing the jury. *State v. Ferguson*, 2009 WI 50, ¶9, 317 Wis. 2d 586, 767 N.W.2d 187. Whether sufficient evidence exists to support giving a particular instruction is a question of law that we review de novo. *State v. Giminski*, 2001 WI App 211, ¶11, 247 Wis. 2d 750, 634 N.W.2d 604.

Here, Kivi’s claim is predicated on WIS. STAT. § 939.48(1m)(ar)1., which provides in relevant part:

(ar) If an actor intentionally used force that was intended or likely to cause death or great bodily harm, the court may not consider whether the actor had an opportunity to flee or retreat before he or she used force and shall presume that the actor reasonably believed that the force was necessary to prevent imminent death or great bodily harm to himself or herself if the actor makes such a claim under [WIS. STAT. § 939.48](1) and ... the following applies:

1. The person against whom the force was used was in the process of unlawfully or forcibly entering the actor’s dwelling, motor vehicle, or place of business, the actor was present in the dwelling, motor vehicle, or place of business, and the actor knew or reasonably believed that an unlawful and forcible entry was occurring.

Kivi insists that the two men were “in the process of unlawfully or forcibly entering” his vehicle when he shot and killed them.

We are not persuaded by Kivi's argument. Again, the evidence at trial established only that one of the two men threw a beer bottle at Kivi's truck and broke a window. There was nothing to suggest that the men were "in the process of unlawfully or forcibly entering" Kivi's vehicle when he shot and killed them. Indeed, the thrown bottle did not even enter Kivi's vehicle. Accordingly, Kivi could not have reasonably believed that an "unlawful and forcible entry was occurring" under WIS. STAT. § 939.48(1m)(ar)1. As a result, we are satisfied that the circuit court properly denied his requested instruction.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*