

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 13, 2018

Diane M. Fremgen
Acting Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2017AP1057

Cir. Ct. No. 2016JV130

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN THE INTEREST OF J.D.V.:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

J. D. V.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Brown County:
WILLIAM M. ATKINSON, Judge. *Affirmed.*

¶1 SEIDL, J.¹ Joseph² appeals an order adjudicating him delinquent on one count of battery. He argues the evidence was insufficient to support that adjudication because his act of striking a fellow student was privileged as self-defense. We disagree with Joseph and affirm.

BACKGROUND

¶2 A delinquency petition charged thirteen-year-old Joseph with battery and disorderly conduct based upon allegations that Joseph punched Thomas in the head outside of school. Another student, Charles, witnessed the incident and captured it on video with his electronic device. All three juveniles and a law enforcement officer who interviewed Joseph testified at the dispositional hearing, and Charles's video was reviewed and entered into evidence.

¶3 Thomas testified that he stepped on Joseph's fingers during a middle school choir rehearsal. Thomas claimed to have done so accidentally, but Joseph accused him of doing it on purpose. After the rehearsal ended, the students went outside the school to board busses. Joseph confronted Thomas, asking if he wanted to fight. Thomas thought Joseph was joking and said, "No. I'm not that dumb." However, when Joseph approached him, Thomas clenched his fists, raised them to his face, and then "playfully" jabbed at Joseph "around his waist." Joseph then walked toward Thomas and swung his left arm across his body, missing Thomas by about a foot and a half. At that point, Thomas realized Joseph was

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

² We refer to Respondent-Appellant J.D.V. and the other juveniles in this case using pseudonyms rather than initials. *See* WIS. STAT. RULES 809.19(2)(a), 809.86(4).

serious about having a fight with him. Thomas lowered his hands and started to walk away from Joseph. As Thomas walked away, Joseph came toward Thomas and threw another punch that connected with the left side of Thomas's head. The punch caused Thomas pain and gave him a headache. The confrontation ended with Thomas and Joseph boarding separate busses. Thomas reported the incident the next day to a teacher after viewing Charles's video.

¶4 Joseph's version of the incident differed. In addition to stepping on his fingers during the rehearsal, Joseph claimed Thomas kicked him in the back of his legs and made "mean comments" to him. When Joseph asked him to stop, Thomas challenged Joseph to "fight me." After they were outside, Joseph noticed Thomas had stopped to block Joseph's path to his bus. To Joseph's surprise, Thomas then put his hands up and threw a punch at Joseph's stomach, which Joseph blocked. Joseph, fearing physical harm from the taller Thomas, "immediately ... reacted in the act of self-defense." Joseph missed one punch aimed at Thomas, but because he believed Thomas was about to retaliate, he threw another that hit Thomas. Joseph denied asking Charles to record a video of the incident or knowing Charles was recording the incident until after the fact. However, Joseph also accused Charles of instigating the incident by volunteering to record any fight.

¶5 In his testimony, Charles described Thomas as "joking around" with Joseph during choir practice, including when Thomas kicked Joseph in the back of his knees. Joseph told Thomas to stop and later told Charles that he wanted to fight Thomas. Charles agreed to record a fight when Joseph asked him to do so. When outside, Joseph sought out and confronted Thomas. Charles thought Thomas appeared "startled" after seeing Joseph. Charles began the recording on his electronic device once Joseph looked over at Charles. Charles thought

Thomas's first jab at Joseph, as captured on the video, was "kind of like [Charles was] trying to push [Joseph] away more out of defense." After Joseph's first swing, Charles observed Thomas back away toward his bus. Charles stopped recording a few seconds after Joseph hit Thomas. At Joseph's request, Charles showed the video to Joseph on the bus. Charles believed Joseph was the aggressor in the incident.

¶6 According to the law enforcement officer, Joseph said during an interview that he asked Charles to record the fight to prove self-defense. The officer also noted that when Joseph was asked to describe Thomas's first punch, Joseph used "a mocking sort of a tone" and acted out an "effeminate type of a punch."

¶7 The circuit court found Joseph committed battery and rejected his argument that he acted in self-defense. Primarily relying upon Charles's recording, as well as finding Charles credible and Joseph incredible, the court found that Joseph was the aggressor during the incident and that Thomas was retreating when Joseph threw the second punch. The court entered an order adjudicating Joseph delinquent on the battery charge but dismissed the disorderly conduct charge. Joseph was placed under one year of in-home supervision, subject to conditions. He now appeals.

DISCUSSION

¶8 Joseph argues the evidence was insufficient for the circuit court to find him guilty of battery beyond a reasonable doubt because the State did not meet its burden to prove he was not acting in self-defense. When reviewing the sufficiency of the evidence, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the

conviction, is so lacking in probative value and force that no reasonable trier of fact could have found guilt beyond a reasonable doubt. *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). If more than one inference can reasonably be drawn from the evidence, we must accept the inference actually drawn by the trier of fact. *State v. Routon*, 2007 WI App 178, ¶17, 304 Wis. 2d 480, 736 N.W.2d 530. This standard is the same regardless of whether the jury or the court is the trier of fact. *Id.* Whether the evidence, viewed most favorably to the verdict, satisfies the legal elements of the crime is a question of law that we review de novo. *Id.*

¶9 Joseph does not dispute that the evidence satisfied all the elements of battery. See WIS. STAT. § 940.19(1); WIS JI—CRIMINAL 1220 (2015). Rather, he argues the State failed to disprove he acted in self-defense once he argued the issue to the circuit court. See WIS. STAT. § 939.48(1). Self-defense is considered an affirmative defense, *State v. Head*, 2002 WI 99, ¶66, 255 Wis. 2d 194, 648 N.W.2d 413, and a defendant who successfully raises an affirmative defense may be found not guilty even if the State proves he or she committed the underlying crime, see *State v. Watkins*, 2002 WI 101, ¶¶39-40, 255 Wis. 2d 265, 647 N.W.2d 244. Therefore, we must evaluate whether the evidence was sufficient for the circuit court to find that Joseph did not act in self-defense when striking Thomas. The State had the burden to prove beyond a reasonable doubt that: (1) Joseph did not have a reasonable belief in the existence of an unlawful interference by Thomas; and (2) Joseph did not have a reasonable belief that the amount of force he intentionally used against Thomas was necessary to prevent or terminate the interference. See § 939.48(1); see also *Head*, 255 Wis. 2d 194, ¶¶84, 106-07.

¶10 Joseph argues the video recording refutes the circuit court’s finding that he was the “aggressor” in the incident. According to Joseph, the video shows

Thomas “remain[ed] standing and facing [Joseph,] who had reason to fear physical attack if [he] did not neutralize [Thomas].”

¶11 When evidence consists of both disputed testimony and a video recording, we review the circuit court’s findings of fact under a clearly erroneous standard. *See State v. Walli*, 2011 WI App 86, ¶17, 334 Wis. 2d 402, 799 N.W.2d 898. Upon review of the video, we are satisfied that it supports the circuit court’s findings of fact. The video shows Thomas turned toward Joseph when Thomas raised his fists, but it also shows Thomas attempting to walk away from Joseph through a group of students before Joseph followed him and delivered the second swing that connected with Thomas’s head. From this evidence, along with Charles’s testimony that Joseph staged the incident, the court could reasonably conclude Joseph was not acting in his own defense when he pursued and struck Thomas as Thomas walked away, but instead, was acting as the aggressor. The court could also conclude Joseph did not have a reasonable belief that the amount of force he intentionally used against Thomas was necessary to prevent or terminate any interference by Thomas. The court was entitled to decide which testimony was credible and to resolve any conflicts within the evidence. *See Poellinger*, 153 Wis. 2d at 503.

¶12 Moreover, Thomas’s first swing—the alleged unlawful interference at issue—appears on the video to be a non-threatening gesture, consistent with Thomas’s and Charles’s testimony. The circuit court was permitted to infer that Joseph did not have a reasonable belief in the existence of an unlawful interference by Thomas based upon that gesture, and that Joseph unreasonably responded to Thomas’s minor jab when Joseph threw the second punch that struck Thomas as Thomas walked away. *See WIS. STAT. § 939.48(1)*.

¶13 Joseph also contends that Thomas's conduct during the choir rehearsal provided Joseph with a reasonable belief that Thomas would respond violently after Joseph's missed swing. The circuit court was not required to draw that inference. *See Poellinger*, 153 Wis. 2d at 507. The court instead reasonably inferred that, while Thomas may have behaved in an irritating manner during choir rehearsal, that behavior did not permit Joseph to engage in a violent reprisal that was quite attenuated from the irritating behavior. The court reasonably found that Joseph did not have a reasonable belief in the existence of an unlawful interference by Thomas, and that Joseph did not have a reasonable belief that the amount of force he intentionally used against Thomas was necessary to prevent or terminate the interference. These findings were not clearly erroneous. We therefore conclude the evidence was sufficient to support the battery adjudication beyond a reasonable doubt.

By the Court.—Order affirmed.

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

