**COURT OF APPEALS**
**DECISION**
**DATED AND RELEASED**

February 21, 1996



**No. 95-0742-CR**

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

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**EUNICE J. COOPER,**

**Defendant-Appellant.**

APPEAL from an order of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Reversed and cause remanded*.

Before Brown, Nettesheim and Snyder, JJ.

BROWN, J. Eunice J. Cooper claims that the trial court erred when it refused her request to submit a self-defense instruction to the jury. The jury convicted Cooper of aggravated battery and first-degree reckless injury with penalty enhancers after she stabbed Sandy Hernandez. *See* §§ 940.19(2), 940.23(1) and 939.63, STATS., 1991-92. Cooper primarily argues that a reasonable view of the evidence reveals how she was only reacting to

Hernandez's threats. She also contends that the evidence was insufficient to support her aggravated battery conviction. We hold that the evidence was sufficient to warrant a self-defense instruction and that the trial court erred by not submitting it. We thus reverse the postconviction order and grant Cooper a new trial. However, we conclude that the evidence could also support a conclusion that Cooper intended to cause great bodily harm and hold that this charge may be submitted in her new trial.

The parties dispute many of the facts. Nonetheless, when reviewing a request for a self-defense instruction, this court must view the evidence in a light most favorable to the defendant. *See* ***State v. Jones***, 147 Wis.2d 806, 809, 434 N.W.2d 380, 380 (1989). Accordingly, we will summarize the facts in a manner which best supports Cooper's claim that she acted in self-defense. *See* ***id.*** at 809, 434 N.W.2d at 380-81.

On July 2, 1993, at about 3:00 a.m., Hernandez went to see Franklin Jones at his apartment. Hernandez and Jones had ended their seven-year relationship that May, but she apparently wanted to speak with Jones about visitation with their children. Cooper was already at Jones's apartment. She and Jones had begun seeing each other soon after the breakup.

Before going over, Hernandez had a few drinks at an area tavern. She and Jones began arguing soon after she went up to the apartment; Cooper was also brought into the dispute. Hernandez disapproved of Cooper's relationship with Jones; she felt that it affected his relationship with the children. Jones nonetheless persuaded Hernandez to leave.

While Hernandez left for a short time, she only drove around the block. When she pulled back into the driveway, she struck Cooper's parked car. Hernandez then pulled back out and took another drive around the block.

Jones and Cooper apparently heard the crash and went outside to investigate. Cooper waited on the front steps and Jones approached the car for a closer look. Hernandez still continued to circle the block and yell obscenities at Jones and Cooper. She eventually stopped at Jones's apartment for a third time.

When Hernandez drove into the driveway this time, she immediately rekindled her argument with Jones, who was still examining Cooper's car. Hernandez then struck Jones with her car, backed up and hit him again. The second time, she managed to pin Jones against the back of Cooper's car. According to Cooper, Jones "screamed out a little bit in pain and kind of slumped down." Hernandez then backed out and drove down the street.

Some neighbors immediately went over and tended to Jones. Cooper yelled to them to see if he was all right and to be sure that someone called the police. Otherwise, Cooper continued to remain on the front steps of Jones's apartment in a state of shock.

Hernandez again returned to the scene. This time, however, she stayed in her car at the curb. But because she appeared to be thinking about turning her attention back to Jones, Cooper called to her hoping to distract her. Hernandez responded with a warning that she would "run over [your] fucking

ass, too." This statement only heated the exchange between Cooper and Hernandez.

According to Cooper's further testimony, tempers between the two women reached a boiling point and Hernandez "jumped" out of her car and ran towards Cooper who still remained on the steps. Cooper had originally grabbed a knife from the kitchen when she first left the apartment and now tried to let Hernandez see it, "figuring that she wouldn't run up on me." Indeed, Hernandez admitted that after she hit Jones with her automobile, she yelled at Cooper, using words that "weren't very nice" and eventually became involved in a fight with Cooper, hitting her "[w]ith my fist. In the head area." Both women appeared in person before the jury and the record reveals that there was a forty-pound weight difference between the two women at the time of the incident, Cooper weighing about 190 pounds and Hernandez weighing about 230 pounds.

Cooper could not specifically recall how Hernandez became wounded. Moreover, Hernandez was not able to specifically recall being stabbed. Still, Hernandez received very serious wounds; her treating physician characterized them as "life threatening" and "life disabling."

The trial court rejected Cooper's request for a self-defense instruction. *See* WIS J I—CRIMINAL 805.[1] The trial court reasoned that the above

[1] In her briefs to this court, Cooper focuses on the aggravated battery conviction and does not expressly request this court to consider how a self-defense instruction would

evidence, as a matter of law, could not sustain a reasonable person's belief that he or she faced an imminent threat of great bodily harm. It summarized its position as follows:

> I understand in submitting instructions I have to accept the view most favorable to each side—but without accepting a casual statement about hurting somebody when there is no other evidence that death is likely—or death or great bodily harm is likely to be sustained by [Cooper], that every time an angry remark is made, that that justifies the infliction of death or great bodily harm on the other person, that's only driving our law further down into the sewer in which it presently resides.

Cooper now argues, in essence, that the trial court misused its discretion because it delved too deeply into the fact-finding function of the jury.[2]

When reviewing alleged errors in jury instructions, this court looks to whether the trial court properly exercised its discretion. ***State v.***

(..continued)
have affected both of her convictions. However, our review of the instructions conference record indicates that both parties and the trial court considered how self-defense would possibly apply to both charges. Accordingly, we have not segregated the aggravated battery and first-degree reckless injury convictions and conclude that the instruction would be applicable to both. *See* WIS J I—CRIMINAL 801 cmt. 5 & 6.

[2] At the postconviction hearing, the trial court resummarized its reasoning as follows:

> I do think that I said it as well as I am ever going to be able to say it at the time of the trial as to why I did not feel this was a proper case for the giving of self-defense instruction. Had the accusation against [Cooper] been battery, then I would have given a self-defense instruction. But because both of the crimes to which [Cooper] was exposed of conviction required the infliction of great bodily harm as an element, there was no factual basis upon which a reasonable person could have concluded that her safety was in the degree of danger necessary to justify the use of life-endangering force.

***Boshcka***, 178 Wis.2d 628, 636, 496 N.W.2d 627, 629 (Ct. App. 1992). This entails assessing the trial court's application of the correct law and its view of the facts. *See* ***id.*** at 636-37, 496 N.W.2d at 629. However, when considering proposed self-defense instructions, the law requires the trial court to view the evidence in the defendant's favor and measure if there is some support for a theory that the defendant faced an imminent threat of death or great bodily harm. *See* ***Jones***, 147 Wis.2d at 816, 434 N.W.2d at 383-84.

As a result, the trial court's function is limited when a party asks for a self-defense instruction. As the ***Jones*** court explained, the trial court is not to measure "what the totality of the evidence reveals" but may only inquire if the evidence "will support the defendant's theory." ***Id***. at 816, 434 N.W.2d at 383. Hence, in an earlier case, the supreme court described how the trial court's role was limited to testing if the self-defense theory was based on "mere conjecture." *See* ***State v. Mendoza***, 80 Wis.2d 122, 152-53, 258 N.W.2d 260, 273 (1977) (quoting ***Ross v. State***, 61 Wis.2d 160, 172-73, 211 N.W.2d 827, 833 (1973)).

Two cases further illustrate the limiations on the trial court's role. First, the ***Jones*** court concluded that the defendant could have acted in defense of another when he stabbed his sister's estranged boyfriend because he could have reasonably feared that the boyfriend was going to harm his sister. *See* ***Jones***, 147 Wis.2d at 818, 434 N.W.2d at 384.[3] In reaching this conclusion, the

[3] Although we describe cases in which defense of another—not self defense—was discussed, the two defenses are substantively comparable. ***State v. Jones***, 147 Wis.2d 806, 814-15, 434 N.W.2d 380, 383 (1989).

majority admitted that the *jury* could easily reject the brother's self-defense of another claim. ***Id.*** Still, after examining the previous confrontations between the boyfriend and the brother, how the boyfriend outsized and outmuscled the brother and the events leading up to the stabbing, the court equally reasoned that the brother provided enough plausible evidence that he reasonably believed that the boyfriend was about to harm his sister and that deadly force was necessary to stop him. *See* ***id***. at 816-18, 434 N.W.2d at 384.

In contrast, the supreme court upheld a trial court's refusal to give a defense of another instruction in ***Thomas v. State***, 53 Wis.2d 483, 192 N.W.2d 864 (1972). There, the court explained that no reasonable view of the evidence could support the defendant's theory because the potential victim was out of harm's way when the defendant fired his gun. ***Id.*** at 488-89, 192 N.W.2d at 866-67.

Taken together, these decisions help shape the role of the trial court when it considers whether to instruct on self-defense. It must generally accept the evidence as it could possibly favor the defendant's theory. Its ability is limited to instances where there is *no evidence* which could support such a theory.

Our review of the record under the above principles reveals that the trial court overstepped its function when it found that Cooper could not have reasonably believed Hernandez posed an imminent threat of great bodily harm. By attempting to measure the validity of Cooper's fact-based theory, instead of just looking for evidence to determine if it was plausible, the trial

court delved too deeply into an area which is almost exclusively reserved for the jury when there is an issue of self-defense. *See* ***Jones***, 147 Wis.2d at 816, 434 N.W.2d at 383 ("[T]he determination of reasonableness is peculiarly within the province of the jury.") (quoted source omitted).

From Cooper's standpoint, and giving her the benefit of any doubts in the evidence, she faced her boyfriend's former lover. This woman had made it very clear that she believed Cooper to be interfering in the relationship between her children and their father. Cooper also heard this woman hit her car. She then observed this woman argue with her boyfriend and strike him twice with her car. The woman then threatened to do the same thing to her. This woman then jumped out of a car and began hitting her in the head. Cooper's attacker outweighed her by forty pounds and had been drinking earlier that evening. We believe that such a progression of events could lead a reasonable person to believe that this woman posed an imminent threat of great bodily harm and therefore hold that Cooper was entitled to the self-defense instruction.

Cooper also argues that she is entitled to an acquittal as a matter of law regarding her aggravated battery conviction alleging insufficiency of evidence.

Our review of this issue is limited. We may only reverse if the evidence is so weak that no reasonable trier of fact could have found her guilty beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis.2d 493, 501, 451 N.W.2d 752, 755 (1990).

In her brief, Cooper essentially argues that the facts cannot support a reasonable conclusion that she intended to stab Hernandez. She specifically asserts that to prove intent, the State needed to present evidence that she aimed or swung at the victim with the knife. At a minimum, she believes that the evidence only shows that "she was using her hands in a swinging type motion consistent with throwing punches." The lack of evidence thus left the jury to "speculate" about Cooper's intent.

We disagree. Even the facts which we have summarized in Cooper's favor could support a theory that Cooper perceived Hernandez to be a real threat to her relationship with Jones and thus intended to stab her. Even Cooper's portrayal of the evidence shows a progression of the events. It started with an argument involving Cooper and Hernandez in Jones's apartment. When Cooper went outside to the front yard, there was more arguing. Cooper also admitted that she brought a knife with her. This could have been either a defensive *or* offensive move. After some time, the events *escalated* into the fistfight. Most importantly, the State presented evidence showing the severity of Hernandez's wounds. As the State posits, the jury was free to infer intent from Cooper's actions. *See* ***State v. Cydzik***, 60 Wis.2d 683, 697, 211 N.W.2d 421, 429-30 (1973). Thus, the jury was free to screen the evidence presented by Cooper and other various sources and reach a conclusion that Cooper became so angry from her arguments with Hernandez, that she welcomed the opportunity to attack her with the knife. Of course, as we explained above, other inferences could be drawn. As Cooper argues, she only intended to scare Hernandez away with the knife. Nonetheless, when reviewing a jury verdict,

we must defer to its reasoning. *See* ***Poellinger,*** 153 Wis.2d at 504, 451 N.W.2d at 756.[4]

*By the Court.* – Order reversed and cause remanded.

Not recommended for publication in the official reports.

[4] We do not believe it necessary to consider Cooper's third argument alleging trial court error in its treatment of written questions issued by the jury during deliberations. There is little likelihood that a new jury will be similarly confused.