STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2014AP285-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GABRIEL JUSTIN BOGAN,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN MILWAUKEE COUNTY, THE HONORABLE JEFFREY A. WAGNER, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

J.B. VAN HOLLEN
Attorney General

ROBERT G. PROBST
Assistant Attorney General
State Bar #1063075

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-7063
(608) 266-9594 (Fax)
probstrg@doj.state.wi.us

TABLE OF CONTENTS

Page

Page

CASES

Page

Page

Page

STATUTES

OTHER AUTHORITIES

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2014AP285-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GABRIEL JUSTIN BOGAN,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN MILWAUKEE COUNTY, THE HONORABLE JEFFREY A. WAGNER, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The plaintiff-respondent, State of Wisconsin, requests neither oral argument nor publication because the briefs should adequately set forth the facts and applicable precedent, and because resolution of this appeal requires only the application of well-established precedent to the facts of the case.

STATEMENT OF THE CASE, FACTS AND PROCEDURAL HISTORY

As respondent, the State exercises its option not to present a full statement of the case. Wis. Stat. § (Rule) 809.19(3)(a)2. Instead, the State will present additional facts in the "Argument" portion of its brief.

ARGUMENT

BOGAN'S TRIAL COUNSEL WAS NOT INEFFECTIVE IN FAILING TO REQUEST A DEFENSE OF OTHERS INSTRUCTION BECAUSE THE EVIDENCE DID NOT SUPPORT THE INSTRUCTION BEING GIVEN AND DIRECTLY CONTRADICTED VALID TRIAL STRATEGY.

I. APPLICABLE LEGAL PRINCIPLES AND STANDARDS OF REVIEW

A. Regarding Sufficient Evidence That Would Warrant A Defense Jury Instruction

A criminal defendant is entitled to an instruction on a statutory defense if there is a reasonable construction of the evidence, viewed in the most favorable light from the standpoint of the defendant, that meets the requirements of the statutory defense. *State v. Giminski*, 2001 WI App 211, ¶¶ 8-11, 247 Wis. 2d 750, 634 N.W.2d 604. Whether there was sufficient basis for the instruction based on the record presented is a question of law that the appellate court reviews de novo. *Id.*, ¶ 11.

However, as this court further observed in *Giminski*:

> To support a requested jury instruction on a statutory defense to criminal liability, the defendant "has the initial burden of producing evidence to establish [that] statutory defense." *State v. Stoehr*, 134 Wis. 2d 66, 87, 396 N.W.2d 177 (1986). That burden may be satisfied, however, from evidence adduced by either the prosecution or the defense. [*State v.*] *Coleman,* 206 Wis. 2d [199, 214, 556 N.W.2d 701, (1996)]. As the supreme court explained, the "[u]ltimate resolution of the issue" of whether to give a requested theory-of-defense instruction, based on a statutory defense, "'turns on a case-by-case review of the evidence, with each case necessarily standing on its own factual ground.'" *Stoehr,* 134 Wis. 2d at 87, 396 N.W.2d 177 (quoting *Johnson v. State,* 85 Wis. 2d 22, 28, 270 N.W.2d 153 (1978)).
>
> . . . .
>
> Thus, the privilege of defense of others, like the privilege of self-defense, has two components, both of which must be satisfied by a defendant claiming the privilege: (1) subjective--the defendant must have actually believed he or she was acting to prevent or terminate an unlawful interference; and (2) objective--the belief must be reasonable. *See* [*State v.*] *Jones*, 147 Wis. 2d [806, 814-15, 434 N.W.2d 380 (1989)].

Id., ¶¶ 11, 13.

"[The] circuit court has broad discretion in deciding whether to give a particular jury instruction." S*tate v. Fonte*, 2005 WI 77, ¶ 9, 281 Wis. 2d 654, 698 N.W.2d 594. A circuit court properly exercises its discretion by giving an instruction that "'fully and fairly inform[s] the jury of the rules of law applicable to the case and . . .

assist[s] the jury in making a reasonable analysis of the evidence.'" *Id*. (citation omitted).

Where the circuit court incorrectly instructs the jury, an appellate court must set aside the verdict unless that error was harmless, i.e., unless there is no reasonable possibility that the error contributed to the conviction. *State v. Neumann*, 179 Wis. 2d 687, 703, 508 N.W.2d 54 (Ct. App. 1993). In this inquiry, the State has the burden of establishing, beyond a reasonable doubt, that there is no reasonable possibility that the error contributed to the conviction. *State v. Dyess*, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985). An error is harmless if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. *State v. Harvey*, 2002 WI 93, ¶ 46, 254 Wis. 2d 442, 647 N.W.2d 189 (quoting *Neder v. United States*, 527 U.S. 1 (1999)). This presents a question of law which is reviewed de novo. *State v. Harris*, 199 Wis. 2d 227, 256-63, 544 N.W.2d 545 (1996). In determining whether an error is harmless, an appellate court weighs the effect of the trial court's error against the totality of the credible evidence supporting the verdict. *Id.* at 255.

B. Regarding Ineffective Assistance Of Counsel

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.

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. *Id.*, ¶ 36 n.12; *State v. Erickson*, 227 Wis. 2d 758, 766, 596 N.W.2d 749 (1999).

A criminal defendant who claims his attorney was ineffective has a dual burden to prove both that his attorney's performance was deficient and that the deficient performance prejudiced his defense. *State v. Allen*, 2004 WI 106, ¶ 26, 274 Wis. 2d 568, 682 N.W.2d 433. *State v. Thiel*, 2003 WI 111, ¶ 18, 264 Wis. 2d 571, 665 N.W.2d 305. A claim of ineffective assistance fails if the defendant fails to prove either one of these requirements. *State v. Williams*, 2006 WI App 212, ¶ 18, 296 Wis. 2d 834, 723 N.W.2d 719.

To prove that his attorney's performance was deficient, the defendant must establish that counsel's representation fell below an objective standard of reasonableness. *Thiel*, 264 Wis. 2d 571, ¶ 19; *State v. Johnson*, 133 Wis. 2d 207, 217, 395 N.W.2d 176 (1986).

The reasonableness of an attorney's acts are judged deferentially on the facts of the particular case viewed from counsel's contemporary perspective to eliminate the distortion of hindsight. *State v. Maloney*, 2005 WI 74, ¶ 25, 281 Wis. 2d 595, 698 N.W.2d 583; *Johnson*, 133 Wis. 2d at 217. Importantly, trial counsel's

failure to make a meritless objection does not constitute deficient performance. *See State v. Wheat*, 2002 WI App 153, ¶ 23, 256 Wis. 2d 270, 647 N.W.2d 441.

Indeed, to prove that an attorney's performance was deficient, it is not enough for a defendant to establish merely that his attorney was not very good. *Thiel*, 264 Wis. 2d 571, ¶ 19. Instead, the defendant must establish that his attorney's acts were outside the wide range of professionally competent assistance as illustrated by prevailing professional norms. *Id.*; *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). The defendant must demonstrate that his attorney made serious mistakes that could not be justified under an objective standard of reasonable professional judgment. *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Further, "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689. In evaluating a deficiency claim, the court should not "second guess trial counsel's selection of trial tactics or strategies." *State v. Nielsen*, 2001 WI App 192, ¶ 44, 247 Wis. 2d 466, 634 N.W.2d 325 (citation omitted).

Secondly, the defendant must "offer more than rank speculation to satisfy the prejudice prong." *Erickson*, 227 Wis. 2d at 774. The test is whether "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687; *Johnson*, 133 Wis. 2d at 222. The defendant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "Showing prejudice means showing that counsel's alleged errors actually had some adverse effect on the defense." *State v.*

Koller, 2001 WI App 253, ¶ 9, 248 Wis. 2d 259, 635 N.W.2d 838. And when the defendant alleges that his attorney was ineffective for failing to take some action, he must show with specificity what that action would have accomplished if it had been taken, and how its accomplishment would have probably altered the result of the proceeding. *State v. Byrge*, 225 Wis. 2d 702, 724, 594 N.W.2d 388 (Ct. App. 1999), *aff'd*, 2000 WI 101, 237 Wis. 2d 197, 614 N.W.2d 477.

On appellate review, ineffective assistance of counsel cases present a mixed question of fact and law. The circuit court's factual findings will be upheld unless clearly erroneous. Whether counsel's performance was deficient and prejudicial to the defense is a question of law reviewed de novo. *State v. Mayo*, 2007 WI 78, ¶ 32, 301 Wis. 2d 642, 734 N.W.2d 115.

II. APPLICATION OF PRINCIPLES AND STANDARDS TO FACTS OF THIS CASE

A. Bogan's Trial Counsel Was Not Ineffective For Failing To Request An Instruction That Was Unwarranted And In Conflict With Trial Strategy

Bogan argues that his trial counsel, Attorney Anne T. Bowe, was ineffective in failing to request a defense of others instruction at trial. Bogan's brief at 14-21. Bogan contends that he was trying to protect Leroy Newman after a confrontation over a dice game between Newman and Dontez Jefferson when Bogan shot and killed Yvontae Young and shot and severally wounded Amuri Burgess. *Id.*

For reasons argued below, Attorney Bowe was not ineffective in failing to request a defense of others instruction because there was no evidence to support such an instruction, and because trial strategy focused on the lack of credible evidence that identified Bogan as the shooter (including no DNA evidence and no gun ever recovered), thus putting the State to its burden of proof as to all the elements of the crimes charged.

Wisconsin Stat. § 939.48(4), the defense of others statute, states:

> A person is privileged to defend a 3rd person from real or apparent unlawful interference by another under the same conditions and by the same means as those under and by which the person is privileged to defend himself or herself from real or apparent unlawful interference, provided that the person reasonably believes that the facts are such that the 3rd person would be privileged to act in self-defense and that the person's intervention is necessary for the protection of the 3rd person.

First, it should be noted that Wis. Stat. § 939.48(4) states that the actor must have a reasonable belief "that the facts are such that the 3rd person would be privileged to act in self-defense . . . ."

Moreover, Wis. Stat. § 939.48(4) is part of Wis. Stat. § 939.48, self-defense and defense of others. Subsection (1), describing the extent of a self-defense claim, states that:

> [t]he actor may intentionally use only such force or threat thereof as he reasonably believes is necessary to prevent or terminate the interference. He may not intentionally use force which is intended or likely to cause death or great bodily harm unless he

> reasonably believes that such force is necessary to prevent imminent death or great bodily harm . . . .

Wis. Stat. § 939.48(1).

Giminski, 247 Wis. 2d 750, ¶¶ 11, 13, states that the second component of a review of such a claim is that, although the actor may hold the belief that the defensive actions may be necessary, the actor's belief must also be a reasonable one. According to this portion of Wis. Stat. § 939.48(1), the actor may only use the force or threat thereof that he *reasonably* believes is necessary to terminate the interference.

In the instant case, there is no evidence in the record that would support either component. As testimony at Bogan's trial made clear, Bogan was not even in the group with Leroy Newman when he shot Young and Burgess, and no evidence was elicited at trial that would show that both components were satisfied: 1) Bogan must have maintained a reasonable belief "that the facts are such that [Newman] would be privileged to act in self-defense . . ." (Wis. Stat. § 939.48(4)), and 2) Bogan's beliefs based on those facts must be reasonable. Thus, there is no way Bogan could have been seeking to protect Newman, as his brief claims. Further, Bogan fired at Young and Burgess, both of whom were unarmed, not Dontez Jefferson who had earlier brandished a pistol. Finally, the testimony reflects that whatever confrontation had occurred was already over when Bogan shot Young and Burgess, both of whom were unarmed and did nothing to incite or attack Bogan.

Officer Matthew Dresen testified that he arrived on scene and found Burgess struggling to breathe with a gunshot wound to his chest and Young apparently lifeless with a gunshot wound to

the head (57:29-32). Office Dresen found no weapons on Young or Burgess (57:33).

Dontez Jefferson, who had been playing the dice game with Leroy Newman,[1] testified that after the two argued they each called a number of individuals who all coalesced into one area (58:13-26). Jefferson testified that Newman's group had nine people in it as opposed to his two, so he called people including Burgess and Young (58:23-25). Jefferson brandished an unloaded weapon to Newman's group (58:19-22), and Newman's group gave Jefferson's group chase before the parties lost one another and became discombobulated (58:26-29).

Importantly, Jefferson testified that he was *no longer* with Burgess or Young and his group had split up (58:29). It was not until that point that Jefferson heard several shots ring out, as Bogan had unexpectedly and without provocation shot Burgess and Young (58:30-32). Jefferson further testified that no one else in his group had a gun (58:32).

Amuri Burgess then testified consistent with Jefferson's testimony (58:41-56). Burgess pointedly stated that he was not chasing anybody when he was shot; rather, he was walking away from the entanglement "[bec]ause we thought everything was done" (58:49-50, 57). Burgess testified that he didn't even see who it was that shot him (58:54-55).

As noted above, to warrant a defense of others instruction, Bogan must have shown facts at trial that would allow a jury to conclude that

[1] Newman did not appear to testify. A body attachment was issued, but Newman could not be located (59:61-69; 63:12-13).

Newman reasonably feared for his life from Young and Burgess, that Bogan was aware that Newman had such a fear, and that Bogan's actions in response were reasonable and in protection of Newman.

But because Newman was not even present with the group when Bogan shot Young and Burgess, because there is no evidence either possessed a weapon or were attacking or even considering attacking Newman, Bogan had no right and no legal defense to attack Young and Burgess.

And, even if Young and Burgess were a threat to Newman, under the second component of Wis. Stat. § 939.48(4), the level of corresponding force employed by Bogan would still of have to be reasonable. *Id.* But there is no evidence that Newman felt threatened by either Young or Burgess (and Newman did not even testify at trial), and no evidence that either Young or Burgess were armed and preparing to attack Newman. Thus, Bogan's decision to shoot both from some distance was entirely unreasonable. *Accord Jones*, 147 Wis. 2d at 819 ("While sec. 939.48(1) and (4), Stats., recognizes that a person may defend another with force likely to cause death or great bodily harm, the statute limits this privilege. The law does not authorize the use of deadly force except in limited situations. The words of the statute confine the privilege of defense of others to a narrow range of circumstances.").

Finally, had Attorney Bowe sought an instruction on the defense of others, the State could have asked that Wis. JI-Criminal 835 be given, considering the back and forth nature of the incident. That instruction states unequivocally that a "person who engages in unlawful conduct of

a type likely to provoke others to attack, and who does provoke an attack, is not allowed to use or threaten force in self-defense against that attack." Wis. JI-Criminal 835 (2005). Because Newman had amassed a group of people, including an armed Bogan, and had gone back and forth with Jefferson's group, it is entirely possible that a jury could have concluded neither Newman nor Bogan acting on his behalf were entitled to use deadly force.

Bogan also argues that the circuit court erred in rejecting his claim a defense of others instruction was warranted, labeling its decision "scant." Bogan's brief at 21. Further, Bogan argues that the fact that he did not testify at trial should not preclude him from seeking that instruction. *Id.* at 22.

The circuit court's conclusion is correct. Given the evidence adduced at trial as set forth above, the trial strategy that focused on the lack of direct evidence tying Bogan to the shooting, and published case law regarding when such an instruction is appropriate, the circuit court succinctly and appropriately rejected Bogan's interpretation of Wis. Stat. § 939.48(4).

In *Jones*, 147 Wis. 2d 806, our supreme court held that defendant was entitled to jury instruction on defense of others privilege after the circuit court refused to give that instruction. *Id.* at 808-09. In *Jones*, the defendant's sister Eunice Jones and Donald Price were standing outside the defendant's home, arguing about some keys. *Id.* at 809. The two had lived together, and Price had on previous occasions beaten Eunice "to the point of being bloody . . . ." *Id.*

Further, the court observed:

> Price was 38 years old, close to 6 feet tall and described as being "well-muscled." The defendant was 17 years old and approximately 5 feet 4 inches to 5 feet 6 inches tall.
>
> In the course of the argument with Eunice, Price began "cursing, talking crazy talk" and hitting Eunice. The defendant, his mother, and others were standing nearby.
>
> The defendant's mother told Price to stop hitting her daughter. Price pushed the defendant's mother away and threatened to kill her. The defendant then intervened, telling Price to stop hitting his mother. Price's response was to push the defendant down several porch steps. During his exchange with the defendant and the defendant's mother, Price continued to hold onto Eunice. The defendant told Price to release Eunice, and Price responded by striking the defendant with his fist.
>
> The defendant said he viewed Eunice as "badly bruised" and he was fearful for Eunice's safety because Price refused to let her go. The defendant testified that he thought that if he did not stop Price, Price might kill her. The defendant ran into the house, grabbed a butcher knife and ran back outside. Price was still holding Eunice, twisting her arm and hitting her in the face. The defendant approached Price and swung at him with the knife. The swing did not connect.
>
> The defendant testified that, after his first swing missed, "I [the defendant] stood there for about two minutes, and I asked him to let go of my sister, and she finally broke loose. He came walking towards me, and he swung, and he bumped on it [the knife] like that, and he just-he just fell backwards on his back." The defendant denied that he intended

> to stab Price. His motive in getting the knife and confronting Price was to stop Price.

Id. at 809-10 (footnote omitted).

Under these circumstances, our supreme court concluded that a defense of others instruction was warranted:

> On the basis of the defendant's different answers to separate questions, we conclude, examining the evidence in the light most favorable to the defendant, as we are required to do, that the jury could reasonably have concluded that the defendant was confused by the questioning, that the defendant had a poor concept of how long a minute is, or that his perception of time was affected by the trauma of the events. The jury could reasonably conclude from the testimony that moments--that is, minute portions of time--not minutes, had elapsed between Eunice's breaking away and the stabbing.
>
> Upon examination of the record in the light most favorable to the defendant, as we are required to do, we conclude, as did the court of appeals, that a jury could decide that the defendant reasonably believed that his actions were necessary to protect his sister Eunice from imminent death or great bodily harm. We agree with the court of appeals that "Jones' testimony allows the inference that Price had turned his aggression toward Jones and that the time span between Eunice's escape and the stabbing was minimal, making the entire incident a continuous act."

Id. at 818.

Notably, then, Jones *did testify* as to his previous history with Price, his version of events, and how his perception of those events was colored by that previous history.

None of that happened here. Bogan elected not to testify (61:87-91). Further, there was no testimony whatsoever as to any prior history between Young, Burgess, and Bogan, or to the extent of the encounter (if any) between Bogan and the two victims that preceded the shooting. Finally, whereas Jones testified regarding his belief in the necessity of his actions, no such testimony was elicited from Bogan.

Similarly, in rejecting a defendant's argument that a defense of others instruction was warranted, this court in *Giminski* held that a sufficient level of detail at trial was necessary before a defense of others instruction should be considered. Giminski resisted three Secret Service agents' attempts to seize a vehicle that Giminski's daughter was attempting to drive away. *Giminski*, 247 Wis. 2d 750, ¶¶ 2-6. Giminski pointed a gun at one of the agents, the agent lunged at Giminski, and the gun discharged several times, hitting both the agent and Giminski. *Id.*, ¶ 5. Giminski testified that he did not intend to shoot the agent, that he seriously believed his daughter was in "mortal danger," and Giminski simply wanted to "extricate" her from the car. *Id.*, ¶ 6. Several other witnesses' testimony also supported Giminski's. *Id.*

This court rejected Giminski's argument, concluding that his actions, viewed objectively, were unreasonable:

> Giminski concentrates his arguments on those portions of the jury instruction explaining the subjective component--that the law allows for the defense of others if a defendant "believed that there was an actual or imminent unlawful interference" even if the belief was "mistaken." *See* Wis. JI-Criminal 830. The State, however, while maintaining that "the matter [of Giminski's belief] is not entirely free from doubt,"

> concedes "at least for the sake of argument, that [Giminski] did, as a subjective matter, actually entertain the beliefs necessary to establish the privilege of defense of others." Thus, the State concentrates on the objective component, emphasizing that Giminski would have had to have *reasonably* believed that his actions were necessary to terminate an *unlawful* interference. *See id.* The State astutely argues that even viewing the circumstances from Giminski's perspective would not allow for any *reasonable* belief that Agent Hirt's actions were unlawful, or any *reasonable* belief that Agent Hirt was going to do anything from which Elva needed protection. The State is correct.
>
> . . . .
>
> Even sliding inside Giminski's shoes, and even allowing for a father's extraordinarily strong urge to protect his child, we see absolutely nothing that established a basis for any *reasonable* belief justifying Giminski's conduct. He knew the lawfulness of the agents' seizure of the van. He knew that anything Elva might have been doing in attempting to drive that van away would have constituted *her* unlawful interference with the seizure. He knew, therefore, that Agent Hirt was lawfully entitled to prevent Elva from driving off in the van. And he could not have reasonably believed that Agent Hirt, in front of witnesses in a residential neighborhood, in the broad daylight of a summer afternoon, had any incentive to harm Elva or do anything more than necessary to prevent her from taking the van.

Id., ¶¶ 14-16.

Thus, the *Giminski* court evaluated Giminski's testimony and any supporting evidence, and concluded that his belief in using potentially lethal force to defend his daughter, even if subjectively sufficient under the first prong, was still objectively unreasonable under

the second. *See id.*, ¶ 13 (defendant must show *both* "1) subjective -- the defendant must have actually believed he or she was acting to prevent or terminate an unlawful interference 2) objective -- the belief must be reasonable").

Here, because Bogan did not testify, and did not otherwise establish the necessary two components to assert the privilege, a defense of others instruction was entirely unwarranted. Consequently, counsel could not have been ineffective in failing to pursue it. *See State v. Simpson,* 185 Wis. 2d 772, 784, 519 N.W.2d 662 (Ct. App. 1994) (It is not ineffective assistance to fail to make a request that would have failed.). Consequently, the circuit court was entirely correct in surmising that the evidence at trial did not warrant an instruction without any support for that defense existing in the record.

Indeed, the circuit court did give the pattern jury instructions regarding first-degree reckless homicide and first-degree recklessly endangering safety, both of which require proof of criminally reckless conduct (57:7-10; 61:99-105). *See also* Wis. JI-Criminal 1020, 1345 (2012)). Both require proof that Bogan created a risk of death or great bodily harm, that the risk of death or great bodily harm was *unreasonable* and substantial, and that the defendant was aware that his conduct created that risk. *Id.*

Therefore, to be found guilty the jury would've had to reject a conclusion that Bogan's conduct was reasonable and that the level of force used was reasonable. *Accord Giminski*, 247 Wis. 2d 750, ¶ 13 (defendant must show both that 1) defendant actually believed he was acting to prevent or terminate an unlawful interference and 2) that belief must be reasonable). This means that there is no risk that the jury convicted Bogan

of using reasonable force under a valid belief that Newman's life was in danger. Consequently, any error in not giving the defense of others instruction was harmless because there is no reasonable possibility that the alleged error contributed to the conviction *See Neumann*, 179 Wis. 2d at 703.

Indeed, even *if* a defense of others instruction *could have been given* in an exercise of circuit court discretion under the evidence, the instructions as given properly conveyed to the jury the requirement that Bogan's conduct be unreasonable. *Cf. State v. Lenarchick*, 74 Wis. 2d 425, 455, 247 N.W.2d 80 (1976) ("If the instructions of the court adequately cover the law applicable to the facts, this court will not find error in the refusal of special instructions even though they refused instructions themselves would not be erroneous.").

Finally, as the circuit court noted in its postconviction decision, the defense strategy was to challenge the state's witnesses' credibility, lack of DNA evidence, failure to recover the gun used by Bogan, and to point to Newman as a man who had reason to do the shooting (41:1; *see also* 39:2-7).

Attorney Bowe made the above strategy evident in her opening and closing remarks, and attacked the state's witnesses throughout the trial regarding same. For example, in opening Attorney Bowe argued:

> This is not a technicality case. This is not a case where at the end you're going to hear arguments from me about whether this was an intentional act or reckless act or negligent act. This is a straight up not guilty, I didn't do it case.
>
> . . . .

> . . . . Well, in this case, there is no scientific evidence that connects Gabriel Bogan to this case, to this homicide.
>
> There's no video surveillance. That's no fingerprints. There's no DNA. There's no scientific evidence that [connects] Mr. Bogan in any way. They don't even have a gun.

(57:23-24).

To further prove the point, Attorney Bowe attacked the credibility of state's witnesses: Newman (whom she said really had reason to pull the trigger and instigated the entire incident), and jailhouse tipsters Ricky Chiles, Nate Richmond, and Robert Brown (whom Attorney Bowe painted as convicted felons hoping to catch a break in exchange for their testimony).

> These people are bank robbers, criminals. Between the three of them I can't -- more than you can count how many times they've been convicted. . . . These are issues that go to their character. These are issues that go to their reliability, believability, and credibility. They are people who sit there in jail . . . trying to figure out who they can talk to, what they can find out that they can use for their own ends, and those are their motives for testifying.
>
> . . . .
>
> . . . [T]he real truth here is that Morgan is covering up for his friend, Leroy. His friend, Leroy, is the one who is in on the fight. His friend, Leroy, is the one whose got his, you know, manhood challenged and then disrespected.

(62:18, 28).

The record reflects that Attorney Bowe attacked all three witnesses as to their motives for

testifying for the State (58:118, 122; 59:39; 60:23-37).

Finally, Attorney Bowe attacked Tavaris Morgan's credibility in closing. Shortly after it occurred, Morgan had originally told detectives that he witnessed the shooting, but Morgan refused to testify to that effect at trial, saying he didn't remember telling detectives that (60:50-82; 61:8-42). Consequently, Attorney Bowe argued:

> [W]hen Tavaris Morgan stops getting yelled at, stops getting harassed, stops getting good cop/bad cop, has a moment to settle down and talk and say what is the truth as I believe it to be, as Mr. Bogan believes it to be, what does he say. He says I didn't see what happened . . . .

(62:14).

As is evident, Attorney Bowe's questioning of state's witnesses and attack of their credibility, and her arguments based upon the facts that the state hadn't or couldn't prove, were entirely reasonable trial strategies and very much supported the idea that Bogan did not do the shooting at all. Respectfully, simply because Bogan was found guilty after pursuit of this strategy does not mean Attorney Bowe was ineffective. *See Nielsen*, 247 Wis. 2d 466, ¶ 44 (In evaluating a deficiency claim, the court should not "second guess trial counsel's selection of trial tactics or strategies.").

B. Alternatively, If This Court Concludes That A Defense Of Others Instruction Was Warranted, A Return To The Circuit Court For a *Machner* Hearing Is Necessary

It is a fundamental principle of ineffective assistance of counsel claims that a defendant may not obtain relief on his claim without first giving trial counsel a chance to explain the disputed action. *See, e.g., State v. Cox*, 2007 WI App 38, ¶ 6, 300 Wis. 2d 236, 730 N.W.2d 452; *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979) ("We hold that it is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel.").

Here, the circuit court concluded in an exercise of discretion that no evidentiary hearing was warranted (41). However, if this Court concludes that Bogan's trial counsel was in fact ineffective, a remand to the circuit court for the opportunity to take testimony, for the State and opposing counsel to ask questions of Attorney Bowe, and for the circuit court to make relevant factual findings and credibility determinations should precede the any appellate relief. *Cf. State v. Curtis*, 218 Wis. 2d 550, 554-55, 582 N.W.2d 409 (Ct. App. 1998) (A *Machner* hearing is "essential in every case where a claim of ineffective assistance of counsel is raised.").

CONCLUSION

For the foregoing reasons, this court should affirm Bogan's judgment of conviction and order denying his motion for postconviction relief.

Dated this 12th day of June 2014.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General

ROBERT G. PROBST
Assistant Attorney General
State Bar #1063075

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-7063
(608) 266-9594 (Fax)
probstrg@doj.state.wi.us

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 5,254 words.

_____
Robert G. Probst
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 12th day of June, 2014.

_____
Robert G. Probst
Assistant Attorney General