

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**JULY 22, 1998**

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. 98-0821-FT**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**IN THE INTEREST OF DONNIS J.,  
A PERSON UNDER THE AGE OF 18:**

**STATE OF WISCONSIN,**

**PETITIONER-RESPONDENT,**

**V.**

**DONNIS J.,**

**RESPONDENT-APPELLANT.**

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APPEAL from an order of the circuit court for Racine County:  
DENNIS J. FLYNN, Judge. *Affirmed.*

ANDERSON, J. Donnis J. appeals from a dispositional order adjudging him delinquent after the trial court found him guilty of disorderly conduct contrary to § 947.01, STATS. The adjudication stems from a fight Donnis had with another boy, Julius J., while at school. Donnis argues that the trial court erred when it found that Donnis did not meet his burden when he asserted the self-

defense privilege. We conclude that Donnis' taunting and exchange of words with Julius was provocative conduct. Thus, Donnis was required to make a reasonable effort to retreat in order to assert the privilege of self-defense. Because Donnis made no effort to retreat, we affirm the trial court's order.

The facts are largely undisputed. On May 12, 1997, the State filed a delinquency petition charging Donnis with disorderly conduct. The charges stemmed from an April 15, 1997 fight between Donnis and another student, Julius, that occurred on school property before school began. The fight drew a large crowd. It was broken up by an assistant principal, Brian Colbert, and the police were called.

At the August 14, 1997 trial to the court, it was learned that the day before the fight there was verbal altercation between the two boys. Donnis testified that a girl pushed him into Julius in the hallway at school and that he said he was sorry. Initially, Julius was fine, but then Julius began yelling profanities at Donnis, stated that he wanted to fight him and he threatened Donnis with a chair. Donnis told him he did not want to fight and walked away. An assistant principal, Donna Sens, who was in the hallway, asked Donnis if he needed assistance but Donnis declined any help.

Donnis testified that Julius had a reputation at school for being a bully "[b]ecause he's always picking on people and taking people's stuff." Julius also belonged to the Gangster Disciples gang. Sens indicated that Julius is much larger than Donnis.

Donnis further stated that when he arrived at school on April 15, Julius approached him and told him "don't go over there where the G.D.'s are ... go over there where the Vice Lords are." Donnis responded that he could go

anywhere he wanted to. At that point the two started arguing. Julius asked, “[Y]ou never saw me fight before[?]” Donnis replied, “I saw you got beat up twice.” The crowd started laughing and Julius hit Donnis in the eye. The fight ensued. While in the assistant principal’s office, Donnis stated that the fight was mutual.

At trial, Donnis argued the privilege of self-defense. He maintained that based on the verbal altercation the previous day and “what he knew of [Julius,] bully and gang member, he had no reason to expect the first shot would be the last of it, so he did what he had every right to do, he defended himself.” Because Donnis had alternatives to the use of force, such as seeking help from the principal or leaving the area, the trial court concluded that Donnis had not proven an entitlement to the privilege of self-defense. The court then found Donnis guilty of disorderly conduct and adjudged him delinquent. Donnis filed a motion for reconsideration on the issues of self-defense and the duty of retreat which the court denied.

On September 5, 1997, a dispositional hearing was held and Donnis was placed on supervision in foster care for a period of six months. The dispositional order was later extended for nine months and Donnis was placed with his maternal grandmother. Donnis appeals the dispositional order entered on September 5.

On appeal, Donnis reasserts the privilege of self-defense. This issue involves the application of law to the facts of the case. It therefore presents a question of law that we review de novo. See *Ball v. District No. 4, Area Bd.*, 117 Wis.2d 529, 537, 345 N.W.2d 389, 394 (1984).

Self-defense may be invoked if a defendant believes use of force is necessary to protect himself or herself. *See Ross v. State*, 61 Wis.2d 160, 166-67, 211 N.W.2d 827, 830 (1973).<sup>1</sup> The privilege, however, is not absolute. Provocation can have an effect on the privilege of self-defense. *See State v. Herriges*, 155 Wis.2d 297, 305, 455 N.W.2d 635, 639 (Ct. App. 1990).

Donnis denied provoking the attack. The evidence suggests otherwise. While it is uncontested that Julius approached Donnis barking out orders about where Donnis could and could not walk, it is also uncontested that instead of walking away, as he did the day before, Donnis stood his ground and the two boys started arguing. The culmination was Julius' question, "[Y]ou never saw me fight before," and Donnis' response, "I saw you got beat up twice." These were fighting words said only to taunt Julius. Donnis' comment certainly evoked a response from the crowd—they all started laughing at Julius. Fighting words are those words which tend to cause or provoke a disturbance. *See State v. Bougneit*, 97 Wis.2d 687, 696, 294 N.W.2d 675, 680 (Ct. App. 1980) (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573-74 (1942)). It was after this comment that Julius struck him.

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<sup>1</sup> For the privilege of self-defense to apply, a defendant must show all three of the following elements:

- (1) the defendant reasonably believed that he [or she] was preventing or terminating an unlawful interference with his or her person;
- (2) the defendant reasonably believed that force or threat thereof was necessary to prevent or terminate the interference; and
- (3) the defendant reasonably believed that the actual amount of force used was necessary to prevent or terminate the interference.

*State v. Camacho*, 176 Wis.2d 860, 869, 501 N.W.2d 380, 383 (1993); *see also* § 939.48(1), STATS.

We conclude that Donnis' conduct was of the kind which would provoke another to attack him. He invited Julius to fight by taunting him with fighting words. *Cf. Bougneit*, 97 Wis.2d at 696, 294 N.W.2d at 680 (disparaging and annoying words constitute fighting words). The test as to whether words tend to cause or provoke a disturbance and thus become fighting words is whether persons of common intelligence would understand that the words would probably cause an average addressee to fight. *See id.* The test has been met here. Donnis' comment was intended to provoke a response, if not a disturbance.

If there has been provocation by one assaulted, the successful assertion of a self-defense privilege requires a reasonable belief that one cannot retreat before force may be used. *See Herriges*, 155 Wis.2d at 305, 455 N.W.2d at 639. Contrary to Donnis' contention, the abrogation of the common-law duty to retreat has not been extended to cases of provocation. *See id.* at 304, 455 N.W.2d at 638.

The trial court found that Donnis had alternatives. “[He] had a duty and an ability to retreat under the facts of this case and avoid a fight to the extent it was possible. He instead chose to do otherwise ....” The court concluded that Donnis' belief that his only alternative was to use force was unreasonable. We agree. Donnis had numerous opportunities to retreat. He could have continued on his way when Julius first approached him, he could have walked away instead of arguing with Julius and he could have maintained his position not to fight Julius instead of taunting him. Even after Julius struck him, he could have walked away, but he chose not to. Because Donnis failed to make an effort to retreat, we conclude that he is not entitled to the privilege of self-defense.

Our holding might have been different had Donnis attempted to walk away. If Donnis had maintained his no-fighting stance and Julius had struck him anyway, Donnis may have had the right to protect himself. However, by taunting Julius and standing his ground instead of walking away, Donnis does not have a valid claim of self-defense.

*By the Court.*—Order affirmed.

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

