COURT OF APPEALS
DECISION
DATED AND FILED

SEPTEMBER 28, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. **99-0739-CR**

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL T. WINKLER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Barron County: EUGENE D. HARRINGTON, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Gordon Myse, Reserve Judge.

PER CURIAM. David Winkler appeals a judgment convicting him of unlawful use of OC spray (pepper spray) and fleeing an officer. He also appeals an order denying his postconviction motion. He argues that the trial court erred when it refused to instruct the jury on self-defense and that he is entitled to a

new trial because the court provided the jury with an unredacted copy of exhibit 29, one page of a police officer's report that contained extraneous information. Because we conclude that the self-defense instruction was not reasonably required by the evidence and that any error in allowing the jury to see exhibit 29 was harmless, we affirm the judgment and order.

The State presented testimony and a dispatch tape to establish that Winkler sprayed Officer Mike Nelson with pepper spray and fled from Nelson after Nelson confronted him to determine why he was in a business parking lot at 2:30 a.m. Nelson testified that after the dispatcher informed him that the number on Winkler's license plate was not on file, Nelson approached Winkler's vehicle and saw a can of dog repellent between Winkler's legs. Nelson stepped back and ordered Winkler to give him the spray and get out of the vehicle. Winkler sprayed Nelson in the face and drove off. After chasing Winkler's vehicle in marked squad cars using lights and sirens, police officers succeeded in stopping his vehicle. Winkler then accelerated into a squad car, put his vehicle in reverse, and backed into other squad cars. It took four officers to subdue and arrest Winkler.

Officer Daniel Siewert testified that he observed a can of mace fall from Winkler's jacket during the arrest. At the police station, Winkler told Siewert that he maced Nelson after Nelson maced him. Winkler refused any medical treatment. Officer Chad Thompson testified that he took Nelson to the emergency room. Nelson's eyes were bloodshot and watery, and he could barely open them.

Winkler testified that the dog repellent was in plain view on the passenger's seat. When Nelson saw the repellent, he became angry and asked Winkler if he had any problem with dogs. Nelson drew his service weapon and

ordered Winkler to pass the dog repellent out of the car. As Winkler turned back, Nelson struck him in the face, breaking his nose. Nelson then apologized for striking Winkler, but ordered him to get out of the car. Winkler was afraid and refused to comply. Nelson then maced Winkler who drove away until other officers stopped him. Winkler denied ever having maced Nelson or struggling with the arresting officers. He denied having ever seen the mace container that Siewert testified fell out of Winkler's pocket. Winkler admitted to six prior convictions.

The court properly refused to instruct the jury on self-defense because, construing the evidence in the light most favorable to the defense, it was not reasonably required by the evidence. *See* ***State v. Hilleshiem***, 172 Wis.2d 1, 9, 492 N.W.2d 381, 384 (Ct. App. 1992). The self-defense instruction would have been inconsistent with Winkler's testimony that he did not mace Nelson. The only evidence that would arguably support the self-defense instruction was Siewert's testimony that Winkler told him he maced Nelson after Nelson maced him. However, Winkler disavowed that statement at trial.

There is no basis for instructing the jury on self-defense as it relates to the charge of fleeing an officer. The self-defense privilege allows a person to use threats or force to defend himself. *See* § 939.48, STATS. Because fleeing an officer does not constitute a threat or use of force, the instruction would not be appropriate for that offense. Although self-defense is not implicated here, we acknowledge that a privilege of necessity might be a defense to fleeing an officer. However, this defense was never raised or such an instruction requested and we, therefore, need not discuss it.

The record discloses no prejudice from the court allowing the jury to see an unredacted copy of exhibit 29, page four of Officer Siewert's report.[1] While the report contained some extraneous information, we conclude beyond a reasonable doubt that this information did not affect the verdicts. *See* ***State v. Eison***, 194 Wis.2d 160, 177-78, 533 N.W.2d 738, 745 (1995). The jury had already heard substantial evidence that Winkler was belligerent and uncooperative. The new information contained in Siewert's report that he also threatened Siewert at the police station added little to the jury's perception of Winkler. The report also stated that Winkler had over $300 on him at the time he was arrested. There is nothing inherently suspicious about carrying that amount of money and there is no reason to believe that this extraneous information affected the verdict.

Finally, Winkler requests a new trial in the interest of justice. We conclude that the controversy was fully and fairly tried, justice has not miscarried and a new trial would be unlikely to produce a different verdict. *See* ***Vollmer v. Luety***, 156 Wis.2d 1, 19, 456 N.W.2d 797, 805 (1990).

By the Court.—Judgment and order affirmed.

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

[1] Winkler contends that the court erred by responding to the jury's request to see the police reports when Winkler was not present. A defendant's absence when the court communicates with the jury is subject to the harmless error rule. *See* ***State v. McMahon***, 186 Wis.2d 68, 88, 519 N.W.2d 621, 629 (Ct. App. 1994). Because we do not hold Winkler to have waived his right to object to the jury seeing the report, and there is no reasonable possibility that the verdict was based on that document, the error in answering the jury's inquiry in Winkler's absence was harmless beyond a reasonable doubt.