STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2013AP749-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRIAN A. PATTERSON,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT AND ORDER DENYING MOTION FOR POSTCONVICTION RELIEF ENTERED IN THE CIRCUIT COURT OF MILWAUKEE COUNTY, THE HONORABLE DENNIS R. CIMPL AND ELLEN R. BROSTROM, CIRCUIT COURT JUDGES, RESPECTIVELY

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication because the issues presented can be resolved by application of established principles of law to the particular case.

ARGUMENT

I. THE EVIDENCE WAS NOT INSUFFICIENT TO PROVE PATTERSON GUILTY OF FIRST-DEGREE RECKLESS HOMICIDE.

A criminal conviction cannot be reversed on the ground of insufficient evidence "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990); *see also Jackson v. Virginia*, 443 U.S. 307, 324 (1979).

Credibility of the witnesses and the weight of the evidence are for the trier of fact to determine. *Poellinger*, 153 Wis. 2d at 504. If more than one reasonable inference can be drawn from the facts presented at trial, the reviewing court will accept the inference drawn by the trier of fact, even if other inferences could also be drawn. *Poellinger*, 153 Wis. 2d at 506-07. The reviewing court must uphold the conviction if there is any reasonable hypothesis that supports it. *State v. Smith*, 2012 WI 91, ¶ 24, 342 Wis. 2d 710, 817 N.W.2d 410.

In reviewing the sufficiency of the evidence, the appellate court views the evidence in the light most favorable to the conviction. *Poellinger*, 153 Wis. 2d at 501.

Because the trier of fact has the great advantage of being present at the trial, the appellate court may substitute its judgment for the trier of fact only when the evidence that the trier of fact relied upon is inherently or patently incredible. *Gauthier v. State*, 28 Wis. 2d 412, 416, 137 N.W.2d 101 (1965). Inherently or patently incredible evidence is limited to evidence that is in conflict with nature or in conflict with fully established or

conceded facts. *Day v. State*, 92 Wis. 2d 392, 400, 284 N.W.2d 666 (1979).

The United States Supreme Court held that in determining whether evidence is constitutionally sufficient to sustain a conviction

> the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution. The criterion thus impinges upon "jury" discretion only to the extent necessary to guarantee the fundamental protection of due process of law.

Jackson, 443 U.S. at 319 (alteration in original) (footnotes omitted) (citation omitted).

Inconsistencies and contradictions in testimony of witnesses or in the testimony of a witness do not render the testimony inherently or patently incredible. *Haskins v. State*, 97 Wis. 2d 408, 425, 294 N.W.2d 25 (1980). Inconsistencies and contradictions simply create issues of credibility for the jury. *Haskins*, 97 Wis. 2d at 425; *see also State v. Daniels*, 117 Wis. 2d 9, 17-18, 343 N.W.2d 411 (Ct. App. 1983). The jury may convict on the basis of uncorroborated testimony unless the testimony is patently or inherently incredible. *Kohlhoff v. State*, 85 Wis. 2d 148, 153-54, 270 N.W.2d 63 (1978).

The appellate court "cannot reverse a jury verdict where credibility is the issue unless it can conclude as a matter of law that no finder of fact could believe the

testimony relied on for conviction." *State v. Powers*, 66 Wis. 2d 84, 93, 224 N.W.2d 206 (1974).

For the first time on appeal, Patterson claims the evidence was insufficient to convict him of first-degree reckless homicide as a matter of law because the evidence was undisputed that he intended to kill the victim, Joseph McGowan. Patterson asserts that because it is undisputed that he intended to kill McGowan, his conduct could not have been criminally reckless. Patterson's claim is meritless.

First and foremost, it was not undisputed that Patterson intended to kill McGowan. Although it was the State's theory that Patterson intended to kill McGowan, Patterson never admitted or conceded that he intended to kill McGowan.

Patterson relies on the presumption that when one fires a shot, the weapon being aimed at a vital part of the body, and death ensued as a natural and probable consequence, the presumption of intent to take human life, in the absence of any explanatory circumstance or evidence, makes a prima facie case for the prosecution. The presumption, however, is not conclusive. *Smith v. State*, 69 Wis. 2d 297, 304, 230 N.W.2d 858 (1975). A jury cannot be directed to find intent under such circumstances.

Patterson was charged with first-degree intentional homicide, while armed with a dangerous weapon (2; 3). At the State's request, the jury was also instructed on the lesser-included offenses of second-degree intentional homicide (imperfect/unreasonable self-defense) and first-degree reckless homicide (112:83-105, 114-29).[1] Patterson's theory of defense was that he was exercising

[1] In a separate argument, Patterson also claims the trial court should not have instructed the jury on the lesser-included offense of first-degree reckless homicide. The State will address that claim in a separate argument, *infra*.

the perfect privilege of self-defense when he shot at McGowan, and therefore he was not guilty of first-degree intentional homicide, or any other offense.

On appeal, Patterson claims the evidence was insufficient to prove first-degree reckless homicide because it was undisputed that he caused the death of McGowan with intent to kill.

Patterson is wrong. The State presented evidence that, if believed, was sufficient to prove beyond a reasonable doubt that Patterson had the mental purpose to take the life of McGowan or that Patterson was aware that his conduct was practically certain to cause the death of McGowan (112:119); *see* Wis. Stat. §§ 940.01(1) and 939.23(4). The jury was not required to so find, however. It was not undisputed that Patterson intended to kill McGowan, and it was not undisputed that he was aware his conduct of firing his gun at McGowan was practically certain to kill McGowan.

Although at trial Patterson readily admitted that he intentionally shot at McGowan to make McGowan stop advancing toward him, he never admitted that he intended to kill McGowan. Indeed, he testified quite to the contrary. Patterson testified that McGowan reached his hand under the front passenger car seat, and Patterson thought he was reaching for a gun, although he did not see a gun (111:34). Patterson testified as McGowan approached him, Patterson reached into his pocket and pulled out his gun, displaying it to McGowan in the palm of his hand with the barrel pointed out (111:35-38). Patterson explained that he displayed the gun in the palm of his hand because he was not trying to shoot the gun, he was only trying to display it (111:38). When McGowan refused to stop approaching Patterson, Patterson pulled his gun up to his hip and fired from his hip (111:39). Patterson is left handed; he had the gun in his right hand because he had his car keys in his left hand, and he never intended to use the gun (111:40). He was able to fire the gun with his left hand (111:40).

Patterson fired the gun four or five times; he did not know whether his shots hit McGowan or, if so, where they hit, but guessed they must have (111:40). Patterson stopped firing as soon as McGowan turned his body to retreat (111:40). Patterson testified that he fired from his hip with the gun in his right (non-dominant) hand because there was not time to actually aim the gun at McGowan and shoot (111:42).

When asked whether he extended his hand in a classic shooting position with his arms straight out in front of him, Patterson responded, "No. I wasn't trying to kill him" (111:42). Patterson did not empty the gun into McGowan; he stopped shooting when McGowan turned away (112:32, 28). Patterson did not know that he had killed McGowan until hours later (112:35).

The medical examiner who performed the autopsy on McGowan's body testified one bullet entered the front upper left arm midway between the shoulder and elbow; that bullet exited the left arm, entered the chest, went through both lungs and lodged in the muscles around the bone on the back of the shoulder blade (107:103-08). This was the most severe wound and would alone have caused death because of the amount of bleeding and restriction of the airway it caused (107:113, 122-23). The other gunshot wounds were serious, but would not necessarily have caused death (107:123). One bullet went through the left shoulder and exited the left shoulder, going only through the tissue under the skin (107:117). Another bullet went into the left buttock, entered the abdomen and a loop of the small intestine and lodged in the fat tissue (107:119). Another bullet entered the back of the left hand and exited the palm of the hand (107:119-20).

Based on this evidence, which the jury was entitled to credit and believe, the jury reasonably could have concluded that the State did not prove beyond a reasonable doubt that Patterson intended to kill McGowan or that Patterson knew his conduct was practically certain to result in death. The jury could reasonably have

concluded that the State did not prove beyond a reasonable doubt that Patterson aimed and discharged his gun at a vital part of McGowan's body.

Accordingly, contrary to Patterson's assertion, it cannot be said that it was undisputed that Patterson intended to kill McGowan or that he was aware his conduct was practically certain to cause death.

The evidence that Patterson fired the gun quickly with his non-dominant hand, without aiming, without intending to kill, striking McGowan in non-vital areas of his body, was sufficient for the jury to conclude beyond a reasonable doubt that Patterson's conduct was criminally reckless and that it showed utter disregard for human life.

This court must reject Patterson's assertion that the only reasonable view of the evidence that would have permitted the jury to acquit him of first and second-degree intentional homicide is that the State failed to disprove Patterson had an actual belief that deadly force was necessary. As demonstrated above, the jury could reasonably have concluded that the State did not prove beyond a reasonable doubt that Patterson intended to kill McGowan, which would have required the jury to acquit him of both first and second-degree intentional homicide.

This court cannot speculate that the jury acquitted of first and second-degree intentional homicide because it found the State did not disprove that Patterson had an actual belief that deadly force was necessary to prevent death or great bodily harm. Wisely, Patterson does not argue that the evidence was insufficient to disprove that Patterson had such an actual belief, nor would the record sustain such a claim.

There was abundant evidence that on the day of the shooting, the initial verbal confrontation between McGowan and Patterson was over; Patterson could have left the scene as he planned to do; he chose instead to insert himself in a verbal confrontation between Tommy

Wynne and McGowan; Patterson admitted he never saw McGowan with a gun that day; McGowan never pulled a gun on Patterson that day; the police never found a gun on or near McGowan after the shooting; and Patterson was angry at, rather than afraid of, McGowan (112:22, 36; 113:6-14). Thus, it cannot be said that because the State failed to disprove Patterson had an actual belief that deadly force was necessary, the evidence was insufficient as a matter of law to prove first-degree reckless conduct.

Moreover, Patterson is wrong when he asserts that where a defendant's conduct is practically certain to cause death, the conduct is not criminally reckless. Rather, such conduct is criminally reckless, plus more. Intent to kill includes and encompasses, but does not exclude, criminally reckless conduct.

For all of these reasons, this court must reject Patterson's appellate argument that because he acted with intent to kill McGowan, the evidence was insufficient as a matter of law to convict him of first-degree reckless homicide.

II. THE TRIAL COURT DID NOT ERR IN GIVING THE JURY AN INSTRUCTION ON THE LESSER-INCLUDED OFFENSE OF FIRST-DEGREE RECKLESS HOMICIDE.

A trial court may instruct the jury on a lesser-included offense at the request of the State, over the objection of the defense, if the offense is a lesser-included offense of the charged offense and if there is a reasonable basis in the evidence for acquittal on the greater offense and conviction on the lesser offense. *State v. Moua*, 215 Wis. 2d 511, 519, 573 N.W.2d 202 (Ct. App. 1997). Whether the evidence at trial supports an instruction on a lesser-included offense is a question of law the appellate court determines *de novo*. *State v. Kramer*, 149 Wis. 2d 767, 792, 440 N.W.2d 317 (1989).

By statute, first-degree reckless homicide is a lesser-included offense of first-degree intentional homicide. Wis. Stat. § 939.66(2).

On appeal, Patterson asserts that there is no reasonable basis in the evidence for acquittal on first-degree intentional homicide because the evidence was undisputed that he intended to kill and the only way he could be acquitted of first and second-degree intentional homicide is if the jury believed the State did not disprove that he had an actual belief that deadly force was necessary. This is no more than a rehash of his argument that the evidence was insufficient to convict him of first-degree reckless homicide. The State has fully responded to that argument in the prior section of this brief, and will not unnecessarily repeat these arguments here.

Patterson also asserts on appeal for the first time that it violated his due process right to notice of the charge to submit an instruction on first-degree reckless homicide after he had presented his defense. He did not raise this constitutional claim in the trial court, and therefore he has forfeited the right to raise it on appeal. *State v. Ndina*, 2009 WI 21, ¶ 30, 315 Wis. 2d 653, 761 N.W.2d 612.[2]

Patterson's claim of lack of notice is bogus. By statute, every crime which is a less serious type of criminal homicide than the one charged is a lesser-included offense. Wis. Stat. § 939.66(2). Accordingly, a criminal defendant charged with first-degree intentional homicide has sufficient notice that the jury may be allowed to consider and convict him of a lesser degree of homicide.

[2] In *Ndina*, 315 Wis. 2d 653, ¶¶ 29-30, the supreme court clarified that the term forfeit or forfeiture is more correct in this situation than waive or waiver. However, case law using the waiver terminology is still good law, and is consistent with the language in Wis. Stat. § 805.13(3). In this brief, the State uses the terms interchangeably.

Patterson asserts that if he had been charged with first-degree reckless homicide, he would have put on a different defense and could have chosen not to testify. The State is not required to charge a lesser-included offense as a prerequisite to obtaining an instruction on a lesser-included offense.

As the State explained at the instruction conference, it was requesting an instruction on first-degree reckless conduct based on Patterson's own testimony that he did not intend to kill McGowan. Although the State believed the jury should find intent to kill, it was aware the jury might not find that element, and if it did not, it could find Patterson guilty of reckless homicide (112:84-98). Allowing the State to obtain a lesser-included offense instruction in response to the Patterson's testimony, which the State could not have known until Patterson actually testified, did not in any way deprive Patterson of due process.

As this court has explained,

> It is unreasonable for a criminal defendant at the outset of trial to assume that the evidence presented at trial may not affect the state's prosecuting position. A criminal defendant must always be aware that the evidence may suggest to the state that an instruction on a lesser-included offense is appropriate.

State v. Fleming, 181 Wis. 2d 546, 559, 510 N.W.2d 837 (Ct. App. 1993).

For all of these reasons, this court must reject Patterson's appellate claim that the trial court erred in instructing the jury on the lesser-included offense of first-degree reckless homicide.

III. PATTERSON IS NOT ENTITLED TO RELIEF ON HIS UNPRESERVED CHALLENGE TO THE STANDARD JURY INSTRUCTIONS.

Patterson asserts the standard instructions the trial court gave the jury regarding first-degree reckless homicide was erroneous because it shifted the burden of proof to Patterson to prove self-defense and it did not instruct the jury that if Patterson actually believed the deadly force used was necessary, then he could not be found guilty of first-degree reckless homicide.

This court should decline to review this claim. Patterson challenged the jury instructions for the first time in his postconviction motion (82). His complaint comes too late. At trial, Patterson objected to the jury being instructed on first-degree reckless homicide, but once the court ruled that it would instruct the jury on that offense, Patterson did not object to the language of the standard instruction. Patterson never argued at trial that the instruction shifted the burden of proof to him, or that it failed to inform the jury that if he actually believed the deadly force used was necessary, then he could not be found guilty of first-degree reckless homicide.

By failing to make the requisite timely objections in the trial court, Patterson forfeited his right to appellate review of any challenges to the jury instructions.

A contemporaneous objection to the jury instructions is a prerequisite to appellate review of any challenge to the instructions. Wisconsin Stat. § 805.13(3) provides that at the jury instruction conference at the close of the evidence and prior to closing arguments, the trial court shall hold a conference with counsel outside the presence of the jury and inform the parties on the record of the instructions and verdicts it proposes to give to the jury. A party's failure to object to the trial court's proposed jury instructions or verdict at that time

constitutes a waiver of any error in the proposed instructions.

The Wisconsin Supreme Court reinforced in *Ndina* the reasons why a contemporaneous objection in the trial court is a prerequisite to the right to appellate review of the objection. *Ndina*, 315 Wis. 2d 653, ¶ 30. The rule that a litigant forfeits the right to appellate review of a claim, including a constitutional claim, if he fails to timely raise it in the trial court, serves valid purposes:

> The purpose of the "forfeiture" rule is to enable the circuit court to avoid or correct any error with minimal disruption of the judicial process, eliminating the need for appeal. The forfeiture rule also gives both parties and the circuit court notice of the issue and a fair opportunity to address the objection; encourages attorneys to diligently prepare for and conduct trials; and prevents attorneys from "sandbagging" opposing counsel by failing to object to an error for strategic reasons and later claiming that the error is grounds for reversal.

Ndina, 315 Wis. 2d 653, ¶ 30 (footnotes omitted).

This court does not have power to review challenges to jury instructions on appeal that were not properly preserved in the trial court. *State v. Cockrell*, 2007 WI App 217, ¶ 36, 306 Wis. 2d 52, 741 N.W.2d 267. This court may grant relief based on forfeited claims of trial court error under its discretionary power to reverse in the interest of justice, or under the rubric of ineffective assistance of trial counsel. *Cockrell*, 306 Wis. 2d 52, ¶ 36 n.12; *State v. Erickson*, 227 Wis. 2d 758, 766, 596 N.W.2d 749 (1999); *see State v. Schumacher*, 144 Wis. 2d 388, 406-08, 424 N.W.2d 672 (1988).

Patterson, however, does not assert that the claimed error in the jury instructions prevented the real controversy from being fully tried or resulted in a miscarriage of justice.

Patterson labels the error in this case plain error, but he utterly fails to discuss, much less apply, the standards of that doctrine. This court must decline to consider whether Patterson is entitled to relief under the plain error doctrine, because Patterson did not adequately brief that issue. This court cannot serve as both advocate and judge, and it would not be appropriate for it to attempt to do so. *State v. Pettit*, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992).

At any rate, Patterson is not entitled to relief under the plain error doctrine. To obtain relief under this doctrine, the defendant must establish that the unobjected to error is fundamental, obvious and substantial. *State v. Jorgensen*, 2008 WI 60, ¶ 23, 310 Wis. 2d 138, 754 N.W.2d 77. Patterson cannot meet this standard. The standard jury instructions have long been used without anyone noticing a problem with them. Under these circumstances, any error in the instructions was certainly not "obvious" as required by the plain error doctrine.

Moreover, the error was neither fundamental nor substantial. The standard jury instructions given in this case, considered as a whole rather than in isolation, did not shift the burden of proof to Patterson and were adequate to inform the jury that if Patterson actually believed the deadly force used was necessary, then he could not be found guilty of first-degree reckless homicide. The instructions included the following directives:

> The defendant is guilty of first-degree reckless homicide if the defendant caused the death of Joseph McGowan by criminally reckless conduct and the circumstances of the conduct showed utter disregard for human life. You will be asked to consider the privilege of self-defense in deciding whether the elements of first-degree reckless homicide are present.
>
> Because the law provides that it is the State's burden to prove all of the facts necessary to constitute a crime beyond a reasonable doubt you

will not be asked to make a separate finding on whether the defendant acted in self-defense.

Instead you will be asked to determine whether the State has established necessary facts to justify a finding of guilty for first- or second-degree intentional homicide or for first-degree reckless homicide.

If the State does not satisfy you that those facts are established by the evidence, you will be instructed to find the defendant not guilty. The facts necessary to constitute each crime will now be defined for you in greater detail. . . .

. . . .

. . . First-degree reckless homicide, as defined in Section 940.02, paren. 1, of the Criminal Code of the State of Wisconsin, is committed by one who recklessly causes the death of another human being under circumstances that show utter disregard for human life. Before you may find the defendant guilty of first-degree reckless homicide, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present:

One, that the defendant caused the death of Joseph McGowan. "Cause" means the defendant's act was a substantial factor in proving -- in producing the death; two, that the defendant caused the death by criminally reckless conduct.

"Criminally reckless conduct" means the conduct created a risk of death or great bodily harm to another person and the risk of death or great bodily harm was unreasonable and substantial and the defendant was aware that his conduct created the unreasonable and substantial risk of death or great bodily harm.

If the defendant was acting reasonably in the exercise of the privilege of self-defense, his conduct did not create an unreasonable risk to another. The circum -- And the third element is that the circumstances of the defendant's conduct showed utter disregard for human life. In determining

whether the conduct showed utter disregard for human life, you should consider these factors: What the defendant was doing, why the defendant was engaged in that conduct, how dangerous the conduct was, how obvious the danger was, whether the conduct showed any regard for -- for life and all other facts and circumstances relating to the conduct.

You should consider the evidence relating to self-defense in deciding whether the defendant's conduct showed utter disregard for human life.

If you are satisfied beyond a reasonable doubt that the defendant caused the death of Joseph McGowan by criminally reckless conduct and that the circumstances of the conduct showed utter disregard for human life, you should find the defendant guilty of first-degree reckless homicide. If you are not so satisfied, you must find the defendant not guilty. You are not in any event to find the defendant guilty of more than one of the forgoing offenses.

Self-defense is an issue in this case. The law of self-defense allows the defendant to threaten or intentionally use force against another only if the defendant believed there was an actual or imminent unlawful interference with his person and the defendant believed that the amount of force used -- that the defendant used or threatened to use was necessary to prevent or terminate the interference and the defendant's beliefs were reasonable.

The defendant may intentionally use force which is intended or likely to cause death or great bodily harm only if the defendant reasonably believed that the force used was necessary to prevent imminent death or great bodily harm to himself.

A belief may be reasonable even though mistaken. In determining whether the defendant's beliefs were reasonable, the standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense.

> The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of the defendant's acts and not from the viewpoint of the jury now. There is no duty to retreat, however, in determining whether the defendant reasonably believed the amount of force used was necessary to prevent or terminate the interference, you may consider whether the defendant had the opportunity to retreat with safety, whether such retreat was feasible and whether the defendant knew of the opportunity to retreat.

(112:117-18, 125-29). The instruction does not misstate the burden of proof or expressly place the burden of proof on the defendant. The flaw, if it exists, is that it does not take the extra step of specifying that the State has the burden to disprove self-defense. The issue is whether, considering the jury instructions as a whole, there is a reasonable likelihood the jury understood the instructions to allow conviction based upon insufficient proof. *State v. Patterson*, 2010 WI 130, ¶ 53, 329 Wis. 2d 599, 790 N.W.2d 909.

Under the plain error doctrine, if the defendant proves the error was fundamental, obvious and substantial, the burden shifts to the State to show the error was harmless by showing beyond a reasonable doubt that the jury would have found the defendant guilty absent the error. Because the instructions here contained no express error or misstatement, but at most failed to contain additional language expressly spelling out that the State had to disprove lawful self-defense, any error was subtle.

Alternatively, Patterson cannot demonstrate that trial counsel rendered ineffective assistance of counsel. A criminal defendant alleging ineffective assistance of trial counsel must prove that his trial counsel's performance was deficient and that he suffered prejudice as a result of that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Koller*, 2001 WI App 253, ¶ 7, 248 Wis. 2d 259, 635 N.W.2d 838.

The question is whether, under the circumstances of the case as they existed at the time of trial, the challenged conduct or failure to act could have been justified by an attorney exercising reasonable professional judgment. *Koller*, 248 Wis. 2d 259, ¶ 8; *State v. Kimbrough*, 2001 WI App 138, ¶¶ 31-34, 246 Wis. 2d 648, 630 N.W.2d 752. To prove deficient performance, the defendant must show that counsel's act or omission was "objectively unreasonable." *State v. Oswald*, 2000 WI App 2, ¶ 63, 232 Wis. 2d. 62, 606 N.W.2d 207.

To prove prejudice, the defendant must show that counsel's alleged errors actually had an adverse effect on the defense such that the proper functioning of the adversarial process was undermined and the trial cannot be relied upon as having produced a just result. To make this showing, the defendant must prove there is a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different. *Koller*, 248 Wis. 2d 259, ¶ 9.

Whether under those facts trial counsel's performance was deficient and prejudicial is reviewed by the appellate court *de novo*. *Koller*, 248 Wis. 2d 259, ¶ 10.

The court need not address both prongs if the defendant fails to prove either one of the prongs. *State v. Johnson*, 153 Wis. 2d 121, 128, 499 N.W.2d 845 (1990).

Patterson fails to explain how defense counsel can be faulted for failing to object to the long standing standard instruction. Because counsel cannot be faulted for failing to recognize any subtle flaw in the instructions, it cannot be said that his failure was objectively unreasonable and constituted deficient performance. Moreover, because any error in the instructions was so subtle, he cannot prove prejudice.

Wisely, Patterson does not seek to analogize to this court's recent decision in *State v. Austin*, 2013 WI App 96, ¶¶ 16-18, 349 Wis. 2d 744, 836 N.W.2d 833.

It should be noted that in *Austin*, this court did not find the error in the instruction was plain error, and it did not find defense counsel rendered ineffective assistance by failing to object to the standard instruction given at trial. Rather, this court granted a new trial in the interest of justice under the unique circumstances of that case. In *Austin*, unlike this case, the jury was presented with claims of both self-defense and defense of others. In the instruction on defense of others relative to the first-degree charges, the jury was instructed that the State must prove beyond a reasonable doubt that defendant did not act lawfully in defense of others. Confusingly, that instruction was not given in regard to self-defense as it related to second-degree reckless endangering safety, the crime of which Austin was convicted. *Austin*, 349 Wis. 2d 744, ¶¶ 7-10.

In Patterson's case, no inconsistent, confusing instructions on self-defense were given.

Moreover, Patterson does not argue that he is entitled to a new trial in the interest of justice, and he does not argue that the error in the jury instruction on self-defense prevented the real controversy from being fully tried. By failing to make that argument, he implicitly concedes that a new trial in the interest of justice is not warranted in this case. His implicit concession is well-taken.

Patterson is not entitled to relief under any theory for his belated complaints about the jury instructions. Properly viewing the instructions as a whole, there is no reasonable likelihood the jury understood the instructions to require Patterson to prove that he had an actual belief that the force used was necessary in order to avoid conviction of first-degree reckless homicide. *Austin* is limited to its facts, in which particular contradictory instructions were given. The *Austin* flaw does not exist in this case. In Patterson's case, there was no plain error, trial counsel's failure to object to the instructions on the grounds raised after trial did not constitute ineffective

assistance, and a new trial in the interest of justice is not warranted.

For all of these reasons, Patterson is not entitled to a new trial based on his unpreserved challenge to the standard jury instructions given in his case.

IV. PATTERSON IS NOT ENTITLED TO RELIEF ON HIS UNPRESERVED CHALLENGES TO HIS SENTENCE.

On appeal for the first time, Patterson asserts the trial court erroneously exercised its discretion by failing to set forth a nexus between the factors considered and the sentence imposed. Patterson has forfeited this issue by failing to raise it in a postconviction motion in the trial court, and this court should therefore decline to consider the issue. A postconviction motion challenging the trial court's sentence is a prerequisite to appellate review of the sentence. The law is very clear that the appellate court will not review a sentence on appeal if the defendant did not first file a motion challenging the sentence in the trial court. *State v. Walker*, 2006 WI 82, ¶ 30, 292 Wis. 2d 326, 716 N.W.2d 498; *State v. Chambers*, 173 Wis. 2d 237, 261, 496 N.W.2d 191 (Ct. App. 1992); *State v. Norwood*, 161 Wis. 2d 676, 680-81, 468 N.W.2d 741 (Ct. App. 1991); *State v. Meyer*, 150 Wis. 2d 603, 442 N.W.2d 483 (Ct. App. 1989). This prerequisite is based on the long-standing policy in Wisconsin "that it is better to give the circuit court, which is familiar with the facts and issues, an opportunity to correct any error it has made before requiring an appellate court to expend its resources in review." *Walker*, 292 Wis. 2d 326, ¶ 30.

Patterson also complains for the first time on appeal that in discussing sentencing, the trial court misstated the facts indicating McGowan was shot twice in the back while he was running away, rather than the correct fact that one bullet entered his buttocks. Patterson admitted that wound could have been inflicted while

McGowan was retreating. Moreover, the medical examiner who performed the autopsy opined the wound could have been inflicted while McGowan was bending or falling or while he was lying on the ground (107:132). Thus, the trial court's point that there was evidence that Patterson shot and hit the victim after any potential danger was over and while the victim was helpless was not mistaken.

In any event, Patterson forfeited this claim because he failed to object to the trial court's reliance on allegedly inaccurate information at sentencing. Patterson also failed to raise this challenge to the sentence in a postconviction motion, which, as stated above, is a prerequisite to appellate review.

For all of these reasons, Patterson is not entitled to relief on his unpreserved challenges to the sentence imposed.

V. PATTERSON HAS ABANDONED ANY APPELLATE CHALLENGE TO THE TRIAL COURT'S EVIDENTIARY RULINGS.

In the Summary of Arguments section of his brief, Patterson asserted:

> The circuit court erred in permitting Patterson to testify to some -- but not all -- of the prior acts of violence by McGowan of which Patterson was aware at the time. Patterson filed a pretrial motion for a preliminary ruling on the admissibility of evidence concerning prior violent acts by the victim, McGowan, of which Patterson was aware at the time of the shooting. The court conducted a hearing into the motion. The court ruled that Patterson could testify to some of the incidents, but excluded the majority of them on the grounds that they were either remote in time or not firmly established. The circuit court erroneously exercised its discretion because it applied the wrong legal standard. The defendant has the right to testify concerning his knowledge of the victim's propensity for violence.

> There is no requirement that the incidents be near in time nor firmly established. The only basis for excluded [sic] such testimony is if the probative value is exceeded by considerations of unfair prejudice. Here, the circuit court may [sic] no such finding.

(Patterson's brief at 9).

Patterson's brief, however, does not contain an actual argument on this issue, nor is such an argument included in his table of contents. The brief summary of argument does not cite any case law or authority, it does not specifically identify the individual items of evidence the trial court ruled inadmissible, and it does not contain an argument explaining why the trial court erred in excluding each item.

To the extent Patterson is challenging the trial court's evidentiary rulings on appeal, he has abandoned that challenge by failing to present a developed argument on the issue. This court must decline to consider this issue, because this court cannot develop and present the argument for Patterson. This court cannot be both advocate and judge, and it would not be appropriate for it to attempt to do so. *Pettit*, 171 Wis. 2d at 647.

For all of these reasons, to the extent Patterson is claiming the trial court's evidentiary rulings were error, this court must consider that claim abandoned on appeal.

CONCLUSION

Based on the record and the legal authorities and theories presented herein, the State asks this court to affirm the judgment of conviction, sentence and order denying postconviction relief entered below.

Dated this 24th of January, 2014.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,119 words.

Dated this 24th of January, 2014.

_____

SALLY L. WELLMAN
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 24th of January, 2014.

_____

SALLY L. WELLMAN
Assistant Attorney General