

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 10, 2001

Cornelia G. Clark
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 WIS. STAT. § 808.10 and RULE 809.62.

No. 00-2439-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RONALD F. ZITTLow,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County:
WILLIAM GRIESBACH, Judge. *Affirmed.*

¶1 PETERSON J.¹ Ronald Zittlow appeals his judgment of conviction for battery, contrary to WIS. STAT. § 940.19(1), and disorderly conduct, contrary

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

to WIS. STAT. § 947.01. He argues that the modified self-defense jury instruction misstated the law. We disagree and affirm the conviction.

BACKGROUND

¶2 Zittlow, a seventeen-year old, was involved in an altercation at his mother's home. His mother, Lois, told him that he could not leave the house. Zittlow insisted on leaving. Because of her poor health, Lois asked Zittlow's sister and brother, Michelle and Norbert, to help stop Zittlow from leaving.

¶3 Michelle ran to the front door and blocked it. Zittlow tried to get around her by pushing her aside. He yelled at her to get out of the way. Michelle refused. Zittlow then went to the back door, but Michelle and Norbert blocked that door also. Michelle then grabbed Zittlow's duffel bag. They struggled. Zittlow punched Michelle in the face. Michelle threw the duffel bag into the bathroom and the two struggled and wrestled their way to the bathroom.

¶4 While wrestling, Zittlow hit Michelle with his fist on the back of her neck and head ten to fifteen times. While hitting her, Michelle yelled that she would not let him leave. The police arrived and the fight stopped.

¶5 Zittlow was charged with battery and disorderly conduct. The case proceeded to a jury trial. Zittlow requested a self-defense instruction. The trial court granted the request, but modified the instruction to state that a parent may lawfully authorize another person to use reasonable force to control a child. *See* WIS JI—CRIMINAL 950. Zittlow objected to the modification.

¶6 The jury subsequently found Zittlow guilty of battery and disorderly conduct. This appeal followed.

STANDARD OF REVIEW

¶7 A trial court has wide discretion in framing jury instructions. *State v. McCoy*, 143 Wis. 2d 274, 289, 421 N.W.2d 107 (1988). We will uphold a trial court's discretionary decision if it examined the relevant facts of record, applied the correct legal standard and reached a conclusion that a reasonable judge could reach. *State v. Edmunds*, 229 Wis. 2d 67, 74, 598 N.W.2d 290 (Ct. App. 1999). When an instruction does not correctly state the law, there is an erroneous exercise of discretion. See *State v. Jones*, 228 Wis. 2d 593, 597, 598 N.W.2d 259 (Ct. App. 1999).

DISCUSSION

I. PARENTAL PRIVILEGE

¶8 At Zittlow's request, the trial court instructed the jury on self-defense.² However, the trial court modified the instruction to include the following language:

² The following instruction was given to jury regarding self-defense:

Self-defense is an issue in this case. The law of self-defense allows a person to threaten or intentionally use force against another under certain circumstances. The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant was not acting lawfully in self-defense. The law allows the defendant to act in self-defense only if the defendant believed that there was an actual or imminent unlawful interference with the defendant's person and believed that the amount of force he used or threatened to use was necessary to prevent or terminate the interference.

In addition, the defendant's beliefs must have been reasonable. A belief may be reasonable even though mistaken. In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the

(continued)

I have instructed you that a person is privileged to threaten or intentionally use force against another for the purpose of preventing or terminating what he or she reasonably believes to be an unlawful interference with his or her person by such other person. A parent, *or a person who is acting at the request of and with the authorization of a parent*, has a privilege to use reasonable force to control that child. Reasonable force is that force which a reasonable person would believe is necessary

....

If Michelle Arndt was acting at the request of Ronald Zittlow's mother and if further the force used by her was reasonable under the circumstances, then her interference with his person was lawful. This does not mean, however, that a belief by Ronald Zittlow that such interference was not lawful would have been unreasonable. (Emphasis added.)

¶9 The trial court based the language on WIS JI—CRIMINAL 950. WISCONSIN JI—CRIMINAL 950 is based on WIS. STAT. § 939.45(5), which establishes the defense of privilege in the discipline of a child. The privilege is available to persons “responsible for the child’s welfare.” WIS. STAT. § 939.45(5)(b). The statute defines those persons as being the child’s parent, stepparent or guardian, an employe of a public or private residential home, institution or agency where the child resides, is confined or which provides

circumstances that existed at the time of the alleged offense. The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of his acts and not from the viewpoint of the jury now.

If you are satisfied beyond a reasonable doubt that the defendant caused bodily harm to Michelle Arndt without Michelle Arndt's consent, that the defendant intended to cause bodily harm to Michelle Arndt, that the defendant knew Michelle Arndt did not consent, and that the defendant did not act lawfully in self-defense, you should find the defendant guilty. If you are not so satisfied, you must find the defendant not guilty.

services to the child, or any other person legally responsible for the child's welfare in a residential setting. WIS. STAT. § 939.45(5)(a)3.

¶10 Zittlow argues that Michelle was not privileged under the statute to discipline him because siblings acting at the direction of a parent are not included under the definition of persons "responsible for the child's welfare."³ WIS. STAT. § 939.45(5)(b). He contends that the availability of the privilege is limited to those with a legal duty to care for the child. *See State v. Dodd*, 185 Wis. 2d 560, 567, 518 N.W.2d 300 (Ct. App. 1994).

¶11 We agree with Zittlow that WIS. STAT. § 939.45(5) does not provide a basis for the instruction. First, he is correct that a sibling acting at the direction of a parent is not included in the definition of persons "responsible for the child's welfare." Second, and more fundamental, even if Michelle were covered by the statutory definition, the parental privilege in the criminal code does not apply to this case. WISCONSIN STAT. § 939.45's purpose is to establish the statutory privilege that defendants may invoke when they have been charged with a crime. The defendant in this case is Zittlow. He is not in a position to invoke the parent-child privilege. Therefore, WIS. STAT. § 939.45(5) does not apply.

¶12 Nevertheless, even though WIS. STAT. § 939.45 does not provide a basis for the instruction, we conclude that instruction correctly states the law for an independent reason. Parents have a fundamental liberty interest in the care, custody, and management of their children. *In re Z.E.R.*, 225 Wis. 2d 628, 648, 593 N.W.2d 840 (Ct. App. 1999). The lawful authority of a parent over a minor

³ Zittlow additionally claims that the last sentence of the privilege instruction is not curative. Because our resolution of Zittlow's previous argument is dispositive of the appeal, we need not address this issue. *Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d (Ct. App. 1983).

child includes the authority to control the child's life. That authority may be exercised by confining or restraining the child in a reasonable way. *State v. Teynor*, 141 Wis. 2d 187, 200, 414 N.W.2d 76 (Ct. App. 1987).

¶13 Parents certainly may ask others to assist them in directing their child's activities. If Zittlow's mother had stopped him from leaving home, her conduct would have been lawful. Similarly, she could direct Michelle to assist her. Therefore, we conclude that the trial court did not misstate the law when it instructed the jury that a person acting at the request of a parent has a privilege to use reasonable force to control that child.

II. HARMLESS ERROR

¶14 Even if the instruction misstated the law, the error was harmless. When there is no reasonable probability that an error contributed to the defendant's conviction, it is harmless. *State v. Dyess*, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985). Any possible error in the instruction had no influence on the jury because the evidence does not establish that Zittlow: (1) believed there was an unlawful interference; and (2) reasonably believed the amount of force he used was necessary.

A. Unlawful Interference

¶15 In order to claim self-defense, Zittlow must have believed that there was an "unlawful interference" with his person. WIS. STAT. § 939.48(1). An unlawful interference is defined by statute as conduct which is tortious or expressly prohibited by criminal law. WIS. STAT. § 939.48(6). In other words, Zittlow could not establish self-defense unless he believed Michelle's conduct was tortious or expressly prohibited by criminal law.

¶16 Zittlow has not pointed to any authority establishing that Michelle's interference was unlawful. It is undisputed that Zittlow's mother had forbidden him to leave the home. It is also undisputed that Zittlow's mother suffered from health problems that prevented her from disciplining Zittlow herself. She asked Zittlow's siblings to assist. As stated above, a person acting at the request of a parent has a privilege to use reasonable force to control that child.

B. Reasonable Belief

¶17 In addition, we observe that in order for Zittlow to qualify for self-defense, not only must he believe that the amount of force he used was necessary, but his belief must be reasonable. WIS. STAT. § 939.48(1).

¶18 It is crucial to the defense of self-defense that the actor had a reasonable belief that he was likely to suffer bodily harm. *Maichle v. Jonovic*, 69 Wis. 2d 622, 627, 230 N.W.2d 789 (1975). The privilege of self-defense rests upon the need to allow a person to protect himself or herself from real or perceived harm when there is no time to resort to the law for protection. *State v. Brown*, 107 Wis. 2d 44, 54, 318 N.W.2d 370 (1982).

¶19 At no time did Michelle threaten Zittlow with physical force or give Zittlow cause to believe that he was going to suffer bodily harm. Yet, Zittlow responded by punching Michelle numerous times in the face and head. Michelle was merely standing in the doorway and grabbed Zittlow's bag. Zittlow knew that his mother had told him not leave. No reasonable person under the circumstances could have believed that he or she was about to suffer physical harm. If Zittlow believed the force he used against Michelle was necessary, his belief was not reasonable.

By the Court.—Judgment affirmed.

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

