STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT 3

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In the interest of J.D.V.:

STATE OF WISCONSIN,
Petitioner-Respondent,

v. Case No. 2017AP1057

J.D.V.,
Respondent-Appellant.

ON NOTICE OF APPEAL FROM A DISPOSITIONAL ORDER-DELINQUENT ORDERED AND ENTERED IN BROWN COUNTY CIRCUIT COURT, BRANCH 8, THE HONORABLE WILLIAM M. ATKINSON PRESIDING

RESPONDENT-APPELLANT'S BRIEF & APPENDIX

KACHINSKY LAW OFFICES
By: Len Kachinsky
State Bar No. 01018347
832 Neff Court
Neenah, WI 54956-2031
Phone: (920) 841-6706
Fax: (775) 845-7965
E-Mail: LKachinsky@core.com

Attorneys for the
Respondent-Appellant

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ISSUE PRESENTED

WAS THE EVIDENCE SUFFICIENT FOR THE COURT TO FIND BEYOND A REASONABLE DOUBT THAT J.D.V. COMMITTED THE OFFENSE OF BATTERY AND WAS NOT ACTING IN SELF-DEFENSE?

The trial court answered this question in the affirmative.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested as the respondent-appellant (J.D.V.) believes that the briefs of the parties will sufficiently meet and discuss the issues on appeal. Publication is not requested as this is a one judge appeal based upon settled case law and unique facts.

STATEMENT OF THE CASE

This matter was commenced by the filing of a delinquency petition (1) on August 9, 2016, charging J.D.V. with battery and disorderly conduct contrary to Sec. 940.19(1) and 947.01(1) Wis. Stats. Assistant State Public Defender (ASPD) Scott Stebbins was appointed to represent J.D.V. (2). On August 24, 2016, J.D.V. entered a denial and further proceedings were scheduled (32). A fact-finding hearing to the court, the Honorable William Atkinson presiding, was held on December 12, 2016 which resulted in a finding of delinquency of battery and dismissal of the disorderly conduct allegation (36). The court ordered a pre-dispositional report which was later filed (16). At disposition on January 19, 2017, the court placed J.D.V. on

supervision until January 8, 2018 subject to certain conditions (37) and subsequently entered a written order on January 16, 2017 (21; App.101-104).

J.D.V. filed a notice of intent to purse post-adjudication relief (25) and the undersigned attorney was appointed to represent him (28). On May 25, 2017, J.D.V. filed a notice of appeal directed at the dispositional order (27).

STATEMENT OF FACTS

At the fact-finding hearing that commenced on December 12, 2016, T.S.[1] testified that on the morning of May 26, 2016, he was in the rehearsal for the choir for Bay Port Middle School (36: 6-7). J.D.V. was also in the choir (36: 7). T.S. was behind J.D.V. on some risers during the practice and stepped on J.D.V.'s fingers (36: 7-8, 16, 17). T.S. claimed it was an accident but J.D.V. disagreed (36: 8). While still on the risers, words were exchanged between the two (36: 9). J.D.V.'s facial expressions indicated that J.D.V. was upset (36: 9).

As T.S. and J.D.V. were leaving the school, J.D.V. asked T.S. if he wanted to fight and T.S. responded that he was not that dumb (36: 10, 25).

[1] In this brief, J.D.V. will use the initials of juveniles who are witnesses.

J.D.V. got closer to T.S. and said something but did not appear angry (36: 11, 36). T.S. jabbed playfully at J.D.V. (36: 12). Just before T.S. was about to board his bus, J.D.V. swung at T.S.'s head from a distance but did not connect (36: 10-11, 13, 19, 25). T.S. put his hands up and fists balled up as if they were joking around (36: 20, 21). T.S. threw a punch and kept his hands up and then by his waist (36: 21). J.D.V. threw a punch back that missed (36: 21). As T.S. walked away, J.D. V. came at T.S. again and made contact with T.S.'s head, giving T.S. a headache (36: 13-14). T.S. claimed that he had already turned away when J.D.V. punched him a second time and connected (36: 36). J.D.V. did not keep coming at T.S. after the punch connected (36: 22). Then T.S. walked into his bus (36: 14).

T.S. admitted that he made cutting down comments to J.D.V. but claimed he did not do so during this incident (36: 17). T.S. knew of no other reason J.D.V. was mad at him besides T.S. stepping on his fingers (36: 18).

K.C. testified that on May 36, 2016 that during choir T.S. kicked the back of J.D.V.'s knees several times and kept joking around after J.D.V. told him to stop (36: 30, 38). T.S. was also saying things to J.D.V. in the bleachers (36: 37). J.D.V. told K.C. and a couple others (but not T.S.) that they were going to fight (36: 30). J.D.V. asked K.C. to record the fight (36:

30, 34, 38). Out by the buses after practice, J.D.V. caught up to T.S. (36: 31). T.S. took a jab at J.D.V.'s chest trying to push him away while K.C. was recording the incident (36: 32, 40). In response, J.D.V. swung at T.S.'s head (36: 33, 34, 40). T.S. was moving away after the first punch (36: 42). J.D.V. viewed the recording K.C. made while they were in the bus (36: 35).

The State also offered the 30 second video taken by K.C. as evidence (14, 36: 43). From the undersigned attorney's observations, the video clearly depicted T.S. throwing the first punch. T.S. continued to face J.D.V. after J.D.V.'s first punch missed. Then J.D.V. threw a second punch that struck T.S.

J.D.V. testified that while on the risers during choir practice that T.S. kicked him in the back of the legs, put lint balls on him and stepped on his fingers (36: 46). T.S. had picked on J.D.V. before (36: 46). T.S. made comments relating to J.D.V.'s ability to play football (36: 47). J.D.V. asked T.S. to stop but T.S. did not (36: 47). K.C. offered to record the fight (36: 47, 48). T.S. and K.C. left the risers together (36:49). Once they were by the buses, T.S. threw the first punch (36: 49). J.D.V. could not get to his bus without going through T.S. (36: 53). While walking toward the bus, J.D.V. was talking about BMXing and not fighting (36: 54). When J.D.V. walked toward his bus, he unexpectedly was greeted by T.S. who put his hands up

(36: 54). J.D.V. thought that T.S. was going to fight him (36: 55). When J.D.V. turned to avoid being hit in the back of the head, T.S. threw a punch at him (36: 55). J.D.V. blocked the punch to avoid getting hit (36: 56). J.D.V. threw his first punch in self-defense and T.S. smiled at him (36: 56). J.D.V. feared there would be another punch from T.S. so he punched T.S. and the incident ended (36: 56). J.D.V. did not know the incident was recorded until K.C. showed him the video in the bus (36: 56, 58). The video showed J.D.V. walking past T.S. but then facing T.S. once T.S.'s hands were up (36: 57). J.D.V. feared physical harm from T.S. (36: 61).

Officer Michael Calmes testified in rebuttal for the State that Vice Principal Hermes and him interviewed J.D.V. after the incident and J.D.V. stated that he wanted K.C. to make the video so people would know it was self-defense (36: 65). J.D.V. had described T.S.'s punch at him as effeminate that did not cause him any fear (36: 66) .

Judge Atkinson relied primarily upon the video for finding J.D.V. guilty of battery and dismissed the disorderly conduct allegation (36: 77-79; App. 105-107).

Further facts will be stated in the argument below.

ARGUMENT

THE EVIDENCE WAS INSUFFICIENT FOR THE COURT TO FIND BEYOND A REASONABLE DOUBT THAT J.D.V. WAS GUILTY OF BATTERY AND NOT ACTING IN SELF-DEFENSE.

When an appellate court reviews a challenge to the sufficiency of the evidence, it views the evidence most favorably to the State and to the conviction. *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). If more than one reasonable inference can be drawn from the evidence presented at trial, we accept the inference most favorable to the verdict, even if other inferences could be drawn. *State v. Routon*, 2007 WI App 178, ¶17, 304 Wis. 2d 480, 736 N.W.2d 530. The test is whether "`the trier of facts could, acting reasonably, be so convinced by evidence it had a right to believe and accept as true.'" *State v. Schutte*, 2006 WI App 135, ¶14, 295 Wis. 2d 256, 720 N.W.2d 469 (quoting *Poellinger*, 153 Wis. 2d at 503-04; one set of internal quotations marks omitted). This highly deferential standard of appellate review of a challenge to the sufficiency of the evidence is the same whether the fact finder is a jury or the trial court. *Routon*, 304 Wis. 2d 480, ¶17. Whether the evidence viewed most favorably to the verdict satisfies the legal elements of the crime presents a question of law,

which appellate courts review *de novo*. *Id.* It is the fact-finder's function to decide the credibility of witnesses. See *Poellinger*, 153 Wis. 2d at 506.

In this case, the State was required to prove the following beyond a reasonable doubt the offense of battery which is defined as

940.19 Battery; substantial battery; aggravated battery. (1) Whoever causes bodily harm to another by an act done with intent to cause bodily harm to that person or another without the consent of the person so harmed is guilty of a Class A misdemeanor.

In this case, J.D.V. admitted striking T.S. but claimed it was self-defense (36:61). The privilege of self-defense as applicable to the facts of this case is as follows:

939.48 Self-defense and defense of others. (1) A person is privileged to threaten or intentionally use force against another for the purpose of preventing or terminating what the person reasonably believes to be an unlawful interference with his or her person by such other person. The actor may intentionally use only such force or threat thereof as the actor reasonably believes is necessary to prevent or terminate the interference. ...

Conceivably, one might argue that J.D.V. provoked T.S.'s initial jab at J.D.V. In that case, the applicable law is:

(2) Provocation affects the privilege of self-defense as follows:
(a) A person who engages in unlawful conduct of a type likely to provoke others to attack him or her and thereby does provoke an attack is not entitled to claim the privilege of self-defense against such attack, except when the attack which ensues is of a type causing the person engaging in the unlawful conduct to reasonably believe that he or she is in imminent danger of death or great bodily harm.

Self-defense is generally viewed as an affirmative defense. See, e.g., *State v. Head*, 2002 WI 99, ¶ 64, 255 Wis.2d 194, 648 N.W.2d 413. "An 'affirmative defense' is ... 'a defendant's assertion raising new facts and

arguments that, if true, will defeat the plaintiff's or prosecution's claim even if all allegations in the complaint are true.' " *State v. Watkins*, 2002 WI 101, ¶ 39, 255 Wis.2d 265, 647 N.W.2d 244 (citation and emphasis omitted). When an affirmative defense is successfully put at issue, the burden is on the State to disprove the defense beyond a reasonable doubt. See *Head*, 255 Wis.2d 194, ¶ 106, 648 N.W.2d 413.

As a matter of law, the actions of J.D.V. in striking T.S. were privileged. Although Judge Atkinson labelled J.D.V. as the aggressor and a liar (36:78), the undisputed facts did not support that. T.S. struck J.D.V in the back area several times when behind him during practice in the rafters and had made derogatory remarks to him (36: 7-8, 17, 30, 38, 46-47). J.D.V. had reason to fear that T.S. would be aggressive as J.D.V. had asked T.S. to stop but T.S. did not (36: 36, 38). Once they were on the sidewalk heading toward the buses, the testimony was unanimous that T.S. threw the first punch[2] (14, 36: 12, 32, 40, 49, 56). There is a dispute in testimony as to what T.S. did immediately after that when J.D.V. threw two punches, the second of which connected (36: 56, 42 and 36). However, the recording (14), in this viewer's opinion, was the most credible evidence. No rational finder of fact could find after viewing it that T.S. did anything but remain

[2] Although T.S. claimed it was just a jab (36: 12)

standing and facing J.D.V. who had reason to fear physical attack if J.D.V. did not neutralize T.S.

Judge Atkinson's finding of fact was clearly erroneous after a careful review of the video. J.D.V. was not the aggressor. The state did not prove beyond a reasonable doubt that J.D.V.'s actions in punching T.S. was not necessary to prevent unlawful interference with his person from T.S. who had already stepped on J.D.V. in the rafters and whom had swung at J.D.V. on the sidewalk by the buses.

While courts rarely reverse a court's finding of guilt in a delinquency case, the facts of this case justify it. The State did not present facts sufficient for a rational fact-finder to find beyond a reasonable doubt that J.D.V.'s battery upon T.S. was not privileged because of self-defense.

In *Burks v. United States*, 437 U.S. 1, 12-14, 57 L.Ed.2d 1, 98 S.Ct. 2141 (1978), the United States Supreme Court held that the double jeopardy clause precludes a second trial once a reviewing court has found the evidence legally insufficient, and the only available remedy is the direction of a judgment of acquittal. Because the evidence was insufficient for a finding of delinquency as a matter of law, the only remedy is dismissal with prejudice.

CONCLUSION

For the reasons stated above, the undersigned attorney requests that this court reverse the trial court's dispositional order and remand this matter to the trial court with instructions to vacate it.

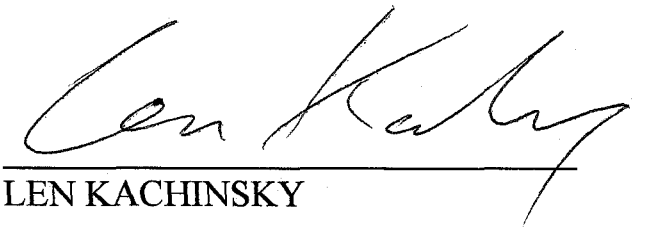
Dated this 22nd day of July 2017

KACHINSKY LAW OFFICES
By: Len Kachinsky
Attorneys for the Defendant-Appellant
State Bar No. 01018347
832 Neff Court
Neenah, WI 54956-2031
Office: (920) 841-6706
E-Mail: LKachinsky@core.com

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 a serif proportional font. This brief has 2388 words, including certifications.

Dated this 22nd day of July 2017



LEN KACHINSKY

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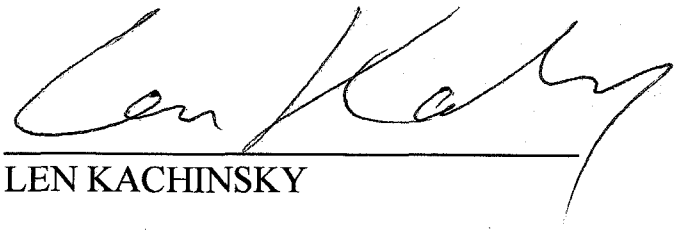
Dated this 22nd day of July 2017



LEN KACHINSKY