COURT OF APPEALS
DECISION
DATED AND FILED

April 22, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2569-CR **Cir. Ct. No. 2010CF86**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANDREW C. NEEVEL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Iowa County: ROBERT P. VANDEHEY, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Andrew Neevel appeals a judgment convicting him of second-degree reckless homicide and an order denying his motion for a new trial. He argues: (1) the trial court erroneously prohibited Neevel from presenting

"***McMorris***[1] evidence" regarding the victim's history of domestic violence; (2) the court improperly refused to instruct the jury on defense of others; (3) the prosecutor misstated the law regarding self-defense, preventing the real controversy from being tried; and (4) the cumulative effect of these alleged errors justifies a new trial. We reject these arguments and affirm the judgment and order.

BACKGROUND

¶2 Neevel was charged with first-degree intentional homicide based on his shooting Jeffrey McPhail. McPhail arrived drunk at Neevel's residence with McPhail's girlfriend, Michelle K. Neevel instructed McPhail to leave, having many times before made clear that McPhail was not welcome. McPhail became belligerent, cursing and challenging Neevel. Neevel went into his residence and came back to the door with a rifle, again instructing McPhail to leave. Undeterred, McPhail continued to threaten Neevel and rushed toward him, reaching for the rifle. Neevel fired. The bullet passed through McPhail's hand and entered his throat.

¶3 Neevel contends he was acting in self-defense or in defense of his two daughters who were in the house at the time of the shooting. Neevel filed a motion in limine, requesting to admit evidence of McPhail's history of violence. The court allowed some evidence of McPhail's violent history. Neevel testified McPhail had threatened violence against him for years, and had tried to start bar fights with him. Neevel was also allowed to present evidence from another witness regarding a bar fight McPhail had with another man after McPhail pushed

[1] *See* ***McMorris v. State***, 58 Wis. 2d 144, 205 N.W.2d 559 (1973).

Michelle K. off a barstool. Neevel testified McPhail was, by his own account, a man of violence and "always talking about how he's a big fighter." However, the court excluded testimony regarding instances of domestic violence by McPhail against Michelle K. The court concluded the limited probative value of these incidents was substantially outweighed by the danger of unfair prejudice and would confuse the issues.

DISCUSSION

McMorris Evidence

¶4 Evidentiary rulings are generally reviewed with deference. Our task is to determine whether the circuit court properly exercised its discretion in accordance with the facts and accepted legal standards. ***State v. Tucker***, 2003 WI 12, ¶28, 259 Wis. 2d 484, 657 N.W.2d 374. This court must sustain the trial court's ruling if it examined the relevant facts, applied a proper standard of law, and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach. ***Id.*** We review de novo whether exclusion of evidence implicates a defendant's constitutional guarantee of a meaningful opportunity to present a complete defense. ***Id.***

¶5 In a homicide trial where self-defense has been adequately raised, the dangerous character or reputation of the victim is relevant to determine whether the victim was the aggressor and to judge the reasonableness of the defendant's apprehension of danger when the incident occurred. ***McMorris***, 58 Wis. 2d at 149. However, admissibility of the proffered evidence is not automatic, and it may not be used to support an inference about the victim's actual conduct during the incident. ***State v. Head***, 2002 WI 99, ¶128, 255 Wis. 2d 194, 648 N.W.2d 413. Rather, it is admissible only with respect to the defendant's state of

mind, that is, only to the extent it bears on the reasonableness of the defendant's apprehension of danger. ***Id.*** In addition, the trial court may exclude ***McMorris*** evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury. ***Id.***, ¶129.

¶6 The trial court appropriately found the proffered evidence regarding instances of domestic violence by McPhail against Michelle K. was substantially more prejudicial than probative. It was prejudicial because, in effect, it would put McPhail on trial for his past conduct, possibly suggesting to the jury that he deserved punishment for his past conduct. It had limited probative value because there is little similarity between the episodes of alleged domestic violence and the incident at Neevel's residence. The trial court also properly rejected the proffered testimony due to the risk that the evidence would confuse the jury by focusing attention on whether the incidents of domestic violence occurred, rather than on the incident in question.

¶7 Neevel presented much uncontradicted evidence of McPhail's history of violence and threats, including his belligerent behavior during this incident. Adding specific incidents of domestic violence to Neevel's understanding of the threat posed by McPhail would have little probative value. Because the trial court allowed Neevel to present ample evidence demonstrating the basis for his fear of McPhail, the court did not deny Neevel the right to present a complete defense when it disallowed evidence of McPhail's domestic abuse.

¶8 In addition, any error in disallowing this evidence was harmless. Imperfect self-defense mitigates a charge of first-degree intentional homicide to

second-degree intentional homicide, *see* WIS. STAT. § 940.01(2)(b), and Neevel was convicted of second-degree reckless homicide.[2] Therefore, the only relevant question is whether there is any reasonable possibility that the excluded evidence would have persuaded the jury that Neevel acted in perfect self-defense. Perfect self-defense would involve a reasonable belief that interference with Neevel's person involved the danger of imminent death or great bodily harm, and it was necessary to use force which was intended to or likely to cause death or great bodily harm to prevent or terminate that interference. ***Head***, 255 Wis. 2d 195, ¶64. In light of the substantial evidence Neevel presented regarding the threats of violence against him for years, his fear of McPhail, McPhail's bragging about what a good fighter he was and testimony about a particular bar fight, there is no reason to believe the jury would have found perfect self-defense if it had known about McPhail's history of domestic violence.

Jury Instruction

¶9 We also reject Neevel's argument that the court should have instructed the jury on defense of others. The trial court has broad discretion in

[2] Under WIS. STAT. § 939.48(1), perfect self-defense is a complete affirmative defense to any charge of homicide if the following two objective conditions are present: (1) the person reasonably believed that an interference with his person involved the danger of imminent death or great bodly harm; and (2) the person reasonably believed that it was necessary to use force which was intended or likely to cause death or great bodily harm to prevent or terminate that interference. ***State v. Head***, 2002 WI 99, ¶64, 255 Wis. 2d 194, 648 N.W.2d 413; WIS JI—CRIMINAL 1017.

Under WIS. STAT. § 940.01(2)(b), imperfect self-defense (also known as unnecessary defensive force) mitigates first-degree intentional homicide to second-degree intentional homicide if the defendant actually believed he was in imminent danger of death or great bodily harm and actually believed that the deadly force used was necessary to defend against this danger, if either of these beliefs was not reasonable. ***Head***, 255 Wis. 2d 194, ¶69; WIS JI—CRIMINAL 1017.

deciding whether to give a particular jury instruction. The court must exercise its discretion to fully and fairly inform the jury of the rules of law applicable to the case and to assist the jury in making a reasonable analysis of the evidence. ***State v. Coleman***, 206 Wis. 2d 199, 212, 556 N.W.2d 701 (1996). Again, because the jury in effect found that Neevel acted in imperfect self-defense, the question is whether it might reasonably have found perfect self-defense if it had been instructed regarding defense of others. The trial court properly exercised its discretion because there was no evidence that McPhail threatened Neevel's children or had any intention of attacking them. While Neevel testified he was afraid for his daughters' safety, at most his testimony was sufficient to present an imperfect self-defense issue.

Prosecutor's Statements

¶10 Neevel next argues the prosecutor misstated the law while cross-examining Neevel and in his closing argument. That issue is not properly preserved for appeal because there was no contemporaneous objection. *See* ***State v. Guzman***, 2001 WI App 54, ¶25, 241 Wis. 2d 310, 624 N.W.2d 717. In addition, the prosecutor's questions and argument did not improperly define self-defense. The prosecutor said deadly force in self-defense can only be used when someone is threatened with deadly force. Neevel contends these statements were defective because the law allows deadly force to be used when there is a threat of great bodily harm to the defendant or others. However, Neevel's argument is based on a narrow interpretation of the term "deadly force." Deadly force is not force that always results in death. It is a violent action known to create a substantial risk of causing death or serious bodily harm. *See* BLACK'S LAW DICTIONARY 656 (7th ed. 1999). The Model Penal Code defines deadly force as "force (a) which its user uses with the intent to cause death or serious bodily injury

to another or (b) which he knows creates a substantial risk of death or serious bodily injury to another." 2 WAYNE LAFAVE, SUBSTANTIVE CRIMINAL LAW § 10.4 at 144 (2nd ed. 2003). The prosecutor's statements regarding "deadly force" do not contradict the statutes if these definitions are taken into consideration.

Cumulative Effect of Errors

¶11 Finally, we reject Neevel's argument that the cumulative effect of these alleged errors justifies a new trial. He established neither error nor prejudice from the alleged errors. As a result, no new trial is warranted.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).