STATE OF WISCONSIN
COURT OF APPEALS
Appeal No. 2005AP001735-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOSEPH KEEPERS,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND SENTENCING IMPOSED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE MARSHALL MURRAY, PRESIDING

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

LAW OFFICES OF JEFFREY W. JENSEN
633 W. Wisconsin Ave., Suite 1515
Milwaukee, WI 53203
(414) 224-9484

Attorneys for Defendant-Appellant
By: Jeffrey W. Jensen
State Bar No. 01012529

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The issues presented by this appeal are controlled by well-settled law and are factual in nature. Therefore, the appellant recommends neither oral argument nor publication.

STATEMENT OF THE ISSUES

I. Whether the evidence was sufficient as a matter of law to support the jury's verdict finding Keepers guilty of second degree recklessly endangering safety while armed.

ANSWERED BY THE TRIAL COURT: Yes.

II. Whether the trial court abused its discretion in denying Keeper's motion for the self-defense instruction.

ANSWERED BY THE TRIAL COURT: No.

SUMMARY OF ARGUMENT

I. SUFFICIENCY OF THE EVIDENCE. When the evidence is viewed in the light most favorable to the State the most that one can conclude is that Keepers walked into the room while armed with a knife and took Ladaska Brown by the arm and attempted to escort her out of the house. This behavior on the part of Keepers did not create a substantial risk of death or great bodily harm to Ladaska. Had she cooperated and left the house she would certainly have been uninjured. The only reason she was in any danger is because she escalated the confrontation into a physical altercation by pushing Keepers against the wall once he took her by the arm. Without doubt she was then in danger of being hurt by the knife; however, in order to violate the statute it must be the behavior of the actor (in this case, Keepers) which creates the substantial risk of death or great bodily harm.

II. JURY INSTRUCTIONS. The issue of self-defense was not only raised by the evidence in this case- it was the very crux of the controversy. Although Keepers' attorney failed to identify the

correct number of the pattern instruction for the trial court the issue of the self-defense instruction was adequately argued and ruled upon by the trial court. The trial court abused its discretion in refusing to give the instruction because there was ample evidence that Keepers was threatened by Ladaska and her brother, Antonio, and his response was reasonable and measured (i.e. he went and got the knife but he did not brandish it at them).

STATEMENT OF THE CASE

I. PROCEDURAL BACKGROUND

The defendant-appellant, Joseph Keepers ("Keepers") was charged with second degree recklessly endangering safety[1] while armed and possession of an electric weapon[2]. Following a preliminary hearing Keepers was bound over for trial and entered not guilty pleas to both charges. (R:21-19)

The case was tried to a jury. At the close of all evidence Keepers moved the court to instruct the jury as to self-defense. (R:28-152). The prosecutor objected on the grounds that, "There is no claim here either on the part of the State or the defense, I think, that the defendant injured anybody intentionally." (R:28-152) The trial court then examined the self-defense instruction concerning intentional crimes and, ultimately, ruled that self-defense was not raised by the evidence. (R:28-157). Neither party identified Wis. JI-Criminal 801 which is the self-defense instruction to be read in cases of reckless crimes.

The jury returned verdicts finding Keepers guilty of both charges. (R:9, 10)

The court sentenced Keepers to three-year prison sentences on each count, concurrent. The sentences were bifurcated so as to

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1Sec. 941.30(2), STATS: "**Second-degree recklessly endangering safety**. Whoever recklessly endangers another's safety is guilty of a Class G felony."

2 Sec. 941.295(1), STATS: " Whoever sells, transports, manufactures, possesses or goes armed with any electric weapon is guilty of a Class H felony."

require one year of initial confinement and two years of extended supervision. (R:17)

Keepers timely filed a notice of intent to pursue postconviction relief and then filed a notice of appeal.

II. FACTUAL BACKGROUND

This case involves a gentlemen's game of chess gone bad. On May 8, 2004 Keepers was at home playing chess and drinking beer with his stepson, Antonio Brown. (R:28-47) A number of other children and young adults were also present in the home[3]. Antonio managed to checkmate Keepers three straight times and Keepers' stepdaughter, Ladaska Brown[4], was not a good sport about it. When Keepers tried to persuade Antonio to play one more game Ladaska commented that, "Maybe he want to lose again." (R:28-9) According to Keepers, Ladaska also ridiculed him by suggesting that he was "a loser." (R:28-129)

Predictably, this started a row between Keepers and Ladaska. Keepers stood up and put his finger in her face and drew his hand back. (R:28-129). At that point Antonio intervened and told Keepers that a "Brody"[5] was on. (R:28-129). Not wanting to fight both Antonio and Ladaska, Keepers left the room. (R:28-130).

He returned, of course, several minutes later- now time armed with a Bowie knife. (R:28-130). Keepers explained to the jury that the reason he got the knife is because he only wanted Ladaska to leave. (R:28-130).

There is remarkably little dispute in the record concerning what happened next. According to Keepers, Ladaska exclaimed that she was not afraid of him, nor of his knife, and proceeded to attack him. (R:28-131). Ladaska moved toward Keepers swinging her fists

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3 Keepers the a father of twelve children (R:28-128)

4 Lakaska was never asked her age; however, it appears from the record that she is an adult

5 Meaning if Keepers touched Antonio's sister Keepers would have to fight Antonio as well (R:28-130)

at him (R:28-131) and striking him in the face. (R:28-132) Ultimately Ladaska hit Keepers with a can of beer and then put him in a headlock. (R:28-132)

Antonio testified that he could not recall who attacked whom once Keepers returned with the knife. (R:28-51).

Ladaska described the incident as follows:

> Q What did he do when he came out with the knife?
>
> A He just told me, you know, I had to leave. You know, I was like I'll leave as soon as my mom comes to take me home.
>
> He was like, no, you have to leave right now; and my brother is behind him. I don't know if he felt like—my brother was—you know, he was pretty much like watching his back at the same time while he was pretty much talking to me like he was maybe—I don't want to say nervous or – and—
>
> * * *
>
> He just pretty much told me I had to leave, and I was like, well, I'll leave when my mom come.
>
> He was like he's going to grab me by my arm to just pretty much throw me out the door, and that's when I took my arm and pushed him; and he ended up against the wall.

(R:28-14, 15)

During the scuffle, though no one was able to testify exactly it occurred, Ladaska was cut on the thumb. (R:28-17; Antonio does not know R:28-49; Keepers did not testify at all how Ladaska got the cut).

ARGUMENT

I. THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO CONVICT KEEPERS OF SECOND DEGREE RECKLESSLY ENDANGERING SAFETY.

When one views the evidence in the light most favorable to the verdict the most that can be found is that Keepers came into the room armed with a knife and first asked Ladaska to leave the home and then took her by the arm to escort her out once she failed to comply. It was at that point that Ladaska, by her own testimony, pushed Keepers against the wall and the incident became a physical altercation. Plainly, Ladaska's physical safety was endangered by the knife at that point but, significantly, it was not the behavior of Keepers which created the danger. Thus, under no view of the evidence could a reasonable finder of fact conclude that Keepers was guilty of second degree recklessly endangering safety.

Upon a challenge to the sufficiency of the evidence to support a jury's guilty verdict, the appellate court may not substitute its judgment for that of the jury "unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990). The court must uphold the verdict if any possibility exists that the jury could have drawn the inference of guilt from the evidence. *See id*. at 507, 451 N.W.2d at 758. It is the jury's province to fairly resolve conflicts in the testimony, weigh the evidence and draw reasonable inferences from the facts. *See id*. at 506, 451 N.W.2d at 757.

Keepers was charged with second degree recklessly endangering safety while armed. A conviction for second degree recklessly endangering safety under § 941.30(2), STATS, requires that the State prove the following elements beyond a reasonable doubt: (1) that the defendant endangered the safety of another person; (2) "by criminally reckless conduct". "`[C]riminal recklessness' means that *the actor creates* an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk." Sec. 939.24(1), STATS.

(emphasis added). The "awareness of risk" element relates to a mental state. Direct proof of intent is rare. *See* ***State v. Hoffman***, 106 Wis.2d 185, 200, 316 N.W.2d 143 (Ct.App. 1982). As in most criminal cases, state of mind may be proven by circumstantial evidence. *See* ***State v. Bowden***, 93 Wis.2d 574, 583, 288 N.W.2d 139 (1980)

Here, when one views the evidence in the light most favorable to the State, what happened is that there was an argument between Ladaska and Keepers. When Antonio threatened to get involved Keepers was out-numbered and so he left the room and armed himself with a knife. He came back into the room and (taking Ladaska's testimony *verbatim*) told Ladaska numerous times to leave the house. He did not attack her with the knife; rather, Keepers took her by the arm and attempted to escort her out of the house. At that point Ladaska pushed him against the wall and a struggle ensued. The fact that Ladaska's finger was cut during the struggle is irrelevant because Keepers was not charged with recklessly causing injury.

If Keepers endangered anyone's safety at all it was either in coming into the room with a knife in his hand; or, possibly, in holding the knife in his hand while he attempted to escort Ladaska out of the house.

It requires no more than common sense to conclude that no jury acting reasonably could find that merely holding a knife in one's hand endangers the safety of any other persons in the room. If this were the case, a chef in a busy restaurant kitchen would have to cut meat with a fork in order to avoid committing a crime.

The remaining possibility, then, is that it was reckless of Keepers to attempt to escort Ladaska out of the house with a knife in his hand. Had Ladaska cooperated and left the house when asked she would certainly have been in no danger. The only way the knife posed any danger to Ladaska was if she escalated the conflict or made it physical. Here, that is precisely what she did. Only because she became physically aggressive and pushed Keepers against the wall was she endangered by the knife. Under these circumstances, though, it was not the behavior of Keepers ("the actor") *that created* an unreasonable and substantial risk of death or great bodily harm to Ladaska- it was her own behavior.

Even viewing the evidence in the light most favorable to the State, then, it was not the behavior of Keepers that endangered Ladaska- it was her own behavior.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING KEEPERS' MOTION TO INSTRUCT THE JURY CONCERNING SELF-DEFENSE.

At the verdict and instruction conference Keepers requested that the court instruct the jury as to self-defense. The State objected on the grounds that there was no allegation that Keepers acted intentionally. Both parties and the court seemed to believe that a self-defense instruction is appropriate only in the case of an intentional crime. No one mentioned Wis. JI-Criminal 801 which applies where self-defense is an issue in a crime involving recklessness. Although it is a close call, Keepers is not guilty of waiver. He requested the self-defense instruction and the State was afforded an opportunity to respond. The trial court was made aware of the issue and made a ruling. It certainly would have been better practice for defense counsel to identify the applicable instruction for the court but the failure to do so does not, under the totality of the circumstances, amount to waiver. It was an abuse of discretion for the trial court to refuse to give the self-defense instruction because the evidence overwhelmingly begged for it. Keepers was directly threatened by Ladaska and Antonio. His response to the threat was reasonable and measured- he armed himself with a knife but he did not brandish it in way to directly endanger anyone. The attention of the jury should have been focused on whether it was reasonable for Keepers to bring the knife into the situation.

Whether to submit a requested jury instruction is left to the discretion of the trial court. ***State v. Coleman***, 206 Wis.2d 199, 212, 556 N.W.2d 701 (1996). A trial court should give a requested instruction when the issue is fairly raised by the evidence. *Id.*

Here, Keepers requested that the jury be instructed on self-defense. The prosecutor responded to the motion by arguing that

there was no allegation that Keepers intentionally harmed anyone and, therefore, that self-defense was inappropriate. The trial court reviewed the self-defense instruction that applies to intentional crimes and then ruled that the instruction was not appropriate.

Keepers' attorney failed[6], however, to point out to the court that there is, in fact, a pattern instruction to be read in the case of self-defense to crimes involving recklessness.[7] A party's failure to request and instruction at trial constitutes a waiver of that party's

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6 Postconviction/appellate counsel was faced with the issue of whether to file a postconviction motion on this point alleging ineffective assistance of counsel. Although trial counsel certainly could have been better prepared to argue the issue, appellate counsel decided that an appeal, as opposed to a postconviction motion alleging ineffective assistance of counsel, is the more appropriate manner to proceed. There are no factual issues concerning trial counsel's conduct. The self-defense instruction *was* requested. There could be no strategic reason to request a self-defense instruction but to then fail to point out to the trial court the correct pattern instruction number. The trial court and the prosecutor were made aware of the legal issue and all had a full opportunity to argue the issue and the court made a ruling. Thus, no waiver of the jury instruction issue occurred. Only if waiver applied would a claim of ineffective assistance of counsel have merit.

7 Wis JI-Criminal 801 provides:

PRIVILEGE: SELF-DEFENSE: FORCE LESS THAN THAT LIKELY TO CAUSE DEATH OR GREAT BODILY HARM: CRIMES INVOLVING RECKLESSNESS OR NEGLIGENCE. [INSERT THE FOLLOWING AFTER THE FIRST PARAGRAPH OF THE INSTRUCTION ON THE CRIME CHARGED BUT BEFORE THE ELEMENTS ARE DEFINED.]

In deciding whether the defendant's conduct (was criminally reckless conduct which showed utter disregard for human life) (was criminally reckless conduct), you should also consider whether the defendant acted lawfully in self-defense. The law allows the defendant to act in self-defense only if the defendant believed that there was an actual or imminent unlawful interference with the defendant's person and believed that the amount of force he used or threatened to use was necessary to prevent or terminate the interference. In addition, the defendant's beliefs must have been reasonable. A belief may be reasonable even though mistaken. In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense. The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of his acts and not from the viewpoint of the jury now. [CONTINUE WITH THE DEFINITION OF THE ELEMENTS OF THE CRIME.] You should consider the

right to raise the issue on appeal. ***State v. McBride***, 187 Wis. 2d 409, 420, 523 N.W.2d 106 (Ct. App. 1994). The waiver rule is codified in Sec. 805.13(3), STATS.

Under the facts of this case, though, the Court of Appeals ought not apply the waiver rule. Defense counsel adequately raised the issue of self-defense. He did not recite for the court the correct pattern instruction number but the motion and objection were adequately made so as to allow the State to object and to allow the trial court to make a ruling

To the extent any waiver is argued by the State on appeal, under Wis. Stat. § 752.35, the Court of Appeals may order a new trial where an erroneous jury instruction prevented the real controversy from being fully tried. ***State v. Harp***, 161 Wis.2d 773, 776, 469 N.W.2d 210 (Ct.App. 1991). The cout's authority to do so is very broad. ***Vollmer v. Luety***, 156 Wis.2d 1, 19, 456 N.W.2d 797 (1990).

Getting to the merits of the issue, then, did the trial court abuse its discretion in denying Keepers' request for the self-defense instruction? Plainly it did.

Firstly, the court did not review the correct jury instruction and theory of application to the facts of the case (i.e. the parties and the court seemed to believe that self-defense may only be raised as a defense to an intentional crime). A discretionary determination that fails to demonstrate, on its face, consideration of the proper factors is an abuse of discretion as a matter of law. ***Schmid v. Olsen***, 111 Wis.2d 228, 237, 330 N.W.2d 547 (1983).

Nonetheless, "[The Court of Appeals] may independently search the record to determine whether it provides a basis for the trial court's unexpressed exercise of discretion." ***Farrell v. John Deere Co.***, 151 Wis.2d 45, 78, 443 N.W.2d 50 (Ct.App. 1989). The appellate

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evidence relating to self-defense in deciding whether the defendant's conduct created an unreasonable risk to another. If the defendant was acting lawfully in self-defense, his conduct did not create an unreasonable risk to another. [You should consider the evidence relating to self-defense in deciding whether the defendant's conduct showed utter disregard for human life.] CONTINUE WITH THE CONCLUDING PARAGRAPHS OF THE INSTRUCTION..)

court must look for reasons to sustain discretionary decisions. ***Prosser v. Cook***, 185 Wis.2d 745, 753, 519 N.W.2d 649 (Ct.App. 1994).

If ever there were a case of an alleged reckless crime in which self-defense is an appropriate issue it is this case. Unlike a garden-variety reckless crime where the victim does nothing to contribute to the dangerousness of the situation (e.g. where people are sitting in their home when gunshot are fired into the house from the outside), in this case Ladaska Brown, and to a certain extent her brother Antonio Brown, actively contributed to the dangerousness of the situation.

Firstly, Keepers had every right to put Ladaska out of his house. He also had every reason to believe that an unlawful interference with his person was imminent. This is because once Ladaska refused to cooperate Antonio told Keepers that a "Brody" was on- that is, if Keepers pushed the issue Antonio would side with Ladaska. Keepers' response to this threat was measured. He armed himself with a knife but he did not directly threaten anyone with it (even Ladaska admits that Keepers merely asked her a number of times to leave). Only because she (Ladaska) demonstrated her own foolish bravado in exclaiming that was not afraid of him or his knife and in pushing Keepers against the wall did the state of affairs became dangerous.

Plainly, the evidence properly raised the issue of self-defense.

Moreover, this was not harmless error. It obviously left the real controversy untried. As was argued at length in the preceding section of this brief, it was the conduct of Ladaska that endangered her own safety- not the conduct of Keepers. But this is a rather fine distinction that was not adequately argued by the parties and was apparently not considered by the jury. Even though the evidence was legally insufficient, it is not difficult to imagine what was the reasoning of the jury- Ladaska was unarmed, Keepers armed himself, and this created a substantial risk of injury to Ladaska (and she was in fact injured). The self-defense instruction would have focused the collective mind of the jury on the real controversy- was arming himself with the knife a reasonable and measured response to the threats from Antonio and Ladaska? In other words, was

Keepers within his "rights" in behaving as he did? The jury's actual verdict seems to reflect a misplaced belief that any time one holds a knife in a room where there are other unarmed people a reckless crime is committed.

For these reasons, even viewing the record as a whole and applying the correct law, the trial court abused its discretion in denying Keepers' motion for a self-defense instruction.

CONCLUSION

The Court of Appeals should find that the evidence was insufficient as a matter of law to sustain the conviction for second degree recklessly endangering safety while armed and order that a judgment of acquittal be entered. If the court finds that the evidence is legally sufficient then the court should order a new trial because the trial court abused its discretion in denying Keepers' motion for the self-defense instruction.

Dated at Milwaukee, Wisconsin, this _____ day of October, 2005.

LAW OFFICES OF JEFFREY W. JENSEN
Attorneys for Appellant

By:_____
Jeffrey W. Jensen
State Bar No. 01012529

633 W. Wisconsin Ave.
Suite 1515
Milwaukee, WI 53203

414.224.9484

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 3081 words.

This brief was prepared using *Microsoft Works* word processing software. The length of the brief was obtained by use of the Word Count function of the software

Dated at Milwaukee, Wisconsin, this ____ day of October 2005.

_____

Jeffrey W. Jensen

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APPENDIX

A. Record on Appeal

B. Excerpt of ruling on self-defense