IN THE UTAH COURT OF APPEALS

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State of Utah, Plaintiff and Appellee, v. Alan Reed Fitz, Defendant and Appellant.	MEMORANDUM DECISION (Not For Official Publication) Case No. 20040552-CA F I L E D (August 25, 2005) 2005 UT App 364

Fourth District, Provo Department, 031404193
The Honorable Derek P. Pullan

Attorneys: Margaret P. Lindsey, Orem, for Appellant
Carlyle Kay Bryson and Randy M. Kennard, Provo, for Appellee

Before Judges Billings, Bench, and McHugh.

PER CURIAM:

Defendant Alan Reed Fitz appeals his convictions for assault, a class B misdemeanor, in violation of Utah Code section 76-5-102, and commission of domestic violence in the presence of a child, a class B misdemeanor, in violation of Utah Code 76-5-109.1. Fitz argues that the district court erred in finding that the evidence was sufficient to establish beyond a reasonable doubt that Fitz did not act in self defense.

"When reviewing a bench trial for sufficiency of the evidence, we must sustain the trial court's judgment unless it is 'against the clear weight of the evidence, or if the appellate court otherwise reaches a definite and firm conviction that a mistake has been made.'" State v. Goodman, 763 P.2d 786, 786 (Utah 1988) (quoting State v. Walker, 743 P.2d 191, 193 (Utah 1987)). Further, "[u]pon review, we accord deference to the district court's ability and opportunity to evaluate credibility and demeanor." Id. at 787.

"A person is justified in threatening or using force against another when and to the extent that he or she reasonably believes that force is necessary to defend himself or a third person against such other's imminent use of unlawful force." Utah Code Ann. § 76-2-402(1) (2003). Utah Code section 76-2-402(5) lists

several factors a finder of fact may consider in determining the imminence of potential harm and the reasonableness of a defendant's actions. See id. § 76-2-402(5). After reviewing and weighing these factors, the district court determined that the State had met its burden in proving that Fitz did not act in self defense. Fitz argues that these findings were against the clear weight of the evidence. We disagree.

The evidence at trial established that Fitz's wife slapped him in the face while he was sleeping. She then retreated to a love seat which was approximately ten feet away. Upon reaching the love seat, she sat down next to the couple's two-week-old baby. Fitz chased his wife to the love seat and struck her at least twice in the arm or shoulder region. Fitz testified in court, and admitted to responding officers, that he knew he was striking his wife as opposed to some unknown assailant. Similarly, testimony indicated that Fitz was not in fear of further injury from his wife at the time he struck her. Although the facts demonstrate that Fitz's wife had a history of striking Fitz, there is no suggestion in the record that any such incident had ever resulted in serious harm or escalated to the point that Fitz would be fearful of a more serious attack from his wife. These facts support the district court's findings that the nature of the danger was minimal, that there was no immediacy of further danger to Fitz, and that there was no probability that any further force by Fitz's wife would cause death or serious bodily injury or death. Under such circumstances, we cannot disagree with the district court's conclusion that Fitz did not reasonably believe that force was necessary to protect himself. Accordingly, we conclude that the district court's judgment was not against the clear weight of the evidence. Further, the evidence adduced at trial does not give this court a definite and firm conviction that the district court made a mistake in concluding the Fitz did not act in self defense.

Therefore, we affirm the judgment and conviction of the district court.

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Judith M. Billings,
Presiding Judge

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Russell W. Bench,
Associate Presiding Judge

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Carolyn B. McHugh, Judge