COURT OF APPEALS
DECISION
DATED AND FILED

January13, 2000

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0988-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

BRENT R. HOWE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for La Crosse County: MICHAEL J. MULROY, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Deininger, JJ.

¶1 PER CURIAM. Brent Howe appeals from a judgment convicting him of substantial battery while armed, and disorderly conduct. He also appeals from an order denying him postconviction relief. He contends that he should have a new trial because his trial counsel failed to obtain and employ all of the peremptory strikes to which he was statutorily entitled, and because the trial court

erroneously and prejudicially refused to instruct the jury on self-defense. We affirm on both issues.

¶2 Howe cut two people with broken beer bottles during a dispute outside a bar. The State charged him with substantial battery, disorderly conduct and other charges that were later dismissed. During jury selection at his trial, both counsel mistakenly used only four peremptory strikes rather than the five allowed by statute when an alternate juror is seated. *See* WIS. STAT. § 972.03 (1997-98).[1] Howe offered a self-defense theory at trial, but did not testify. The trial court refused his request for a self-defense instruction.

¶3 The jury found Howe guilty on both the battery and disorderly conduct charges. The trial court denied his postconviction motion, and Howe appeals his conviction and the denial of postconviction relief.

¶4 Howe contends that the denial or impairment of his statutory right to five peremptory strikes, for whatever reason, results in automatic reversal. *See* ***State v. Ramos***, 211 Wis. 2d 12, 24-25, 564 N.W.2d 328 (1997). However, after Howe commenced this appeal, the supreme court limited the ***Ramos*** holding to situations where trial court error in failing to strike a juror for cause is responsible for denying the mandated number of peremptory strikes to a defendant. *See* ***State v. Erickson***, 227 Wis. 2d 758, 772-73, 596 N.W.2d 749 (1999), *petition for cert. filed* (U.S. Oct. 4, 1999) (No. 99-6572). Where, as here, the defendant fails to timely assert the right to additional peremptory strikes due to counsel's neglect, actual prejudice must be shown. *See* ***id.*** at 773. Howe did not offer any evidence

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

of actual prejudice from the loss of one peremptory strike, given that the State also had one less than allowed by statute, and that resolves the issue to his detriment.

¶5 Howe also failed to establish grounds for a self-defense instruction. WISCONSIN. STAT. § 939.48(1) provides that: one may use force to prevent what one reasonably believes is an unlawful interference with his or her person; the use of such force is limited to that which the actor reasonably believes is necessary to prevent or terminate the interference; and one may not intentionally use force intended or likely to cause death or great bodily harm unless one reasonably believes that such force is necessary to prevent death or great bodily harm to one's self. If the unlawful interference has not yet occurred, it must be imminent. *See* WIS JI—CRIMINAL 800. The trial court should give a self-defense instruction if a reasonable construction of the evidence, when viewed most favorably to the defendant, would support it. *See* ***State v. Jones***, 147 Wis. 2d 806, 816, 434 N.W.2d 380 (1989).

¶6 Here, the evidence, viewed most favorably to Howe, was as follows. Several witnesses testified that Howe taunted, cursed and threatened several people in a bar, most of whom then followed him outside when he left. He argued for several moments with one of the men who followed him out. A woman then approached Howe and urged both men to calm down. While she continued speaking with Howe, three or four men stood in a semi-circle behind her. Howe then grabbed two beer bottles off the ground and broke them near her face, cutting her hand with flying glass. One of the men testified that he stepped forward to protect her from further injury as she stepped back. He received a deep cut on his arm as Howe windmilled the beer bottles, one in each hand. Howe was then overpowered and held for the police.

¶7 There was no testimony that anyone made threatening or aggressive gestures or remarks toward Howe, or brandished or possessed weapons. Even if one accepts Howe's contention that the mere presence of the other men, under the circumstances which he provoked, caused him to reasonably believe that unlawful interference was imminent, he did not and cannot reasonably suggest that the circumstances described in the trial testimony caused him to reasonably believe that he was in imminent danger of death or great bodily harm. Therefore, even if Howe was privileged to use some means of self-defense, he was not privileged to swing broken beer bottles in the manner he did, which was likely to cause great bodily harm to his perceived attackers under any reasonable view.

¶8 We do not hold, as the trial court seemed to suggest, that a defendant can never obtain a self-defense instruction without testifying. We hold only that there was no evidence from other witnesses to show that Howe could reasonably believe the force he used was necessary.

By the Court.—Judgment and order affirmed.

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