COURT OF APPEALS
DECISION
DATED AND FILED

January 12, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP448 **Cir. Ct. No. 2014SC147**

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

DAVID SHOTLIFF,

PLAINTIFF-RESPONDENT,

V.

JOHN WEINEL,

DEFENDANT-APPELLANT,

ANA WEINEL,

DEFENDANT.

APPEAL from a judgment of the circuit court for Rusk County: STEVEN P. ANDERSON, Judge. *Affirmed*.

¶1 STARK, P.J.[1] John Weinel shot and killed a bull owned by David Shotliff in August 2013. Shotliff sued Weinel for conversion, and, following a bench trial, the circuit court awarded Shotliff $5000 in damages. Weinel appeals, arguing: (1) the circuit court erroneously exercised its discretion "by failing to consider [his] claim of self-defense"; and (2) there was sufficient evidence to support his self-defense claim. We reject these arguments and affirm.

BACKGROUND

¶2 At trial, Shotliff testified the animal Weinel shot was a six- or seven-year-old purebred Scottish Highland bull named Vindicator. Shotliff testified he had raised Vindicator from a calf, and Vindicator was "just like a pet." He described Vindicator's demeanor as "docile," "easy going," and "nice handling." He further recounted that his children and their friends routinely played with Vindicator, who would eat candy and cookies from their hands.

¶3 As of August 2013, Vindicator was being boarded at a farm owned by the Jenness family and was being cared for by Steven Stapleton, a friend of Shotliff who lived on that farm. Like Shotliff, Stapleton described Vindicator's demeanor as "very docile." He denied that Vindicator was mean or aggressive and stated he had never seen Vindicator hurt anyone. Stapleton testified his children were around Vindicator "constantly," and Vindicator "acted more like a dog than … a normal animal around the farm[.]" A photograph was introduced into evidence showing Stapleton's young nephew playing with Vindicator about one month before Vindicator was shot.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶4 Stapleton testified Weinel raised beef cattle on property located next to the Jenness farm. According to Stapleton, Weinel's cattle would routinely cross the fence line and come onto the Jennesses' property, looking for food. Stapleton testified Vindicator would sometimes follow these cattle back onto Weinel's property, either "looking for a date" or because he "just wanted to be with the herd."

¶5 Stapleton further testified that, in August 2013, Weinel confronted him after finding Vindicator on Weinel's property. Weinel was "very upset" and was yelling and screaming at Stapleton. At one point, Weinel stated he was going to "take care of [Vindicator] so that [Stapleton] would never get him back." Stapleton interpreted this as a threat to physically harm Vindicator. Following the confrontation, Weinel drove off on his four-wheeler. After about fifteen to twenty minutes, Stapleton heard gunshots. Approximately one month later, Vindicator's body was found in the woods with multiple gunshot wounds.

¶6 Weinel testified that, prior to August 2013, Vindicator had repeatedly ripped through Weinel's barbed wire fence in order to come onto Weinel's property. Once on Weinel's property, Vindicator would chase Weinel's heifers, which caused them to stop eating and, consequently, to stop gaining weight. Weinel testified he discussed this problem with the Jennesses on five or six occasions. He admitted having a conversation with Stapleton about Vindicator in August 2013, but he denied screaming at Stapleton or threatening to shoot Vindicator. He testified that, after this conversation, he returned to his property and repaired his fence.

¶7 The following day, Weinel testified he found another hole in his fence, which he believed Vindicator had made. Weinel's cattle were loose on his

property, outside the fenced area. He and his daughters therefore drove around the property in his pickup truck in order to count the cattle. They found Vindicator and some of the cattle in the middle of a field. When Weinel got out of this truck to count the cattle, Vindicator "came running at [him]." Weinel testified he ran forty to fifty feet back to his truck, slammed the door, and took his .45 caliber pistol out of the glove compartment. Vindicator was standing about three feet away, "swinging his horns and huffing and puffing[.]" Weinel then pointed his gun out the window and fired fourteen shots at Vindicator. He testified, "I wanted to put that thing down before it got me, my kids, my truck, or another fence line. I didn't think there was any alternative." He described Vindicator as "mean and nasty and stealthy and not to be trusted." He further stated Vindicator was a "menace" rather than a "pet."

¶8 In addition to his own testimony, Weinel submitted a letter from Daniel Geisler, who worked for Weinel during the summer of 2012. Geisler confirmed that, when Weinel's heifers went into heat, Vindicator "crawled through the fence" in order to breed with them. Geisler specifically described one occasion on which he and Stapleton tried for two days to get Vindicator off of Weinel's property by coaxing him with grain and chasing him with an all-terrain vehicle. They ultimately had to tranquilize Vindicator in order to get him back to the Jennesses' property. Geisler stated, "I am thankful that no one was injured during this ordeal. [Stapleton] and I both had a couple of close calls with the bull during this situation."

¶9 After considering the evidence, the circuit court rejected Weinel's claim that he shot Vindicator in self-defense. The court declined to make any findings regarding Vindicator's disposition, or whether it was Vindicator or Weinel's cattle that tore through Weinel's fence. Instead, the court explained:

> [W]hat the Court finds significant is that Mr. Weinel was able to get to his truck. He got into his truck, whether the bull continued to charge or not; he was protected by his truck from harm from the bull. So the act of shooting the bull, 14 times I think …[,] was unnecessary.

The court therefore concluded Weinel was liable to Shotliff for killing Vindicator. It ordered Weinel to pay Shotliff $5000 in damages and to return Vindicator's skull. Weinel now appeals.

DISCUSSION

¶10 On appeal, Weinel first argues the circuit court erroneously exercised its discretion by failing to consider his self-defense claim.[2] This argument fails, however, because the circuit court clearly *did* consider Weinel's claim that he killed Vindicator in self-defense. During its oral ruling, the court specifically noted, "Mr. Weinel[] claims that the shooting of the bull was more or less in self-defense[.]" The court then rejected that argument, for the reasons explained above. The court later reiterated, "I am going to find that Mr. Weinel is liable to Mr. Shotliff for the killing of the bull because the killing was not privileged. There was no need to kill the bull for self-defense." These comments clearly show that the court considered Weinel's self-defense claim.

¶11 Weinel also challenges the sufficiency of the evidence to support the circuit court's finding that he did not kill Vindicator in self-defense. "When considering the sufficiency of the evidence, we apply a highly deferential standard of review." ***Jacobson v. American Tool Cos., Inc.***, 222 Wis. 2d 384, 389, 588

[2] Neither party cites any authority for the proposition that self-defense is available as an affirmative defense in a conversion action. For purposes of this appeal, we assume, without deciding, that Weinel could properly assert self-defense as an affirmative defense to Shotliff's conversion claim.

N.W.2d 67 (Ct. App. 1998). We will not set aside the circuit court's findings of fact unless we conclude that they are clearly erroneous. ***Id.*** at 389-90 (citing WIS. STAT. § 805.17(2)). "Furthermore, the fact finder's determination and judgment will not be disturbed if more than one inference can be drawn from the evidence." ***Id.*** at 389. We search the record for facts supporting the findings the circuit court did make, not facts supporting findings the court did not make or could have made. ***Becker v. Zoschke***, 76 Wis. 2d 336, 347, 251 N.W.2d 431 (1977).

¶12 Self-defense is "the right to defend one's person by the use of whatever force is reasonably necessary under the circumstances." WIS JI—CIVIL 2006 (2013); *see also* ***Crotteau v. Karlgaard***, 48 Wis. 2d 245, 249, 179 N.W.2d 797 (1970). A defendant asserting self-defense as an affirmative defense must prove: (1) that he or she reasonably believed the use of some force was necessary to prevent injury; and (2) that the amount of force he or she used was reasonably necessary. *See* WIS JI—CIVIL 2006 (2013). The same standard applies when a defendant asserts that he or she acted in defense of a third party. *See* ***id.***, *cmt.*

¶13 Here, the circuit court concluded it was not reasonably necessary for Weinel to shoot Vindicator in order to protect himself. The court noted that Weinel was able to get into his truck before shooting Vindicator. Once inside the truck, the court found that Weinel was protected from Vindicator and was not in any danger. These findings are not clearly erroneous. Weinel testified that, after he got into his truck, Vindicator was about three feet away. Although Weinel testified Vindicator was "swinging his horns and huffing and puffing," there is no evidence that Vindicator continued charging after Weinel entered the vehicle, or that Vindicator was close enough to the vehicle to harm Weinel or his daughters. On these facts, the circuit court could reasonably infer that shooting Vindicator

was not reasonably necessary. That the evidence may also have supported a contrary inference is not a sufficient basis to overturn the court's finding.[3]

¶14 Alternatively, Weinel appears to suggest in his appellate brief that he was privileged to shoot Vindicator in order to prevent damage to his property—specifically, "his pick-up truck, fences, and his other cattle." Defense of property and self-defense are distinct affirmative defenses. *See, e.g.*, WIS JI—CIVIL 2006 (2013); WIS JI—CIVIL 2006.5 (2013). However, Weinel did not clearly raise defense of property as an affirmative defense in the circuit court, separate from his self-defense claim. We need not address arguments raised for the first time on appeal. *See* ***State v. Van Camp***, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997). Moreover, Weinel does not develop any argument on appeal specifically related to a defense-of-property affirmative defense. We will not abandon our neutrality to develop an argument for him. *See* ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82.

By the Court.—Judgment affirmed.

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

[3] For instance, Weinel emphasizes his own testimony that "the bull was a clear menace and not a pet" and Geisler's evidence that the bull "had a propensity to be untouchable and to evade capture unless tranquilized." However, the circuit court was not required to accept this evidence regarding Vindicator's disposition in the face of other, contrary evidence. *See* ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345 ("When the circuit court acts as the finder of fact, it is the ultimate arbiter of the credibility of the witnesses and the weight to be given to each witness's testimony."). Moreover, the circuit court expressly declined to make any findings regarding Vindicator's disposition, concluding that, whatever the bull's disposition, it was not reasonably necessary for Weinel to shoot him. Weinel's citations to Geisler's letter and to his own testimony about Vindicator's disposition therefore fail to convince us the circuit court erred by rejecting Weinel's self-defense claim.