

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 23, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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No. 98-1813-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANDREW C. POLHAMUS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Monroe County:
STEVEN L. ABBOTT, Judge. *Affirmed.*

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

PER CURIAM. Andrew C. Polhamus appeals from a judgment of conviction for substantial battery and disorderly conduct. He contends the trial court erred when it refused to instruct the jury on defense of others. Because the trial court did not erroneously exercise its discretion, we affirm.

“In determining whether the circuit court should have given the defense of others instruction, this court must view the evidence in the light most favorable to the defendant.” *State v. Jones*, 147 Wis.2d 806, 809, 434 N.W.2d 380, 380 (1989). Thus, we summarize the evidence in the light most favorable to Polhamus.

The underlying incident took place in a restaurant parking lot in the early morning hours of June 8, 1996. At trial, witnesses for both sides offered conflicting testimony about the events. In both versions, the victim, Brent Peters, and a friend were involved in an argument with another man, identified only as Travis. According to Polhamus, he and his wife were enjoying a night out at the Happy Chef restaurant. As they left the restaurant, Polhamus saw Peters holding Travis by the collar and shaking him. Travis apparently said, “Hey, that guy wants to fight me.” Polhamus began to walk away but turned to look back and saw that Peters had Travis by the shirt. Polhamus asked, “Hey, what’s going on?” Peters responded, “Why don’t you mind your own fucking business.” Peters then pushed Travis aside and took two steps towards Polhamus. Polhamus and Peters exchanged a few words, and then Peters spit in his face. Polhamus swung once and struck Peters in the face. Peters fell down and Travis jumped on top of Peters and started punching him in the face. After the single punch, Polhamus left.

At trial, Polhamus asked the court to instruct the jury on defense of others, alleging that he struck Peters in an attempt to protect Travis from harm. The court refused, concluding that when Polhamus hit Peters, Travis was out of the picture. Instead, the court gave an instruction on self-defense. Polhamus appeals.

Section 939.48(4), STATS.,¹ sets out the standard for defense of others. *Jones* explains:

[A]n actor is privileged to defend a third person from real or apparent unlawful interference by another under the same conditions and by the same means as he is privileged to defend himself from real or apparent unlawful interference. The statute further states that the actor must reasonably believe that the facts are such that the third person would be privileged to act in self-defense and that the actor's intervention is necessary for the protection of the third person. The actor may intentionally use only such force or threat of force as he or she reasonably believes is necessary to prevent or terminate the interference.

Id. at 814-815, 434 N.W.2d at 383 (footnote omitted). Thus, the question we must ask is whether a reasonable construction of the evidence, viewed in the most favorable light to Polhamus, allows us to conclude that Polhamus believed there was an actual interference with Travis, that Travis would have been entitled to use self-defense, and that Polhamus believed his punch was necessary for the protection of Travis. If we answer this question affirmatively, then we must conclude that the trial court erred.

We believe Polhamus's testimony allows the inference that he reasonably believed there was an actual and unlawful interference with Travis. Polhamus testified that as he walked by, Peters had grabbed Travis by the collar of

¹ Section 939.48(4) STATS., reads as follows:

A person is privileged to defend a third person from real or apparent unlawful interference by another under the same conditions and by the same means as those under and by which the person is privileged to defend himself or herself from real or apparent unlawful interference, provided that the person reasonably believes that the facts are such that the third person would be privileged to act in self-defense and that the person's intervention is necessary for the protection of the third person.

his shirt. We also believe that at the time Peters had Travis by the shirt, Travis would have been entitled to use self-defense. However, when Peters released Travis's shirt and walked toward Polhamus, the actual and unlawful interference with Travis ended.

We cannot conclude that Polhamus reasonably believed his punch was necessary for the protection of Travis. Polhamus's testimony demonstrates he did not throw the punch to protect Travis. Polhamus described his mental state when he threw the punch as follows:

Q: You were not only protecting Travis, but you also thought there was an invitation to fight. That there was consent for you to come and get involved in the fight?

A: The initial reason I was involved with the whole altercation in general was because I thought Travis needed some help. After I approached Brent and after he threatened to kick my ass, at that point in time it didn't become, hey, I need to take care of Travis. It was this man just spit in my face. I need to take care of me at that point in time.

Q: You're not defending Travis at that point?

A: I was defending myself when I swung at Brent.

Based on his own testimony, Polhamus was not defending Travis when he hit Peters. He was defending only himself.

Polhamus argues that this testimony is misleading and should be read in context with his other testimony. Polhamus suggests that the following testimony demonstrates he was defending Travis:

Q: Why didn't you just walk away?

A: I don't know why I didn't walk away. I felt that he was still going to beat up Travis. I don't know why. But I know at that point in time he just told me he wanted to kick my ass so I proceeded towards him.

I had no intentions of hitting him. I didn't want to fight him. I didn't know what was going to happen, but I proceeded towards him.

Q: And at the time you punched Mr. Peters, he wasn't engaged with Travis, was he?

A: No.

This testimony only demonstrates Polhamus's state of mind when he initially approached Travis and Peters. This testimony does not describe Polhamus's mental state when he actually threw the punch. Furthermore, Polhamus fails to demonstrate why he believed his punch was necessary for the protection of Travis. No reasonable interpretation allows us to conclude the punch was necessary for Travis's protection.

Finally, this case is distinguishable from *Jones*. In both *Jones* and this case, a very short time elapsed between the interference with the third person and the act of the defendant. In *Jones*, the defendant stabbed his brother-in-law after his brother-in-law threatened to hurt his sister. *Id.* at 809-10, 434 N.W.2d at 381. The brother-in-law held Jones' sister until she finally broke free. *See id.* at 810, 434 N.W.2d at 381. The brother-in-law then lunged at Jones and was stabbed. *See id.* In *Jones*, the court said that the time span between his sister's escape and the alleged crime "was minimal, making the entire incident a continuous act." *Id.* at 818, 434 N.W.2d at 385. We agree that in the instant case, the time span between when Peters released Travis and when Polhamus punched Peters was minimal as well. However, in *Jones*, the defendant claimed that he had the state of mind necessary to establish the privilege of defense of others. He testified that when he used deadly force, he feared for his sister's safety and was afraid that if he did not stop the attacker, his sister might be killed. *See id.* at 810, 434 N.W.2d at 381. Here, Polhamus testified he was not protecting or defending Travis when he hit Peters; he was defending himself. It would be speculation for a

jury to attribute a state of mind to Polhamus that he did not claim. We cannot conclude that a jury could find that Polhamus reasonably believed that his punch was necessary for the protection of Travis. Accordingly, he was not entitled to a defense of others instruction, and the trial court did not erroneously exercise its discretion by refusing to give one. We therefore affirm.

By the Court.—Judgment affirmed.

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

