The Supreme Court of Wisconsin

19-AP-1990-CR

State of Wisconsin,
Plaintiff-Respondent

v.

Raymond R. Barton
Defendant-Appellant

Appeal from The Circuit Court of Vernon County
The Honorable Darcy Jo Rood, presiding

Petition of Defendant-Appellant-Petitioner Raymond R. Barton

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Statement of Issues

Wisconsin law has established a low bar an accused must surmount to be entitled to a jury instruction on self-defense. The instructions should be given even when the evidence supporting self-defense is weak, insufficient, inconsistent, or of doubtful credibility. When an alleged victim has verbally provoked an encounter with the accused, is the accused entitled to a jury instruction on self-defense?

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Reasons to Accept Review

Three years ago, this Court issued its decision in *State v. Stietz*, compiling case law, and reiterating Wisconsin's low bar for raising the issue of self-defense. *State v. Stietz*, 2017 WI 58, ¶¶12-19, 375 WIs. 2d 572, 895 N.W.2d 796 (2017). The factual scenario from the defendant's perspective in *Stietz* (two armed men trespassing, and initiating physical contact) greatly exceeds the low bar to raise self-defense. *Stietz*, ¶¶36-55. Accepting review in this case will clarify the law of self-defense as it will begin to establish a lower limit to the evidence required to raise the issue of self-defense.

Statement of the Case

Mr. Barton had been in a romantic relationship with C.G. 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, C.G., their four children, and C.G.'s older son E.M. lived together. (R. 69:74). E.M. considered Mr. Barton to be his step-father. (R. 69:89). Recently there had been significant tension between E.M. and Mr. Barton caused by E.M.'s use of alcohol and inability to hold a job. (R. 69:100-101).

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

E.M. 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). E.M. knew Mr. Barton found the word "fuck" particularly offensive, and it was not to be use in the house. (R. 69:78). Despite this, E.M. 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). E.M. was still in the downstairs living room. (R. 69:93). While

Mr. Barton was looking for E.M. upstairs, E.M. told him "I'm right here". (R. 69:93).

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

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

Like her mother, M.B. 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). M.B. saw nothing more than Mr. Barton being held in a bear hug, and Mr. Barton pushing E.M. into a chair. (R. 69:120). M.B. did not see what or who caused the injury to E.M.'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). On September 24, 2020, Judge Blanchard affirmed the circuit courts decision to not instruct the jury on self-defense.

Argument

I. A Decision by the Supreme Court Will Clarify the Lower Boundary for Evidence Required To Instruct a Jury on Self Defense

The facts of this case are straightforward and simple. E.M. instigated a physical encounter with Mr. Barton. The legal frame work of self-defense is well established, but the boundaries of what constitutes sufficient evidence has yet to be determined. This case provides a vehicle for this Court to answer this question.

A person is privileged to use force against another for the purpose of preventing 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

prevent or 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 appellate court review 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 would unlawfully interfere 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

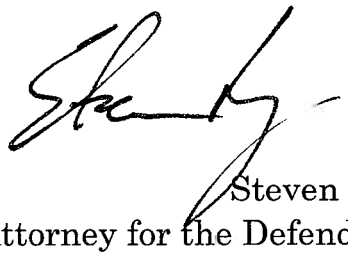
into a conversation between Mr. Barton and C.G., the confrontational words the alleged victim used when Mr. Barton was looking for the alleged victim, and the "bear hug" the alleged victim had Mr. Barton in. (R. 69:154-55). Counsel then argued the accumulation of these factors was sufficient to submit to the jury Mr. Barton was in a position he believed he was or was going to have his person unlawfully interfered with.

On appeal, Judge Blanchard placed significant emphasis on the lack of physically aggressive actions towards Mr. Barton as well as the lack of an explicit threat. *State v. Barton* ¶19. Judge Blanchard goes on to expound while E.M.'s verbal interjections are sufficient to "provoke an emotional reaction", it is "too great a leap to contend that this could have reasonably given rise to a belief by Barton that he was in imminent physical danger." *Id.* ¶20. Judge Blanchard further found "[I]t is a stretch to argue....he could have reasonably interpreted [E.M.'s words] as an invitation to engage in a mutual fight." *Id.* ¶21. Judge Blanchard has fallen into the same trap the circuit court did. Rather than evaluating whether there is a bare minimum of evidence to support a self-defense instruction, the lower courts have instead looked to the totality of the evidence, weighed the evidence, and invaded the province of the jury. *See Stietz*, ¶18.

Until a case which provides a lower boundary for the requirements of self-defense is established, the lower courts are likely to continue to incorrectly weigh the totality of the evidence in evaluating self-defense claims. The evidence in this case is substantially less than what was presented by Stietz, but is still

sufficient to raise the issue of self-defense. This Court should accept review in this case to illustrate to the lower courts the Court means what it has said: self-defense is a low bar, and courts are not to weight the evidence, but to construe it in the most favorable reasonable standpoint of the accused.

Dated: Monday, October 26, 2020
Respectfully submitted,



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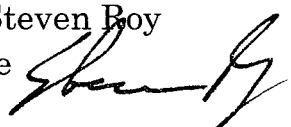
Signature 

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