COURT OF APPEALS
DECISION
DATED AND FILED

August 17, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP1868-CR **Cir. Ct. No. 2008CF942**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

IAN M. GULBRONSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID L. BOROWSKI, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Ian M. Gulbronson appeals from a judgment of conviction, entered upon a jury's verdict, on one count of aggravated battery. Gulbronson also appeals from an order denying his postconviction motion for a new trial. Gulbronson argues that he was denied the effective assistance of

counsel because his trial attorney failed to object to two errors in the jury instructions. Specifically, he complains counsel should have objected to the court's modification of the self-defense instruction, WIS JI—CRIMINAL 805, and to the inclusion of the provocation instruction, WIS JI—CRIMINAL 815. Gulbronson also argues the real controversy was not fully tried as a result of counsel's errors. We conclude that the record actually does not support instructing the jury on self-defense. Any errors in the instructions were, therefore, harmless. Further, even if counsel should have objected at the time, Gulbronson has suffered no prejudice. We therefore affirm the trial court on different grounds. *See* ***Liberty Trucking Co. v. DILHR***, 57 Wis. 2d 331, 342, 204 N.W.2d 457 (1973).

BACKGROUND

¶2 Gulbronson did not testify at trial. However, based on his statement to police and the testimony of his victim, the following is the relevant factual background. On February 24, 2008, Gulbronson was at a bar with girlfriend Brooke Scholler. He was intoxicated; she had allegedly used cocaine earlier in the evening. They became annoyed with each other and agreed to leave the bar. Scholler dropped Gulbronson at a gas station to buy cigarettes. She continued to drive home and Gulbronson walked home.

¶3 According to Gulbronson's statement, the exterior door was locked when he arrived home. He called Scholler and then walked around the block until the door was opened. He went in, went upstairs to the kitchen, and argued with Scholler. The next thing he remembers is Scholler grabbing a knife and stabbing him.

¶4 According to Scholler's trial testimony, after she dropped Gulbronson at the gas station, she went home and went to bed. When Gulbronson

returned, he attempted to argue with her, but she refused to engage him. He grabbed her by the arm, pulling her from the bed onto the floor. She managed to get up and run to the kitchen. He followed her. She grabbed a steak knife. He pulled her hair. She turned around and stabbed him.

¶5 The accounts then generally reconverge. When both parties recognized Gulbronson—who had been stabbed on the left side of his chest, near his heart—was bleeding, Scholler agreed to take him to the hospital. They went downstairs; Gulbronson exited first. Scholler, still inside, attempted to close the door behind him. He kicked the door open and then began to beat Scholler. She suffered multiple injuries, including a fractured nose, a laceration requiring stitches, and a possible concussion. Gulbronson later told police officer Wayne Treep that, because of Scholler's refusal to take him to the hospital, he feared for his life.

¶6 Ultimately, a neighbor called 911, and paramedics transported Gulbronson for medical attention. He was subsequently charged with one count of second-degree recklessly endangering safety, a Class G felony, which was later amended to aggravated battery, a Class E felony.

¶7 When it came time to decide on jury instructions, Gulbronson requested the self-defense instruction, which the State opposed. After much discussion, defense counsel conceded that "the [theory of] self-defense is him deciding to beat her as a way to convince her to take him to the hospital." The court ultimately determined:

> I'll be honest, it's a close call. I'm going to give 805 but here's the ruling. First of all, I'm modifying the first sentence from "self-defense is an issue in this case." I'm modifying it to read "self-defense may be an issue in this case." The rest of the self-defense instruction I'm

> going to read pretty much verbatim. (Quotation marks added.)

¶8 The court also concluded, based on Gulbronson's behavior, that it would be appropriate to give WIS JI—CRIMINAL 815 on provocation. Provocation may prevent someone from claiming the privilege of self-defense. *See* WIS. STAT. § 939.48(2)(a) (2007-08).[1] The court explained that the instruction "clearly applies under the circumstances in light of the testimony that was elicited, in light of the evidence, and to be fair in terms of everything that's presented as an instruction." The jury convicted Gulbronson on the aggravated battery charge. The court sentenced him to eighteen months' initial confinement and thirty months' extended supervision.

¶9 Gulbronson filed a postconviction motion. Among other things, he alleged that his trial counsel was ineffective for failing to object to the jury instructions. He asserted counsel should have objected to the court's modification of WIS JI—CRIMINAL 805, from "self-defense *is*" to "self-defense *may be* an issue," because "this modification … renders the self-defense instruction meaningless in that the jury need not consider evidence of self-defense at all." Gulbronson further claimed the evidence did not support giving the provocation instruction, as "his actions before the knife attack … did not by any means deprive him of his right to exercise self-defense."

¶10 The court adopted the State's analysis on both points. The State had asserted the self-defense instruction was properly crafted based on the facts of the case and, based on the totality of the record, including other jury instructions, the

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

jury was properly directed. As to the provocation instruction, the State argued that prior case law had held that conduct as simple as fighting words could justify giving the instruction. Here, the State asserted, Gulbronson pulled Scholler from bed, then followed her to the kitchen and pulled her hair, provoking subsequent events. Because the court agreed the jury was properly instructed, it concluded that trial counsel had not been ineffective for his lack of objection. Gulbronson appeals.

DISCUSSION

¶11 Failure to object at a jury instruction conference "constitutes a waiver of any error in the proposed instructions." WIS. STAT. § 805.13(3). Gulbronson's postconviction motion therefore alleged, and the current appeal focuses on, ineffective assistance of trial counsel for failure to make appropriate objections.

¶12 In order to prove that he has not received effective assistance of counsel, Gulbronson must show two things: that his attorney's performance was deficient and that this deficiency prejudiced his defense. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441. Gulbronson must show both components to make a successful ineffective-assistance claim. *See* ***id.*** Questions of whether counsel was deficient and whether the deficiency was prejudicial are questions of law, for which we need not defer to the trial court. ***Id.***

¶13 "A [trial] court has broad discretion when instructing a jury." ***Nommensen v. Am. Cont'l Ins. Co.***, 2001 WI 112, ¶50, 246 Wis. 2d 132, 629 N.W.2d 301. Standard instructions are recommended, but modification may sometimes be necessary to fully and fairly state the law. ***State v. Foster***, 191 Wis. 2d 14, 26-27, 528 N.W.2d 22 (Ct. App. 1995). However, a court should not

give an instruction at all "where the evidence does not reasonably require it." ***State v. Amundson***, 69 Wis. 2d 554, 564, 230 N.W.2d 775 (1975).

¶14 Although ultimately the burdens of proof and persuasion fall to the State, Gulbronson had a burden of *production* regarding his affirmative defenses. *See* ***State v. Pettit***, 171 Wis. 2d 627, 640, 492 Wis. 2d 633 (Ct. App. 1992). "[I]t is necessary for a defendant to come forward with some evidence of the … defense to warrant the jury's consideration of the issue." ***Id.***; *see also* ***State v. Nollie***, 2002 WI 4, ¶19, 249 Wis. 2d 538, 638 N.W.2d 280.

¶15 To be entitled to the self-defense instruction, Gulbronson had to show that: (1) he believed that there was an actual or imminent unlawful interference with his person; (2) he believed that the amount of force the defendant used or threatened to use was necessary to prevent or terminate the interference; and (3) his beliefs were reasonable. *See* WIS JI—CRIMINAL 805; *see also* WIS. STAT. § 939.48(1) and ***Nollie***, 249 Wis. 2d 538, ¶19. We view the facts in the light most favorable to the defendant. ***Id.***, ¶20.

¶16 We conclude Gulbronson failed to show he was entitled to invoke self-defense. The aggravated battery was charged based on events occurring after Scholler started to lock him out of the house instead of taking him to the hospital. We conclude self-defense was unavailable because under no circumstances could Gulbronson reasonably believe he was using "only such force … necessary" to prevent interference with his person.

¶17 Gulbronson's theory of "self-defense is him deciding to beat her as a way to convince her to take him to the hospital." He also claimed that he feared for his life when Scholler refused to take him to the hospital. Fatal to Gulbronson's self-defense claim, however, is Officer Treep's testimony that:

> He stated that, quote, that bitch tried to kill me. I'm going to kill her. He ended up pushing the door in, grabbing her, and he said he beat her fucking ass for at least 5 minutes and she had it coming.

¶18 Gulbronson's reaction reveals a disproportionate amount of force necessary to get Scholler to take him to the hospital. Further, continually beating or killing the person on whom one's survival ostensibly depends is completely unreasonable. In light of the patently unreasonable mindset, the jury should not have been instructed on self-defense at all.

¶19 If the self-defense instruction should not have been given, neither then should the provocation instruction have been given. Provocation, if shown, effectively deprives a defendant of the ability to claim the self-defense privilege. *See* WIS. STAT. § 939.48(2)(a). That is, a jury would not be instructed on provocation absent the self-defense instruction.

¶20 "A new trial is not warranted in cases where the trial court erroneously gave an instruction unless the error is determined to be prejudicial." ***Helmbrecht v. St. Paul Ins. Co.***, 122 Wis. 2d 94, 123, 362 N.W.2d 118 (1985). Here, we conclude there was no prejudice.

¶21 The jury reached its guilty verdict by one of three possible paths after first concluding that Gulbronson had battered Scholler. The first possibility is that the jury never considered the self-defense instruction, as Gulbronson feared. The second possibility is that the jury considered, but rejected, self-defense and thus never considered provocation. The third possibility is that the jury concluded self-defense applied, but also considered Gulbronson to be the provocateur, thus negating the self-defense privilege. However, the net result is the same under all three situations: the same result would have occurred had the jury never received

the self-defense and provocation instructions. For that reason, no reversible error exists, and any error in giving the self-defense—modified or not—and provocation instructions was harmless. *See* ***Nommensen***, 246 Wis. 2d 132, ¶52. As the errors are harmless, Gulbronson suffered no prejudice; absent prejudice, counsel was not ineffective. *See* ***Wheat***, 256 Wis. 2d 270, ¶14.[2]

¶22 We also disagree with Gulbronson's assertion that the real controversy was not fully tried. With or without the erroneous instructions on self-defense and provocation, the jury first had to determine whether Gulbronson was guilty of battery. The jury concluded he was, thereby resolving the real controversy.

By the Court.—Judgment and order affirmed.

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

[2] We express no opinion as to whether counsel performed deficiently.