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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1019**

State of Minnesota,
Appellant,

vs.

Amy Jane Johnson, petitioner,
Respondent.

**Filed April 9, 2018
Reversed and remanded
Reilly, Judge**

Mille Lacs County District Court
File No. 48-CR-16-2396

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Joe Walsh, Mille Lacs County Attorney, Milaca, Minnesota (for appellant)

Christopher B. Sailors, SailorsAllen Law, Milaca, Minnesota (for respondent)

Considered and decided by Halbrooks, Presiding Judge; Connolly, Judge; and
Reilly, Judge.

UNPUBLISHED OPINION

REILLY, Judge

The State of Minnesota challenges the district court's judgment of acquittal following the jury's verdict of guilty for domestic assault. Because there was sufficient evidence to sustain the jury's verdict of guilty and rejection of respondent's defense of

another theory, we reverse the district court's judgment of acquittal and remand for sentencing pursuant to the jury verdict.

FACTS

Victim M.J.C. and respondent Amy Jane Johnson were formerly married and share custody of their two children, a son and a daughter. In November 2016, respondent brought the children to M.J.C.'s house to stay. At M.J.C.'s house, their daughter refused to get out of the car, because she did not want to go to M.J.C.'s house that day. Respondent sent M.J.C. a text message asking him to come out of the house and encourage their daughter to get out of the car.

M.J.C. came out of the house and tried to coax his daughter inside. The exchange became heated. M.J.C. told his daughter he would get rid of her cats if she did not get out of the car, and she kicked him. In response, he backed away from his daughter. Respondent got out of the car and pushed M.J.C. back, then pursued him and slapped him. M.J.C. then called the police, and respondent was charged with domestic assault.

At trial, the district court instructed the jury on the defense of self or others over the state's objection. The jury found respondent guilty of domestic assault. After trial, respondent filed a motion for judgment of acquittal, arguing that appellant had failed to present evidence sufficient to rebut her claim of self-defense. The district court granted respondent's motion, determining that no reasonable jury could conclude that respondent was not acting in self-defense.

This appeal followed.

DECISION

A judgment of acquittal is reviewed de novo. *State v. McCormick*, 835 N.W.2d 498, 506 (Minn. App. 2013), *review denied* (Minn. Oct. 15, 2013). A motion for acquittal is procedurally equivalent to a motion for a directed verdict. *Id.* In such a case, “our limited role is to determine whether the record contains any competent evidence reasonably tending to sustain the verdict.” *Kaiser-Bauer v. Mullan*, 609 N.W.2d 905, 910 (Minn. App. 2000), *review denied* (Minn. July 25, 2000). On review of a criminal conviction, this court construes the record “most favorably to the state and will assume the evidence supporting the conviction was believed and the contrary evidence disbelieved.” *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). “This is especially true where resolution of the case depends on conflicting testimony, because weighing the credibility of witnesses is the exclusive function of the jury.” *Id.* The role of the jury and judge are necessarily separate in criminal trials. *See* Minn. Stat. § 631.06 (2016). The jury’s role is to decide questions of fact, which of course includes weighing the credibility of witnesses. *See State v. Janecek*, 903 N.W.2d 426, 429 (Minn. App. 2017) (“[W]e defer to the jury’s credibility determinations.”). In cases where a credibility determination is the crux of the case, we are especially deferential to a jury verdict. *See State v. Brocks*, 587 N.W.2d 37, 42 (Minn. 1998).

I. There was sufficient evidence for the jury to conclude that the state disproved an element of defense of others.

The state argued the district court erred by determining that there was insufficient evidence for the jury to determine that the state had disproved an element of defense of

another. The district court granted respondent's motion for judgment of acquittal after finding that respondent met her burden of defense of others and the state failed to disprove one of the elements of self-defense beyond a reasonable doubt.

Minnesota's law on self-defense is well established:

The defense of self or another has four elements: (1) the absence of aggression or provocation by the defendant, (2) the defendant's actual and honest belief that he or another was in imminent danger¹ of [an assault against the person],² (3) the existence of reasonable grounds for the belief, and (4) the absence of a reasonable possibility of retreat to avoid danger.

State v. Zumberge, 888 N.W.2d 688, 694 (Minn. 2017); *see also* Minn. Stat. § 609.06, subd. 1(3) (2016). A defendant has the burden of producing evidence to support a claim of self-defense. *Id.* (citing *State v. Basting*, 572 N.W.2d 281, 286 (Minn. 1997)). Once self-defense is properly raised, the state has the burden of disproving one or more of these elements beyond a reasonable doubt. *Id.* The state argues that a reasonable jury could have found that the state disproved an element of self-defense and defense of others. We agree. Here the record contains enough evidence for a reasonable jury to find respondent did not satisfy any of the four elements of defense of another.

¹ The jury did not receive an "imminent danger" instruction, only an instruction for where the "offense was being committed on the person or the person reasonably believed it was." The "imminent danger" element was adopted by *State v. Soukup*, 656 N.W.2d 424, 429 (Minn. App. 2003), *review denied* (Minn. Apr. 29, 2003), which incorporated defending against disorderly conduct into the self-defense standard. Though the instruction was not given, the state still prevails under it, and the standard under which the jury was instructed is even harder for respondent to meet.

² Unlike *Zumberge*, this case does not involve deadly force, so the "assault against the person" language would replace "death or great bodily harm" pursuant to Minn. Stat. § 609.06, subd. (1)(3).

A. Respondent was the aggressor.

The evidence viewed in the light most favorable to the verdict, is sufficient to establish that respondent was the aggressor. M.J.C. testified that he never hit respondent and did not push or pull his daughter. Respondent first got out of the car and pushed M.J.C. When M.J.C. backed up, respondent pursued and continued hitting him, including a slap that knocked his glasses off his face. Respondent could have used words to de-escalate the encounter, but, instead, she resorted to assault. If the jury believed M.J.C.'s testimony, as we must assume it did, respondent was the aggressor in the encounter.

B. Respondent did not possess an actual and honest belief that her daughter was in imminent danger of assault against the person.

The evidence viewed in the light most favorable to the verdict, is sufficient to establish that respondent did not possess an actual and honest belief that her daughter was in imminent danger of an assault against the person. During her interview with the officer at the scene, respondent did not report being motivated by a belief that she needed to protect her daughter from an imminent assault. Instead, respondent reported being angry that M.J.C. threatened her daughter's cats, which helped her daughter cope with her anxiety. Respondent testified for the first time at trial that she believed M.J.C. was going to hurt her daughter when she decided to intervene. A reasonable jury could have concluded that respondent did not believe M.J.C. was about to assault his daughter, because she did not explain that motivation to the officer at the time of the incident at the scene. Although repugnant, a threat involving an animal is not a legal basis to assert self-defense. There was sufficient evidence for a reasonable jury to conclude that respondent did not possess

an actual or honest belief that her daughter was in imminent danger of an assault against the person.

C. There were not reasonable grounds for respondent's belief that her daughter was in imminent danger of being assaulted.

The evidence viewed in the light most favorable to the verdict, is sufficient to establish that there were not reasonable grounds for respondent's belief that her daughter was in imminent danger of being assaulted. Based on the evidence, a reasonable jury could conclude that a father was speaking with a raised voice to his noncompliant daughter in order to get her to unbuckle her seatbelt, but was not threatening. Therefore, there was evidence for a reasonable jury to conclude that respondent did not have reasonable grounds to believe that her daughter was in imminent danger of being assaulted.

D. Respondent had a reasonable possibility of retreat to avoid danger.

The evidence viewed in a light most favorable to the verdict, is sufficient to establish that respondent had a reasonable possibility of retreat to avoid danger. M.J.C. testified that he never grabbed his daughter and that he was actually backing away from her after being kicked. Then, according to M.J.C.'s testimony, respondent's first action to resolve the situation was to use physical force against M.J.C. M.J.C. then backed up 10 or 15 feet as respondent persisted in assaulting M.J.C. Respondent had the chance to retreat once M.J.C. backed away from her, but she pursued and continued to hit him. Based on this evidence, a reasonable jury could have concluded that respondent had a reasonable possibility of retreat to avoid danger.

This is not a case of *no* evidence or *insufficient* evidence. This was a case of ample, yet conflicting evidence. In such a case, the jury's task is to reconcile the conflicting evidence and arrive at a verdict. Respondent was able to fully present her case; she does not allege that any evidence was improperly excluded or erroneously admitted. Also, the district court adopted respondent's jury instructions regarding defense of another over the state's objection.

There was sufficient evidence for the jury to conclude that the state disproved an element of defense of another, and the district court's judgment of acquittal was improper in this case.

II. The district court based its ruling on an erroneous definition of assault.

Our de novo review concludes the district court's judgment of acquittal was erroneous in this case. The district court improperly usurped the fact-finding role usually reserved for the jury. The district court repeatedly cited respondent's and her daughter's testimony in its judgment of acquittal, at times construing the statements against M.J.C.'s testimony and the verdict. The district court did not view the evidence in a light most favorable to the verdict.

We also note that the district court incorrectly framed M.J.C.'s threat to get rid of his daughter's cats as an assault on his daughter's person. The district court found that:

[M.J.C.'s] threat towards the cats was akin to an offer of physical violence towards his daughter. A threat to deprive a person who suffers from . . . anxiety . . . of something they love and use as therapy to maintain mental health is itself an assault on their mental health. It caused physical harm to his daughter's psyche and instantly elicited physical reactions

from the daughter, just as surely as if she had been slapped, pushed, or kicked.

The district court did not provide any legal authority to support these assertions, and we find none. It is well established that “mere words do not justify an assault.” *State v. Blank*, 352 N.W.2d 91, 92 (Minn. App. 1984). The jury was instructed that assault is “the intentional infliction of bodily harm upon another or an intentional attempt to inflict bodily harm upon another or an act done with intent to cause fear of immediate bodily harm or death in another.” CRIMJIG 7.06. Bodily harm does not include psychological pain. Affirming the district court’s judgment of acquittal is inconsistent with the definition of assault. As a matter of law, M.J.C.’s threat to get rid of the cats did not serve as a basis for defense of others.

III. We will not apply the circumstantial evidence test.

Respondent argues the state’s case was based largely on circumstantial evidence and asks this court to evaluate the evidence under the circumstantial evidence test. We will not employ the circumstantial evidence test. A fact is proven by direct evidence when a person testifies to what they personally observed. *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017). Circumstantial evidence is “evidence from which the factfinder can infer whether the facts in dispute existed or did not exist.” *Id.* None of the evidence submitted at trial was circumstantial. Eyewitness testimony, audio recordings, and photographs are all direct evidence. There is no reason for us to consider the evidence under the circumstantial evidence standard, because this case did not involve circumstantial evidence.

IV. The evidence does not support a *Soukup* analysis.

Respondent then argues that she proved self-defense because she was helping her daughter escape from a mutual fight. Though *Soukup* holds that self-defense is not offense-specific and may be asserted for any “offense against the person,” respondent’s argument fails for two reasons. 656 N.W.2d at 428 (quoting Minn. Stat. § 609.06, subd. 1(3)). First, the jury was not instructed that self-defense could be asserted against “any offense against the person,” only that it could be asserted against an assault. Respondent could have requested jury instructions to include “any offense against the person,” but she failed to do so. *See State v. Vazquez*, 644 N.W.2d 97, 99 (Minn. App. 2002) (holding that a defendant is entitled to an instruction on their theory of the case if there is evidence and law to support it). Second, even if this court adopted respondent’s theory of intervening in a mutual fight, the argument fails on the merits. When viewing the evidence in a light most favorable to the verdict, M.J.C. and his daughter were not engaging in a mutual fight. The evidence suggests that M.J.C. was backing away after being assaulted by his daughter.

Because there was sufficient evidence to sustain the jury verdict, we reverse the district court’s judgment of acquittal. We remand this case for further sentencing consistent with this opinion.

Reversed and remanded.