**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**February 1, 2018**

**Diane M. Fremgen**
**Acting Clerk of Court of Appeals**



**Appeal No. 2016AP1878-CR** **Cir. Ct. No. 2015CF250**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**DILLON M. HEILLER,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for La Crosse County: RAMONA A. GONZALEZ, Judge. *Reversed and cause remanded.*

Before Lundsten, P.J., Sherman and Kloppenburg, JJ.

¶1 PER CURIAM. Dillon Heiller appeals a judgment of conviction for strangulation and suffocation, battery, and misdemeanor bail jumping, all as a repeater, and an order of the circuit court denying his motion for postconviction relief. Heiller contends that he is entitled to a new trial because the circuit court failed to instruct the jury on self-defense, his right to a speedy trial under WIS. STAT. § 971.10(2)(a) (2013-14)[1] was violated, he was denied his right to counsel, and he was not afforded sufficient notice of the State's motion to deny him of his right to confrontation. For the reasons discussed below, we conclude that the jury should have been instructed on self-defense and, therefore, reverse.

## BACKGROUND

¶2 Heiller was charged with strangulation and suffocation, substantial battery, misdemeanor intimidation of a victim, and misdemeanor bail jumping following an altercation with his girlfriend, B.O. On May 20, 2015, Heiller made a demand for a speedy trial.

¶3 On August 18, 2015, the State moved the court to find that Heiller had forfeited his right to confront B.O.[2] The State also moved the circuit court to restrict Heiller's telephone, visitation, and mail privileges. Underlying both motions were claims by the State that Heiller attempted to intimidate B.O. into seeking to have the charges against Heiller dropped and to prevent her from

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] The doctrine underlying the State's motion is the forfeiture by wrongdoing doctrine, which "states that an accused can have no complaint on the right to confrontation about the use against him or her of a declarant's statement if it was the accused's wrongful conduct that prevented any cross-examination of the declarant." ***State v. Jensen***, 2007 WI 26, ¶35, 299 Wis. 2d 267, 727 N.W.2d 518.

testifying at Heiller's trial. The circuit court granted both motions following a hearing that was held on the same day the motions were made. With regard to the State's motion to restrict Heiller's telephone, visitation, and mail privileges, the court ordered "that all of [Heiller's] custody telephone, visitation, and U.S. Mail privileges, including by a third-party, such as a fellow inmate, while [Heiller] remains in custody during this prosecution, **SHALL BE COMPLETELY RESCINDED**, with the exception of any communications to his attorney."

¶4 Heiller's trial was held on August 27, 2015. At trial, Timothy Devine, a deputy with the La Crosse County Sheriff's Department, testified that he was dispatched to B.O.'s residence on March 26, 2015, in response to a complaint of a possible domestic violence incident. Deputy Devine testified that B.O. did not let him inside her home and that they spoke on B.O.'s porch and that B.O. told him that she had been "kneed in the face, … her eyes had been gouged at, and [] she had been choked." Deputy Devine testified that B.O. initially refused to identify her attacker because she was afraid of him and said she was fearful that he would "come back and get her" if she identified him. Deputy Devine testified that he ultimately learned Heiller's identity from Mitchell Munkwitz, who lived across the street from B.O. Munkwitz testified that he observed Heiller exit B.O.'s residence and leave the area in a vehicle after Munkwitz saw B.O. open her door and tell Munkwitz that she was "afraid he's gonna kill me."

¶5 Heiller testified that on the morning of March 26, 2015, he received a text message from the mother of his children asking if Heiller would like to see his children that day. Heiller testified that B.O. became upset over Heiller having contact with the mother of Heiller's children and began "wielding [a] knife at [Heiller]." Heiller testified that he then grabbed B.O. by the neck, "slammed her" to the ground and grabbed the knife from B.O. Heiller testified that while

grabbing the knife from B.O., B.O. cut Heiller's hand with the knife. Heiller testified that after he took the knife from B.O., Heiller threw it into the ceiling, B.O. ran to the doorway, and Heiller left the residence.

¶6 Heiller requested that the jury be instructed on self-defense. The circuit court declined to provide the jury with that instruction, stating: "There has to be some level of proof that would shift the burden to the State to prove beyond a reasonable doubt that [Heiller] did not act in self-defense. We do not have that requisite amount of evidence in this case."

¶7 The jury found Heiller guilty of strangulation and suffocation, battery, and bail jumping, and not guilty of intimidation of a victim. Heiller moved the circuit court for postconviction relief, raising the same issues that he now raises on appeal. Following an evidentiary hearing, the circuit court denied Heiller's motion. Heiller appeals.

## DISCUSSION

¶8 Heiller contends that he should be granted a new trial because the court erred in refusing to instruct the jury on self-defense, his right to a speedy trial under WIS. STAT. § 971.10(2)(a) was violated, he was denied his right to counsel, and he was not afforded sufficient notice of the State's motion to deny him his right to confrontation.

¶9 We turn first to Heiller's contention that he is entitled to a new trial because the circuit court erred in failing to instruct the jury on self-defense. WISCONSIN STAT. § 939.48 sets forth under what circumstances self-defense may be asserted. Section 939.48(1), provides in relevant part:

> (1) 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. (Emphasis added).

¶10 A circuit court generally has wide discretion in instructing the jury. *See* ***State v. Foster***, 191 Wis. 2d 14, 26, 528 N.W.2d 22 (Ct. App. 1995). However, "[w]hether there are sufficient facts to warrant the circuit court's instructing the jury on self-defense is a question of law that this court decides independently of the circuit court." ***State v. Stietz***, 2017 WI 58, ¶14, 375 Wis. 2d 572, 895 N.W.2d 796.

¶11 "A jury must be instructed on self-defense when a reasonable jury could find that a prudent person in the position of the defendant under the circumstances existing at the time of the incident could believe that [the defendant] was exercising the privilege of self-defense." ***Id.***, ¶15. The threshold that a defendant must surmount to be entitled to a jury instruction on the privilege of self-defense is "low." ***Id.***, ¶16. "The accused need produce only 'some evidence' in support of the privilege of self-defense." ***Id.*** (quoting ***State v. Head***, 2002 WI 99, ¶112, 255 Wis. 2d 194, 648 N.W.2d 413). Evidence that is "'weak, insufficient, inconsistent, or of doubtful credibility' or 'slight,'" is sufficient to satisfy the defendant's burden. ***Id.***, ¶17 (quoted source omitted). If the defendant produces "some evidence" that the defendant reasonably believed that another person was unlawfully interfering with the defendant's person and that the defendant reasonably believed that the amount of force he or she used was

necessary to prevent or terminate the interference, it is the duty of the jury, not the circuit court, to determine whether to believe the defendant's version of events. ***Id.***, ¶19.

¶12 The State argues that a self-defense instruction was not appropriate because Heiller's belief that force was necessary to prevent or terminate B.O.'s alleged interference with Heiller's person was not reasonable. We are not persuaded, and conclude that viewing the record favorably to Heiller, as we are required to do, *see* ***id.***, ¶22, evidence at trial provided an adequate basis for supporting Heiller's explanation that he was exercising his right to defend himself.

¶13 The following is the evidence from Heiller's perspective, based on his testimony.[3] On March 26, 2015, B.O. was upset that Heiller had received text messages from the mother of Heiller's children, a woman with whom Heiller had previously been in a long-term relationship. Heiller made plans to visit his children at the children's mother's home without B.O., and B.O. became upset and accused Heiller of planning on having a sexual encounter with the mother of Heiller's children. Heiller went to use the bathroom and when he came out, his phone was missing from the bedroom. B.O., who was not in the bedroom when Heiller came out of the bathroom, came to stand in the doorway and had her hands behind her back. B.O. again accused Heiller of planning on having sexual intercourse with the mother of Heiller's children and demanded that Heiller take her with him. B.O. became "frenz[ied]" and began "wielding [a] knife" at Heiller.

[3] As the court stated in ***Stietz***, "[w]e do not present the defendant's one-sided picture of the events as representing the entire story…. The jury was not obliged to believe the defendant, but they could have believed him." ***State v. Stietz***, 2017 WI 58, ¶23, 375 Wis. 2d. 572, 895 N.W.2d 796.

B.O. did not put the knife down after Heiller asked her to do so, and Heiller grabbed B.O. by the throat, "slammed her [to the ground]," "put [his] knee on her head" and "grabbed the knife" from B.O. While Heiller was attempting to take the knife from B.O., Heiller's hand was cut. Heiller testified that the cut caused him to bleed substantially and left two scars on his hand.

¶14 Deputy Devine testified that B.O. declined to let him inside her home and initially refused to identify her attacker because she was afraid of him and said she was fearful that he would "come back and get her" if she identified him.

¶15 The question before this court is not whether we find Heiller's narrative credible, or whether there is a competing factual narrative that refutes his defense, but whether the jury *could* have believed him. *See* ***Stietz***, 375 Wis. 2d 572, ¶23. Whether Heiller's testimony, or any other witness's testimony, is credible is a question to be resolved by the jury, not the circuit court or this court. ***Id.***, ¶58. Our job is only to determine whether there is "some evidence" supporting Heiller's self-defense theory. *See* ***id.***, ¶59.

¶16 The State does not direct this court to any evidence that B.O. did not "wield[]" a knife at Heiller in a manner that would reasonably cause him to believe that B.O. was going to unlawfully interfere with Heiller's person, and our own non-exhaustive review of the record did not reveal any. Accordingly we conclude that, viewing the evidence in the light most favorable to Heiller's theory of defense, *see* ***Head***, 255 Wis. 2d 194, ¶113, a reasonable jury could find that a person in Heiller's position at the time of the incident could believe that he or she was exercising the privilege of self-defense. *See* ***Stietz***, 375 Wis. 2d 572, ¶15.

Accordingly, we conclude that the circuit court erred in refusing to instruct the jury on self-defense.[4]

## CONCLUSION

¶17 For the reasons discussed above, we reverse.

*By the Court*.—Judgment and order reversed and cause remanded.

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

[4] Because our decision on this issue is dispositive, we do not address Heiller's remaining arguments. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (if a decision on one point disposes of the appeal, the court will not decide other issues raised). We note that Heiller's speedy trial argument is not a constitution based speedy trial argument, which might lead to dismissal of charges with prejudice. Rather, Heiller alleges a violation of his statutory right to speedy trial which, post trial, is moot because the only authorized remedy for such a violation is pretrial release from confinement. *See* WIS. STAT. § 971.10(4).