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CLERK OF WISCONSIN
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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Case No. 2023AP02013-CR

TOMMY JAY CROSS,

Defendant-Appellant.

ON NOTICE OF APPEAL FROM A JUDGMENT OF CONVICTION AND
DECISION AND ORDER DENYING POST CONVICTION MOTION
ORDERED AND ENTERED IN BROWN COUNTY CIRCUIT COURT, THE
HONORABLE JUDGE TAMMY JO HOCK PRESIDING

DEFENDANT-APPELLANT’S REPLY BRIEF

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TABLE OF CONTENTS

ISSUES PRESENTED.....4

STANDARD OF REVIEW.....5

ARGUMENT5

 I. THE COURT INCORRECTLY INSTRUCTED THE JURY ON COUNT ONE THAT CROSS WAS NOT ENTITLED TO ACT IN DEFENSE OF MCGREW IF CROSS PROVOKED AB’S ATTACK ON MCGREW.....5

 II. CROSS WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL BY THE FAILURE OF ATTORNEY HASSEL TO IMPEACH AB WITH AB’S FIVE PRIOR CONVICTIONS.....12

CONCLUSION14

CASES CITED.

State v. Laxton, 2002 WI 82, 254 Wis. 2d 185, 647 N.W.2d 784.....11

State v. Lohmeier, 205 Wis. 2d 183, 556 N.W.2d 90 (1996).....11

WISCONSIN STATUTES CITED

Sec. 801.18(6).....15

Sec. 809.19(8)14

OTHER AUTHORITIES CITED

Wis. JI-*Criminal* 835.....,10

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ISSUES PRESENTED

I. DID THE TRIAL COURT ERR BY INSTRUCTING THE JURY THAT
 CROSS WAS NO ENTITLED TO ACT IN DEFENSE OF MCGREW IF
 CROSS PROVOKED AB’S ATTACK ON MCGREW?

The trial court answered this question in the negative.

II. WAS CROSS'S COUNSEL INEFFECTIVE BY HIS FAILURE TO IMPEACH AB WITH AB'S FIVE PRIOR CONVICTIONS?

The trial court answered this question in the negative. It held that any deficient performance did not affect confidence in the outcome of the case.

STANDARD OF REVIEW

Although they cite different cases, the parties agree on the standard of review to be applied in this case. Cross's brief at pages 20-21 and State's brief at pages 21-22.

ARGUMENT

I. THE COURT INCORRECTLY INSTRUCTED THE JURY ON COUNT ONE THAT CROSS WAS NOT ENTITLED TO ACT IN DEFENSE OF MCGREW IF CROSS PROVOKED AB'S ATTACK ON MCGREW.

The State contended that Cross forfeited his right to object to the instruction on self-defense and defense of other because there was not a contemporaneous objection (p. 22-23 of State's brief).

The position of the parties at the jury instruction conference at the end of the second day of trial regarding self-defense and defense of others was hard to follow. Attorney Hassel was "torn" about a revision of the defense of others instruction by the court because he wanted an instruction that stated that Cross had

the right to defend McGrew from AB's reaction to provocation by Cross (169:300). Then the court proposed adding ,”provided the defendant did not provoke the attack” to the end of the instruction (169: 303). Hassel explained why he did not like that phrase (169: 303-304). The State contended that Cross lost the right to defend himself or others by his attack (169: 306). Then Hassel stated that they just fundamentally disagreed as to the state of the law and the State concurred (169: 306-307). Hassel clearly opposed the additional phrase at the end of the instruction (169: 311, 322),

Some of the discussion between the court and counsel on the self defense and defense of others instruction reproduced on pages 25-26 of Cross's brief-in-chief (169: 308 and 109: 13) make it clear that Attorney Hassell objected to the instruction given which provided that Cross was not allowed to act in defense of McGrew if Cross provoked AB's attack on McGrew. After that objection and the presentation of final instructions to counsel the beginning of the third day of the trial, there was a discussion in which the court stated that the record of the parties on the instructions had been made the previous day (170: 3-5). Attorney Hassel was clear he wanted those objections preserved and the court agreed that it had a different view of the law than Attorney Hassel (170:5)

Cross's defense to Count One was that he used his car to stop AB from harming McGrew by shooting or using AB's gun as a bludgeon against her. A jury might find that Cross provoked AB into getting his gun and striking or

threatening McGrew with it in response to provocation by Cross through his conduct in Count Two (the first hit). The issue in this case is whether Cross was entitled to defend McGrew (though not himself) from a reaction to Cross's own provocation. The court held while drafting the instruction that he was not.

Part of the very extended discussion during the jury instruction conference was the following:

THE COURT: They want to add one phrase at the end under Provocation, fourth paragraph, "provided the defendant did not provoke the attack." What are your thoughts on that? Am I accurately stating what you want to do with that instruction, Mr. Saunders?

MR. SAUNDERS: Yes.

THE COURT: What's your position with respect to that, Mr. Hassel?

MR. HASSEL: I would have to oppose it. To the point it might clarify something, I don't agree it's necessarily the law. To the point the intent is to clarify that point, I think it causes more risk of the jury misreading and misimplying the entire instruction. I don't see substantively really what it adds.

THE COURT: What I think it adds, and then you can tell me what you think, I think it's saying that if she provoked the attack, he would be able to still defend her if she was still given the opportunity to act in self-defense, but not if he provoked it, which I think is an accurate statement of the law. If that's not, tell me where or why. Because earlier it says if he provoked it, he's not allowed to use or threaten force in self-defense,

(169: 308).

The instruction given on Count One¹ concluded with the following which precluded Cross from acting in defense of McGrew if Cross provoked the attack on McGrew with the first hit:

You should also consider whether the defendant provoked an alleged attack of him. A person who engages in unlawful conduct of a type likely to provoke others to attack, and who does provoke an attack, is not allowed to use or threaten force in self-defense or *defense of others* (emphasis added) against that attack.

(109: 13)

The instruction by its terms as applied to the facts of this case did not allow Cross to act in defense of McGrew if Cross provoked the attack by the first hit (Count Two) contrary to the opinion expressed by the court in its decision on the post conviction motion. Defense of others under Sec. 939.48(4) may be exercised in circumstances such as these even if the actor provoked the attack on the third person. At best, the instruction is confusing as to whether Cross could defend McGrew from an attack by AB provoked by Cross through the first hit.

There are no Wisconsin or other relevant cases the undersigned attorney has been able to find on this precise issue. But the plain language of Sec. 939.48(4), Wis. Stats. may be sufficient to decide the issue. Under that section, the focus is on the right of the defended person to defend him/her self. If McGrew was privileged to defend herself from further aggression by AB, Cross was permitted to defend McGrew even if Cross's own actions prompted AB to point a gun at her

¹Count One is the "second hit" that caused serious injuries to AB. Count Two was first in time when Cross either brushed up against AB or came close to doing so.

or strike her with a gun. To the extent that McGrew provoked the incident inside of American Foods or even in the parking lot, that provocation was over after Cross engaged in the conduct included in Count Two.

The purpose of the defense of others statute is to provide the greatest possible protection of innocent human life. It would make no sense to state that a person who provokes an incident which endangers someone else's life cannot take action to prevent the third person from losing her life from his misconduct. This was exactly what happened in the parking lot of American Foods on the evening of May 27, 2021 if the jury was to accept the testimony of Cross and McGrew. But the jury was informed that Cross had no right to defend McGrew because of Cross's provocation even if they believed the testimony that AB pointed a gun at her and struck her with it (169: 125-126, 167-168). .

In its ruling on the post conviction motion, Judge Hock stated that the instruction given only prohibited Cross from claiming defense of others for an attack Cross provoked of himself (208: 10; App.. 112). However, the instruction given stated that if Cross provoked an alleged attack of Cross that he was "not allowed to use or threaten force in self-defense *or defense of others against that attack* (emphasis added) (109: 13; see also 208: 9; App. 111). The issue in the case was whether Cross had a privilege to defend McGrew after he provoked AB by striking AB in the leg with Cross's car the first time. McGrew claimed that after the first hit, AB hit her with a gun and pointed it at McGrew (169: 125-126, 167-168). Cross's testimony regarding that portion of the incident was similar

(169: 187, 213-314, 231). There was a viable argument that Cross, by engaging in the first hit, caused AB to then attack McGrew. Under the instruction given by the court, Cross could not claim defense of others to then use force against AB because Cross's first hit had provoked AB's actions against McGrew, AB's friend. The State appears to have admitted that the instruction as given prevented Cross from using the defense of others privilege because of an attack "he provoked of himself when AB pointed the gun at Cross (page 30 of State's brief and 208: 10). The court's use of the phrase "should consider" whether McGrew or Cross provoked attacks on themselves (170: 11-12; page 29 of State's brief) did not solve the problem as claimed by the State n(pages 29 and 30 of State's brief). . It was followed by the following sentence that precluded Cross from using self-defense or defense of other: " A person who engages in unlawful conduct of a type likely to provoke others to attack, and who does provoke an attack, is not allowed to use or threaten force in self-defense or defense of others against that attack (170: 13).

The jury instruction given did not set forth how the jury was to analyze the privilege of defense of others if determined that Cross withdrew from the fight after the first strike when Cross put his car in reverse and backed away. This would have reinstated Cross's right to defend others under Sec. 939.48(2)(b), Wis. Stats.

This was a complicated scenario of events. But the instruction on provocation given effectively prevented the jury from finding defense of others as a defense to Count One because under reasonable interpretations of the evidence it foreclosed Cross from having that defense due to provocation by the first hit. . Wis *Jl-Criminal* 835 had an optional paragraph the court did not use that read, “A person who provokes an attack may regain the right to use or threaten force if the person in good faith withdraws from the fight and gives adequate notice of the withdrawal to his assailant.” Arguably, when Cross backed up after hitting AB the first time, he withdrew from the fight and gave notice he did not intend to continue. But when AB attacked McGrew, it showed that AB wished to continue the fight after Cross’s withdrawal. It could be argued that Cross’s right to defend McGrew was reinstated by those circumstances. But the jury instruction given, which did not include that paragraph, ended the jury’s analysis with evidence of provocation by Cross and no circumstances explained to the jury that might have reinstated it in this case.

That is why the trial court’s and State’s analysis on page 31 of the State’s brief is flawed. There was no doubt that Cross struck AB the first time and backed up while AB reacted. The exact nature of the interaction between AB and McGrew was disputed but a reasonable jury could infer that AB struck or pointed a gun toward MdGrew. But the jury was told provocation as a bar to Cross acting to protect McGrew might no longer apply once Cross backed away.

Only if the jury instructions, as a whole, misled the jury or communicated an incorrect statement of law will appellate courts reverse and order a new trial.. *State v. Laxton*, 2002 WI 82, ¶ 29, 254 Wis. 2d 185, 647 N.W.2d 784. A new trial should be ordered only if there is a reasonable likelihood that the jury was misled and therefore applied potentially confusing instructions in an unconstitutional manner. *State v. Lohmeier*, 205 Wis. 2d 183, 193-194, 556 N.W.2d 90 (1996). That is the case here.

Provocation was the key issue as to Count One. The incorrect instruction affected the verdict looking at the trial as a whole. It was not harmless as claimed by the State (page 31 of State's brief). The video evidence was grainy under poor lighting conditions and accurately showed only the most obvious physical interactions. It only showed it from one perspective. The credibility determinations were important but most importantly bore on the issue of provocation and defense of others which was governed by the flawed jury instructions.

II.. CROSS WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL BY THE FAILURE OF ATTORNEY HASSEL TO IMPEACH AB WITH AB'S FIVE PRIOR CONVICTIONS..

In this case, there was an agreement by counsel before the commencement of the trial that AB could be impeached with five convictions which the court accepted prior to jury selection without analysis of the rationale (168: 9).

Judge Hock assumed there was deficient performance by Attorney Hassel in not impeaching AB with his five prior convictions (208: 12; App. 114) and only analyzed the second prong of *Strickland*. The State's attempt to argue that it was part of Hassel's trial strategy based upon his vague 20-20 hindsight at the *Machner* hearing (pages 35-36 of State's brief) was unpersuasive and failed to consider whether it was objectively reasonable.

The real issue was the second prong of *Strickland* regarding whether the deficient performance undermined confidence in the verdict. For the reasons stated in (II) above and in his brief-chief, Cross submits that evidence of the prior convictions of the two most important State witnesses was necessary to fully evaluate the evidence in the case. Exhibit 2 (the video) was important but not dispositive. There was conflicting testimony as to what happened after the first hit. Whether or not AB struck McGrew or pointed a gun at her was subject to dispute. Although there was video evidence of the incident in the parking lot, the quality of the video was poor due to darkness and light rain during the late evening of May 27, 2021. The credibility of AB and Walker compared to Cross and McGrew was important. While the State impeached Cross with eight convictions and Cross's friend McGrew with five, the jury never heard that AB had five convictions. This was significant enough to warrant granting a new trial on both

counts since the credibility of the witnesses, including AB, was important to the jury's determination.

CONCLUSION

For the reasons stated above and in his brief-in-chief,, Cross requests that this court reverse the judgment of conviction and decision and order denying the post conviction motion and order a new trial. In the alternative, he asks that the conviction and sentence for Count One be vacated and a new trial ordered for that offense.

Dated this 29th day of April 2024

Electronically signed by Len Kachinsky

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CERTIFICATION AS TO BRIEF LENGTH

I hereby certify that this brief conforms to the rules contained in Sec. 809.19(8)(b) and (c) for a brief and appendix produced with proportional serif spaced font. This brief has 3038 words, including table of contents, certifications and cover page.

Dated this 29th day of April 2024

Electronically signed by Len Kachinsky

LEN KACHINSKY

CERTIFICATION OF ELECTRONIC FILING

I hereby certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court of appeals by using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 29th day of April 2024

Electronically signed by Len Kachinsky

LEN KACHINSKY