COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-0801-CR

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

OTIS J. BRAXTON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rock County: EDWIN C. DAHLBERG, Judge. *Affirmed.*

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

¶1 PER CURIAM. Otis J. Braxton appeals from a judgment convicting him of second-degree reckless endangerment of safety by use of a dangerous weapon, obstructing an officer and damage to property, all as a repeat offender, as well as from an order denying him postconviction relief. He claims

he was entitled to a jury instruction on self-defense. However, because the trial court reasonably determined the facts adduced at trial could not support a finding that Braxton's actions were reasonably necessary to protect himself from imminent danger, we affirm.

BACKGROUND

¶2 According to Braxton's testimony,[1] Hywel Bowman brought alcohol, cigarettes and marijuana over to an apartment where Braxton was staying, and the two of them partied all night into the following day. Sometime late in the afternoon, Bowman told Braxton he was missing $50 and some drugs, and accused Braxton of stealing them. Braxton denied taking the money or drugs. Bowman then suggested that Braxton's wife might have taken them, and could be hiding them in her vagina. Braxton got upset and threw Bowman out of the apartment.

¶3 He said he escorted him outside, and the two scuffled a little bit on the lawn, where Braxton broke the window of the car Bowman had been using.[2] Braxton said Bowman went over to his car as if he were going to leave, but then came back up the apartment stairs with one of his hands behind his back. Braxton threw a chair from the landing down the stairs at Bowman, went back into the apartment, and got a knife. Bowman went to his car again, then came back up to the apartment. When he saw that Braxton had a knife, he turned around and went back down the stairs. Braxton followed him outside with the knife. Bowman told Braxton he had something in his car for him. Braxton then threatened Bowman

[1] For the purpose of this appeal, we will review the evidence in the light most favorable to Braxton. *See* ***State v. Coleman***, 206 Wis.2d 199, 213, 556 N.W.2d 701, 707 (1996).

[2] The car actually belonged to Bowman's sister.

with the knife to keep him from getting to the car, because he thought the "something" in the car might be a gun. Braxton said he had no intention of hurting Bowman; he just wanted him to leave, and wanted to keep any confrontation out of the apartment and the presence of his wife and the children who were there.

¶4 Officers dispatched to the scene found Braxton chasing Bowman with a knife. Braxton refused to put the knife down until the officers threatened to shoot him, and he was forced to the ground to be placed in custody, although he did not threaten the officers at any time. No weapons were recovered from Bowman's car.

¶5 The trial court refused counsel's request to give a jury instruction on self-defense, finding that "this record doesn't come close to establishing that at any time that Mr. Braxton was in imminent danger of either death or great bodily harm or any bodily harm … [and] there isn't any evidence that the wife was at any point in imminent danger." After Braxton was convicted on all three counts, the trial court also denied his postconviction motion for relief, and he appeals.

STANDARD OF REVIEW

¶6 The trial court has wide discretion over the decision whether to give a requested jury instruction. *See* ***State v. Wilson***, 180 Wis.2d 414, 420, 509 N.W.2d 128, 130 (Ct. App. 1993). We will uphold a discretionary determination so long as the trial court considered the facts of record under the proper legal standard and reasoned its way to a rational conclusion. *See* ***Burkes v. Hales***, 165 Wis.2d 585, 590, 478 N.W.2d 37, 39 (Ct. App. 1991).

ANALYSIS

¶7 Wisconsin law recognizes that certain conduct, which would otherwise constitute a crime, may be privileged when undertaken in self-defense. *See* § 939.45, STATS. Section 939.48(1), STATS., provides:

> A person is privileged to threaten or intentionally use force against another for the purpose of preventing or terminating what the person reasonably believes to be an unlawful interference with his or her person by such other person. The actor may intentionally use only such force or threat thereof as the actor reasonably believes is necessary to prevent or terminate the interference. The actor may not intentionally use force which is intended or likely to cause death or great bodily harm unless the actor reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself.

Wisconsin Jury Instruction—Criminal 805 explains the law of self-defense in Wisconsin as codified in § 939.48(1), and further advises:

> [T]he defendant's beliefs must have been reasonable. A belief may be reasonable even though mistaken. In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense. The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of his acts and not from the viewpoint of the jury now.

WIS J I—CRIMINAL 805 (footnotes omitted). The parties agree that WIS J I—CRIMINAL 805 is a proper statement of the law in this state.

¶8 A defendant is entitled to a timely requested self-defense instruction when the defense is supported by the evidence and not covered by other instructions. *See* ***State v. Coleman***, 206 Wis.2d 199, 212-13, 556 N.W.2d 701, 706 (1996). The State does not dispute that Braxton timely requested a self-

defense instruction which was not covered by other instructions given to the jury. The issue we must decide is whether the trial court reasonably determined that the instruction sought was not supported by the evidence. *See* ***State v. Hilleshiem***, 172 Wis.2d 1, 9, 492 N.W.2d 381, 384 (Ct. App. 1992).

¶9 Braxton claims the trial court invaded the province of the jury when it determined that he could not reasonably have believed that he was in imminent danger, because the jury could have believed his testimony that he thought Bowman had a gun in his car. We agree that the jury could have found that Braxton reasonably believed that Bowman had a gun in the car, and that his belief could have been reasonable even if it was mistaken. However, it does not follow that a jury could have found that it was reasonable for Braxton to believe that it was necessary to chase Bowman with a knife in order to protect himself.

¶10 Braxton himself testified that Bowman turned around and went back down the stairs when he saw that Braxton had a knife. Bowman had not mentioned having any weapons and had not issued any specific threats at that time. All Braxton needed to do was step back into the apartment and close the door. The trial court did not erroneously exercise its discretion when it determined that no jury could properly conclude that Braxton had used only that force reasonably necessary to protect himself when he followed Bowman down the stairs with a knife.

By the Court.—Judgment and order affirmed.

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