COURT OF APPEALS
DECISION
DATED AND RELEASED

NOVEMBER 21, 1995

No. 95-1885-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAVID A. PLOTKIN,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Outagamie County: JOSEPH M. TROY, Judge. *Affirmed.*

CANE, P.J. David Plotkin appeals a judgment of conviction for reckless use of a weapon, contrary to § 941.20(1)(c), STATS. Plotkin seeks a new trial based on his contention that the trial court erred in the self-defense instruction given to the jury. Because this court concludes the self-defense instruction was not in error, the conviction is affirmed.

The facts are undisputed. Plotkin lived in a trailer home with his cousin Chris Bedor, and Randall Swanson lived in a nearby mobile home in the same trailer park. Swanson became irritated with Plotkin and Bedor because they had left in the trailer park an old sink smashed into pieces awaiting transportation to the dump. In response, Plotkin and Bedor complained to

Swanson about not cleaning up after his dog. Swanson went back to his mobile home, but being still aggravated about the sink, returned to Plotkin's trailer where the arguments continued. Swanson entered Plotkin's trailer and continued shouting and making physical threats toward Plotkin. Swanson refused to leave the trailer after repeated demands from both Plotkin and Bedor.

Finally, Plotkin became afraid that the much larger Swanson might hurt him in a fight. Plotkin had back problems from an accident and was concerned that his back would be reinjured if Swanson attacked him. Plotkin reached into the drawer of his dresser and took out a .357 magnum pistol. While in a combat stance, Plotkin pointed the pistol at Swanson and told him to put his hands in the air and leave the trailer. After Swanson left the trailer, Plotkin laid the pistol on the floor and followed Swanson in an attempt to reconcile their differences. The State concedes the pistol was unloaded and that Plotkin knew it was unloaded when he pointed the weapon at Swanson.

The jury trial centered on the question of whether Plotkin pointed the pistol at Swanson in self-defense. Plotkin objected to that portion of the self-defense instruction which read in pertinent part:

> The defendant may intentionally use force or *threaten to use force* which is intended or likely to cause death or great bodily harm only if he believed that such force was necessary to prevent death or great bodily harm to himself. (Emphasis added).

Plotkin contends that the plain language of § 939.48, STATS., provides for a special limitation on the self-defense privilege only where actual force is used and intended or likely to cause death or great bodily harm. The first two sentences of § 939.48(1), STATS., apply to the self-defense privilege in general and provide:

> 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. (Emphasis added).

Plotkin reasons that the statute then continues with a final sentence that does not include threats, but only the actual use of force. It reads, with emphasis added:

> 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.

Plotkin reasons that the evidence shows the only actual force he used was the pointing of an unloaded pistol at Swanson, which could not have caused death or great bodily harm. He complains that therefore the trial court's self-defense instruction is not supported by the facts and consequently was in error. Plotkin also contends that because this instruction misstated the law, the jury was misled into believing he only acted in self-defense if he reasonably believed that pointing the pistol at Swanson was necessary to prevent imminent death or great bodily harm to himself. This court is not persuaded.

This court refuses to adopt such a restrictive reading of the statute as Plotkin proposes. When reading the self-defense statute as a whole, it is apparent the legislature envisioned that the actor may only use such force or threat of force as the actor reasonably believes is necessary to prevent or terminate the interference. Therefore, the threat of force by the person asserting the self-defense can only rise to the degree of the perceived interference. The statute simply emphasizes, however, that if a person does use force that is likely to cause death or great bodily harm, it is only justified as self-defense if he reasonably believed it was necessary to prevent imminent death or great bodily harm.

Here, the trial court instructed the jury that, "The law allows the defendant to act in self-defense only if the defendant believed that there was an imminent and 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." Also, the trial court reasoned that when Plotkin aimed a pistol at Swanson, the threat to Swanson was to cause death or great bodily harm. Although Plotkin knew the pistol was unloaded, Swanson did not. The threat to Swanson was to use a .357 magnum pistol, which obviously could cause death or great bodily harm. That was the only message this gesture represented. The trial court therefore concluded that the threat of this type of force could only be justified as an act in self-defense if Plotkin reasonably believed such force was necessary to prevent imminent death or great bodily harm. Accordingly, it instructed the jury to this effect. This court agrees with the trial court. The judgment of conviction is therefore affirmed.

By the Court.—Judgment affirmed.

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