STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2017AP2045-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DEVON L. LOGGINS,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JEFFREY A. CONEN, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Wisconsin Attorney General

SARAH L. BURGUNDY
Assistant Attorney General
State Bar #1071646

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-8118
(608) 266-9594 (Fax)
burgundysl@doj.state.wi.us

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ISSUE PRESENTED

Did the trial court soundly deny Devon Loggins's request for a self-defense jury instruction to charges of first-degree reckless homicide and first-degree reckless endangerment, where he admittedly shot a gun 15 times into a crowd and where there was no evidence that anyone else had a gun or was threatening him with one?

The circuit court denied Loggins's request.

This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request either. This Court may resolve the issue presented based on established law, and the parties' briefs should adequately set forth the facts.

INTRODUCTION

Loggins introduced a gun to a fistfight, shooting it 15 times indiscriminately into a crowd. By the time he was done and fled the scene, two men were dead and three were injured. In his trial for counts of first-degree reckless homicide and first-degree recklessly endangering safety, Loggins asked the court to instruct the jury on self-defense, based on his testimony that he grabbed the gun while people were punching and kicking him in the fight.

The circuit court soundly denied his request. To start, Loggins was statutorily barred from advancing the defense to the two reckless homicide charges. Moreover, Loggins failed his burden of producing some evidence that he reasonably believed that the specific force he used under the circumstances—shooting a gun 15 times into a crowd—was necessary to prevent or terminate any threat of great bodily harm or imminent death.

STATEMENT OF THE CASE

The State charged Loggins with two counts of first-degree reckless homicide, three counts of first-degree recklessly endangering safety, and one count of felon in possession of a firearm. (R. 1:1–2.) The charges resulted from an incident on May 1, 2015, when a family dispute escalated into a large brawl on a Milwaukee street, which Loggins ended by shooting a gun 15 times into the crowd. When police arrived minutes later, Damario Jones and Montrell Burdine were shot to death, and three other men—T.L., D.N., and D.B.—were injured by gunshots. (R. 1:1–2.)

The shooting was the culmination of a family dispute between the adult children of two families—the Jones family and the Loggins family—and their respective friends and kin. The facts at trial about the lead-up to the shooting were largely consistent.

Larry Jones, Jr., had three adult children, one of whom was Damario Jones. (R. 139:102.) Larry's girlfriend was Nessie Loggins, who also had adult children, including Devon Loggins and Ladonna Loggins. (R. 139:102–03.) Loggins and Ladonna had other sisters and brothers, including a half-brother, Mario Granville. (R. 142:141.) The families knew each other well, and not just because of Nessie and Larry's relationship; Ladonna (Nessie's daughter) and Damario (Larry's son) were also in a relationship and had a child together. (R. 139:103.)

On April 30, 2015, Devon Loggins,[1] joined by Granville, confronted Larry in his home and accused him of

[1] In this brief, the State refers to Devon Loggins and Mario Granville by their last names, but other members of the Loggins or Jones families by their first names.

"mistreating" Nessie. (R. 139:104.) During the confrontation, Loggins punched Larry in the face. (R. 139:104.) Loggins and Granville left and went to join Ladonna and other family members at Ladonna's home on 37th and Nash in Milwaukee. (R. 139:105; 141:10; 142:142–43.)

Damario learned of Loggins's hitting Larry. (R. 139:107–08.) After calling family members and friends, who described Damario as sounding angry (R. 139:109; 141:19, 35), Damario showed up at his and Ladonna's house in the early morning hours of May 1, 2015, where groups of Damario's friends and family members arrived in their cars (R. 139:116–18; 140:29; 141:36–37, 79–80). There, Damario stood with his group in the front yard and yelled at the occupants in Ladonna's upper flat. Soon after, Loggins and several others from the flat came down to the yard, at which point a fistfight erupted between Damario and Loggins. (R. 139:122.) The fight moved from the yard to the street. (R. 139:122–23.)

The eyewitness accounts diverged at that point. A neighbor who watched the incident from her upper floor flat said that the fight between Damario and Loggins turned into a "brawl," and the 20 to 30 people who were out in the yard began fighting each other as well. (R. 140:13; 141:69.) Other witnesses noted that Damario and Loggins were fighting and the others were involved simply to break it up. (R. 141:98.) According to Loggins and two of his sisters, Loggins bested Damario, at which point Damario began arguing with Ladonna, and a group of Damario's companions then "jumped on" Loggins. (R. 141:11, 142:108, 139–40.)

In any event, the witnesses largely agreed that the fight between Damario and Loggins lasted about five minutes (R. 141:54, 82), that Damario and Loggins became

separated (R. 141:101, 142:113–14), and that Loggins then acquired a gun (R. 142:140).

The accounts diverged on how Loggins got the gun. In one version of the story, Loggins picked up the gun from the street. Specifically, Loggins testified that after he fought Damario, a group of Damario's companions "jumped" him; during that point, a "guy with a gray hoodie," whom Loggins did not know, punched Loggins. When the man punched Loggins, a gun fell from the man's hoodie, and Loggins grabbed it.[2] (R. 142:140.) Loggins claimed that he began shooting after another man tried to kick him. (R. 142:140, 151.)

In another version of events, some witnesses stated that the fighting had ended, after which Loggins went to a car and retrieved the gun from there. (R. 141:83, 101; 142:95–96.)

Regardless, Loggins, by his own admission, had a gun and "just started pulling the trigger" and shooting indiscriminately. (R. 142:151, 155.) In investigating the incident, police found 15 shell casings grouped near a car in the middle of the street in front of Ladonna's residence. (R. 140:55–56.) Those casings, based on where they were found and a crime lab investigation, all came from the same nine-millimeter gun. (R. 142:58–59.) Moreover, ShotSpotter data from the early morning hours of May 1, 2015, detected

[2] Ladonna and two of Loggins's other sisters also testified that the gun fell from an unknown man's gray hoodie, or that they heard an object hitting the ground. (R. 141:24; 142:109, 125, 130.) Ladonna and the other sisters all acknowledged that they did not report to police hearing a gun or like object hitting the ground. (R. 141:32; 142:115, 127–28.)

two distinct shooting incidents in the area of 37th and Nash: one that involved a series of 15 rounds shot over eight seconds, followed by a second involving a single round discharged roughly 40 seconds later. (R. 142:42–43.)

As a result of the shooting, two men died and three were injured; all five of those men were associated with Damario. Notably, Damario had been shot three times—in the lower right leg, the left thigh, and the chest—and died at the scene of multiple gunshot wounds. (R. 142:8–11.)

Montrell Burdine, Damario's uncle, also died at the scene of a single gunshot wound to his thigh, which severed his femoral artery. (R. 142:21–25.)

T.L., who had driven to 37th and Nash with Damario's brother, was shot in the left leg. (R. 141:79–80.) D.N. and D.B.—who drove together to 37th and Nash with several others after Damario had called D.N.—each also sustained single gunshot wounds to the leg. (R. 141:40–41, 48–49.)

All three of those men survived their injuries and testified at trial. D.N. ran when he heard gunshots and did not see the shooter, but D.B. testified that he saw Loggins shooting (R. 141:55), and T.L. identified Loggins as the shooter in a photo array (R. 141:87, 111). Several other witnesses either identified Loggins as the shooter in a photo array, or testified or told police that they saw Loggins with a black gun shooting from the street near where the casings were found. (R. 139:124, 140:13, 15, 74–75; 141:32; 142:18, 53, 95.) The neighbor who saw the incident testified that she also saw Damario lying prone on the ground and Loggins walking up to Damario, standing over him, and shooting him. (R. 140:14–15.)

That said, the jury also heard evidence that there was a second gun and potentially a second shooter involved. As

for the second gun, the medical examiner removed the two bullets that were still in Damario's body.[3] (R. 142:10.) Those bullets were sent to the crime lab. The bullet removed from Damario's leg was shot by a nine-millimeter gun, but the bullet removed from Damario's chest was from a .357 caliber gun. The State's expert testified that the two bullets could not have been shot by the same gun. (R. 142:61–63.)

As for the second shooter, a few witnesses either testified or told police that Granville (i.e., Loggins's brother) was also firing a gun (R. 140:37; 141:32; 142:121); that Granville or someone matching Granville's description shot Damario while he was on the ground (R. 140:41; 141:56, 62); or that Granville chased or shot Burdine (R. 141:105–06). One witness also claimed that Burdine, while he was dying, said that Granville had shot him. (R. 142:91, 122.) But others testified or told police that they saw no one other than Loggins with a gun (R. 139:127, 130; 140:15), or that they never saw Granville shooting (R. 141:15; 142:67, 98). In any event, none of the evidence presented suggested that anyone among Damario's group of gathered family and friends displayed a gun or other weapon or threatened Loggins or anyone in his group of his friends or family with one.

At the close of evidence, Loggins asked the court to instruct the jury on self-defense. (R. 143:3.) The State asked for lesser-included instructions of second-degree reckless homicide and second-degree recklessly endangering safety. (R. 143:3.) The parties argued the self-defense issue, and the

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[3] Those were the only two bullets presented as evidence at trial. It did not appear that any other bullets were recovered. The bullet that struck Burdine passed through his leg and was not recovered. (R. 142:24.) The bullet that struck D.N. was still in his knee. (R. 141:42.) The bullet in D.B.'s leg was removed, but it did not appear that police recovered it. (R. 141:49.) It is not clear what happened to the bullet that struck T.L. (R. 141:84.)

court ultimately agreed with the State's position, which was that self-defense was not statutorily available under Wis. Stat. § 939.48(3) for charges of reckless homicide. (R. 143:4–6.) Moreover, the court held that even taking the evidence in the light most favorable to Loggins, it did not support a self-defense instruction, given that there was no evidence of any "real fear of great bodily harm or death that comes from any of the melee that went on." (R. 143:6–7.)

The court also allowed the lesser-included instructions, but they proved unnecessary given that the jury found Loggins guilty of all of the first-degree charges—i.e., two counts of first-degree reckless homicide, three counts of first-degree recklessly endangering safety—as well as guilty of one count of felon in possession of a firearm. (R. 112:1.)

The court sentenced Loggins to 30-year sentences for each of the homicides, seven-year sentences for each of the reckless endangerment counts, and a two-year sentence for the felon-in-possession count. (R. 112:1.)

Loggins appeals.

STANDARD OF REVIEW

The question presented involves two sub-points. First, whether Wis. Stat. § 939.48(1) permits a defendant to assert the privilege of self-defense to homicide crimes involving recklessness is a question of statutory interpretation, which presents a question of law that this Court reviews de novo. *State v. Head*, 2002 WI 99, ¶ 41, 255 Wis. 2d 194, 648 N.W.2d 413.

Second, whether the evidence presented was sufficient to warrant a particular jury instruction is also a question of law subject to this Court's de novo review. *Id.* ¶ 44.

ARGUMENT

Loggins was not entitled to a self-defense instruction under the statute or under the evidence presented at trial.

A. Relevant law regarding standards for giving requested instructions and the self-defense privilege

A circuit court has broad discretion in deciding whether to give a requested jury instruction. *State v. Coleman*, 206 Wis. 2d 199, 212, 556 N.W.2d 701 (1996). But the circuit 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. Vick*, 104 Wis. 2d 678, 690, 312 N.W.2d 489 (1981) (quoting *State v. Dix*, 86 Wis. 2d 474, 486, 273 N.W.2d 250 (1979)).

For a defendant to be entitled to a self-defense instruction, he must produce "some evidence" in support of the privilege. *Head*, 255 Wis. 2d 194, ¶ 112. To apply that "some evidence" standard, the circuit court must determine whether a reasonable construction of the evidence will support the defendant's theory "viewed in the most favorable light it will 'reasonably admit from the standpoint of the accused.'" *Id.* ¶ 113 (quoting *State v. Mendoza*, 80 Wis. 2d 122, 153, 258 N.W.2d 260 (1977)).

Wisconsin Stat. § 939.48(1) provides that the privilege of self-defense permits a person "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." But any such force or threat must be tailored to the situation and limited to what the actor reasonably believes is

necessary to end the threat: "The actor may intentionally use only such force or threat thereof as the actor reasonably believes is necessary to prevent or terminate the interference." *Id.* ¶ 83; *see also* Wis. JI—Criminal 801 (2014). But the actor cannot "intentionally use force which is intended or likely to cause death or great bodily harm unless the actor reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself." Wis. Stat. § 939.48(1).

As the supreme court has observed, the statute distinguishes between a defendant's ability to *use* and his ability to *threaten* deadly force. *State v. Watkins*, 2002 WI 104, ¶ 55, 255 Wis. 2d 265, 647 N.W.2d 244. Specifically, the clear language of Wis. Stat. § 939.48 permits a person to *use* deadly force only when the person reasonably believes that the use of deadly force is necessary to prevent imminent death or great bodily harm. *Watkins*, 255 Wis. 2d 265, ¶ 55. In contrast, "the person may *threaten* to use deadly force if the person reasonably believes that the threat is necessary to prevent or terminate an unlawful interference." *Id.*

Taking all of that together, here, Loggins had the burden to produce "some evidence" that he "reasonably believed that another person was unlawfully interfering with his person and that he used or threatened to use such force as he reasonably believed necessary to prevent or terminate the interference." *State v. Stietz*, 2017 WI 58, ¶ 19, 375 Wis. 2d 572, 895 N.W.2d 796 (citing *Mendoza*, 80 Wis. 2d at 153). If Loggins satisfied that burden, the court should have instructed the jury as to self-defense and left the question whether to believe Loggins's version of events for the jury. *See id.* (quoting *Mendoza*, 80 Wis. 2d at 153).

B. Loggins failed to meet his burden of demonstrating some evidence warranting a self-defense instruction.

In Loggins's view, the circuit court should have given the instruction because there was evidence that his firing the gun indiscriminately was self-defense based on his claim that multiple people were physically fighting him. (Loggins's Br. 17.)

His claim lacks merit for two reasons. First, the statute governing the privilege of self-defense expressly provides that the privilege does not extend to unintended infliction of harm upon a third person when that infliction of harm constitutes the crime of first- or second-degree reckless homicide:

> (3) The privilege of self-defense extends not only to the intentional infliction of harm upon a real or apparent wrongdoer, but also to the unintended infliction of harm upon a 3rd person, except that if the unintended infliction of harm amounts to the crime of first-degree or 2nd-degree reckless homicide . . . the actor is liable for whichever one of those crimes is committed.

Wis. Stat. § 939.48(3).

Two of the counts for which Loggins was charged and convicted were first-degree reckless homicide—one each for Damario and Burdine. Notably, Loggins presented no evidence that he believed that either of those victims—i.e., Damario or Burdine—were "real or apparent wrongdoer[s]," or that he intended to inflict harm on either of them individually. Rather, his testimony was that he was being physically attacked by people who had come to support Damario and he just started pulling the trigger and shooting indiscriminately into the crowd. The only person in the group attacking him that he distinguished was the unknown

man in the gray hoodie; he was not Damario or Burdine. Hence, Damario and Burdine were third persons who were the unintended recipients of harm from Loggins. Accordingly, under the plain language of Wis. Stat. § 939.48(3), the privilege of self-defense was not available to Loggins as to the two reckless homicide charges.

That said, Wis. Stat. § 939.48(3) does not bar extension of the privilege to Loggins's unintentional infliction of harm on T.L., D.N., and D.B. as third parties. That is so because that harm resulted in the first-degree recklessly endangering safety counts, which is not an enumerated crime in subsection (3). Wis. Stat. § 939.48(3); *see also State v. Austin*, 2013 WI App 96, ¶ 2, 349 Wis. 2d 744, 836 N.W.2d 833 (self-defense raised to charges of recklessly endangering safety). But that leads to the second reason why Loggins's claim lacks merit: viewing the evidence in the light most favorable to Loggins, he failed to advance facts supporting a claim of self-defense.

According to Loggins, he confronted Damario and Damario's crowd in the front yard. Damario threw the first punch, and the two started fighting. (R. 142:148.) Loggins claimed that others joined in the fight, until "the tall dude," broke up the fight, but then sucker-punched Loggins, who was at that point tired and out of breath. (R. 142:149–51.) Loggins said that after the "tall dude" punched him, "some other dude over here, he punched me. Boom!" (R. 142:151.) Then "the dude that was directly in front of" Loggins in the gray hoodie swung, Loggins ducked, and Loggins then grabbed a gun that had fallen from the man's hoodie. (R. 142:151.)

Loggins claimed that after he picked up the gun, someone yelled about his having the gun, and someone else tried to kick him in the arm, "[b]ut they missed. They hit me

right here." (R. 142:151.) At that point, Loggins said, "I kind of turned over. I just started pulling the trigger" and released 15 rounds of gunfire at the people in the street. (R. 142:151.)

Here, assuming that Loggins's explanation is true, there is some evidence that Loggins reasonably believed he had to act to terminate an unlawful interference, i.e., the multiple people fighting him. Moreover, Loggins's claim that he was being physically attacked by numerous people when he found the gun is some evidence that he may have reasonably believed that he needed to threaten deadly force to end the attack. *See Watkins*, 255 Wis. 2d 265, ¶ 55.

But unquestionably, the force Loggins used here—shooting a gun 15 times into a street full of people—was intended or likely to cause death or great bodily harm. To be entitled to use that force, Loggins had to have believed that he faced a like threat. *See* Wis. Stat. § 939.48(1) (providing that deadly force may be used only when the actor "reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself"); *Watkins*, 255 Wis. 2d 265, ¶ 55.

Here, Loggins failed to present evidence that his using deadly force—shooting a gun 15 times indiscriminately into a crowd—was necessary to prevent or terminate a threat of imminent death or great bodily harm. Nothing in Loggins's version of events evinced a belief that his attackers were threatening him with imminent death or great bodily harm. Loggins did not testify that he saw any weapons on or near his alleged attackers. At the point he claimed to have picked up the gun, there appeared to have been only one attacker, i.e., someone who tried to kick his arm and missed. Loggins did not claim that multiple people continued to attack him after he had the gun. Nor did he say that the man who tried

to kick him, the attacker in the gray hoodie, or anyone else was posing an immediate threat to the then-armed Loggins.

In addition, Loggins failed to claim that he believed that using the force he did was necessary to terminate any presumed deadly threat. Loggins writes that "numerous persons" jumped on him, and that one witness estimated that 30 people were jumping on him. (Loggins's Br. 18.) But Loggins also testified that at the point he had the gun, that the people around him recognized that he had a gun and that his remaining assailant was someone who tried to kick the gun away. (R. 142:151.)

Loggins complains that the prosecutor and the court misunderstood Loggins's testimony to mean that he felt threatened only by the man in the gray hoodie. (Loggins's Br. 19, 21.) But the prosecutor's and the court's point was that the closest Loggins came to identifying a specific "threat" was an unknown man in a gray hoodie, along with someone who kicked at him once he had the gun. Again, however, Loggins did not claim that either of those people posed a deadly threat. And by Loggins's own testimony, once he had the gun, his lone attacker was someone who tried to kick his arm. Firing a gun 15 times indiscriminately into a crowd is not a lawful response to having one's arm kicked.

Loggins argues that in evaluating the testimony in the light most favorable to him, that the court must disregard "his most damaging concession," which was that he was shooting indiscriminately, and it must accept that he was being attacked by numerous people when he had the gun. (Loggins's Br. 22.) He asserts that the prosecutor and court never viewed the evidence in the light most favorable to him, which was that "a number of [Damario's] partisans" physically attacked Loggins and "[a]t this point, outnumbered being beaten, Mr. Loggins produced or

obtained a gun and started shooting at the persons attacking him." (Loggins's Br. 23.)

But viewing the evidence in the light most favorable to Loggins does not mean that the court must ignore Loggins's testimony as to what he believed was happening. As noted above, Loggins testified that at the point he had the gun, he began shooting either after the man in the hoodie punched him and someone tried to kick him, or while 15 to 20 people were jumping on him. Contrary to his brief, Loggins never claimed to shoot specifically at his attackers; rather, he testified that his shooting was indiscriminate and that the fact that none of the bullets struck his own family or friends was "just a coincidence." (R. 142:155.)

Nor did Loggins offer any evidence that his shooting was necessary to terminate a threat of death or great bodily harm from Damario, Burdine, T.L., D.N., or D.B. specifically. Rather, by Loggins's and other witnesses' testimony, Loggins's fight with Damario was over by the time Loggins had the gun; Damario, who was by then arguing with Ladonna, was no longer an immediate threat. There was no evidence that Burdine posed a specific threat to Loggins. Moreover, while the circumstances of D.B.'s shooting were less clear, the gunshot that hit T.L. entered his leg from the back, i.e., while he was running away from Loggins (R. 141:84); D.N. likewise testified that he was moving backward away from the crowd when the shooting began (R. 141:40).

In sum, Loggins failed to present some evidence supporting a jury instruction on self-defense. The court did not err in declining to so instruct the jury.

CONCLUSION

This Court should affirm the judgment of conviction.

Dated this 6th day of March, 2018.

Respectfully submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General

SARAH L. BURGUNDY
Assistant Attorney General
State Bar #1071646

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-8118
(608) 266-9594 (Fax)
burgundysl@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,973 words.

_____
SARAH L. BURGUNDY
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 6th day of March, 2018.

_____
SARAH L. BURGUNDY
Assistant Attorney General