COURT OF APPEALS
DECISION
DATED AND FILED

May 27, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP2534-CR **Cir. Ct. No. 2007CM379**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SHANE R. HEINDL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Portage County: JOHN V. FINN, Judge. *Affirmed*.

¶1 VERGERONT, J.[1] Shane Heindl appeals his judgment of conviction for misdemeanor battery, contrary to WIS. STAT. § 940.19(1), on the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) and (3) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

ground that the circuit court erred in refusing to give a jury instruction on self-defense. We conclude the circuit court did not err and therefore affirm.

BACKGROUND

¶2 The battery charge arose out of an incident involving Heindl and Megan Lien, with whom he lived.[2] Heindl called 911 and, when the responding officer arrived at the scene, Lien and Heindl gave him starkly contrasting accounts of what happened.

¶3 According to the officer's testimony at trial, Lien was crying and upset and gave him the following account. Heindl was drinking and became upset with her over her messiness and other matters. After she poured his whisky down the sink, he became more upset and threw two ceramic bowls at her, which hit the wall. She walked toward the living room from the kitchen and he approached her from behind and put her in a headlock, which made it difficult to breath. They ended up on the floor, with him on top of her, pinning her to the floor. She was able to break his hold and began scratching and punching him to get out of his control. She managed to break free and get a knife from the kitchen, which Heindl took away from her. He left the residence and called the police.

¶4 The responding officer's testimony at trial concerning Heindl was that he was extremely intoxicated and had scratches on his chest area and around his neck and perhaps one on his face; he also had swelling around his eye. Heindl's account to the officer was as follows. He and Lien were arguing and he

[2] Heindl was also charged and convicted of disorderly conduct, but this appeal does not involve that charge.

threw two bowls against the wall. Lien punched him first and he punched her back. She threw him to the ground and choked him with her hands wrapped around his neck; she was on top. He managed to get away. She grabbed the knife, and he was able to take it away from her. According to the officer, in a second interview with Heindl, conducted after the officer spoke to Lien, Heindl stated that, after Lien poured out the alcohol, she attacked him, threw him to the ground, and choked him. In this interview, the officer testified, Heindl did not mention that Lien punched him and said there were many things he could not remember because he was intoxicated.

¶5 The only other witness at trial besides the responding officer was Lien. She agreed that she was crying and upset when the officer arrived and that most of the statements the officer attributed to her were true statements of what had happened. She agreed that Heindl "confronted her" and she pushed him away, and he got even more angry then. Specifically with respect to the headlock, she agreed that he approached her from behind and put her in a headlock, and that this made it difficult for her to breathe. Her disagreements were: she didn't know if Heindl was throwing the dishes at her or just at the wall; she didn't know if he "directed" her to the floor after he put her in the headlock or if they just ended up on the floor because of their struggle; and she did not tell the officer that the mark around her wrist was a bruise from Heindl pinning her to the floor. On this last point, she testified that the mark was from a cheap gold bracelet she was wearing.

¶6 Lien also testified to aspects of her conduct during the incident that were not included in her statements to the officer on that night. She acknowledged that she hit Heindl and that she did so both while they were "in the struggle with the headlock and everything" and before that. With respect to being on the ground with Heindl on top of her, Lien testified that she was "trying to hurt him as much

as [she] could" by hitting him and scratching him, and she was angry that he was holding her down. Once she got away from him, she testified, she grabbed the knife because she was angry and at that moment she wanted to "hurt him really bad." She denied that she grabbed the knife to protect herself.

¶7 During the discussion of jury instructions, defense counsel requested the standard instruction on self-defense. Criminal Jury Instruction 1220A provides in relevant part:

> Self-defense is an issue in this case. The law of self-defense allows the defendant to threaten or intentionally use force against another only if:
>
> - The defendant believed that there was an actual or imminent unlawful interference with the defendant's person; and
> - The defendant believed that the amount of force the defendant used or threatened to use was necessary to prevent or terminate the interference; and
> - The defendant's beliefs were reasonable.

¶8 The court declined to give the instruction, concluding there was no evidence in the record of what Heindl's beliefs were. Noting that the defense had not yet rested and Heindl had just waived his right to testify, the court gave defense counsel the opportunity to talk to Heindl to decide if the defense wanted to put on any additional evidence. After a brief recess for this purpose, defense counsel informed the court that there was no change in Heindl's decision not to testify, and the defense rested without introducing evidence.

¶9 The jury returned a guilty verdict on the battery charge.

DISCUSSION

¶10 Heindl contends that the circuit court erred in failing to give the jury the self-defense instruction. He asserts that he did not need to testify on his beliefs in order to be entitled to this instruction because the jury could reasonably infer from the evidence that Heindl believed that there was "an actual or imminent unlawful interference with [his] person" and that "the amount of force [he] used or threatened to use was necessary to prevent or terminate the interference." The evidence that, in his view, provides a reasonable basis for these inferences is: (1) Lien's testimony that she struck him before he put her in the headlock; (2) her testimony that when she was hitting and scratching him she was angry and trying to hurt him; (3) the scratches and swollen eye the officer observed; (4) Heindl's statement to the officer that she attacked him; (5) her testimony that, when she got away, she grabbed the knife because she was angry and "wanted to hurt him really bad"; and (6) the fact that Heindl, not Lien, left the house and called 911.

¶11 A defendant has the right to a self-defense instruction if the evidence viewed in the light most favorable to the defense supports the instruction. ***State v. Mendoza***, 80 Wis. 2d 122, 153, 258 N.W.2d 260 (1977). The issue whether the evidence provides a sufficient basis for the instruction presents a question of law, which we review de novo. ***State v. Giminski***, 2001 WI App 211, ¶11, 247 Wis. 2d 750, 634 N.W.2d 604.

¶12 Before we begin our analysis we clarify that we do not understand the circuit court to have ruled that, as a matter of law, a defendant has to testify about his or her beliefs in order to have sufficient evidence to warrant the self-defense instruction. Rather, we understand the court to have ruled that, *in this case*, there was insufficient evidence without Heindl's testimony.

¶13 Because the State's theory was that the battery occurred when Heindl placed Lien in a headlock, we focus on the evidence of what occurred before that point in time, viewing it in the light most favorable to Heindl's assertion of self-defense. In order for Heindl to be entitled to the instruction, there must be evidence from which it is reasonable to infer that, before Heindl put Lien in a headlock, he believed that there was an actual or imminent unlawful interference with his person and that he believed the headlock was necessary to prevent or terminate that interference.

¶14 The primary portion of the evidence on which Heindl relies for evidence of Lien's conduct before the headlock is the following testimony by Lien:

> Q. All right. Did you hit Mr. Heindl?
>
> A. Yes, I did.
>
> Q. At what point did that occur?
>
> A. When we were kind of in the struggle with the headlock and everything.
>
> Q. Do you recall if you struck him ***before*** that?
>
> A. Yes.
>
> Q. Okay.
>
> A. I was punching him in the face and scratching his neck.
>
> Q. How hard did you punch him?
>
> A. I don't remember how hard.

Q. Were you trying to hurt him at the time?

A. Yes. I was extremely angry.

(Emphasis added.)

¶15 It is not clear from this testimony when Lien struck Heindl before he put her in the headlock; it is also not clear whether she was punching him and scratching his neck, trying to hurt him because she was angry, before he put her in the headlock. Elsewhere her testimony on hitting and scratching him, being angry and trying to hurt him was only in the context of him pinning her to the floor after the headlock. However, viewing this quoted testimony most favorably to a self-defense instruction, we assume Lien is testifying that she did these things before he put her in the headlock. However, the quoted testimony also neither expressly states *when* she did this before the headlock nor gives rise to a reasonable inference as to when she did this before the headlock. She testified elsewhere three times unequivocally that he put her in a headlock "from behind" or "approached [her] from behind." In view of this testimony and because the testimony on which Heindl relies gives no timeframe for her hitting him before the headlock, it is not reasonable to infer that, when Heindl put her in a headlock *from behind*, he subjectively believed that amount of force was necessary to terminate her actual or imminent interference with his person. If he was behind her or approaching her from behind, she was not at that point in time hitting and scratching him.

¶16 None of the other testimony on which Heindl relies fills in this absence of a reasonable basis for inferring that, when Heindl put her in a headlock *from behind*, he subjectively believed that amount of force was necessary to terminate an actual or imminent interference with his person. As noted above, the other portion of Lien's testimony in which she describes "trying to hurt him as

much as [she] could" by hitting him and scratching him was expressly focused on the time he was holding her down on the floor after the headlock; she testified that she was angry that he was holding her down then and she was trying to get away. This does not create a reasonable inference that she was engaging in this same conduct before he put her in the headlock. The evidence that he had scratches on his neck and chest and a swollen eye are without a timeframe for these injuries in relation to the headlock, as is his statement to the officer that he was attacked. As for the evidence that she grabbed a knife, regardless of her intention and motive at that time, it does not supply a reasonable basis for inferring Heindl's beliefs at the time he put her in a headlock. The same is true of his leaving the house and calling 911 after he took the knife away from her.

¶17 Heindl may have subjectively believed that the headlock was necessary to prevent or terminate Lien's actual or imminent unlawful interference with his person. However, that is not an inference that one can reasonably draw from the evidence before the jury, given the unequivocal testimony that he was behind her when he put her in the headlock and the absence of evidence about when, before the headlock, she hit and scratched him. We agree with the circuit court that, based on the evidence, the jury would have to engage in speculation to determine whether Heindl believed he needed to put Lien in a headlock to protect himself from her.

CONCLUSION

¶18 We conclude Heindl was not entitled to a jury instruction on self-defense and we affirm the judgment of conviction.

By the Court.—Judgment and order affirmed.

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