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

Reply Brief of Appellant Raymond R. Barton

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Argument

I. This Court Should Reject the State's Invitation to Weigh the Evidence Regarding Self-Defense

The State begins its argument with lengthy quotations of standard jury instructions and case law regarding self defense. (State's Brief 10-11). Conveniently, the State forgets to mention Wisconsin law has established there is a very low bar the accused must surmount to be entitled to the instruction on self-defense. *State v. Stietz*, 2017 WI 58, 375 Wis.2d 572 ¶16 (2017). Courts are to instruct the jury on self-defense if there is evidence which viewed in the light most favorable to the defendant supports the theory of self-defense, even when the evidence is weak, inconsistent, slight, or of doubtful credibility. *Id.* At ¶13-17.

The State's argument is: "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". (State's Brief 11). Whether or not Mr. Barton's belief was reasonable is a jury question. The only question this court must resolve was if there was sufficient evidence to support a theory of self-defense in the light most favorable to the defense. There was significant tension in the household do to EM's drinking, EM loudly interjected himself into a discussion with words he knew would anger Mr. Barton, and when Mr. Barton was looking for EM, EM called right out for him. (R. 69:100-101, 78, 92, 93). In the light most favorable to Mr. Barton, these facts support his belief EM was looking to start a fight. This Court must resist the urge to weight

the totality of the evidence as the State urges and apply the proper legal standards as outlined in *Stietz*.

The State also claims the amount of force used by Mr. Barton was unreasonable. (State's Brief 11). This again is a question best left to the jury. EM suffered a minor laceration near his eye, and one near his lip. He told police Mr. Barton hit him four to five times, and later testified he was hit five to eight times. (R. 69:108). Mr. Barton did not use any weapon, or object to increase the force of his punches. In its brief, the State concedes Mr. Barton did not hit EM after EM was subdued in a chair. (State's Brief 11). Once the potential interference with his person was over, Mr. Barton stopped defending himself. While his behavior is certainly not laudable, whether it was reasonable should be left to the jury to determine.

The State next contends if this Court finds the circuit court erred in not instructing the jury on self-defense this court should find the error to be harmless. This is nothing but a brazen attempt to have this Court weigh the evidence in violation of settled precedent. The State cites to three cases in support of the proposition harmless error analysis should govern this case.

The State urges this Court to adopt the reasoning of the Court of Appeals in *State v. Escamea*. *Escamea* is an unpublished, per curium decision in which the Court of Appeals found any reasonable jury would have convicted Escamea

regardless of whether it had been instructed on self-defense[1]. *State v. Escamea*, 2009 WI App 110, ¶8 (2009). At trial, the emergency room doctor, several nurses, and three security guards testified consistently about Escamea's provocative and aggressive conduct. *Id.* at ¶4. Amongst other things, Escamea spit in the mouth of a nurse, told a nurse to suck his penis, poured urine on the floor, and kicked one nurse and three security officers. *Id.* at ¶2. Escamea attempted to justify his actions, telling the jury he felt his life was in jeopardy and the hospital staff was trying to kill him. *Id.* at ¶5. This is the type of case in which a court is quite right to determine no reasonable jury would believe a claim of self-defense. When compared to *Escamea*, it is clear how much closer of a call Mr. Barton's case is, and the issue of self-defense should have been submitted to the jury.

The State also cites to *State v. Harvey* in support of its claim an error does not effect the substantial rights of the defendant if it is clear beyond a reasonable doubt a rational jury would have found the defendant guilty regardless of the error. *State v. Harvey* is a drug case and the error complained of was the circuit court taking judicial notice of the fact Penn Park was a city park for a specific penalty enhancer. *State v. Harvey* 2002 WI 93, 254 Wis.2d 442 (2002) This is a wildly different factual scenario than presented in this case. While the language

[1] Rule 809.23(3)(a) states: An unpublished opinion may not be cited in any court of this state as precedent or authority, except to support a claim of claim precusion, issue preclusion, or the law of the case, and except as provided in par. (b).

regarding harmless error is correct, it is utterly inapplicable to this case.

The State's argument harmless error analysis should govern this case is destroyed by its last citation, an actual self-defense case. In *State v. Peters*, the circuit court erred in failing to give an instruction of self-defense. *State v. Peters*, 2002 WI App 243, 258 Wis.2d148, ¶29 (2002). The court went on to explain when a court erroneously fails to instruct the jury on self-defense, the error is not harmless, as a properly instructed jury could have concluded there was a reasonable belief the defendant needed to act in self-defense and would not have returned a guilty verdict. *Id.* This court should follow the *Peters* court both in concluding there was an error, and the error was not harmless.

II. This Court Should Reverse the Circuit Court's Decision to Not Grant a Mistrial as the State has Failed to Rebut Mr. Barton's Arguments

Again, the State begins its argument with lengthy citations to correct law regarding how appellate courts are to review a decision not to grant a mistrial. The parties agree, this court should give great deference to the trial court's ruling and overturn the courts ruling only on a clear showing of erroneous exercise of discretion. At no point does the State contend the circuit court examined the relevant facts, applied the proper standard of law, and engaged in a rational decision making process. A respondents failure to dispute a proposition in the

appellants brief may be treated as an implicit concession. *See e.g. State v. Dartez* 2007 WI App 126, 301 Wis.2d 499, ¶6 n. 3 (2007). As there has been no contention the circuit court exercised its discretion, this court should reverse the lower court's decision, and remand for a new trial.

The State then cites to *Rogers v. Rogers*, a case regarding the visitation rights of grandparents, for the proposition this court may affirm the circuit court's ruling if it can independently conclude the facts of the record applied to the proper legal standards support the court's decision. One unpublished, authored decision supports this conclusion when applied to a defense request for a mistrial. *State v. Knapp*, 2010 WI App 71, 325 Wis. 2d 402 (2010). Counsel has been unable to find any binding authority which suggests an appellate court may independently review the record and apply the facts of the case to the appropriate standards in order to uphold the lower courts decision to deny a motion for a mistrial.

Even if this Court looks to the record and applies the facts of the record to the proper standards, this Court should reverse the lower courts ruling. MB testified "because things have happened before." (R. 69:114). Mr. Barton's initial brief explained how this is other acts evidence, and there's a strong presumption against allowing such evidence as it is frequently prejudicial. (Appellant's Brief 6-7). The State argument MB's statement is not sufficiently prejudicial is not supported by any legal reasoning. The argument is merely a collection of statements regarding the ambiguity of MB's statement.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (8)

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 1,421 words.

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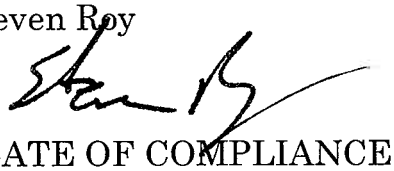
Signature 

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I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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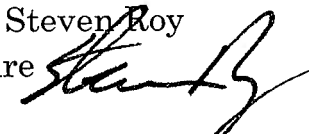
Signature 

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Appellate courts will not consider arguments unsupported by references to legal authority. *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (1992). As the State has made no legal argument as to how MB's statement was not prejudicial, this court should find the lower court abused its discretion in denying Mr. Bartons motion for a mistrial, and when applying the appropriate legal standards to the facts of the record, MB's statement was prejudicial enough to warrant a mistrial.

Conclusion

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

Dated: Tuesday, March 24, 2020
Respectfully submitted,

Steven Roy
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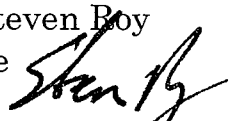
Signature 

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