COURT OF APPEALS
DECISION
DATED AND FILED

July 21, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-0641

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

IN THE INTEREST OF MASON S.,
A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

MASON S.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Racine County: DENNIS J. FLYNN, Judge. *Reversed.*

NETTESHEIM, J. The law holds that when a defendant harbors an honest belief of fact which negates criminal intent, such belief need not be reasonable. *See* § 939.43(1), STATS.; ***State v. Bougneit***, 97 Wis.2d 687, 690-92, 294 N.W.2d 675, 677-78 (1980). In this case, following a bench trial, the juvenile court found that Mason S. honestly believed that the victims of his conduct had

stolen money from him and that he honestly believed that he was entitled to threaten and restrain them in an effort to recapture his money. Nonetheless, the court adjudged Mason guilty of armed robbery and false imprisonment because Mason's belief, while honestly held, was not reasonable. Accordingly, the court found Mason guilty and entered a delinquency adjudication.

Under ***Bougneit***, the juvenile court's application of the law was error, and we are compelled to reverse the delinquency adjudication and the order denying postadjudication relief. Moreover, the court's factual determination that Mason's belief, albeit mistaken, was honestly held precludes us from remanding this case for a new trial.

FACTS

When Mason left a party on June 7, 1998, he was a front seat passenger in a car operated by John Gfesser. The back seat passengers were Joe Poehlman and a girl Poehlman knew. Mason fell asleep during the trip, but awoke when the car arrived at his apartment. At this time, Poehlman and the girl were no longer in the car. Instead, Jim McDonald was in the back seat. When Mason saw McDonald, he checked to see if $800 in cash he was carrying was still in his pockets. The money was missing. Mason suspected McDonald because McDonald had previously stolen money from him.

Mason asked McDonald and Gfesser what happened to his money, but they denied any knowledge. All three then went to Mason's apartment. There, Mason called a friend, John Campbell, and reported that he had been robbed of $800. Campbell then arrived at the apartment with a baseball bat. Mason took the bat, threatened Gfesser and McDonald and asked where his money was. Both replied that Poehlman probably took it. Mason did not believe this.

Gfesser then handed Mason $50 saying that he had not stolen Mason's money but "if you really think I took your money, here, you can have my $50." Mason took the money, but still wanted the balance.

Gfesser and McDonald then used a telephone to call Poehlman in an effort to get the money. Gfesser gave the keys to the vehicle to Campbell so that Campbell could search the car. In the meantime, Mason ordered Gfesser and McDonald to stay in the bedroom. However, Gfesser and McDonald escaped from the bedroom by jumping out a window.

Based on these events, the State charged Mason with armed robbery by force and two counts of false imprisonment. At the ensuing bench trial, Mason defended on the grounds of mistake. Specfically, he contended that he honestly believed that Gfesser and McDonald had stolen his money and that he was merely trying to recover it from them. As noted above, the juvenile court found that Mason honestly held this belief. However, the court ruled that Mason's belief had to be reasonable. Because Mason's belief was not reasonable, the court rejected Mason's defense and found him guilty. Mason appeals from the ensuing delinquency adjudication and a later order denying postadjudication relief.

DISCUSSION[1]

The crime of armed robbery includes the element of intent to steal. *See* WIS J I—CRIMINAL 1480. The crime of false imprisonment includes the element of knowledge by the defendant that the confinement or restraint of the

[1] Mason raises other issues on appeal which we are not required to address in light of our reversal. Mason claims that the juvenile court improperly allowed hearsay testimony in violation of his right to confrontation and cross-examination and that the court's bench decision erroneously cited to testimony which the court had rejected during the trial.

victim was without lawful authority. *See* WIS J I—CRIMINAL 1275. Mason defended the charges in this case on the grounds of mistake. Specifically, he claimed that he honestly believed that Gfesser and McDonald had stolen his money and therefore he did not intentionally steal $50 from Gfesser and that he did not unlawfully restrain Gfesser and McDonald.

Section 939.43(1), STATS., recognizes the defense of mistake. It states, "An honest error, whether of fact or of law other than criminal law, is a defense if it negatives the existence of a state of mind essential to the crime." The court in ***Bougneit***, quoting directly from the Legislative Council Reports relating to the enactment of this statute, stated that "if the mistake is real and it negatives a state of mind essential to the crime, the actor is entitled to the defense *even though the mistake is unreasonable.*" ***Bougneit***, 97 Wis.2d at 692, 294 N.W.2d at 678 (quoting 5 Wisconsin Legislative Council Reports, 36 (1953); emphasis altered). The juvenile court's holding that Mason's belief had to be objectively reasonable is contrary to this law and therefore we are compelled to reverse.[2]

The juvenile court expressed concern that a subjective test was too low a standard and invited vigilante conduct against the public. However, we addressed this concern in ***Bougneit***. There, we observed that while the substantive law makes the test a subjective one, the mistake defense is targeted at the State's burden to demonstrate intent or knowledge beyond a reasonable doubt. The court said, "It may be difficult for a defendant to raise a reasonable doubt that his mistake was real if it appears to be unreasonable, but this is a problem of proof

[2] If the test were an objective one, we would readily affirm the juvenile court's ruling because the court provided a cogent and well-reasoned explanation as to why Mason's belief was unreasonable. Similarly, if the juvenile court had employed the same reasoning to conclude that Mason's belief was not honestly held, we also would readily affirm.

and not a matter of substantive law." ***Id***. (quoted source omitted). In most situations, we suspect that the same considerations which would prompt a determination that a mistaken belief is unreasonable will also prompt a conclusion that the mistake was not honestly held. We question whether juries or judges acting as fact-finders will routinely be persuaded by such defenses.[3]

Were this a jury case and if the juvenile court had communicated its misstatement of the law in a jury instruction, we would reverse and remand for a new trial. However, in this case, the juvenile court has already factually determined that Mason honestly believed that Gfesser and McDonald had stolen his money and that he honestly believed that he was entitled to recapture his money when he threatened them and held them against their wills. Given that finding, Mason is entitled to an acquittal. Were we to remand for a new trial, we would allow a second trial on a factual issue which has already been determined favorably to Mason. That would violate Mason's protection against double jeopardy.[4]

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[3] As an example, the trial court alluded to a case where a defendant expressed a subjective belief that the moon was made of cheese. Absent competency concerns, we would venture that a jury or a judge acting as a fact-finder would find such a belief not honestly held.

[4] The State contends that Mason did not produce sufficient evidence to show that the money he sought to recover was the same money which had been stolen. *See* ***Edwards v. State***, 49 Wis.2d 105, 111-14, 181 N.W.2d 383, 386-88 (1970); *see also* ***State v. Pettit***, 171 Wis.2d 627, 634, 492 N.W.2d 633, 637 (Ct. App. 1992). We reject this argument for three reasons.

First, the State never raised this argument in the trial court. In fact, it was defense counsel who correctly pointed out during final argument that the defendant must believe that he was recovering his own money, not merely a debt, under ***Edwards*** and ***Pettit***. The State made no response to this argument. In fact, the State offered no rebuttal argument. At the postadjudication hearing, the State again offered no argument in opposition to Mason's motion. Instead, the State simply asked the juvenile court to deny the motion. The State has waived this issue.

(continued)

We reverse the delinquency order and the order denying postadjudication relief.

By the Court.—Orders reversed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

Second, the juvenile court did not rely on this law when making its ruling. The court did allude to ***Pettit***, but this reference was made in support of the court's determination that Mason's belief was not reasonable. The court did not make any express finding that addresses or resolves any potential factual issue as to whether the money which Mason sought to recapture was the very money which he claims had been stolen. This was understandable since the precise issue never surfaced in the juvenile court.

Third, the juvenile court's finding that Mason honestly believed that he was recapturing his own property cuts against the State's argument on this point.