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STATE OF WISCONSIN :: COURT OF APPEALS - DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

Appeal No. 2017-AP-2045-CR

vs.

Trial No. 15-CF-2072

DEVON L. LOGGINS,

Defendant-Appellant.

Appeal from a judgment of conviction entered August 29, 2016 in the
Circuit Court of Milwaukee County,
Honorable Jeffrey A. Conen, Judge, presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

The trial court erred in denying Mr. Loggins' request for a self-defense jury instruction

The State makes two arguments in support of the trial court's denial of the self-defense instruction.

* * * * *

First, regarding the homicide counts, the State repeats the prosecutor's argument that Mr. Loggins was not entitled to the instruction because each of the victims was a "3rd person" under Wis. Stat. §939.48(3). State's br. 10-11. Focusing narrowly on Mr. Loggins' testimony, the State reasons that since Mr. Loggins, in describing his attackers, distinguished only the man in the gray hoodie, Damario Jones and Montrell Burdine were necessarily 3rd persons. While that is one way to argue from the evidence, the State can do so only by ignoring the requirements that the defendant need only present "some evidence" in support of self-defense, and that the evidence be viewed in a light most favorable to the defendant. *State v. Head*, 2002 WI 99, ¶¶112-113, 255 Wis.2d 194, 648 N.W.2d 413.

Damario Jones and the other four victims were all on the scene on the sidewalk in front of Ladonna Loggins' house when Mr. Loggins came out of the house. 139: 120. As explained in Mr. Loggins' brief (at pages 6-7), a fight erupted, initially just between Damario Jones and Devon Loggins, and expanded into a brawl involving up to 30 people. While Mr. Loggins does not identify all the persons attacking him after the fight expanded, this does not justify an inference that Damario Jones and Montrell Burdine had been relegated to the status of "3rd persons."

The decision to deny Mr. Loggins a self-defense instruction on the homicide counts turned on who is a 3rd person under the self-defense statute. In some fact situations, the term may leave little room for dispute. For example, if a confrontation between two actors results in injury to a complete stranger to both actors who is completely uninvolved and ignorant of the confrontation, this injured stranger is a 3rd person.

The term "3rd person" is not explicitly defined in Wis. Stat. §939.48(3). Nonetheless, the statute provides some guidance. Under this statute, 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. . . .” Thus, “a real or apparent wrongdoer” and a “3rd person” are mutually exclusive. From this language, one may discern that whatever the parameters of “3rd person” might be, two types of person are *not* to be considered a “3rd person”: “a real . . . wrongdoer” and an “apparent wrongdoer.”

Viewing the evidence in a light most favorable to Mr. Loggins, after a one-on-one fight with Damario Jones, he was being attacked and beaten by Damario Jones’ numerous supporters. From Mr. Loggins’ perspective, these persons surrounding him and beating him were, at a minimum, apparent wrongdoers. Fifteen to 20 persons were beating on him. 142: 162-163. Mr. Loggins testified that when he shot, his “intentions was to just get these people up off of me, get them away from me.” 142: 141. He believed it was an emergency and he acted in self-defense. 142. 154. Thus, he presented some evidence in support of self-defense, which is all he was required to produce to be entitled to a self-defense jury instruction.

* * * * *

In addition to asserting that Wis. Stat. 939.48(3) precluded a self-defense instruction on the homicide counts, the State made a second more general argument

applicable to all counts: that Mr. Loggins failed to “advance facts supporting a claim of self-defense.” State’s br. 11.

The State concedes that Mr. Loggins, being physically attacked by numerous persons, provided some evidence that he reasonably believed that the *threat* of deadly force was needed to end the attack. State’s br. 12. However, the State challenges the reasonableness of the *use* of deadly force.

The State notes that Mr. Loggins did not see any weapons on or near his attackers. State’s br. 12. This is true only if one ignores the gun dropped by one of the attackers. Mr. Loggins’ testimony shows no prior knowledge of this gun’s existence prior to it falling from the gray hoodie. One in Mr. Loggins’ position, seeing that gun fall to the ground, would have no assurance that others who were attacking him were not likewise armed.

The State’s argument rests on an implicit premise: that one has no reasonable cause to fear death or great bodily harm unless one knows that one’s assailants are armed. But certainly, a physical beating, even administered without weapons, can be fatal. See, e.g., *State v. Tyler*, 873 N.W.2d 741 (Iowa 2016) (after one

actor punches a man and knocks him down, others in group kick and stomp the man, inflicting fatal injuries); *Starks v. State*, 223 So.3d 1045 (Fla. App. 2017) (holding that punching a victim to death is “imminently dangerous” under Florida’s second-degree murder statute).

Mr. Loggins testified that as a result of the attack, he was “pretty beat up,” with bruises on his ribs and all over his face. 142: 157. Mr. Loggins did not testify in statutory language; he did not expressly state that he used deadly force “to prevent imminent death or great bodily harm.” Nonetheless, he testified that he acted in self-defense, and described circumstances supporting a reasonable fear of great bodily harm or death.

The State further seeks to minimize the threat Mr. Loggins faced by asserting that at the point he picked up the gun “there appeared to be only one attacker.” State’s br. 12. This conclusion can rest only on a strained reading of Mr. Loggins’ account. After four minutes of fighting, a tall man yelled to stop, and the fight momentarily stopped, but then the tall man punched Mr. Loggins, a second man punched Mr. Loggins, then a man in a gray hoodie swung at Mr. Loggins, and Mr. Loggins ducked. At this point, the gun fell from under this *third attacker’s* hoodie and as Mr.

Loggins grabbed it, and one of the attackers kicked Mr. Loggins. 142: 150-151 (quoted at length in Mr. Loggins' brief at page 18). Although it is unclear if this kicking attacker is a fourth attacker, Mr. Loggins describes at least three persons attacking him at the moment he picks up the gun.

A view of the evidence in a light most favorable to Mr. Loggins shows that he was being attacked, punched and kicked by 15 or 20 persons who were partisans of Damario Jones. These persons were, if not real wrongdoers, apparent wrongdoers who were, as the State concedes, unlawfully interfering with Mr. Loggins by physically assaulting him. Given the number of attackers, Mr. Loggins could perceive a threat of great bodily harm, if not death, which could justify the use of deadly force. The State questions the reasonableness of the force he used. However, an assessment of reasonableness is for the jury: "[T]he question of reasonableness of a person's actions and beliefs, when a claim of self-defense is asserted, is a question peculiarly within the province of the jury." *State v. Stietz*, 2017 WI 58, ¶18, 369 Wis.2d 222, 880 N.W.2d 182 (internal quotation marks and citations omitted). Mr. Loggins' defense, as stated by counsel in his

opening statement, was “reasonable self-defense.” 139: 94. However, without a self-defense instruction, Mr. Loggins could not argue self-defense in closing arguments.

The trial court erred in failing to give a self-defense instruction, as Mr. Loggins satisfied his low burden to produce some evidence in support of the privilege.

CONCLUSION

Devon L. Loggins prays that this court vacate his conviction and sentence and remand the case for a new trial.

Respectfully submitted,

John T. Wasielewski
Attorney for
Devon L. Loggins

FORM AND LENGTH CERTIFICATION

I hereby certify that this reply brief conforms to the rules contained in Wis. Stat. §809.19(8)(b) and (c) for a reply brief produced with a proportional serif font. The length of this reply brief is 1537 words.

John T. Wasielewski

CERTIFICATE OF COMPLIANCE

I hereby certify that I have submitted an electronic copy of this reply brief, identical to the printed form of the brief (and which has no appendix) as required by Wis. Stat. §809.19(12).

John T. Wasielewski