

Taking Sides: How to Help Your Client Come Out on Top in a Self-Defense Case

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Samuel W. Benedict
Nicole M. Wacker
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- I. Everybody takes sides in a fight, especially the jury. Your goal is to make the jury believe that your client should come out on top.

- II. Theory of defense – make sure you have one.
 - a. Theory of defense should be a clear statement of the essential facts that support the legal conclusion that your client is innocent.
 - b. Is the theory consistent with what your client says to you?
 - c. Is the theory consistent with what your client said to others?

- III. Self –defense is an affirmative defense under sec. 939.48, Wis. Stats.
 - a. A person has a privilege 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/her person by the other person.
 - b. A person may intentionally use only such force or threat as the actor reasonably believes is necessary to terminate the interference.
 - c. A person may not intentionally use force that is intended or likely to cause death or great bodily harm unless the person reasonably believes that such force is necessary to prevent imminent death or great bodily harm to him/herself
 - d. Provocation – unlawful conduct likely to provoke an attack eliminates the privilege of self-defense, EXCEPT if the ensuing attack is with deadly force. THEN, the person is privileged to act in self defense, but not with deadly force unless all means of escape have been exhausted.
 - i. Privilege can be regained if the person withdraws from the fight and gives notice to the assailant.
 - ii. There is no privilege to provoke an attack for the purpose of using self-defense as an excuse to use deadly force.
 - e. 3rd Party injury – The privilege extends to the unintended infliction of harm of a 3rd person except it may constitute the crime of reckless homicide or injury.
 - f. The privilege extends to the defense of a 3rd person under the same conditions provided the person reasonably believed that the 3rd person would be privileged to act in self-defense and that the intervention was necessary for the protection of the 3rd party.

- IV. Arguing self-defense: Things to Remember
 - a. Self-defense is “subjective”

- i. A self-defense argument is all about what the defendant ACTUALLY believed at the time of the incident.
 - b. But self-defense also has an “objective” component.
 - i. The belief of the defendant must be objectively reasonable. *State v. Camacho*, 176 Wis. 2d 860 (1993).
 - ii. Reasonableness is judged from the position of a person of ordinary intelligence and prudence in the same situation of the defendant, but not a person identical to the defendant. (See *State v. Hampton*, 207 Wis. 2d 369 (1996).
 - iii. But compare reasonableness in a battered woman syndrome case, *State v. Richardson*, 189 Wis. 2d 418 (1994).
 - c. Context is key
 - i. Think of the jury as looking at a blank slate. They don’t know your client and they don’t know the victim. You have to show the jury who they really are.
 - ii. When arguing a self-defense case, you must do your best to create the scene that is most favorable to your client. It’s not only about what the client knows, but it is also about making the client’s story more believable.
 - d. Be creative
 - i. There is no correct formula to use and no appellate case is going to draw a perfect parallel. It’s your job to mold the argument around your fact scenario.

V. Discovery and Investigation – Finding the bad stuff about the victim.

- a. What does your client say to you?
 - i. What did the client experience before, during and after the incident?
 - ii. What did the client believe was going to happen?
 - iii. Why did the client act the way he/she did?
- b. What did your client say to others?
 - i. Is it consistent with a claim of self-defense?
 - ii. If not, can it be explained?
- c. Making a complete discovery demand. Specificity is key.
 - i. All statements of the defendant.
 - ii. All witness statements.
 - 1. Prior experience with the victim, especially prior acts of violence.
 - iii. All physical and photographic evidence. You must view everything in the custody of law enforcement before trial.
 - iv. All information about the victim and the victim’s prior conduct.
 - 1. Prior record.
 - 2. Civil court records.
 - 3. Mental health records.
 - 4. Ex-spouses and girlfriends.
 - 5. Military records.

- v. All exculpatory evidence. Tell them what you want and why you believe it exists.

VI. Character evidence and prior bad acts.

- a. Methods of proving character under Wis. Stat. § 904.05.
 - i. Reputation or Opinion Evidence
 - ii. Specific Instances of Conduct
- b. Wis. Stat. § 904.04
 - i. Character evidence not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion
 - 1. Exceptions:
 - a. Character of the accused if offered by the accused. (i.e. peacefulness).
 - b. Character of the victim
 - i. Pertinent trait offered by accused
 - ii. Pertinent trait offered by the prosecution as rebuttal evidence
 - iii. In homicide cases: Evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that victim was the first aggressor.
 - ii. Other crimes, wrongs or acts are not admissible to prove the character of a person in order to show that the person acted in conformity therewith.
 - 1. Exception: Evidence of this nature may be offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Also, context.

VII. Character and Bad Acts Evidence in Practice

- a. *McMorris v. State*, 58 Wis. 2d 144 (1973).
 - i. The trial court committed error by refusing to allow the defendant to introduce evidence of his personal knowledge of the victim's prior acts of violence as well as the reputation for violence.
 - ii. But a trial court can require disclosure by the defendant before trial of all *McMorris* evidence that will be offered in support of a self-defense claim. *State v. McClaren*, 2009 WI 69.
- b. *State v. Boykins*, 119 Wis. 2d 272, 350 N.W.2d 710 (Ct. App. 1984)
 - i. The trial court prohibited the defense from call three witnesses to testify regarding the victim's character and reputation in the several years preceding the incident. Only two of the three were allowed to testify and only on a specific topic of testimony.
 - ii. The Court of Appeals found that the trial court had denied the defendant the constitutional right to present a defense and to call witnesses. The Court stated that when the defense has put forth a "sufficient factual basis to raise the issue of self-defense, and the

violent character of the victim is an essential element of the defense, proof of the victim's reputation for being violent is relevant and admissible." Page 279.

- iii. The Court also held that a "fundamental element of due process of law is the accused's right to present the testimony of witnesses in his or her own defense." Page 279, citing the 6th and 14th Amendments of the U.S. Constitution, Articles 1 and 7 of the Wisconsin State Constitution and *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) and *Washington v. Texas*, 388 U.S. 14, 19 (1967).
- c. *Werner v. State*, 66 Wis. 2d 736, 226 N.W.2d 402 (1975)
 - i. Supreme Court holding which states that a defendant is not allowed to put forth evidence of other acts of the victim for the purpose of showing that the victim was the first aggressor in an altercation.
- d. The Sullivan Test; *State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998)
 - i. Three Step Analysis
 - 1. Is the evidence offered for an acceptable purpose under the statute?
 - 2. Is the evidence relevant?
 - a. Does the evidence relate to a fact or proposition that is of consequence to the determination of the action?
 - b. Does the evidence have probative value?
 - 3. Is the probative value of the evidence substantially outweighed by the danger of unfair prejudice under Wis. Stat. 904.03?
 - a. Remember, the defendant, not the victim, has a constitutional right to a proper defense and against unfair prejudice.
- e. *State v. Payano*, 2009 WI 86 (Wis. 2009)
 - i. Uses a *Sullivan* test analysis
 - ii. Other acts that the State wishes to use against the defendant
 - iii. The State sought to use evidence of prior alleged acts against the defendant on the basis that the "other acts" evidence is admissible for the purposes of providing context to certain acts and to rebut a self-defense claim. The Supreme Court held that under the *Sullivan* test, the context of the incident was a fact of consequence and therefore the special circumstances leading up to the incident were pertinent facts for the jury to consider when accounting for the reasonableness of the defendant's actions.
 - iv. "Context" is a very important to the defense in a self-defense case as well.
- f. The Constitution trumps state laws and the rules of evidence.
 - i. *Chambers v. Mississippi*, 410 U.S. 284 (1973)

1. The Supreme Court of the United States held that in those particular circumstances, the Sixth Amendment overrode a State of Mississippi rule of evidence pertaining to hearsay and “adverse” witnesses.
 2. The Court held that no new principle or law was created by the holding, but that a mechanistic application of the rules of evidence resulted in the defendant being denied a fair trial, a right that the Sixth and Fourteenth Amendments sought to prevent. Stating “[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense,” the Court concluded that the defendant should have a new trial.
 3. Why is this case important?
 - a. The SCOTUS held that the U.S. Constitutional protections may in some cases trump rules of evidence and procedure if fairness and the right to present a full defense are at stake.
- ii. *Washington v. Texas*, 388 U.S. 14 (1967)
1. This case dealt with a Texas statute that prohibited persons charged as principals, accomplices or accessories in the same crime to be introduced as witnesses for each other.
 2. The Supreme Court of the United State held that the Sixth Amendment preserves a defendant’s right to have compulsory process for obtaining witnesses in his favor. As this is a fundamental element of due process of law and the State statute prohibited the defendant from fully exercising this right, the conviction was overturned and a new trial granted.
 3. Why is this case important?
 - a. Again, the Sixth Amendment right of the U.S. Constitutional trumped a State statute concerning rules of criminal procedure.

VIII. Defending Against the State

a. Possible arguments of the State:

i. *Werner v. State*

1. You must be careful to have a clear and acceptable purpose for seeking the admission of character evidence. It is not allowed solely for the purpose of showing the victim was the first aggressor.
- ii. If other acts also happen to be criminal convictions, the State may argue that the evidence is excluded under Wis. Stat. 906.09.
1. This statute relates to the use of prior criminal convictions in terms of challenging the credibility of witnesses for impeachment purposes.

- IX. Pre-trial Motions
 - a. Resolve all issues of discovery compliance.
 - b. Suppression of defendant's statements under *Miranda/Goodchild*.
 - i. Statements that are suppressed may be used as impeachment if they are ruled voluntary, even if non-compliance with *Miranda*.
 - ii. If the statement supports a self-defense claim, do you want it suppressed?
 - iii. If it is exculpatory, it may not be admissible by the defendant on hearsay grounds under sec. 908.01(3).
 - c. Suppression of physical evidence.
 - d. Suppression of unfairly suggestive identification.
 - i. Can you claim self defense if your client claims he was not there?
 - e. Motions in limine.
 - i. Prevent admission of irrelevant and/or prejudicial material.
 - ii. IMPORTANT! Gain advance approval for admission of evidence concerning victim's character, reputation or bad acts.

- X. Jury instructions and lesser-included offenses.
 - a. How much evidence is needed for a self-defense instruction?
 - i. The court should consider all evidence in the case regardless of which side offered the evidence.
 - ii. Defendant entitled to self-defense instruction when evidence taken in light most favorable to the defendant supports a self-defense claim. *State v. Mendoza*, 80 Wis. 2d 122 (1977).
 - b. Once the issue has been raised by the evidence, the State has the burden of proving beyond a reasonable doubt that the defendant was not acting in self-defense.
 - c. Self-defense is applicable in any type of case or charge where the defendant is privileged to act to prevent an unlawful interference with his person. (e.g. Battery, DC, Reckless Injury, and crimes of negligence).
 - d. Imperfect self-defense. Sec. 940.01(2)(b), Wis. Stats. It is a Class B felony if the actor had an unreasonable belief that he/she was in imminent danger or that the amount of force was necessary.

- XI. The self-defense case in trial.
 - a. Should the client testify?
 - i. Is it necessary to raise the issue or can it be raised by other evidence?
 - ii. Can the client be impeached by prior convictions and/or inconsistent statements?
 - iii. Does the client have to explain flight?
 - iv. Will the jury find the client more sympathetic if they hear from the defendant directly?
 - b. Voir Dire
 - i. Everyone knows someone that has defended himself or herself against another.

- ii. Everyone has an opinion on when it would be reasonable to defend themselves.
 - iii. The key question: How long would you wait?
- c. Opening statement – This is the opportunity to tell the narrative of the client’s innocence.
 - i. What perspective will you use to tell the story?
 - ii. What chronological time line will you use?
 - iii. What emotional themes are the most important?
- d. Cross-examination – how will you use the State’s witnesses to support the reasonableness of the defendant’s conduct?
 - i. The jury must hate the victim more than they hate your client.
- e. Direct examination – How will you establish the emotional tone, especially if your client testifies?
- f. Closing argument – bringing it all together.
 - i. Not restating the evidence.
 - ii. Stating what the evidence means.
 - iii. Explaining why the law is on your side.
 - iv. Giving the jurors the tools to make your client the winner!