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STATE OF WISCONSIN COURT OF APPEALS DISTRICT IV

STATE OF WISCONSIN

Plaintiff – Respondent

vs. Appeal No. 2019AP001990 CR

Raymond R. Barton

Defendant - Appellant

ON APPEAL FROM THE VERNON COUNTY CIRCUIT COURT

THE HONORABLE DARCY ROOD PRESIDING

RESPONDENT'S BRIEF

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STATEMENT OF THE ISSUES

1. Whether the trial court properly declined to give a self- defense jury instruction.

2. Whether the trial court properly declined to grant defendant's request for a mistrial

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The plaintiff-respondent, State of Wisconsin (State), requests neither oral argument nor publication.

STATEMENT OF THE CASE AND FACTS

On August 11, 2017, Sgt. Luke Sellers was dispatched to E9546 Bloomingdale Road for a domestic dispute. Sellers had contact with Barton and Barton indicated that everything was fine. (R. 2:2). As Sgt. Sellers was speaking to Barton, Sellers observed a female (later identified as CG) exiting the house from another door. (R. 2:2). Sellers asked Barton what happened that night and Barton seemed confused and stated he did not know why law enforcement was there. (R. 2:2). Sellers explained they were there because they received a report of a physical altercation between Barton and his son. (R. 2:2). Barton stated everything was fine and that there was no altercation. (R. 2:2). Barton noted that his stepson, EM, has a drinking problem and that Barton had been in a verbal argument with his wife and EM attempted to intrude and used the word "fuck". (R. 2:2-3). Barton said he does not allow that word to be used around the house and that Barton was upset. (R.2:3). Barton told EM to leave the residence but denied any physical altercation. (R.2:3).

Sellers spoke to EM and noted a laceration above EM's left eye. (R. 2:3). EM stated he was struck 4-5 times by Barton with a closed fist which caused the laceration and that he did not give Barton permission to strike him. (R. 2:3).

Barton was subsequently charged in an Amended Complaint with (1) misdemeanor Battery, Domestic Abuse; (2) Disorderly Conduct, Domestic Abuse; and (3) Obstructing an Officer.

At the jury trial, there were four witnesses who testified and their testimony is summarized below.

At trial, CG, testified that:

(1) she had been with Barton since 1994 and they had 4 children in common, (R. 69:73);
(2) EM was her son, not Barton's son, (R. 69:73);
(3) During the evening of August 11, 2017, she had a loud argument with Barton and EM interjected himself into the argument. EM was in a different room and said "Why don't you let her fuckin' talk" to Barton, (R. 69:76-78);
(4) There was a house rule not to use profanity and the profanity used was a word Barton particularly objected to. When Barton heard EM use profanity, Barton tore out of the bedroom to try and find where Eric was located, (R. 69:78);
(5) At the time Barton was searching for EM, the house was dark
(6) As Barton stormed out of the room, he ran upstairs and then ran back downstairs and EM had not moved from the living room, (R: 69:78);
(7) After Barton came back downstairs, Barton pinned EM in a chair and Barton proceeded to physical assault EM (R: 69:79-80);
(8) CG never observed EM strike or punch Barton, (R:69:80);
(9) CG heard EM say "I'm right here" just prior to the physical altercation, but unsure whether Barton was upstairs or downstairs when EM said that (R:69:84-85);

EM testified at trial as follows:

(1) EM heard his mother and stepfather arguing (R: 69:90);

(2) EM moved from upstairs to the downstairs living room as the argument continued (R:69:91);
(3) EM interjected himself into the argument because he thought that Barton was not adequately allowing EM's mother to explain herself as Barton kept interrupting her responses (R:69:92);
(4) EM then yelled across the room and said "Let her fuckin' talk." (R:69:92);
(5) When asked why he used those words, EM stated that he was angry and annoyed at the situation as that always happened (R: 69:92);
(6) EM acknowledged that there was a house rule not to use that word (fuck) (R: 69:92);
(7) Upon saying that, Barton came out of the bedroom and started running around the house, including running upstairs, looking for EM (R: 69:93);
(8) The room was dark so Barton was unable to see EM (R: 69:93);
(9) EM observed Barton running around and while Barton was either still upstairs or coming down the stairs, EM said "I'm right here." (R: 69:93-94);
(10) When Barton saw EM, Barton immediately rushed over to EM and began hitting and punching EM and EM did nothing in a physical or aggressive manner toward Barton prior to or during the beating he took at the hand of Barton (R: 69:94);
(11) At some point, when Barton attacked EM, EM put his hands up to defend himself and his hand caught the corner of Barton's flimsy, thread-born robe and the robe tore. EM testified that all he was trying to do was defend himself from Barton (R: 69:94-95);
(12) EM eventually ended up in a chair after EM was able to get behind and put Barton in a bear hug so that Barton would stop hitting EM. Barton was able to get out of the bear hug and EM ended up in a chair (R: 69:96);
(13) EM testified that as he was trying to defend himself from Barton's assault, he had turned Barton and got around him from behind and pinned Barton's arms to his side so that Barton would stop hitting EM and EM was subsequently pushed into a chair when Barton freed himself (R: 69:98);

EM was given the opportunity to tell the jury what, if anything, he was trying to accomplish when he said "I'm right here."

Q: When you said "I'm right here," what -- were you trying to prompt something? Were you trying to start something? Why did you say -- as he's upstairs or coming down the stairs, why did you say "I'm right here"?
A: Because he was still upstairs yelling at all of my siblings, "Where is he?". And at this point I had no idea what to expect, and he's calling "Where are you?", and the logical answer to "Where are you?" is "I'm right here."
Q: And by saying "right here," did you believe that that was going to start any kind of a fight or physical altercation?
A: No. I just wanted him to stop rushing around upstairs, and I figured he'd come down and basically yell at me. But that's all I anticipated. (R: 69:98-99)

Upon cross examination, EM testified as follows:

Q: You recall telling Sergeant Sellers that you put your hand up to stop him and may have ripped the robe he was wearing ?

A: Yes. (R: 69:14)

Q: You admit that you -- at some point you tried to bear hug Mr. Barton?
A Yes.
Q After you were pushed into the chair, you were already injured, correct?
A Correct.
Q There were no punches thrown after you were pushed into the chair.
A No. (R: 69:105)

MB (EM's sister) testified as follows at trial:

(1) MB became aware of a verbal argument between her mom and dad during the evening hours of August 11, 2017 (R: 69:111);
(2) MB was aware that EM had gone downstairs and shortly thereafter, Barton was running around the house looking for EM, including coming upstairs (R: 69:111)

The following Q and A and colloquy then took place: (R: 69:114-116)

Q: Okay. When did you see your father next?
A: When I went downstairs after he had gone back downstairs.
Q: Okay. So at some point you did go downstairs. And why did you go downstairs?
A: I was afraid something had happened.
Q: You were afraid something had happened? And why do you believe that?
A: Because things have happened before.

MR. RYAN: Judge, I'm going to object.

MR. GASKELL: Well, --

MR. RYAN: I've got a motion to present to the Court, Judge.

THE COURT: And are you asking that it be out of the presence of the jury?

MR. RYAN: Yes.

THE COURT: All right. All right. So (115) (Jury excused)

THE COURT: Go ahead, Attorney Ryan.

MR. RYAN: Judge, I object to this witness talking about -- I think the direct quote is "Things that have happened in the past." I think that that is a very clear -- that she's testifying about other acts evidence. There's been no other acts motion brought by Mr. Gaskell. Any reference to anything that may or may not have happened in the past is irrelevant. It is prejudicial to Mr. Barton because we're talking about what happened on August 11. Nothing in -- there's been no cross-examination, so there's been no opening of the door, so to speak, for her to testify about these things.
I think she's already testified to it. The jury heard it. It's, again, irrelevant and prejudicial. I would move for a mistrial.

THE COURT: Well, I will deny the motion for a mistrial. There already was unobjected evidence from Mr. Mueller. Did you want to say something, Attorney Gaskell?

MR. GASKELL: No.

THE COURT: That things have happened in the past. So it's not the first reference to that. So I will deny your motion for a mistrial. I don't believe that the -- that it is so prejudicial that it affects Mr. Barton's right to a fair trial. However, no other acts motion has been filed, so I will -- are you making an additional motion that that testimony not be permitted?

MR. RYAN: Well, I don't think it cures the error, but, Judge, I would move that no further testimony about any allegations of things that happened in the past should be allowed.

THE COURT: And I'll grant that motion.

MR. GASKELL: And just for the record, Judge, when we prepped for trial, all the witnesses were informed of the same. So –

THE COURT: It's hard when they get the stand.

MR. GASKELL: Yeah. Yep.

THE COURT: So that motion is granted. The motion for a new trial -- or for mistrial is denied.

MB's Testimony continued:

(1) When MB came downstairs, she observed that EM had Barton in a bear hug and then Barton aggressively put EM into a chair (R: 69:117-118);
(2) EM was bleeding while sitting in the chair and Barton was standing over EM but Barton never struck, hit or punched EM while EM was in the chair (R: 69:119);
(3) MB observed the bloody injury to EM as soon as she came downstairs but never observed how the injury occurred (R: 69:119-120);
(4) Other than the bear hug, EM being pushed into the chair and Barton standing over EM, MB saw nothing that was physically assaultive in nature (R: 69:120);
(5) MB acknowledged, upon cross-examination, that she did not observe whatever caused the injury to EM (R: 69:123)

After MB finished testifying, Sergeant Luke Sellers testified as follows:

(1) That on August 11, 2017, he was dispatched to the Barton residence as there was a 911 call of a physical altercation (R: 69: 124-125);
(2) That Sgt. Sellers was wearing a body camera during his encounter with Barton (R: 69:127);
(3) That the individual that Sgt. Sellers referred to on his body cam as Chris was Chris Neisl (CN) or, also known as, Raymond Barton, the defendant in this case (R: 69: 130-131);

The body camera audio was played to the jury reference Sgt. Sellers contact with Barton as well as the transcript of the body cam which depicted the following:

(1) The first thing Barton tells Sgt. Sellers is that there is no problem and that everything is fine (R: 38: 1);
(2) Barton was asked what happened tonight, and he responded that he had no idea who called or why law enforcement was called. Barton indicated that there was nothing physical (R: 38:3);
(3) Barton noted that there was a problem with his stepson who has a drinking problem (R: 38:3);
(4) Barton again was asked what happened tonight and again Barton said that he was unsure why law enforcement was called because nothing happened between Barton and his stepson, EM (R: 38:5);
(5) The law enforcement officers then try to determine if they need EMS and Barton insisted that "the boys fine" and "everything's fine" and that Barton did not want anyone inside the house (R: 38:6);
(6) Once Barton becomes aware that law enforcement has noted an injury to EM, Barton stated that EM had become belligerent (R: 38:6-7);
(7) Sgt. Sellers again asked Barton for his side of the story and to tell him what happened. Barton informed Sgt. Sellers that EM interfered with a conversation between Barton and his wife (CG) and used the "f" word which was not allowed and that EM became belligerent (R: 38:7-8);
(8) Again, Sgt. Sellers asked Barton to explain what happened and Barton simply noted that EM became belligerent (R: 38:9).

After the body cam audio was played for the jury, Sgt. Sellers finished testifying as follows:

(1) Barton never stated that EM became physically aggressive with him and that Sgt. Sellers gave Barton ample opportunities to tell what happened and that Barton never acknowledged any physical altercation during his contact with Sgt. Sellers (R: 69: 140-141).

After the testimony and evidence was closed, the parties had the jury instruction conference. During the discussion, Attorney Ryan raised the issue of self-defense and the following colloquy took place:

(R: 69:153)

THE COURT: 800, privilege, self-defense. Any objection to this?

MR. GASKELL: Yes.

THE COURT: You object to this?

MR. GASKELL: Absolutely.

THE COURT: Because there's been no evidence –

MR. GASKELL: Judge, there's been no evidence in regards to self-defense at all in regards to this matter. The closest that I think that he can argue is that when Mr. Barton is charging Eric and Eric puts

his hand out and grabs this thread-baring robe and rips it or tears it. And that doesn't support -- that does not support the instruction for self-defense.

THE COURT: Attorney Ryan, you're the one who requested this. What's your position on this?

MR. RYAN: Judge, all we have to do is present enough evidence to raise it as an issue. (R: 69:154)
And I think there are a number of things that do that. The first thing are Mr. Mueller's words, the aggressive way in which he inserted himself into the discussion that Mr. Barton was having with Miss Gotthardt. Secondly, as -- there's evidence – and this is uncontroverted evidence -- that as Mr. Barton is walking through the house looking for Eric, Eric says, "I'm right here." Now, the way that he -- the tone that he used here today was not confrontational, but there is certainly another way that you can say those words that would be confrontational. Mr. Mueller's testimony basically -- I think there were two different things that he said. He cleaned it up a little bit today, but there was also testimony about what he told the officers that night. What he told the officers that night was that when Mr. Barton came towards him, they connected. He testified about a bear hug. Michelle Barton testified that when she came downstairs, that he actually had Mr. Barton in a bear hug. Mr. Barton, if you're being -- Mr. Barton

(R: 69:155) if he's being bear hugged by somebody certainly has the right to use reasonable force to break that hold and to defend himself. So I think there's plenty of evidence to support a self-defense instruction. And, again, you're not telling the jury that they have to agree that it's self-defense. You're just giving the instruction and shifting the burden to the state.

THE COURT: So you're arguing that the fact that Eric Mueller made the statement "I'm here" is enough to put -- and I'm reading from the instruction -- Mr. Barton in a position he believed there was actual imminent unlawful interference and that he believed the amount of force -- oh, and that he used the amount of force necessary to prevent or terminate the interference? You think that's -- that's what you're saying, those words? I understand the bear hug.

MR. RYAN: All of those things I talked about, Judge. All of those things I think add up to an accumulation of evidence that supports a self-defense charge.

THE COURT: I disagree. I'm not reading that.

Barton was subsequently found guilty of all three (3) charges: (1) Battery, Domestic Abuse; (2) Disorderly Conduct, Domestic Abuse; and (3) Obstructing an Officer. Barton then brought a post-conviction motion that was heard July 30, 2019 which raised the self-defense jury instruction issue as well as the mistrial issue. The post-conviction motion was denied and subsequently Barton appealed his convictions.

ARGUMENT

I. THE TRIAL COURT PROPERLY DECLINED THE DEFENDANT'S REQUEST TO GIVE A SELF-DEFENSE JURY INSTRUCTION

The standard jury instruction requested by the defense in this case is set forth below:

800 PRIVILEGE: SELF-DEFENSE: FORCE LESS THAN THAT LIKELY TO CAUSE DEATH OR GREAT BODILY HARM — § 939.48

Self-Defense

Self-defense is an issue in this case. The law of self-defense allows the defendant to threaten or intentionally use force against another only if:

· the defendant believed that there was an actual or imminent unlawful interference[i] with the defendant's person; and,

· the defendant believed that the amount of force the defendant used or threatened to use was necessary to prevent or terminate the interference; and

· the defendant's beliefs were reasonable.

Determining Whether Beliefs Were 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 the defendant's acts and not from the viewpoint of the jury now.

State's Burden of Proof

The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant did not act lawfully in self-defense.

Jury's Decision

If you are satisfied beyond a reasonable doubt that all elements of have been proved and that the defendant did not act lawfully in self-defense, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

A defendant has the right to a self-defense instruction if the evidence viewed in the light most favorable to the defense supports the instruction. *State v. Mendoza,* 80 Wis.2d 122, 153, 258 N.W.2d 260 (1977). The issue whether the evidence provides a sufficient basis for the instruction presents a question of law, which appellate courts review de novo. *State v. Giminski,* 2001 WI App 211, ¶ 11, 247 Wis.2d 750, 634 N.W.2d 604. When reviewing alleged errors in jury instructions, appellate court looks to whether the trial court properly exercised its discretion. *State v. Boshcka,* 178 Wis.2d 628, 636, 496 N.W.2d 627, 629 (Ct.App.1992). This entails assessing the trial court's application of the correct law and its view of the facts. *See id.* at 636-37, 496 N.W.2d at 629.

When a reasonable construction of the evidence would support a theory that a defendant properly acted in self-defense, the issue should go to the jury. *State v. Reinwand,* 147 Wis.2d 192, 199, 433 N.W.2d 27, 30 (Ct.App.1988). In determining whether the trial court should have given the self-defense instruction, appellate courts view the evidence in the light most favorable to the defendant. *State v. Jones,* 147 Wis.2d 806, 809, 434 N.W.2d 380 (1989).

Section 939.48(1), Stats., provides a privilege of self-defense "to ... intentionally use force against another for the purpose of preventing or terminating what he [or she] reasonably believes to be an *unlawful interference* with his [or her] person by such other person." (Emphasis added.)

Even though the trial court did not go through a thorough legal analysis when denying the self-defense jury instruction, the ruling was nonetheless correct. When the appellate court reviews the totality of the facts under its de novo review, the denial of the self-defense jury instruction should be upheld. To allow the jury instruction, the courts have to find that:

· the defendant believed that there was an actual or imminent unlawful interference[i] with the defendant's person; and,

· the defendant believed that the amount of force the defendant used or threatened to use was necessary to prevent or terminate the interference; and

· the defendant's beliefs were reasonable.

Here, the facts and chronology are that EM interjected himself into an argument between Barton and CG and EM said, "let her fuckin' talk" at which point, Barton storms out of the room and runs around a darkened house looking for EM. Barton runs upstairs looking for EM and while upstairs or upon starting down the stairs, EM said, "I'm right here" so Barton would stop frantically running around the house looking for EM.

Upon Barton entering the living room area where EM was standing, Barton comes directly to EM and begins to physically assault EM. As Barton rushes towards EM, EM put up his hands to defend himself and tears the flimsy, thread born robe that Barton was wearing. After the physical assault was over, EM put Barton into a bear hug. Barton was able to get loose and Barton pushed EM into a chair and stood over EM.

At the time that EM put Barton into the bear hug, the assault and injury to EM had already been sustained. There was no physical assault of EM by Barton after the bear hug occurred.

The defendant has argued that EM's simple statement of "I'm right here" was an actual or imminent unlawful interference with the defendant's person. How the defendant could possibly believe that EM informing him of his location so he would stop running around a darkened house looking for him was an unlawful interference is unreasonable. Also, the facts do not support the defendant's belief that the amount of force the defendant used was necessary to prevent or terminate the interference.

There are certainly times when words themselves may support a self-defense jury instruction but this fact pattern is not one of them. The trial court's rule denying the self-defense jury instruction was proper even when viewed in the light most favorable to the defendant. The bottom line is that EM angered Barton and Barton's anger got the best of him that night when he committed an unprovoked assault upon EM.

Even if this court believes the trial court should have given the self-defense jury instruction, this court can still find that the defendant is not entitled to a new trial and allow the convictions to stand.

A defendant is not entitled to a new trial on an erroneous failure to give a self-defense instruction if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. *See State v. Peters,* 2002 WI App 243, ¶ 29, 258 Wis.2d 148, 653 N.W.2d 300. Since we have determined that the trial court committed error, we must therefore assess whether the substantial rights of Peters have been affected. 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. *State v. Harvey,* 2002 WI 93, ¶ 49, No. 00-0541-CR, 254 Wis.2d 442, 647 N.W.2d 189. Here, we need not decide if the circuit court erred by failing to give the self-defense instruction because we conclude it is clear beyond a reasonable doubt that Escamea's jury would have found him guilty even if it had been given the instruction. *State v. Escamea*, 2009 WI App 110, ¶¶ 3-4, 320 Wis. 2d 703, 771 N.W.2d 929.

Per the self-defense jury instruction, Barton had to have believed that there was an actual or imminent unlawful interference with his person. There is no way to know what Barton believed, other than through his words during his initial contact with Sergeant Sellers. Barton informed Sgt. Sellers that there was nothing physical between himself and his stepson, EM, that evening. Even asking numerous times for Barton's side of the story, Barton never said that EM was physically aggressive toward him nor did Barton say that he was defending himself against EM. Barton said that EM interjected himself into an argument and used the "f" word and that EM was belligerent.

Even if this court believes that EM's words alone were an actual or imminent unlawful interference upon Barton, the second prong is whether Barton believed that the amount of force used was necessary to prevent or terminate the interference. Was the physical assault perpetrated by Barton upon EM necessary. This was an unprovoked physical assault and the words "I'm here" did not necessitate the beating Barton gave EM.

The third prong of the self-defense jury instruction asks whether Barton's beliefs were reasonable. The standard for reasonableness is "what a person of ordinary intelligence and prudence would have believed in the position of the defendant under the circumstances existing at the time of the alleged offense." Wis JI-Criminal 1014 (1994). The reasonableness of "that belief must be determined from the standpoint of the defendant at the time of his acts." *Id.*

The defendant's beliefs were not reasonable. The defendant was angered at EM and the only reason EM was assaulted was because of Barton's anger, not because anything EM said.

Here, the State of Wisconsin is moving this court to find similarly to the Escamea court. "Here, we need not decide if the circuit court erred by failing to give the self-defense instruction because we conclude it is clear beyond a reasonable doubt that Escamea's jury would have found him guilty even if it had been given the instruction." *State v. Escamea*, 2009 WI App 110, ¶¶ 3-4, 320 Wis. 2d 703, 771 N.W.2d 929.

II. THE TRIAL COURT PROPERLY DECLINED THE DEFENDANT'S REQUEST FOR A MISTRIAL

The decision whether to grant a motion for a mistrial lies within the sound discretion of the trial court. *State v. Pankow*, 144 Wis.2d 23, 47, 422 N.W.2d 913, 921 (Ct.App.1988). The trial court must determine, in light of the whole proceeding, whether the basis for the mistrial request is sufficiently prejudicial to warrant a new trial. *Id.* We will reverse the trial court's mistrial ruling only on a clear showing of an erroneous exercise of discretion. *Id.* A trial court properly exercises its discretion when it has examined the relevant facts, applied the proper standard of law, and engaged in a rational decision-making process. *Schultz v. Darlington Mut. Ins. Co.*, 181 Wis.2d 646, 656, 511 N.W.2d 879, 883 (1994).

The deference appellate court's accord the trial court's mistrial ruling depends on the reason for the request. *See State v. Barthels*, 174 Wis.2d 173, 184, 495 N.W.2d 341, 346 (1993). When the basis for a defendant's mistrial request is the State's overreaching or laxness, appellate court's give the trial court's ruling strict scrutiny out of concern for the defendant's double jeopardy rights. *Id.; see also State v. Copening*, 100 Wis.2d 700, 710 & n. 3, 303 N.W.2d 821, 827 (1981). In such a situation, a mistrial is allowed only if there is a "manifest necessity" for termination of the trial. *See Barthels*, 174 Wis.2d at 183, 495 N.W.2d at 346; *Arizona v. Washington*, 434 U.S. 497, 505, 98 S. Ct. 824, 830, 54 L.Ed.2d 717 (1978). However, where the defendant seeks a mistrial on grounds not related to the State's alleged laxness or overreaching, we give the trial court's ruling "great deference." *Barthels*, 174 Wis.2d at 184, 495 N.W.2d at 346.

Here, the appellate court should give the trial court's ruling "great deference."

Despite a court's failure to use the correct legal standard, we may nonetheless affirm "if we can independently conclude that the facts of record applied to the proper legal standards support the court's decision." *Rogers v. Rogers*, 2007 WI App 50, ¶ 7, 300 Wis.2d 532, 731 N.W.2d 347. Applying the trial record in Knapp's case to the correct standard, we conclude that the court reached the appropriate result because the defect in the proceedings was not sufficiently prejudicial to warrant a mistrial. *State v. Knapp*, 2010 WI App 71, ¶ 6, 325 Wis. 2d 402, 786 N.W.2d 489

The burden for demonstrating grounds for a mistrial lies with the party seeking the mistrial. *See State v. Harrell*, 85 Wis.2d 331, 337, 270 N.W.2d 428 (Ct.App.1978). A mistrial is not warranted unless, in light of the entire proceeding, the basis for the mistrial motion is sufficiently prejudicial to warrant a new trial. *State v. Adams*, 221 Wis.2d 1, 17, 584 N.W.2d 695 (Ct.App.1998). "[N]ot all errors warrant a mistrial, and 'the law prefers [a] less drastic alternative.' " *Id.* (quoted source omitted). Whether to grant a mistrial requires the court to exercise its discretion. *State v. Bunch*, 191 Wis.2d 501, 506–07, 529 N.W.2d 923 (Ct.App.1995). Appellate courts will reverse the denial of a mistrial only if there is a "clear showing" that the circuit court erroneously exercised its discretion. *Adams*, 223 Wis.2d at 83, 588 N.W.2d 336; *State v. Odegard*, 2009 WI App 56, ¶ 8, 317 Wis. 2d 732, 768 N.W.2d 63.

Even though the trial did not thoroughly explain its ruling and may not have considered the appropriate law/legal standard or given an appropriate legal reason for denying the mistrial motion, the appellate court may nonetheless affirm "if we (appellate court) can independently conclude that the facts of record applied to the proper legal standards support the court's decision." *Rogers v. Rogers*, 2007 WI App 50, ¶ 7, 300 Wis.2d 532, 731 N.W.2d 347.

The following passage taken from MB's testimony was, and is, the sole basis for defendant's mistrial motion during the trial and throughout Barton's appeal:

Q: And why did you go downstairs?
A: I was afraid something had happened.
Q: You were afraid something had happened? And why do you believe that?

A: Because things have happened before.

MB's testimony did not talk about any physical assaults, fights or attacks and MB's statement did not identify whether Barton or EM would be deemed the primary aggressor. The ambiguity surrounding the statement could have referenced prior physical fights or simply could have referenced loud arguments and or verbal arguments between Barton and EM.

Defense counsel properly shut down this line of testimony by MB, but her testimony and statement in light of the whole trial did not warrant a mistrial. A mistrial is not warranted unless, in light of the entire proceeding, the basis for the mistrial motion is sufficiently prejudicial to warrant a new trial. *State v. Adams,* 221 Wis.2d 1, 17, 584 N.W.2d 695 (Ct.App.1998). MB's ambiguous statement was not sufficiently prejudicial to warrant a new trial.

CONCLUSION

The Respondent/State of Wisconsin hereby moves this court to deny the defendant's motions and find that the trial court properly ruled on the self-defense jury instruction issue and the mistrial issue.

Dated Thursday, March 5, 2020

Respectfully Submitted

_____
Timothy J. Gaskell
Attorney for Plaintiff-Respondent
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CERTIFICATION COMPLIANCE WITH RULE 809.19(8)

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 5,723 words.

_____
Timothy J. Gaskell
Attorney for Plaintiff/Respondent

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

I hereby certify that:

I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. § (Rule) 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.

_____
Timothy J. Gaskell
Attorney for Plaintiff/Respondent