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DISTRICT II

December 14, 2022

To:

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Circuit Court Judge
Electronic Notice

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

2022AP37-CR State of Wisconsin v. Jonah S. Nyary (L.C. #2019CF1176)

Before Neubauer, Grogan and Lazar, 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).

Jonah S. Nyary appeals from a judgment of conviction for strangulation and suffocation, entered upon a jury verdict, in violation of WIS. STAT. § 940.235(1) (2019-20).[1] Nyary asserts that the trial court improperly denied his requests for jury instructions on self-defense and accident. 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. Because we determine that the trial court properly declined to give a self-defense jury instruction and any failure to give an accident instruction amounted to harmless error, we affirm.

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

Nyary had an approximately two-month-long relationship with a woman named J.S.[2] The relationship ended in a violent fight in a motel room on September 9, 2019, in which both Nyary and J.S. were injured. Nyary had bite marks on his nose, chest, arm, back, and finger. J.S. had blood in her eyes, a split forehead, swelling in the face that made her "unrecognizable," a swollen jaw, a missing tooth, two black eyes, and bruises and a handprint on her neck. After J.S. reported the incident on September 11, the State charged Nyary with substantial battery (based on J.S.'s loss of a tooth), strangulation and suffocation, and disorderly conduct.

Both J.S. and Nyary testified at Nyary's trial, but they offered significantly different versions about what happened. J.S. testified that the fight began when she accused Nyary of stealing her money to buy alcohol. After verbally insulting her, Nyary "smashe[d] [her] phone into [her] face" while she was lying on the bed in their motel room. He proceeded to start "choking" her with both of his hands on her neck such that she was "suffocating" and "couldn't breathe." J.S. alleges she then grabbed Nyary by the hair and "bit him in the face" so that he would let go of her neck. Nyary then punched her repeatedly, pulled her off the bed, and placed both hands around her neck again, pushing "like he was trying to snap [her] neck." J.S. passed out. She woke up covered in blood with a missing tooth. She denied attacking Nyary and said she only fought back to protect herself.

The State called additional witnesses to provide evidence consistent with J.S.'s account. The emergency room nurse practitioner who treated J.S. several days after the incident described J.S.'s extensive injuries and testified that she observed bruising on J.S.'s neck along with

[2] To protect the identity of the victim, we refer to her as "J.S." *See* WIS. STAT. RULES 809.19(1)(g) and 809.86.

markings called petechiae (or small blood vessel hemorrhages) that can occur from squeezing or strangulation. She also read the report she made based on J.S.'s statements to her at the hospital: "The patient reports being hit multiple times with closed fists, and she also reports choking X2 during the physical assault." An officer, responding to a call from an uninvolved person, came to the hotel and conducted an investigation of the hotel room immediately after the attack. He testified that he found significant blood in the hotel room as well as in the hall and stairway outside the room. He also found Nyary's identification card in the room and testified that, when he located Nyary at Nyary's mother's house within hours of the fight, Nyary had an abrasion on his hand with blood on it in addition to bite marks and scratches on his body.

In Nyary's version of the events, J.S. was the aggressor. He testified that she attacked him out of nowhere by striking him on the back of the head while he was sleeping. He further testified that she pulled out his hair and bit him and that J.S.'s tooth came out when she bit him. Nyary denied ever using closed fists to strike J.S. in the head or face. When asked whether anything happened in his presence that could have caused J.S.'s injuries to her eyes, he said that J.S. was "extremely intoxicated" and that he had observed her fall "on the front of her body." Nyary claimed that he did "[n]ot intentionally" do anything to cause the bruising and marks on J.S.'s neck, but that there was "a possibility where [his] hand could have touched her throat" when he was "trying to put space between an attacker and [him]self." Nyary also called another hotel guest as a witness, who stated that he saw Nyary "blocking" punches and slaps from a woman in Nyary's room through the open door. This witness did not know the date of the incident he observed and he also testified that he saw the police come and talk to the couple. Nyary testified that the police never came during his case-relevant altercation with J.S. and admitted that he "ha[d] no idea what [this witness] was talking about."

The trial court denied Nyary's request for a self-defense jury instruction after Nyary's testimony, explaining that "at no time did Mr. Nyary say that he did any of this" and that Nyary's denial of having caused any of J.S.'s injuries precluded his ability to get a jury instruction saying that a defendant is allowed to "intentionally use force against another" in self-defense. The court also denied Nyary's request for an accident instruction, determining that it did not have "any testimony that it was an accident" that Nyary impeded J.S.'s breathing or accidentally put his hands around her neck. The court noted that the "mental state for strangulation … is that he acted with the mental purpose to impede normal breathing or circulation of blood and—or was aware that his conduct was practically certain to cause that result." The court determined that Nyary's testimony that he "maybe, could have, possibly" made contact with J.S.'s neck in attempting to get away from her was insufficient to instruct the jury on the defense of accident.

The jury convicted Nyary of strangulation and disorderly conduct, but returned a not guilty verdict on the substantial battery charge (which the State had defined as pertaining only to J.S.'s loss of her tooth and not her other injuries). On appeal, Nyary argues that he was entitled to jury instructions for both self-defense and accident, and that the court's failure to provide those instructions warrants reversal.

Generally, "[a trial] court has broad discretion in deciding whether to give a requested jury instruction." ***State v. Stietz***, 2017 WI 58, ¶12, 375 Wis. 2d 572, 895 N.W.2d 796. However, a trial court errs when it fails to give an instruction on an affirmative defense (like self-defense or accident) that the defendant has supported with "some" evidence. ***State v. Schmidt***, 2012 WI App 113, ¶8, 344 Wis. 2d 336, 824 Wis. 2d 839 (citing ***State v. Head***, 2002 WI 99, ¶¶106-07, 112, 255 Wis. 2d 194, 648 N.W.2d 413); WIS. STAT. §§ 939.45(6), 939.48(1). We review the question of whether a defendant has presented sufficient facts for a requested jury instruction

de novo. *See* ***State v. Burris***, 2011 WI 32, ¶24, 333 Wis. 2d 87, 797 N.W.2d 430; ***State v. Mayhall***, 195 Wis. 2d 53, 57, 535 N.W.2d 473 (Ct. App. 1995). If a reasonable construction of the evidence viewed in the light most favorable to the defendant will support the defendant's theory of affirmative defense, the defendant is entitled to a jury instruction on that defense. ***State v. Peters***, 2002 WI App 243, ¶12, 258 Wis. 2d 148, 653 N.W.2d 300.

If we conclude that a trial court erred by refusing to give a jury instruction that was warranted by the facts, we must determine whether the error affected the defendant's substantial rights. ***Id.***; 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." ***Peters***, 258 Wis. 2d 148, ¶29 (citing ***State v. Harvey***, 2002 WI 93, ¶49, 254 Wis. 2d 442, 647 N.W.2d 189). If, on the other hand, a defendant's substantial rights have been affected by an erroneously withheld jury instruction, the error is not harmless and a new trial is warranted. ***Stietz***, 375 Wis. 2d 572, ¶¶68-70.

We turn first to the question of whether Nyary raised sufficient evidence of self-defense at trial such that the trial court's denial of a jury instruction on that affirmative defense constituted an erroneous exercise of discretion. Under WIS. STAT. § 939.48(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." To raise self-defense, a defendant must provide evidence showing both: "(1) a reasonable belief in the existence of an unlawful interference; and (2) a reasonable belief that the amount of force the person intentionally used was necessary to prevent or terminate the interference." ***Head***, 255 Wis. 2d 194, ¶84. In the recent case of ***State v. Ruffin***, which both parties addressed in letters of supplemental authority to this court, our supreme court

held that a defendant was not entitled to a self-defense instruction if there was "no testimony that his use of force was intentional and necessary." 2022 WI 34, ¶46, 401 Wis. 2d 619, 974 N.W.2d 432.

Here, Nyary was charged with strangulation[3]—"intentionally imped[ing] the normal breathing or circulation of blood by applying pressure on the throat or neck or by blocking the nose or mouth of [J.S.]." *See* WIS. STAT. § 940.235(1). Nyary presented his account of the events to the jury, and that account included some of the evidence that would be necessary to raise the issue of self-defense: *i.e.*, that J.S. was the aggressor and unlawfully interfered with his person.

But Nyary points to no evidence that he intentionally used force against J.S. or that he believed the force he used was necessary, the other requirements of self-defense. *See* ***Ruffin***, 401 Wis. 2d 619, ¶46. To the contrary, his testimony was that he did *not* intentionally do anything to cause the injuries to J.S.'s neck and that he did *not* apply force to her throat; he claimed he was only trying to put space between them. The other hotel guest's testimony that he saw a woman attacking Nyary and saw Nyary "blocking" her attack does not fill this gap either. Like Nyary, this witness provided no evidence about Nyary intentionally putting his hands around J.S.'s neck. The "some evidence" standard is low, but in this case there was simply no evidence from which the jury could conclude that Nyary intentionally strangled J.S. in self-

[3] Nyary was acquitted of the substantial battery charge, so the only issue on appeal with respect to both self-defense and accident is whether he provided evidence to support these instructions for the strangulation charge.

defense. Thus, we agree with the trial court that a jury instruction on self-defense was not appropriate.

Next, we review the trial court's decision not to provide the jury with an accident jury instruction. "Accident is a defense that negatives intent." ***State v. Watkins***, 2002 WI 101, ¶41, 255 Wis. 2d 265, 647 N.W.2d 244. Nyary points to his testimony in which he said that there was a "possibility where [his] hand could have touched her throat" when he was "trying to put space between" himself and J.S. Nyary argues this is enough to constitute "some evidence" of accident and that the jury should have been given the accident instruction and been permitted to decide whether J.S.'s breathing was impeded by accident rather than his intentional conduct.

The State argues that Nyary must have admitted to more than touching J.S.'s neck by accident—applying pressure with enough force to impede her breathing, specifically—in order to raise the issue and get an accident instruction. It contends that neither version of events presented at trial would have persuaded a reasonable jury to find that Nyary had accidentally impeded J.S.'s breathing. Either the jury would have believed J.S. that Nyary had intentionally grabbed and squeezed her neck, impeding her ability to breath, or it would have believed Nyary that he had incidental contact with her neck when he was trying to put space between the two of them. But, neither version had facts that established that Nyary *accidentally* squeezed J.S.'s neck to the point where she could not breathe.

Moreover, the State asserts, precisely because the jury, beyond a reasonable doubt, found Nyary acted intentionally—intent being the "antithesis of accident"—the jury actually was permitted to decide whether J.S.'s breathing was impeded accidentally or intentionally. The court is not required to give an accident instruction when intent is an element of the crime at

issue. *See* ***State v. Ambuehl***, 145 Wis. 2d 343, 352, 425 N.W.2d 649 (Ct. App. 1988) (stating that "[a]ll reasonable persons know that intent is the antithesis of accident" and rejecting "the view that the trial court must explain to the jury that accident is the opposite of intent"); *see also* ***Watkins***, 255 Wis. 2d 265, ¶42 ("[A]n accident defense cannot succeed if the state proves intent"). We need not determine whether the evidence presented was sufficient to warrant a jury instruction on accident if any perceived failure on the part of the trial court was harmless.

We conclude that even if the trial court did err in failing to give an accident instruction to the jury in this case, the error was harmless. There can be no reasonable doubt that the jury would have reached the same verdict on Nyary's strangulation charge even with an accident instruction explaining that if the defendant did not act with the intent to impede J.S.'s breathing, he is not guilty of the crime of strangulation and suffocation. *See* ***Peters***, 258 Wis. 2d 148, ¶29. Again, Nyary denied putting his hands around J.S.'s neck and denied that he applied pressure. There are no facts to show that his version, an accidental strangling, took place. The jury was presented with two versions of the fight between Nyary and J.S., and it clearly believed J.S.'s version. It found that Nyary applied pressure to J.S.'s throat with enough force to impede her breathing, and it determined that Nyary did this intentionally. And, by finding Nyary's conduct was intentional, the jury necessarily rejected any argument that he accidentally strangled or suffocated J.S. The error, if any, was accordingly harmless.

For the foregoing reasons, we affirm Nyary's judgment of conviction.

IT IS ORDERED that the judgment of the trial court is affirmed. *See* WIS. STAT. RULE 809.21.

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

Sheila T. Reiff
Clerk of Court of Appeals