STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal No.2015AP1126-CR
(Milwaukee County Case No. 2013CF2480)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PHILLIP KAREEN GREEN,

Defendant-Appellant.

Appeal From the Judgment of Conviction and Order Denying Postconviction Motion, Both Entered In The Circuit Court For Milwaukee County, the Honorable Jeffrey A. Wagner Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED FOR REVIEW

1. Whether the evidence adduced at trial was sufficient to prove that Phillip Kareen Green, who had a concealed carry permit, had utter disregard for human life and therefore to convict Phillip Kareen Green of first degree reckless homicide when Green did nothing to upset or provoke the victim and shot once only after the victim, who was driving, pulled over the truck, pulled open the back door which Green himself could not have opened, threw numerous punches, pulled Green's clothing up over Green's head, and, attempted to stomp on Green's head while Green was on the ground.

The circuit court denied a postconviction motion raising this issue.

2. Whether Phillip Kareen Green is entitled to a new trial in the interests of justice because: (1) the real controversy was not tried either because the jury instructions did not explain that imperfect self-defense negated "utter disregard" or because key testimony concerning events prior to the victim's unprovoked physical escalation was not put in context and a key fact introduced; or (2) because the faulty jury instruction caused justice to miscarry.

The circuit court denied a postconviction motion raising this issue.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is appropriate in this case under Wis. Stat. (Rule) 809.22. Appellant's arguments clearly are substantial and do not fall within that class of frivolous or near frivolous arguments

concerning which oral argument may be denied under Rule 809.22(2)(a).

Green does not seek publication under Wis. Stat. (Rule) 809.23.

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BRIEF OF DEFENDANT-APPELLANT

STATEMENT OF THE CASE

This case involves the shooting of an extremely angry man who began an argument over no-one-knows-what (R57:20, 46-47); pulled over a truck in anger, even though others in the truck believed nothing had been said that would justify doing so (*id*.:89); got out and opened the back door which could not be opened from the inside (*id*.:19, 48, 89-90); threw numerous punches while his target failed to land a punch (R56:80-81, 92; R57:25, 50), pulled the target's clothing up over his head (R56:94-95); and, after the target was on the ground, attempted to stomp on the target's head (*id*.:95; R57:51, 92-93). The target of the man's anger, who was carrying a gun pursuant to a concealed carry permit (*id*.:22, 60; R58:28) and "wasn't really the–that aggressive" (R56:93), never landed a punch. (*id*:80; R57:25, 27) He fired one fatal shot (R56:12; R58:45). The key question at the heart of the trial was whether the shot was fired in self-defense, imperfect self-defense, or solely in anger.

The jury convicted Phillip Kareen Green of one count of First-Deg. Reckless Homicide by Use of a Dangerous Weapon, contrary to Wisconsin Statutes §§ 939.63(1)(b) and 940.02(1). (R20). The court, the Honorable Jeffrey A. Wagner presiding, sentenced him to 30 years in prison with 18 years of initial confinement and 12 years of extended supervision. (R26).

Green timely filed a postconviction motion pursuant to Wisconsin Statutes § 809.30, alleging that the evidence was insufficient to find that he acted with "utter disregard for human life" and that he should get a new trial in the interests of justice. (R35;R36). The court denied the motion without an evidentiary hearing. (R44).

Notice of appeal was timely filed on June 5, 2015. (R45).

FACTS

Phillip Green, the 40-year-old holder of a concealed carry permit (R57:22, 60; R58:26, 28), spent part of the day on May 24, 2013 trying to help his fiancee's brother, Nicklaus Gordon, get a job with Green's employer, the City of Milwaukee (*id*.:26, 29).

That evening, after he and Gordon had parted ways, Gordon was at Dale's Bar (R57:9). Green also drove to Dale's Bar, at the urging of Gordon, who did not mention that he was not alone. (R58:26, 28-29, 32; *see also* R57:38). Green left his gun outside and entered the bar (*id*.:50), where he discovered that Gordon was with two men: Ernest Banks, who was married to the sister of Gordon's fiancee, and Johntel Henderson, a friend of both Banks and Gordon, whom Green had never met before. (*Id*.:5, 7-8, 10, 75-77, 99; R58:45).

All of the men were significantly younger than Green. Banks was the youngest, and he was twelve or thirteen years younger than Green. (R57:41). They were not a group that hung out regularly (*id*.), and they were the only customers in the bar (R58:32).

Banks was the type of hot-head who "goes off easy," especially if he believed he was being disrespected. (R57:107-108). Banks did not like Green, and told Henderson at Dale's that "he don't

know why Nick called [Green] to the bar with us knowing that [Banks] did not like him." (*Id*.:109). They did not have a good relationship from Green's perspective either (R58:46) and had exchanged words approximately three years earlier when Green and Gordon were arguing and Banks tried to intervene (R57:55-56).

Gordon drank alcohol while they were at Dale's, but could not remember how much.(*Id*.:10). Henderson said Banks had a beer and a shot and Gordon had at least as much. (*Id*.:81). Both Green and Henderson testified they had a beer there. (*Id*. 78; R58:32).

After approximately twenty minutes, the men left. (R57:79; R58:33). According to Gordon and Henderson, they left to go to another bar, 502, to shoot pool. (R57:11, 97). Banks said something to Henderson and then those two left while Gordon asked Green to come. (R58:33). Green knew that his fiancee was at a gathering at 502 so he agreed to go. (*Id*.).

Banks drove Gordon's truck to Henderson's house to allow Henderson to drop off his car. (R57:13, 79). Green drove to Henderson's house, where all four met up. (*Id*.:79; R58:14). Gordon then jumped into Green's car. (R57:11; R58:14). Banks came over to Green's car and insisted that they should all ride together. Green grabbed his gun out of his rental car so there was no chance of it being stolen from his rental car and because his permit allowed him to carry it. (*Id.*:50-51). They all got into Gordon's truck. (R57:15). Banks drove and Henderson was in the front passenger seat. (R58:35). Green was in the back seat behind Banks while Gordon was behind Henderson. (*Id*.)

When they arrived at 502, Green discovered that the truck had the child safety locks on and that someone else had to open the door from the outside for him to exit. (*Id*.:35). Banks let him out and they went into 502. (*Id*.:36-37).

Gordon admitted to drinking at 502. (R57:16). Green claimed he did not drink there, although Henderson claimed he did. (*Id*.:81; R58:37). Henderson claimed he only had water. (R57:81).

During the approximately 20-30 minutes they were there (*id*.), Henderson and Banks did not talk to Green or Gordon at all, but were off talking between themselves. (*Id*.:14, 16-17, 37, 43). Green and Gordon met up with their fiancees and other women (*id*.:14, 16-17, 43, 81; R58:37). Henderson and Banks wanted to leave and Banks told Gordon it was time to go (R57:17, 82). Gordon then told Green. (R58:37).

Green thought that he was going back to his car (*id*.:38), but Banks suggested going to a club (R57: 43-44; R58:38). Banks suggested Ricky's, which was on approximately 26th Street and Wells Avenue.[1] (R57:43-44, 86; R58:38). Green said he did not want to go, but Gordon wheedled Green, "we just going for a minute, man." (R57: 44; R58:38).

Banks drove the truck to Ricky's as they all sat in the same places as before. (R57:82-84; R58:39). Banks parked the truck and Banks and Henderson went toward Ricky's. (R57:44). According to Green and Henderson, Banks and Henderson opened the doors for the two in the back who could not get out themselves, due to the child safety locks. Green and Gordon were getting out of the truck as Banks and Henderson approached Ricky's.[2] (*Id*.:84-85; R58:39). Henderson and Banks stopped at the door and returned to the truck. (*Id*.:84-85). There was no conversation about why they did not go inside. (R58:40).

Banks began driving again. (R57:46). The music was on and Banks and Henderson were talking (*id*.:105), but Green could not hear what they were saying (R58:40). Banks then turned down the music and announced that they were going to the Cheetah Club and that everyone was coming with him. (R58:41). Green asked to go home (R57:46, 86) and then Henderson said he wanted to go home

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[1] Although Green does not remember it and Gordon does not mention it, Henderson claimed they first went to a club on Water Street, parked in front, decided it was too crowded and left. (R57:83-84).

[2] Gordon claimed he and Green never got out of the truck. (R57:44).

too (*id*.:87). Gordon, whom Green believed was asleep or drunk (R58:40), again wheedled him into staying with the group (*id*.; *see also* R57:87).

Nevertheless, Banks became angry, upset, and loud. (*Id*.:20,46). He said, "I got my shit together," pointed over to Henderson and said, "I believe you got your shit together," pointed at Gordon, who was in the back seat, and said, "[Y]ou got your shit together," and then pointed at Green and said, "[B]ut I don't know about you." (*Id*.:20). Green responded, "I got my shit together, what the fuck wrong with you?"[3] (*Id*.). Green then asked Gordon what was wrong with Banks (*Id*.:20; R58:41). An argument ensued. (R57:21). Henderson told the police that he did not know what the disagreement was about, but later swore that it was over which strip club was better. (R57:87). Green testified that he heard Banks threaten to beat Green's "ass." (R58:41).

Banks suddenly pulled over by 27th Street and Hadley, saying something such as "this is my brother's truck." (R57:89). Gordon thought it weird. (*Id*.:23). Henderson knew that Banks was very mad, but took no action at all because he was waiting to see if Banks was as mad as Henderson thought. (*Id*.:90).

Green could not get out of the car because of the child safety locks. (*Id*.48). Nor could Gordon. While Gordon was trying to get himself out, Green's door opened. (*Id*: 48, 91) Banks had gotten out and yanked it open. (*Id*.:24, 90). According to Henderson, Green tried to get out but Banks was in his way. (*Id*.:112). Green testified that Banks tried to pull him out of the car by his shirt (R58:42). Green then got out. (*Id*.; R57:90).

The woman viewing parts of the fight from across the street and through a window did not have a clear recollection, but initially saw Banks hitting Green. (*Id*.:92). Green was not the aggressor or causing the problem. (*Id*.:93).

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[3] Henderson testified to a similar exchange but insisted it was not in response to Green requesting to go to his car. (R57:106).

Gordon, Henderson, and Green all agree that Banks punched Green and he fell. (*Id*.:25, 27, 92, 95; R58:42, 53). All of the witnesses agree that, while Green was on the ground, Banks kicked Green, (R57:28, 50, 92, 95), although Green just remembers feeling blows of some type when he was on the ground (R58:43).

Henderson saw Banks try to stomp on Green's head. (R57:92). Banks also pulled Green's vest over his head at some point (*id*.:94, 113) and Green was unable to see (R58:43). Banks punched at Green several other times, with Gordon believing he connected (R57:27), Green agreeing Banks connected with his body (R58:42-43), and Henderson disputing that account. (R57: 117). Gordon's recollection was that Green never threw a punch (*id*.:25, 27), but Henderson remembers it differently (*id*.:116) and Green suggested he might have tried to punch Banks initially to get him to move back, but ultimately indicated that he tried to move his hands away (R58:53-54). The woman across the street, looking through the window, did not have a good recollection, but remembered more wrestling from Green than punching. (R56.:81).

Henderson claimed to have grabbed Banks to calm things down right by the truck door (R57.:90), although Banks then pushed him aside to fight (*id*:91). Henderson said that he then was away from them until after Green fell. (*Id*.:93). Gordon claimed that, while Green was on the ground and before, he and Henderson were trying to calm things down and he was in front of Green. (*Id*.:29, 53). Henderson claimed he again began pulling Banks away, but Banks got away from him. (*Id*.:96). The woman across the street believed that Gordon and Henderson were trying to break up the fight. (*Id*.:76, 79, 82).

Green himself remembered seeing Gordon directly to the left of him when he was on the ground, but did not see Henderson. (R58:44-45, 57-58).

Banks was in a fighting posture (R57:31, 53, 96). Neither Green nor the woman across the way saw much of what happened next. Gordon remembered last seeing Green on the ground, although

he thought Green might have gotten up. (*Id*.:31, 52). Gordon's hands were up and he then heard a shot over his right shoulder and did not know who had shot the gun. (*Id*.:31). The woman saw all four men as being "huddled up," with Green's back toward her and then heard a pop. (R56:82, 85, 99).

Green's testimony matched both these descriptions and the physical evidence. Green testified that Banks then was approximately three feet in front of him, although it could have been a bit more and he initially told the police it was eight feet. (R58:44, 62). He began to get up and, as he did so, he saw Banks coming toward him. He could not run so he pulled his gun. (*Id*.:45, 67). He said several times that he did so because he feared for his life. (*Id*.:45, 65). He pulled the gun up in a swinging motion because his shoulder was injured. (*Id*.:60). He focused his attention on Banks because he did not want to hit anyone else, pointed at his upper chest, and fired when Banks was one or two feet away. (*Id*.:62-63). Dr. Wieslawa Tlomak, the deputy chief medical examiner who autopsied Banks' body, noted that stippling on the body indicated that Banks was shot from between one-and-a-half and two feet away. (R57:122, 124, 131).

But Henderson insisted that they were never that close and that the woman was wrong. (*Id*.:96). He placed Banks and Green four or five feet apart and claimed Banks never left his fighting stance, but he was behind Banks. (Id.:118-119). He saw Green's arm swing, supposedly over Gordon, saw Green pull the trigger, and heard a single shot. (*Id*.).

Banks stumbled and fell. (R56:86; R58:46). Gordon looked at the situation, jumped in the truck, and fled. (R56:87, 101-101, 112; R57:33; R58:46). Henderson claimed he went to the truck and retrieved his phone to call the police, but called his wife instead. (R57:97). The woman across the way contradicted him and said he jumped in the truck with Gordon (R56:87, 100-101).

There is no dispute about what Green did next. Green stayed on the scene, but kept saying "get off me" over Banks, which the

woman across the street assumed came from shock and fright. (R56:86, 103). He holstered his gun, called the police, and said he shot someone. (R56:62; R58:47). The police came within a few minutes. (R58:48).

The police quickly discovered Banks was dead. (R56:11-12, 22, 42). Green walked up to Milwaukee Police Officer Jeffrey Krueger and told Krueger that he was the one who shot Banks and who called 911. (*Id*.:18; R58:48).

ARGUMENT

I.

PHILLIP GREEN'S CONVICTION FOR FIRST DEGREE RECKLESS HOMICIDE SHOULD BE VACATED AND A CONVICTION FOR SECOND-DEGREE RECKLESS HOMICIDE ENTERED BECAUSE THE EVIDENCE WAS INSUFFICIENT AS TO THE ELEMENT OF UTTER DISREGARD FOR HUMAN LIFE.

The jury convicted Mr. Green of first degree reckless homicide. (R20; R26). A person commits first degree reckless homicide when he "recklessly causes the death of another human being under circumstances which show utter disregard for human life." Wis. Stats. §940.02(1). By contrast, a person is only guilty of second degree reckless homicide if he "recklessly causes the death of another human being." *Id.* §940.06(1). The difference between the two crimes is whether the defendant acted with "utter disregard for human life."

The burden in a criminal case is on the state to prove every fact necessary for conviction of the crime charged beyond a reasonable doubt. *E.g.*, ***Jackson v. Virginia***, 443 U.S. 307 (1979); ***In re Winship***, 397 U.S. 358, 364 (1970). "The standard for reviewing the sufficiency of the evidence to support a conviction 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." ***State v. Rushing***, 197 Wis.2d 631, 641, 541 N.W.2d 155 (Ct. App. 1995) (citing ***Jackson***, 443 U.S. at 319).

The requirement of "utter disregard" means the same as the "depraved mind, regardless of life" language used prior to the 1987 revisions to Wisconsin homicide statutes did. ***State v. Miller*****,** 2009 WI App 111, ¶32, 320 Wis.2d 724, 772 N.W.2d 188. "Utter disregard requires 'more than a high degree of negligence or recklessness.'" ***Miller***, ¶33 (quoting ***Wagner v. State***, 76 Wis.2d 30, 46, 250 N.W.2d 331 (1977)). "'[C]riminal recklessness' means that the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk." Wis. Stat. §939.24(1). To evince utter disregard, however, "'[t]he mind must not only disregard the safety of another but be devoid of regard for the life of another. A depraved mind lacks a moral sense, an appreciation of life, is unreasonable and lacks judgment.'" ***Miller***, ¶33 (quoting ***Wagner***, 76 Wis.2d at 46). "A person acting with utter disregard must possess 'a state of mind which has no regard for the moral or social duties of a human being.'" ***Id.*** (quoting ***Wagner***, 76 Wis.2d at 45).

In ***Miller***, the Court faced a sufficiency challenge to a conviction for first degree reckless injury. First and second degree reckless injury track the same elements as first and second degree reckless homicide, the one difference being resulting great bodily harm rather than death. *See* ***Miller***, ¶32. The Court in ***Miller*** noted that it was "aware of no Wisconsin cases challenging the sufficiency of evidence to prove 'utter disregard' or 'depraved mind' that have arisen on facts similar to those of the present case." ***Miller***, ¶35. It nonetheless concluded that the evidence was insufficient for conviction. In doing so, the Court conceded that "Miller fired a shotgun at a person from a range of sixteen to eighteen feet, causing great bodily harm to Nakai and exposing Nakai to an extreme risk that could have caused Nakai's death." ***Id.***, ¶39. The Court noted the remaining considerations, however, "including principally the reason for Miller's conduct," in concluding that the evidence was insufficient to

show "utter disregard." ***Id.*** Primary among the Court's concerns with the evidence was that "[i]t would appear undisputed that a reason, if not *the* reason, for Miller's conduct was to protect himself and his friends. This reason is inconsistent with conduct evincing utter disregard." ***Id.***, ¶40.

In essence, what the Court was saying was that, in imperfect self-defense situations, when the principal actual reason the defendant fires a gun is to defend himself, even if his actions do not meet the criteria for the total defense of self-defense, there cannot be "utter disregard." Because this case presents an imperfect self-defense situation (even construing the evidence in the light most favorable to the state), Green's actions do not evince "utter disregard for human life." The evidence therefore was insufficient to convict him of first degree reckless homicide.

Miller and the case at bar are factually similar in several key ways. The most obvious similarity is that both Miller and Green claimed they acted in self-defense, an assertion the state opposed in both cases. Here, the state's claim that Green was acting in anger (*see, e.g.,* R59:17), did not conflict with the notion that he was acting in self-defense. Anger does not preclude self-defense and a claim of self-defense need not be pure. (***Miller,*** ¶40 (nothing self defense was "a reason, if not *the* reason".) When someone is being beaten, it is human nature for that person to be angry.

Second, both cases involved victims who were violent and belligerent. Compare ***id.,*** ¶40 with R57:92-93. Both victims were neither blameless nor vulnerable and insisted on escalating the confrontation. *See* ***Miller,*** ¶40; R57:28, 50, 92, 93. In ***Miller***, ¶ 5, for example, the initial aggressor was the victim. Here, Banks was known as a hot-head (R57:107-08) and it was Banks, not Green, who stopped the car suddenly, came around, pulled Green out and began fighting (R57:24, 48,89, 90; R58:42). Henderson, a friend of Banks' who had not met Green before that night (R57:5, 7-8), himself testified that nothing Green said that night was worth pulling the car over (*id.*:89). Gordon considered Banks' anger to be out-of-the-blue.

(*Id*.:46-47).

As in ***Miller***, the fight came to Green and Green did not go to the fight. Green was *not* the one who caused the problem and, in the words of neutral witness Shaquita Glover "wasn't really the–that aggressive." (R56:93) The states own witnesses said that, even after Banks himself pulled the truck over for no good reason, Insisted in anger on Green getting out of the vehicle (*id*.:24, 90), landed all of the punches (R56:80-81; R57:25, 27, 75-121), pulled Green's clothing up so Green could not see (R56:94), had Green at a disadvantage on the ground while he still could not see (R56:95; R57:27), would have stomped on Green's head but for Henderson (R58:92), and kicked Green while he was down (*id*.:51). Banks, not Green, created a situation which had Gordon afraid for Green's safety. (*Id*.)

Third, Green, like Miller, ***Miller***, ¶7, first tried to separate himself from the conflict. Neither defendant had a realistic possibility of simply leaving–Miller because he was in his own home, ***Miller***, ¶¶7-9, and Green because the child locks on the vehicle prevented it (R57:48). Their attempts differed because of the different settings. Miller tried to persuade the victim to leave while Green tried to persuade Banks to take him home (*id*.:46,86). Green repeatedly asked to go home. (R57:43-44, 46, 86). Banks, not Green, controlled whether Green could leave and Banks decided, quite vehemently, that Green should not leave and prevented him from going home. (*Id*.:20-21, 46-47).

Moreover, although the circuit court incorrectly believed that Green did not attempt to defuse the situation (R44:2), there would be no relevant difference here. No clearly identified avenue of escape or way to defuse the situation existed for Green. When Banks began to lose his temper, Green was in the back seat of a moving vehicle that Banks was driving. (*See id*.:20, 46-47 (Banks's temper); *id*.:46 (Banks's driving); 82-84 (position in the truck)). Green could not have gotten out because child locks prevented him from opening his door. (*Id*.: 19, 48).

Even after Banks pulled over, those child locks prevented

Green from opening his own door and just leaving. (*Id*.) Once Banks opened the door, the only way out was through Banks himself. (*Id*.: 24, 90). Eventually, Green was on the ground (*id*.: 27) with his vision impaired by the clothing Banks himself pulled up (R56:94-95, 113) and in the presence of a man prepared to stomp his head (R57:92).

The presence of Gordon and Henderson and their willingness to help was not a relevant difference, despite the circuit court's mistaken belief (*see* R44:2), since Green had no reason to believe that they would really be able to protect him. Henderson was behind Banks (R57:118) and was not visible to Green (R58:44-45, 57-58). In addition, Henderson supposedly already had made an earlier attempt to hold onto and stop Banks, but had failed. (R57:90-91, 96). In any event, Henderson did not manage to get Banks to quit fighting, as demonstrated by his second failure to hold Banks and Banks's "fighting stance" (*id*.:96). Gordon was closer to Green (*id*.:31), but not where Green could see whether his intent was to protect Green.

Fourth, the time over which the confrontation occurred does not distinguish these cases. Both Miller, ***Miller***, ¶11, and Green confronted an angry opponent for a shorter time than it seemed to them (compare R57:95 with R58:42-45). Thus Green, like Miller, claimed to shoot in order to stop his assailants. Compare ***Miller*****,** ¶13, with R58:45,67.

What else could Green have done? Calling 911 from the vehicle would have been ridiculous. The police were not going to respond to a call from a man complaining that someone he went with voluntarily now would not take him back to his car. Once the fight began, Green had no opportunity to call 911 to complain of Banks's behavior. He could not do so safely at the same time he was defending himself from the numerous punches. He could not do so when struggling to get his clothing back in place and himself off the ground. At best, he could have been the middle-aged man who tries to flee a man 12-13 years his junior.

It does not matter that here, unlike in ***Miller***, the victim did not attack other people too. The court in ***Miller,*** 2009 WI App 111 ¶37 (analyzing ***State v. Bernal***, 111 Wis.2d 280, 330 N.W.2d 219 (Ct. App. 1983), notes that pointing a loaded gun at someone else is insufficient to show "utter disregard" if the conduct is "'otherwise defensible,' even if it is not privileged." What matters is whether the conduct is "otherwise defensible" and it was. Under our law, the defense of one's self is as "defensible" as the defense of others. Compare Wis. Stats. §939.48(1) (self-defense) with §939.48(4) (defense of others).

Fifth, the use of alcohol is not a difference. Miller did far more drinking than Green did. Compare ***Miller***, ¶3 (five to seven beers over four hours at the bar plus beer at home) with R57:81;R58:32 (possibly more than one beer).

In addition, both Green and Miller took responsibility and showed concern after the shootings. Both immediately called 911 and waited for the police. Compare ***Miller***, ¶14, with R57:62; R58:47. Green called the police, and said he shot someone. (R56:62; R58:47). When they arrived, he walked up to them and said he was the one who shot Banks and who called 911. (R56:18; R58:48).

As for the circuit court's notion that Green should only have shot Banks' leg or some other peripheral part of the body, that notion is not well-rooted in what a person with a firearm permit is taught about self-defense and about guns in general. Green had a gun permit. (*E.g.*, R57:22). Obtaining a gun permit requires a person to have taken a firearm safety class of some kind. Wis. Stats. §175.60(4)(b). The student training guide for concealed carry permit classes, which the Wisconsin Department of Justice developed, notes the difficulty with the idea that one can guarantee hitting a particular body part:

> You are using "deadly force" every time you shoot at someone. Bullets can maim or kill. Gunshot wounds are not minor 'remote-control punch' injuries, like sometimes portrayed in TV or movies. Even if you could guarantee your bullet would strike the assailant's arm or leg—a virtual

> impossibility—that bullet could still cause death. Shooting someone is always the use of deadly force.

Wisconsin Department of Justice, Firearm Safety Course: A Training Guide for Concealed Carry Licenses 32 (January 2015). Thus, both Green and the state should recognize the court's fallacy.

Taking the evidence in the light most favorable to the conviction, the state therefore failed to prove the element of "utter disregard for human life," and this Court therefore should vacate the conviction for first degree reckless homicide, enter a conviction for second degree reckless homicide, and set the case for re-sentencing.

II.

GREEN IS ENTITLED TO A NEW TRIAL IN THE INTERESTS OF JUSTICE.

In this case, the jury instructions failed to explain to the jury that Green had a defense to first degree reckless homicide (although not to second degree reckless homicide) if Green actually believed that there was actual or imminent unlawful interference with his person and believed that the use of a gun was necessary, but either of those beliefs was not reasonable. As was explained above, ***Miller*** stands for the proposition that when a defendant fires a gun intending to defend himself, even if his actions do not meet the criteria for the defense of self-defense, his conduct does not evince "utter disregard for human life." In addition, both the state and the defense, especially at closing argument (R59:19-32), failed to focus on what made Green nervous about the situation even before Banks, unprovoked, pulled the truck over and, instead, focused almost entirely on what happened after Banks suddenly snapped, pulled over, and went after Green. Yet whether a person really believes he or she needs to use a firearm and whether that belief is reasonable rests not just on what is occurring at the time, but also on how circumstances leading up to the event color it. Finally, although the locations of Ricky's, which is on 26th Street and W. State Street, was mentioned at trial (*see* R57:44, 105), no one gave the address of the Cheetah Club,

which is at 5048 N. 35th Street, or explained the differences between the locations. Ricky's, unlike the Cheetah Club, is not in an isolated area. (*See* R36:Ex. 1 & 2). That difference was key to Green's reaction but the jury did not hear it. This Court therefore should order a new trial in the interest of justice either because the real controversy has not been fully tried or it is probable that justice has for any reason miscarried or both. *See* ***Vollmer v. Luety***, 156 Wis.2d 1, 16, 456 N.W.2d 797 (1990).

This Court has the power to grant a new trial in the interest of justice. Wis. Stats. §752.35; ***State v. Henley***, 2010 WI 97, ¶63, 328 Wis.2d 544, 787 N.W.2d 350. The statute allows this Court to order a new trial in the interest of justice either because: (1) the real controversy has not been fully tried; or (2) it is probable that justice has for any reason miscarried. ***Vollmer***, 156 Wis.2d at 16. The Court's discretionary authority to reverse in the interests of justice furthers its obligation to do justice in an individual case. ***Id***. at 15.

If this court determines that the real controversy has not been fully tried, this Court "may exercise its power of discretionary reversal without finding the probability of a different result on retrial." ***Id***. at 16. One situation in which the real controversy may not have been fully tried is when an error in jury instructions exists. ***Id.*** at 20. "In a case where an instruction obfuscates the real issue or arguable caused the real issue not to be tried, reversal would be available in the discretion of the court of appeals under 752.35." ***Id***. at 22. Moreover, such reversal is available even if the error is waived by lack of objection to the instructions. ***State v. Marcum***, 166 Wis.2d 908, 916, 480 N.W.2d 545 (Ct. App. 1992) (citing ***State v. Schumacher*****,** 144 Wis.2d 388, 408 n.14, 424 N.W.2d 672 (1988)).

A. The Real Controversy was Not Fully Tried Because the Jury Instructions Did Not Explain that Imperfect Self-Defense Negated "Utter Disregard "

In this case, the real controversy was not fully tried because the jury was never able to correctly assess the impact of imperfect self-defense for two reasons. First, the jury never knew that imper-

fect self-defense would negate a finding of "utter disregard for human life," especially in situations in which the victim was the initial aggressor. Second, although most of the information explaining Green's fear was scattered throughout the testimony at trial, the full picture was never painted. The evidence in this case supported the idea that Green actually believed that he needed to use a firearm, even though at least one version of it also supported the idea that his belief might not have been reasonable. This Court agreed with that assessment and therefore instructed the jury on second degree reckless homicide.

1. The Real Controversy was Not Fully Tried Because the Jury Instructions Did Not Explain that Imperfect Self-Defense Negated "Utter Disregard "

No jury instruction explained the relationship between imperfect self-defense and utter disregard to the jury. (*See* R58:4-10). Instead, the jury was merely told that "[y]ou should consider the evidence relating to self-defense in deciding whether the defendant's conduct showed utter disregard for human life." (*See id*.:7). When combined with what the jury was told about self-defense, namely that defendant's beliefs as to interference with his person and the amount of force needed had to be reasonable (*see id.)*, the jury instructions left the jury with the impression that it was possible for a defendant to show "utter disregard for human life" even if he actually, but unreasonably, believed use of a firearm was necessary. Yet self-defense, whether perfect or imperfect, was the heart of Green's case. Establishing the elements of self-defense negated any crime. Establishing imperfect self-defense negated the crime of first degree reckless homicide. Here, the lack of proper instructions kept the jury from considering the heart of Green's case.

The jury was told very little about how to analyze proof of actual self-defense if the beliefs underlying it were not reasonable and the evidence therefore did not support a finding of privileged self defense. The jury was told that it would "be asked to consider

the *privilege* of self-defense in deciding whether the elements of first and second-degree reckless homicide are present." (R59:5). The jury also was told that it would "not be asked to make a separate finding on whether the defendant acted in self-defense." (*Id*.). As for the meaning of "utter disregard" and its relationship to self-defense, the jury was only told, "You should consider the evidence relating to self-defense in deciding whether the defendant's conduct showed utter disregard for human life." (*Id*.:7). The jury instructions then set forth the standards for the privilege of self defense, including the requirement that the defendant reasonably believe that the force used was necessary. (*Id*.:8).

As is explained above, *see* Section I *supra*, ***Miller*** stands for the proposition that there can be no finding of "utter disregard for human life" when the principal and actual reason that a defendant fires a gun is to defend himself and that this proposition is true even if his actions do not meet the criteria for the privilege of self-defense. The jury instructions should have reflected this reality. But telling the jury to consider the "privilege" of self-defense (*see* R59:5) suggests to the jury that it cannot consider imperfect self defense because imperfect self-defense does not meet all of the requisite elements of the privilege of self-defense. It colors the direction to "consider evidence relating to self-defense." (*See id*.:7).

As a result, it was quite possible for the jury to find, contrary to controlling law, that:

(1) Green believed he was acting in self-defense just as he testified (*see* R58:45, 65);

(2) his belief was real but not reasonable, possibly because his vest was pulled over his head and he was on the ground (R57:94, 113; R58:43) and therefore did not see Henderson was attempting to break up the fight (*see* R57:96), and such force was not necessary; **and**

(3) he nevertheless evidenced utter disregard for life

possibly because he shot a gun during a fist fight or because he did so while others were standing around.[4]

The jury therefore did not properly weigh the heart of the controversy when it came to the crimes of first degree and second degree reckless homicide.

This Court has the power to reverse on this basis despite the absence of an objection to the jury instructions and such reversal is justified in the limited circumstances in which a circuit court fails to provide a jury with the proper framework for analyzing the only real issue. *See* ***State v. Austin*****,** 2013 WI App 96, ¶23, 349 Wis.2d 744, 836 N.W.2d 833. Although the failure to object to a jury instruction waives the right to review of that error, reversal is nevertheless appropriate "when the instruction obfuscates the real issue or arguably caused the real controversy not to be fully tried." ***State v. Perkins***, 2001 WI 46,¶¶12-13, 243 Wis.2d 141, 626 N.W.2d 762.

This Court therefore should reverse in the interests of justice because the real controversy was not fully tried.

2. The Real Controversy was Not Fully Tried Because Key Testimony was Not Placed Into Context and a Key Fact was Never Introduced

Moreover, the problem was compounded, and reversal is independently appropriate, on grounds that the real controversy also was not fully tried, because key testimony was not placed into context for the jury and a key fact was never introduced into evidence. Juries, as this jury knew, are to evaluate claims of self defense "from the standpoint of the defendant at the time of the defendant's acts." (*See* R59:8). Understanding that standpoint requires under-

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[4] During deliberations, the jury sent out a note. (R60:2-3). According to the court below, "the note was in regard to utter disregard for life element when it's – it states any regard for life should be – should we be considering just the victim's life or the life of others around." (*Id*.) This note evidences a jury concern that others were present. It also shows that the jury focused on the "utter disregard" element.

standing what information might be coloring the defendant's perception. In this case, the relationships between those involved, the events leading up to Banks' abruptly pulling over and dragging Green out of the car, and information concerning where they were headed were significant to understanding Green's viewpoint. Yet, although the jury had some of this information, it was not placed into any comprehensible context.

The relationship between the men itself was enough to make Green wary even prior to Banks' assault on him. Banks was significantly younger than Green (R57:41), was a hot-head who easily took offense (*id.*:107-08), and actively disliked Green (*id.*:109). Green did not know Henderson, who also was significantly younger than Green, and only knew that Henderson could be allied with Banks as he had come with Banks. (R58:45).

That impression was reinforced when Green saw Banks and Henderson talking amongst themselves, separately from the rest of the group, at 502. (*See* R57:14, 16-17, 37, 43). Even though their discussion might have seemed relatively innocent at 502, it would have taken on a potentially dark cast when Banks suddenly seemed intent on beating Green over nothing. At that point, Green could have wondered whether the point of the drive was to go clubbing or to find a place for Banks to take out his dislike on Green by beating and seriously injuring him.

In addition, Green was at Banks' mercy because he had been convinced to leave his car behind, a problem compounded by the child locks on the doors that trapped Green in the car (*See* R58:35). As Banks got more and more angry in the car, Green knew that he could not simply open a door and escape. That knowledge was part of his standpoint and added to perceptions that he might be being set-up. But the significance of those child locks was never highlighted or explained.

Finally, the jury never heard that the difference in locations between Ricky's and the Cheetah Club also was part of Green's standpoint. Green knew that Ricky's, which is at 2601 W. State

Street, was near stores and other bars. (*See* R36:Attach. A) Green also knew that the Cheetah Club, which is at 5048 N. 35th Street, is much more isolated. (*Id*.). It is in an industrial area, which is less lively at night than State Street. (*Id*.) Moreover, unlike Ricky's, the Cheetah Club is on a side street rather than a main road. (*Id*.)

Given the knowledge Green had about the locations, Green' perception was that he was being driven--against his will then--to an isolated place that would make it easier for Banks to do him great harm, in a vehicle that offered no opportunity for escape. He was understandably wary, but the jury never knew why he might be.

Green therefore should get a new trial in the interests of justice because the jury never fully understood information relevant to his standpoint at the time and therefore highly relevant to his claim of self-defense, whether perfect or imperfect. Because the heart of the case was self-defense, the controversy was not fully tried. Standing alone, either error is sufficient to invoke this Court's discretion and warrant reversal in the interests of justice. They are even more powerful together.

B. Justice Has Miscarried Here Because a Substantial Probability of a Different Result on Retrial Exists

This Court also may order a new trial on the ground that justice has miscarried when there is a "substantial probability of a different result on retrial," ***Vollmer,*** 156 Wis.2d at 19, although a this Court may not do so simply on a re-weighing of the evidence, ***State v. Kucharsky*****,** 2015 WI 64, ¶26, __ Wis. 2d __, __ N.W.2d __. Justice has miscarried here because, even if there technically exists sufficient evidence for conviction, the jury could have found Green guilty of first degree reckless homicide despite substantial evidence of imperfect self-defense had a proper jury instruction been given and all the evidence presented. Instead, it is a matter of how the jury might have evaluated the evidence against the correct legal standards, with proper context, and with additional information concerning the isolated location to which they were heading. *See* Section I *supra* for a discussion of the correct standard.

With better instruction, additional information, and context, there is a reasonable probability that a jury could find:

(1) Green believed he was acting in self-defense, just as he testified (*see* R58:45, 65);

(2) Green had a reasonable belief that using a gun was necessary to prevent great bodily harm to himself (*see* R60:4) based upon:

(a) what appeared to Green to be Banks' attempts to isolate him by insisting on going in one vehicle (R57:14, 34, 80) and by refusing to take him home (*id*.:43-44, 46, 86);

(b) the private discussions between Banks and the previously unknown Henderson at 502 (*id*.:14, 15-17, 37, 43);

(c) Banks' subsequent attempt to take him an isolated location–the Cheetah Club (*id.:*44, 105; *see also* R36:Ex.1&2);

(d) Banks' sudden and irrational anger (*id*.:57), which to Green appeared enhanced by Banks' failure to take him to an isolated location;

(e) Banks abrupt decision to pull the car over with Green trapped in it by child locks (*id*.:19, 21, 48, 89);

(f) the extreme level of Banks' anger (*id*.:21, 23, 89-90);

(g) the repeated blows Banks landed, while Green was unable to land a punch (*e.g., id*.:25, 27, 50);

(h) Green's inability to see because Banks had pulled up his clothing (R56:94);

(I) Green's apparently having been knocked to the ground while still unable to see (*id*.:94-95; *see also*

R57:27);

(g) Banks' kicking of Green while he was on the ground and his attempt to stomp on Green's head (*id*.:28, 50, 92, 95), which potentially was lethal;

(h) the apparent ineffectiveness of Gordon and Henderson in stopping Banks (which a reasonable jury could find that Green was unaware of in any event due to blocked sight and sight lines) (*see id*.:31, 53); and

(i) the possibility that Banks might eventually seize the gun that Green carried pursuant to a concealed carry permit.

This Court therefore should grant Phillip Kareen Green a new trial in the interests of justice.

CONCLUSION

For these reasons, Phillip Kareen Green respectfully asks that the Court grant the relief requested.

Dated at Milwaukee, Wisconsin, July 16, 2015.

Respectfully submitted,

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WIS. STAT. (RULE) 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. (Rules) 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,120 words.

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Ellen Henak

WIS. STAT. (RULE) 809.19(12)(f) CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

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Ellen Henak

Green Ct. App. Brief.wpd

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 22nd day of July, 2015, I caused 10 copies of the Brief and Appendix of Defendant-Appellant Phillip Kareen Green to be mailed, properly addressed and postage prepaid, to the Wisconsin Court of Appeals, P.O. Box 1688, Madison, Wisconsin 53701-1688.

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Ellen Henak