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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1312**

State of Minnesota,
Respondent,

vs.

Eric Keith Buschette,
Appellant.

**Filed November 4, 2008
Affirmed as modified
Klaphake, Judge**

Becker County District Court
File No. K0-06-1767

Lori Swanson, Attorney General, John B. Galus, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Michael D. Fritz, Assistant Becker County Attorney, P.O. Box 476, Detroit Lakes, MN 56502 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant State Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Worke, Presiding Judge; Klaphake, Judge; and Peterson, Judge.

UNPUBLISHED OPINION

KLAPHAKE, Judge

Appellant Eric Keith Buschette challenges his conviction for second-degree assault, arguing that the district court erred by excluding evidence of the victim's propensity for violence and by refusing to instruct the jury on defense of dwelling. Appellant also asserts that the district court erred by ordering him to pay \$500 as a public defender fee.

Because under the narrow facts of this case the district court did not abuse its discretion by excluding the evidence or refusing the defense-of-dwelling instruction, we affirm appellant's conviction. But because the district court failed to make findings about appellant's ability to pay, we vacate the court's directive to appellant to pay the public defender's fee.

DECISION

Evidentiary Rulings

We review the district court's evidentiary rulings for an abuse of discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). Appellant has the burden of proving that the court abused its discretion and that he was prejudiced thereby. *Id.* Prejudice results when there is a reasonable possibility that the verdict would have been more favorable to the defendant but for the district court's ruling. *State v. Post*, 512 N.W.2d 99, 102 (Minn. 1994).

A defendant has the fundamental right to a meaningful opportunity to present a complete defense within the established rules of procedure and evidence. *State v. Profit*,

591 N.W.2d 451, 463 (Minn. 1999). Appellant claimed self defense and the district court instructed the jury on the elements of self defense. Appellant asserts, however, that the district court limited his right to present a complete defense by refusing to allow witnesses to testify as to the victim's reputation for violence and specific prior acts of violence.

Evidence of a victim's reputation for violence is admissible in a self-defense case to show that the defendant had reason to fear serious bodily harm, if the defendant knew of the victim's reputation. *State v. Penkaty*, 708 N.W.2d 185, 201 (Minn. 2006). Even if the defendant did not know of the victim's reputation for violence, this evidence is also admissible to show that the victim was the aggressor. *Id.*

Further, evidence of the victim's prior bad acts is admissible to show that the defendant had reason to fear serious bodily harm, for purposes of asserting a claim of self defense, if the defendant knew of the prior acts. *Id.* at 202. But evidence of prior acts of violence is not admissible to show that the victim was the aggressor. *Id.*

Appellant made an offer of proof of one witness with knowledge of an apparent prior act of violence, but with less than clear and convincing testimony. The offer of proof did not include information as to whether appellant was aware of the victim's prior acts of violence; therefore, this testimony would not be admissible to support appellant's reasonable fear of the victim. *See id.*

Appellant also made an offer of proof of multiple witnesses to the victim's reputation for violence. Under *Penkaty*, the reputation evidence could be relevant to appellant's self-defense claim, to show that appellant had a reasonable fear of the victim

or that she was the aggressor. *Id.* The district court concluded that under the narrow facts of the charged assault, this evidence was not relevant: the assault, during which appellant cut the victim's face several times with a shard of glass, occurred after appellant had immobilized the victim. When a defendant responds to an assault but uses a greater level of force than warranted, the use of force is not justified. *State v. Soukup*, 656 N.W.2d 424, 428 (Minn. App. 2003), *review denied* (Minn. Apr. 29, 2003).

Under this narrow set of facts, the district court did not abuse its discretion by refusing to admit the reputation testimony pertaining to the victim.

Defense of Dwelling Instruction

Appellant further argues that the district court abused its discretion by refusing to give a defense-of-dwelling instruction. The district court's refusal to give an instruction is reviewed for an abuse of discretion. *State v. Cole*, 542 N.W.2d 43, 50 (Minn. 1996).

Reasonable force may be used to resist a trespass or other unlawful interference with real or personal property by the person in lawful possession of the property. Minn. Stat. § 609.06, subd. 1(4) (2006). The defense-of-dwelling concept is a version of self defense, with some differences: the defender has no duty to retreat and may use lethal force to prevent the commission of a felony in the home; ordinarily, a person claiming self defense must retreat if possible and may use lethal force only if the defender reasonably believes that he is exposed to great bodily harm or death. *State v. Carothers*, 594 N.W.2d 897, 901, 903 (Minn. 1999). But the party claiming defense of dwelling must nevertheless act reasonably and use the level of force appropriate under the specific circumstances. *State v. Glowacki*, 630 N.W.2d 392, 402 (Minn. 2001).

Appellant may have used a reasonable level of force when he threw the victim to the ground, if we assume that she was attempting to enter the townhouse and appellant was in lawful possession. But after appellant subdued and immobilized the victim, his act of cutting her face, which is the actual assault here, went beyond a reasonable amount of force. *Id.* at 403 (rejecting claim of defense of dwelling when actions go beyond reasonable use of force). The district court did not abuse its discretion by refusing the defense-of-dwelling instruction.

Public Defender Fee

The state concedes that the district court improperly assessed a public defender fee of \$500 without conducting a hearing on appellant's ability to pay. *See* Minn. Stat. § 611.35, subd. 1 (2006); *State v. Hayes*, 428 N.W.2d 871, 875 (Minn. App. 1988) (stating that hearing to determine defendant's ability to pay public defender fee is mandatory and remanding for hearing), *aff'd on other grounds*, 431 N.W.2d 533 (Minn. 1988). We therefore vacate the court's order requiring appellant to pay the public defender fee.

Affirmed as modified.