The Wisconsin Court of Appeals, District IV

2019AP001990 CR

State of Wisconsin,
Plaintiff-Respondent

v.

Raymond R. Barton
Defendant-Appellant

Appeal from The Circuit Court of Vernon
The Honorable Darcy J. Rood, presiding

Brief of Appellant Raymond R. Barton

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Statement of the Issues

This case presents two issues for this court to review: Did the Circuit Court Err in declining to instruct the jury on the privilege of self defense, and Did the Circuit Court err in dealing to grant defense counsel's motion for a mistrial?

Statement on Oral Argument and Publication

This case does not present the novel or complex legal issues nor is it factually complex. As such, the Defendant does not request oral argument or publication.

Statement of Facts and the Case

Mr. Barton had been in a romantic relationship with CG since 1994. (R. 69:73). While they had never been issued a marriage license, they lived together and had four children together. (R. 69:73). Mr. Barton, CG, their four children, and CG's older son EM lived together. (R. 69:74). EM considered Mr. Barton to be his step-father. (R. 69:89). Recently there had been significant tension between EM and Mr. Barton caused by EM's use of alcohol and inability to hold a job. (R. 69:100-101).

When Mr. Barton and CG went to bed on August 11, 2017, they were discussing volunteering at La Crosse's Irish Festival. (R. 69:74). EM was planning to volunteer with two of his siblings. (R. 69:76-77). Mr. Barton wanted EM to go and look for a job rather than spending his time working for free. (R. 69:77). CG and Mr. Barton disagreed, and the discussion turned into an argument. (R. 69:77).

EM had been eavesdropping on his parents through the vent. (R. 69:91). He then came downstairs to listen closer to his parents' bedroom. (R. 69:91). EM knew Mr. Barton found the word "fuck" particularly offensive, and it was not to be use in the house. (R. 69:78). Despite this, EM inserted himself into his parent's argument, yelling out, "Let her fuckin' talk". (R. 69:92).

Mr. Barton left the bedroom and went upstairs trying to find who swore at him, breaking their house rules. (R. 69:93). EM was still in the downstairs living room. (R. 69:93). While Mr. Barton was looking for EM upstairs, EM told him "I'm right here". (R. 69:93).

Mr. Barton then got into a physical altercation with EM. CG did not see the beginning of the physical altercation. (R. 69:86). CG testified she saw EM in a chair and Mr. Barton hitting him. (R. 69:87). CG called the police, and Mr. Barton was arrested. (R.69:81). EM was found with an injury above his eye, one near his lip, and minor bruises. (R. 69:97)

At trial, EM alleged Mr. Barton began to hit him as soon as Mr. Barton saw him. (R. 69:94). EM stated he attempted to place Mr. Barton in a reverse bear hug. (R. 69:96). EM then fell into a chair. (R. 69:96). Interestingly EM testified there were no punches thrown after he was in the chair. (R. 69:105-106).

EM's sister MB testified at trial. (R. 69:110). She testified she was afraid something had happened between EM and her

father. (R. 69:114). When the District Attorney asked her why she was afraid, MB testified "Because things have happened before". (R. 69:114). Defense counsel promptly moved for a mistrial, which was summarily denied. (R. 69:114-116).

Like her mother, MB did not see the start of the altercation. She came downstairs and saw her brother had placed Mr. Barton in a bear hug. (R. 69:117-118). MB saw nothing more than Mr. Barton being held in a bear hug, and Mr. Barton pushing EM into a chair. (R. 69:120). MB did not see what or who caused the injury to EM's face. (R. 69:120).

As the court debated the instructions it would give to the jury, the State objected to the reading of the self-defense instruction. (R. 69:153). The court heard argument from both sides and concluded "I'm not reading that." (R. 69153-155). Mr. Barton was then convicted of battery, disorderly conduct, and obstructing an officer. (R. 69:199).

Mr. Barton was sentenced on September 11, 2018. (R. 62:1). The Court imposed a sentence of three months in jail for battery, three months for disorderly conduct to run consecutive to the battery count and three months for obstructing an officer to run concurrent to the battery charge. (R. 62:20). A timely notice of intent to pursue post conviction relief was filed on September 18, 2018. (R. 42:1-2). Appellate counsel filed a motion for reconsideration on May, 17, 2019. (R. 55:1-7). The court signed an order denying the motion for reconsideration on October 3, 2019. (R. 57:1). Mr. Barton then filed a timely notice of appeal on October 17, 2019. (R. 58:1).

Argument

I. The Circuit Court Erred in Declining to Instruct the Jury on Self-Defense

A person is privileged to use force against another for the purpose of preventing or terminating what the person believes to be an unlawful interference with his person. *Wis. Stat.* 939.48(1). The person may use only such force as they reasonably believe is necessary to terminate the interference. *Id.* While a defendant is not automatically entitled to a jury instruction of self-defense, *State v. Stoehr*, 134 Wis. 2d 66, 87 (1986), Wisconsin law establishes there is only a low bar the accused must surmount to be entitle to the instruction. *State v. Stietz*, 2017 WI 58, 375 Wis.

2d 572, ¶16, *citing State v. Schmidt*, 2012 WI App 113, 344 Wis. 2d 366.

Whether there are sufficient facts to assert the privilege of self-defense is a question of law which this court reviews independently of the lower court's analysis. *Stietz*, at ¶14. In determining whether to instruct the jury on self-defense, "a court must determine whether a reasonable construction of the evidence will support the defendant's theory when viewed in the most favorable light it will reasonably admit from the standpoint of the accused" *Id*, at ¶13. A circuit court may deny a requested self-defense instruction only when there is no reasonable basis for the defendant's belief another person was unlawfully interfering with his person. *Id*, at ¶15. "Evidence satisfies the 'some evidence' quantum of evidence even if it is 'weak, insufficient, inconsistent, or of doubtful credibility' or 'slight'". *Id*, at ¶17. Courts are not to weigh, or look to the totality of the evidence; this is within the province of the jury. *Id*, at ¶18.

When discussing jury instructions, Mr. Barton's trial attorney correctly stated the burden needed to justify a self-defense instruction, "all we have to do is present enough evidence to raise it as an issue." (R. 69:153). Counsel then pointed to the alleged victims words and manner in which he inserted himself into a conversation between Mr. Barton and CG, the confrontational words the alleged victim used when Mr. Barton was looking for the alleged victim, and the "bear hug" the alleged victim had Mr. Barton in. (R. 69:154-55). Counsel then argued the accumulation of these factors was sufficient to submit to the jury Mr. Barton was in a position he believed he was or was going to have his person unlawfully interfered with.

These are sufficient facts to surmount the "low bar" Wisconsin has established to be entitled to an instruction of self-defense. This court should not continue the circuit court's error of weighing the evidence and questioning the reasonableness of Mr. Barton's belief he was facing an encounter where his person would be unlawfully interfered with. Weighing the evidence and determine the reasonableness of his beliefs is a question within the province of the jury, and this court should remand this case to allow a jury consider this privilege.

II. The Circuit Court Erred in Declining to Grant a Mistrial

A mistrial is warranted when the basis of the mistrial motion is sufficiently prejudicial to warrant a new trial. *State v. Adams*, 221 Wis. 2d 1, 17 (1998). A decision not to grant a mistrial is subject to reversal when a court has not examined the relevant facts, applied the proper standard of law, and engaged in a rational decision making process. *State v. Bunch*, 191 Wis. 2d 501, 506 (1995). The Circuit Court made clearly erroneous factual conclusions and failed to apply the correct legal standards. As its exercise of discretion is fundamentally flawed, this court should reverse its decision.

When MB was called to testify, the district attorney asked her why she was afraid something happened. MB replied, "Because things have happened before." (R. 69:114). Trial counsel immediately requested a mistrial, on the grounds this testimony was other acts evidence, and there had been no other acts motion brought by the State. (R. 69:115). Counsel noted the testimony was irrelevant and prejudicial. *Id.* The lower court immediately denied the motion for the mistrial, and cited the alleged victim's testimony of things happening in the past, which counsel had not objected to, so this testimony was not so prejudicial to affect Mr. Barton's right to a fair trial.

A carefully reading of the alleged victim does not reveal any prior acts testimony. There is mention of tension in the house due to the alleged victims use of alcohol and unemployment, but no mention of any sort of altercation between anyone in the household. (R. 69:100-101). As such, the factual groundwork this court based its ruling seems to have used as the basis of its ruling is faulty. This deficit is sufficient for this Court to reverse the Circuit Court's decision not to grant a mistrial.

When asked to reconsider the ruling, the Circuit Court stated it did not think this situation required analysis under *Sullivan*. (App. 2:7). This is clearly erroneous. MB's statement referred to acts which had occurred in the Barton home prior to the night of August 11, 2017. While MB was not given the opportunity to go into specifics, it is illogical to conclude anything but her statements refer to other prior acts.

There is a strong presumption against allowing evidence of other acts at trial. The general exclusion is based upon the fear that an invitation to focus on the accused's character magnifies

the risk jurors will punish the accused for being a bad person regardless of their guilt of the crime charged. *State v. Sullivan*, 216 Wis. 2d 768, 783 (1998), *see also Whitty v. State*, 34 Wis. 2d 278, 292 (1967).

Had the State requested to admit prior acts evidence the State would have needed to satisfy the *Sullivan* analysis; is the evidence offered for an acceptable purpose, is the other acts evidence relevant, and does the probative value of the other acts evidence significantly outweigh the danger of unfair prejudice, confusion of the issues or misleading the jury. *Sullivan*, 772-773. In analyzing the potential harm of Ms. Barton's allegation, this Court conducted none of this analysis. A failure to apply the proper legal standards is also sufficient for this court to reverse the lower courts decision.

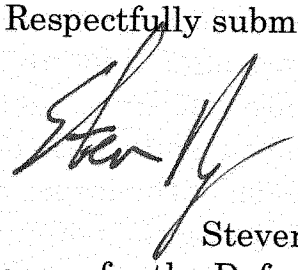
The Circuit court also concluded MB's statement was "a nothing statement" and would be harmless error. (App. 2:7). An error is only harmless if it is clear beyond a reasonable doubt that a rational jury would have come to the same conclusion absent the error or if it is clear beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. *Stietz*, at ¶63. It is illogical to conclude a statement alluding to prior instances of violence in the household did not contribute to Mr. Barton's convictions. The jury was invited to focus on Mr. Barton's character, rather than his behavior on the night of August 11, 2017. The State's assertion MB's statement was five words in a transcript of over 100 pages does not cure the error; there is no evidence which would suggest any jury places equal weight the each word spoken in a trial.

Conclusion

Mr. Barton request this court reverse the rulings of the lower court and remand his case for a new trial.

Dated: Monday, January 27, 2020

Respectfully submitted,



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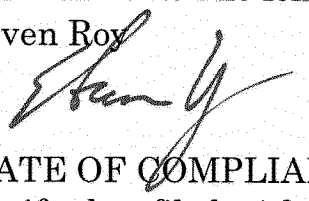
Signature 

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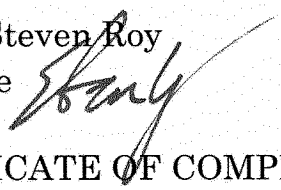
Signature 

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