STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2015AP1126-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PHILLIP KAREEN GREEN,

Defendant-Appellant.

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

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State submits that neither oral argument nor publication are warranted. The briefs of the parties adequately develop the law and facts necessary for the

disposition of the appeal, and this case can be decided by applying well-established legal principles to the facts.

ARGUMENT

I. THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUSTAIN GREEN'S CONVICTION FOR FIRST-DEGREE RECKLESS HOMICIDE.

A. Relevant legal principles.

1. When evaluating sufficiency of the evidence, this court must view the evidence in the light most favorable to the conviction, and must sustain the verdict unless no reasonable fact-finder could have found guilt beyond a reasonable doubt.

Well-established principles govern the highly deferential review of a sufficiency of the evidence challenge:

> [A]n appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990) (citations omitted).

Although the fact-finder must be convinced that the evidence is sufficiently strong to exclude every reasonable

hypothesis of the defendant's innocence, this is not the test on appeal. *Id.* at 503. *See also State v. Hauk*, 2002 WI App 226, ¶ 12, 257 Wis. 2d 579, 652 N.W.2d 393 (appellate court must affirm jury's finding if there is any reasonable hypothesis that supports conviction); *State v. Schulpius*, 2006 WI App 263, ¶ 11, 298 Wis. 2d 155, 726 N.W.2d 706 (appellate court searches record for evidence supporting jury's findings).

As the Wisconsin Supreme Court explained in *Poellinger*:

> In reviewing the sufficiency of circumstantial evidence to support a conviction, an appellate court need not concern itself in any way with evidence which might support other theories of the crime. An appellate court need only decide whether the theory of guilt accepted by the trier of fact is supported by sufficient evidence to sustain the verdict rendered.

Poellinger, 153 Wis. 2d at 507-508.

Thus, the test is not whether this court is convinced of the defendant's guilt beyond a reasonable doubt, but rather, whether this court can conclude that the jury could have, acting reasonably, been convinced to the required degree of certitude by evidence which it had a right to believe and accept as true. *State v. Burroughs,* 2002 WI App 18, ¶ 14, 250 Wis. 2d 180, 640 N.W.2d 190 (appellate court views evidence in light most favorable to conviction).

Only when the evidence is inherently or patently incredible should this court substitute its judgment for that of the fact-finder. *State v. Dukes*, 2007 WI App 175, ¶ 13, 303 Wis. 2d 208, 736 N.W.2d 515.

The Wisconsin Supreme Court recently reaffirmed *Poellinger's* "venerable principle," deeming it inappropriate

for this court to replace the fact-finder's evaluation of the evidence with its own. *State v. Smith*, 2012 WI 91, ¶ 33, 342 Wis. 2d 710, 817 N.W.2d 410. Few legal principles are more indisputable than the idea that a jury is in a far better position to evaluate the evidence than is a reviewing court. *Id.*

2. If competing inferences exist in the evidence, this court must adopt the inference that supports the conviction.

Credibility of the witnesses and weight of the evidence are for the fact-finder, not this court, to determine. *State v. Below*, 2011 WI App 64, ¶ 4, 333 Wis. 2d 690, 799 N.W.2d 95. Because inferences and credibility findings are findings of fact, this court must accept the inferences drawn by the fact-finder, even if other inferences could also be drawn. *State v. Routon*, 2007 WI App 178, ¶ 17, 304 Wis. 2d 480, 736 N.W.2d 530; *State v. Williams,* 2002 WI 58, ¶ 74, 253 Wis. 2d 99, 644 N.W.2d 919.

If more than one reasonable inference can be drawn from the evidence, this court must adopt the inference supporting the conviction. *State v. Long,* 2009 WI 36, ¶ 19, 317 Wis. 2d 92, 765 N.W.2d 557. *See also State v. Kimberly B.*, 2005 WI App 115, ¶ 21, 283 Wis. 2d 731, 699 N.W.2d 641 (if fact-finder could possibly draw appropriate inference of guilt, appellate court will not overturn verdict, even if it believes fact-finder should not have found guilt).

In short, an inference may be rejected on appeal only if it is unreasonable as a matter of law. *State v. Wenk*, 2001 WI App 268, ¶ 8, 248 Wis. 2d 714, 637 N.W.2d 417.

Again, this court should not substitute its evaluation of the evidence for that of the fact-finder, and cannot disturb a jury verdict simply because this court prefers another inference over the jury's reasonable inference. *Smith*, 342 Wis. 2d 710, ¶ 33. This court looks at whether the totality of the evidence supports the fact-finder's conclusion, not whether a single piece of evidence contradicts it. *Id.* ¶ 36.

3. This court reviews independently whether the evidence was sufficient to sustain the jury's verdict.

Great deference is owed the jury's determination that all of the elements of the charged offense have been proven beyond a reasonable doubt. *State v. Jensen*, 2000 WI 84, 236 Wis. 2d 521, ¶ 23, 613 N.W.2d 170 (appellate review is "highly deferential").

The defendant bears a "heavy burden" in attempting to convince a reviewing court to set aside a jury's verdict on insufficiency of the evidence grounds. *State v. Booker*, 2006 WI 79, ¶ 22, 292 Wis. 2d 43, 717 N.W.2d 676. But whether the evidence presented was sufficient to sustain the jury's verdict is a question of law, reviewed independently on appeal. *Id.* ¶ 12.

B. Under *Miller, Jensen* and *Burris*, the jury needed to evaluate the totality of the circumstances, not just one act of alleged self-defense, to determine whether Green acted with utter disregard for human life.

Green argues that the evidence was insufficient to convict him of first-degree reckless homicide with utter disregard, because he was acting in self-defense (Green's

brief at 8-14). Specifically, Green argues that, even if his self-defense defense was "imperfect," the "principal actual reason" he shot the gun was to defend himself (*id.* at 10), thereby precluding a jury finding of utter disregard under *State v. Miller*, 2009 WI App 111, 320 Wis. 2d 724, 772 N.W.2d 188. Green therefore concludes that he should have been convicted of, and sentenced for, second-degree reckless homicide, the lesser included crime of first-degree reckless homicide that does not contain the element of utter disregard (Green's brief at 14).[1]

But Green is wrong on the law. In *Miller*, this court found that the evidence in that case was not sufficient to support the jury's finding that the defendant had acted with utter disregard. *Miller*, 320 Wis. 2d 724, ¶¶ 40-44. *Miller* also held that the defendant's undisputed reason for shooting the victim was self-defense and defense of others—a reason which this court found "inconsistent with conduct evincing utter disregard" in that case. *Id.* ¶ 40.

But in so finding, this court in *Miller* did not hold that one act of alleged "perfect" or "imperfect" self-defense automatically or always precludes a jury finding of utter disregard, as Green asserts (Green's brief at 10, 16-17).[2] Rather, *Miller* simply holds that the jury must look to the totality of the circumstances to determine whether sufficient evidence existed to support the jury's finding of utter disregard. *Miller*, 320 Wis. 2d 724, ¶¶ 34-39.

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[1]In the alternative, Green argues that his conviction should be completely reversed, and that he should be given a new trial in the interest of justice (Green's brief at 14-22). The State will address this argument in Section II.

[2]In Section II, the State will further discuss Green's claims related to "perfect" and "imperfect" self-defense.

Indeed, the controlling cases of *Jensen* (pre-*Miller*) and *Burris* (post-*Miller*) both hold that a finding of utter disregard requires an analysis of the totality of the circumstances based upon the defendant's conduct before, during, and after the homicide. *See, e.g., State v. Jensen*, 2000 WI 84, ¶¶ 17, 24, 236 Wis. 2d 521, 613 N.W.2d 170; *State v. Burris*, 2011 WI 32, ¶¶ 41, 51, 333 Wis. 2d 87, 797 N.W.2d 430.

For example, *Jensen* explains that the jury should evaluate all the circumstances of the conduct which prove utter disregard for human life, including what the defendant was doing; why he was doing it; how dangerous the conduct was; how obvious the danger was and whether the conduct showed any regard for human life. *Jensen*, 236 Wis. 2d 521, ¶ 24 (citing Wis. JI-Criminal 1250). The jury should also consider factors related to the victim, including the extent of the victim's injuries and the degree of force required to cause those injuries, as well as the type of victim, including the victim's age, vulnerability, fragility, and relationship to the perpetrator. *Id*.

Moreover, as *Jensen* also explains, the question of whether the defendant acted with utter disregard for human life is an objective analysis, dependent upon "what a reasonable person in the defendant's position would have known," which, in turn, may be "proven by evidence relating to the defendant's subjective state of mind—by the defendant's statements, for example, before, during and after the crime." *Jensen*, 236 Wis. 2d 521, ¶ 17. But the State does not have to prove the defendant's utter disregard "in fact," and will satisfy its burden when it proves that defendant's conduct and surrounding circumstances, as generally considered by mankind, are sufficient to evince

utter disregard. *State v. Edmunds*, 229 Wis. 2d 67, 77, 598 N.W.2d 290 (Ct. App. 1999).

Similarly, as *Burris* explains, the jury must give each factor the weight it deems appropriate under the totality of the circumstances. *Burris*, 333 Wis. 2d 87, ¶ 41. No single factor is determinative. *Id.* ¶¶ 34-41, 61-63. Indeed, the Wisconsin courts have long eschewed bright-line or *per se* rules in this area, and instead have consistently applied a totality of the circumstances approach to the cases. *Id.* ¶ 38 (under totality of circumstances, questions of weight and reliability of relevant evidence are matters for fact-finder). *See also Miller*, 320 Wis. 2d 724, ¶ 37 (rejecting bright-line rule in favor of totality of circumstances approach).

Importantly, *Burris* specifically holds that, although the jury may consider evidence of some regard for human life—including conduct after the crime which could be considered mitigating—such evidence does not "'preclude' a finding of utter disregard" and does not "require the reversal of the fact-finder's determination that [the defendant's] conduct as a whole evinced utter disregard." *Burris*, 333 Wis. 2d 87, ¶ 34. *See also Jensen*, 236 Wis. 2d 521, ¶¶ 30-32 (sufficient evidence of "utter disregard" existed despite defendant's attempt at mitigation); *Edmunds*, 229 Wis. 2d at 78 (same).

Even in the *Miller* case—the case upon which Green solely relies—this court did not hold that evidence of after-the-fact regard for life is more or less important than the defendant's other conduct occurring before and during the crime. *Miller*, 320 Wis. 2d 724, ¶ 35 n.12. Rather, this court in *Miller* held that the totality of the circumstances should

be considered when determining whether the defendant showed "some regard for life, which may include conduct occurring before, during and after the commission of the criminally reckless act itself." *Id.* *See also Burris*, 333 Wis. 2d 87, ¶ 36 (citing *Miller*).

In short, contrary to Green's argument, *Miller* does not hold, as a matter of law, that an alleged act of self-defense—whether "perfect" or "imperfect"—will automatically preclude a finding of utter disregard. Rather, Wisconsin cases are clear that an act which may be construed as self-defense or life-regarding must be considered and evaluated in the utter-disregard calculus, but that act is not, by itself, determinative. *See, e.g., Burris*, 333 Wis. 2d 87, ¶¶ 41, 54, 63; *Jensen*, 236 Wis. 2d 521, ¶ 32; *Edmunds*, 229 Wis. 2d at 78. Thus, the jury is obligated to consider such evidence, but need only give it the weight that the jury "deems appropriate under the circumstances." *Burris*, 333 Wis. 2d 87, ¶ 41.

C. Sufficient evidence existed for the jury to conclude that Green was not acting in self-defense, but was acting with utter disregard for the victim's life, when he committed the crime of first-degree reckless homicide.

Viewing the evidence in the light most favorable to the State and the conviction, this court should find that sufficient evidence existed, under the totality of the circumstances, to convict Green of first-degree reckless

homicide with utter disregard[3] for the victim's[4] life. *See, e.g., Poellinger*, 153 Wis. 2d at 507-508 (sufficiency of the evidence standard). *See also Hauk*, 257 Wis. 2d 579, ¶ 12 (appellate court must affirm jury's finding if there is any reasonable hypothesis that supports conviction); *Smith*, 342 Wis. 2d 710, ¶ 36 (this court looks at whether totality of evidence supports fact-finder's conclusion, not whether single piece of evidence contradicts it).

1. Sufficient evidence existed for the jury to conclude that the victim had already stopped fighting when Green re-engaged in fighting with the victim and then shot the victim in the head.

Green argues that he had no other choice but to shoot the victim in self-defense, and that the circuit court was incorrect in concluding that Green could have done something to defuse the situation (44:1-4 [A-Ap. 1-4]), because the victim was coming towards him and Green could not escape (Green's brief at 7, 10-12).

But in viewing the evidence in the light most favorable to the conviction, this court should find that Green was not acting in self-defense, but rather, that Green was acting with utter disregard. Specifically, the victim had already stopped fighting yet Green re-engaged the victim in the fight, and then shot the victim in the head at very close

[3]Green does not dispute the other elements of first-degree reckless homicide, but only makes a sufficiency of the evidence argument about the utter disregard element.

[4]Throughout his brief, Green refers to the victim by name, but the State will refer to the victim as "the victim" in order to protect the victim's privacy. *See* Wis. Stat. § 809.86.

range, in a senseless act of retaliatory violence stemming from a stupid, petty argument.

First, contrary to Green's argument that he had no reason to believe his friends would help him or protect him such that he had no choice but to shoot (Green's brief at 12), the record is replete with evidence from which a reasonable person would conclude that both other men—Gordon[5] and Henderson[6]—attempted to break up the fight on Green's behalf, yet Green continued to engage and re-engage in fighting with the victim before shooting him, rather than simply walking away and stopping the fight after the victim had stopped fighting.

For example, the eyewitness to the shooting testified that Green (*i.e.,* the man "in the vest") was pulling on the victim (*i.e.,* the man "with the red shirt") on the victim's shirt from the back, but that the other two men were trying to stop the fight from happening (56:78-79). Green and the victim "were at each other" but "the other guys [were] trying to stop it all" and "trying to break these two guys up" (56:79). Up until the moment before the shooting, the other two men were still trying to get Green and the victim back into the car (56:85).

The eyewitness further testified on cross-examination that, during the tussle, the victim was grabbing Green, trying to hit him, but did not make contact (56:92). The eyewitness was clear that the other two men were grabbing the victim from the back, trying to separate him from Green

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[5]Gordon was Green's brother-in-law to-be, as he was engaged to Green's sister, but Gordon was also friends with the victim (57:7).

[6]Henderson was a friend of both the victim and Gordon, but had never met Green before the night of the shooting (57:75-77).

in order to break up the fight (56:92-93). When the victim pulled on Green's vest, Green lost his balance and fell to the ground, after which the victim kicked Green as he was on the street (56:95). But even at that point, Green's friends were still trying to pull the victim off of Green (56:95). In fact, the eyewitness did not even know the victim had been shot until she heard a pop and the victim fell to the ground (56:85, 99).

Similarly, Gordon testified that Henderson was trying to grab the victim away from Green, and that he (Gordon) tried to grab Green away from the victim (57:25). Importantly, Gordon testified that, after the fight started, he did not see Green running away or trying to get out of the fight in any way (57:26). To the contrary, Green got up after falling down and continued to fight (57:27, 53-59). Indeed, even after Green fell down the second time, Green got up again, and had enough time to turn around before he shot the victim (56:98-99). As Gordon testified, Green shot the victim five or six seconds after falling to the ground the second time (57:31).

Henderson similarly testified that, "before you know it," Green reached over Gordon with his gun, and shot the victim (57:96). As Henderson described, "I [saw] him pull the trigger. I [saw] him shoot right before me. It happened that fast. It wasn't like a five-minute story. It was like a two-second story" (57:96). Green was close enough to the others that Henderson's ears were ringing and he thought he was hit (57:97).

Thus, the record fully supports the circuit court's conclusion that the other men were present to restrain both the victim and Green, yet Green did nothing to defuse the situation or walk away (44:2-3 [A-Ap. 2-3]).

Second, the record is replete with testimony from which a reasonable person could conclude that the victim had already stopped fighting Green when Green shot the victim. Although Green makes much of fact (Green's brief at 7, 12) that the victim was in a boxing or fighting stance after kicking Green on the ground (57:28-29, 52-53), and also testified that the victim came at him (58:69), there was sufficient evidence from which the jury could conclude that the victim was not coming at Green, but that Green was the one who was coming at the victim. The jury was entitled to make the credibility determination that all of the other witnesses were truthful, and that Green was lying. *See, e.g., Below*, 333 Wis. 2d 690, ¶ 4 (credibility of witnesses and weight of evidence are for jury to determine, not this court). *See also Williams,* 253 Wis. 2d 99, ¶ 74 (this court must accept inferences drawn by fact-finder, even if other inferences could also be drawn).

For example, according to Gordon, Green had fallen to the ground and the victim kicked him once, but after that point, the victim just stood there (57:50-51) and had already stopped fighting (57:53). In fact, the victim had backed up and was not continuing the fight, even though Green was getting back off the ground and coming at the victim (57:50). Gordon testified that it was Green who then "got up and wanted to fight some more" (57:53).

Henderson similarly testified that, although the victim went into his boxing stance, the victim "stood right there" and did not "rush[]" at Green (57:96). In addition, both of the other men were still trying to break up the fight at that point, with Henderson trying to calm the victim down, and Gordon trying to block Green (57:29).

Green testified that, when he was on the ground, he could not run or go anywhere because the victim was coming at him (58:67-68). But Green also admitted at trial that, right after the shooting, he never told detectives that the victim was coming at him, and instead told detectives that the victim was "[s]teady talking" (58:69-70). When asked why he never told detectives that the victim was coming at him, Green replied, "There were a lot of things I left out" (58:69). When pressed on the issue and asked again why he forgot to mention to detectives something as important as the fact that he was acting in self-defense because the victim was coming at him, Green replied that "a lot of stuff was on my mind. I thought I was trying to remember everything" (58:69-70).

Thus, the record fully supports the circuit court's conclusion that the victim was being held at bay by another person, and was not actively menacing Green when Green shot the victim (44:2 [A-Ap. 2]).

Third, a reasonable person would believe that deadly force was not necessary in this situation, even though Green testified that he believed he needed to shoot the victim in self-defense (58:45). Instead, a reasonable person would conclude that Green acted with utter disregard, not self-defense, when he shot the victim in the head at close range. *See, e.g., Jensen*, 236 Wis. 2d 521, ¶ 17 (utter disregard determined by what reasonable person in defendant's position would have believed).

For example, Green himself testified that the victim never attempted to shoot, stab, strangle, bite, or suffocate him (58:65). The victim was unarmed (44:2 [A-Ap. 2]). The medical testimony showed that Green had no injuries to his face, no injuries to his hands, and no bruises, cuts, or stab

wounds on his back (58:5-8). Green's injuries from the fight were limited to minor redness and minor abrasions on Green's back (58:6-7). From this evidence, a reasonable person would believe that Green did not need to shoot the victim in self-defense in order to prevent great bodily harm or death to himself or others. *See* Wis. Stat. § 939.48(1) (self-defense statute).[7]

Moreover, Green himself testified that he did not try to run out of the area after he stepped back from the fight (58:67). When asked why he did not run, Green replied, "Why would I run? I don't think I did anything wrong" (58:67). But a reasonable person would believe that Green still should have attempted to get out of the situation, rather than shoot, even if Green himself believed he did not do anything wrong.

Perhaps most importantly, the jury was entitled to believe that Green was not shooting in self-defense because sufficient evidence existed from which the jury could believe that Gordon was blocking the victim from getting to Green, and Green had to reach around Gordon in order to shoot the victim.

Green testified at trial that the victim was right in front of him when he shot the victim (58:58, 64), and that Gordon was off to the side (58:55-56), such that he feared for his life because the victim was coming right at him (58:44-45). Green also denied at trial that he had to reach around Gordon to shoot the victim (58:60, 63-64, 71).

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[7]The State will address the self-defense jury instruction in Section II.

But Green also admitted at trial that he had told detectives on the night of the shooting that he pulled out his gun in such a way as to avoid shooting Gordon (58:71). And Henderson also testified at trial that he saw Green's wrist reach over Gordon in order to shoot the victim (57:96-97).

Moreover, Green also admitted at trial that he did not want to hit Gordon and only wanted to hit the victim (58:60, 63-64, 73-74). Green further admitted that he did not shoot in the air, but pointed the gun right at the victim's upper chest and shot him (58:66-67, 76).

Finally, all of the other testimony was consistent with the conclusion that Gordon was blocking Green from the victim, such that there was no reason for Green to shoot the victim in self-defense. For example, as already discussed, Gordon testified that the other men were still trying to break up the fight right before Green shot the victim, with Henderson trying to calm the victim down, and Gordon trying to block Green (57:29). Similarly, the eyewitness testified, "It was like everybody was in a huddle. Everybody was close" (56:99). They were close enough that "[t]hey could have had a group hug" (56:103-104).

The medical examiner also testified that the victim's gunshot wound entered his right cheek and exited the back of his head (57:125-127). The trajectory of the bullet was front to back, left to right, and upward from the entry wound (57:128-130). Based upon the stippling or abrasions left on the victim's skin from the gunpowder particles, the medical examiner concluded that the gunshot originated approximately 18 to 24 inches from the victim (57:130-133).[8]

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[8]The medical examiner testified that, in forensic pathology, the 18- to 24-inch range was considered an "intermediate" range, not a

Thus, the record fully supports the circuit court's conclusion that Green's self-defense claim was a disputed fact for the jury, and the jury was entitled to find that Green did not act in self-defense (44:3 [A-Ap. 3]).

In short, the jury could have easily concluded from the totality of the evidence that Green acted with utter disregard. *Jensen*, 236 Wis. 2d 521, ¶ 24 (in utter disregard calculus, jury should evaluate all circumstances, including what defendant was doing; why he was doing it; how dangerous the conduct was; how obvious the danger was and whether the conduct showed any regard for human life). Not only had the victim already stopped fighting, the other men were trying to disengage Green, and Green reached around Gordon to shoot the victim from a very close range, aiming at his chest but hitting his head instead.

Green argues that the *Miller* case is controlling (Green's brief at 9-13), but as the circuit court found (44:2-4 [A-Ap. 2-4]), the *Miller* case bears very little resemblance to Green's facts. For example, the *Miller* victim was shot from a distance of 16 to 18 feet, and the defendant was aiming at the victim's thigh or hip. *Miller*, 320 Wis. 2d 724, ¶¶ 12-13, 39. In contrast, Green pointed his gun at the victim's chest (58:76) and shot the victim in the face from no more than two feet (57:125-133).

While true that such a close range could support an inference that Green was acting in self-defense, as Green

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"close" range, because "close" range was anything under 12 inches, a range where gunshots can leave soot on the skin (57:130-132). But the State's argument—that Green shot the victim from a close range—is based on the fact that a reasonable person, not forensic pathologists, would believe that two feet is close range. *Jensen*, 236 Wis. 2d 521, ¶ 17.

contends, such a close range could also support another, different inference that Green was callously and needlessly shooting at the victim, point-blank, in a rage over a stupid, senseless argument. Because more than one inference can be drawn from the evidence, this court must adopt the inference supporting the conviction. *See, e.g., Long,* 317 Wis. 2d 92, ¶ 19. *See also Smith*, 342 Wis. 2d 710, ¶ 33 (this court should not substitute its evaluation of the evidence for that of the jury, and cannot disturb jury verdict simply because this court prefers another inference over the jury's reasonable inference).

Indeed, *Miller* is further distinguishable on this basis, because the victim there did not act in rage, but instead, still attempted to de-escalate the situation more than once, even after the victim had been attacking the defendant for several hours, and had been threatening the defendant and others with a screwdriver. *Miller*, 320 Wis. 2d 724, ¶¶ 10-13, 42 (defendant only shot at victim when victim continued to threaten others). None of the *Miller* mitigating facts existed here, because Green made no attempt to assuage the victim's anger by talking the victim down, nor did Green make any attempts to de-escalate the situation by walking away.

To the contrary, Green's callous actions and angry comments right after the shooting were aggravating, showing Green's rage and utter disregard for the victim. *See, e.g., Burris*, 333 Wis. 2d 87, ¶ 36 (acts committed after the crime can be considered in utter disregard calculus). Specifically, Henderson testified that he saw Green shoot the victim in a rage, and that he heard Green telling the victim that he (Green) was going to shoot him (the victim) (57:97-98).

As Henderson testified, he saw Green standing over the victim right after Green shot him, and Green said, "I told you I was going to do it. I told you. I told you. He kept saying things like that" (57:97). Henderson further explained that he himself feared for his own life, because he did not know what Green's intentions were after shooting the victim, or whether Green was going to continue to keep shooting (57:98).

Henderson testified, "[Green] just had a rage in him, he was going to fire on me and [Gordon]. I wasn't really focused on [Gordon] [any] more. I was more worried about myself" (57:98). So Henderson "just got away from where Mr. Green was with the firearm," and was just trying to get away from where the shooting actually happened (57:98). As Henderson lamented at trial, the whole senseless situation showed Green's utter disregard for the victim: "I didn't understand that. I didn't understand how a pool night and a regular fist fight can end up with somebody getting killed over a couple of words" (57:99).

Finally, Green argues that he could not have shot the victim in the leg or some other peripheral part of the body, because it is difficult to control where the bullets hit and "shooting someone is always the use of deadly force" (Green's brief at 13-14). But that is exactly the State's point. Shooting someone anywhere on their body always constitutes a use of deadly force, but a reasonable person might conclude that shooting someone in the leg may, in some circumstances, mitigate the utter disregard element, as was the case in *Miller*. *Miller*, 320 Wis. 2d 724, ¶¶ 12-13, 39.

In contrast, a reasonable person would not conclude that shooting someone in the head, as Green did, is a

mitigating circumstance, and instead would believe it to be an indication of utter disregard. Indeed, there is no evidence to suggest that Green attempted to shoot the victim in the leg or in the air, but somehow missed and hit the victim's head. Rather, Green himself testified that he pointed the gun at the victim's chest (58:76), and the other evidence showed that the bullet ended up hitting the victim's face after Green specifically reached around Gordon in a rage (57:96-98) in order to shoot the unarmed, non-menacing victim from less than two feet away (57:125-133).

In summary, even if Green himself believed he needed to shoot the victim in self-defense (58:45), a reasonable person would not believe that self-defense using deadly force was justified here. *See, e.g., Jensen*, 236 Wis. 2d 521, ¶ 17 (utter disregard analysis based on what objective, reasonable person would believe); *Edmunds*, 229 Wis. 2d at 77 (utter disregard analysis does not depend on defendant's utter disregard in fact, but whether conduct and surrounding circumstances, as generally considered by mankind, are sufficient to evince utter disregard).

This court's duty is not to search for evidence that supports Green's self-defense theory, but to review the trial evidence in the light most favorable to the State and the conviction. *See, e.g., Poellinger*, 153 Wis. 2d at 507-508. Under that light, the evidence at trial was clearly sufficient to sustain Green's conviction. *See, e.g., Jensen*, 236 Wis. 2d 521, ¶ 24 (in utter disregard calculus, jury can consider what defendant was doing, why he was doing it, how dangerous the conduct was, and how obvious the danger was).

2. Sufficient evidence existed for the jury to conclude that Green acted with utter disregard because Green was just as belligerent and aggressive as the victim, if not more, and acted out in a senseless act of retaliatory violence stemming from a stupid, petty argument.

Green also argues that he was acting in self-defense, and not with utter disregard, because the victim was violent and belligerent, and therefore, neither blameless nor vulnerable (Green's brief at 10-11), particularly because the victim was 12 or 13 years younger than Green (*id.* at 12). Conversely, Green argues that he was not aggressive, noting that "the fight came to Green and Green did not go to the fight" (*id.* at 11).

While true that the jury had an obligation to consider factors related to the victim, *see, e.g., Jensen*, 236 Wis. 2d 521, ¶ 24, the jury also had sufficient evidence from which to conclude that the victim was not the only aggressor, and that Green was just as verbally belligerent and physically aggressive as the victim, if not more. At the very least, the jury had sufficient evidence from which to conclude that the fight was mutual, and was not just the one-sided picture that Green paints of a crazy, hot-headed person (*i.e.*, the victim) attacking a purely innocent bystander (*i.e.*, Green).

Green argues that the eyewitness testified (56:93) that the shooter (*i.e.*, Green) was not that aggressive, and that the victim was the one who created the situation in which Green feared for his life (Green's brief at 5, 11). But the eyewitness also testified that, during the physical altercation, the victim said something to the effect of "Let me go" to the shooter (56:79). The shooter pulled the victim's

shirt, and was "tussling" with the victim (56:80-81). The eyewitness also testified that, although the victim tried to punch the shooter, it was only in an attempt to get away, and the victim did not make contact with the shooter (56:81).

Gordon also testified that he had not seen Green throw any punches, but he still grabbed Green in an effort to stop him from fighting with the victim (57:25). When asked why he grabbed Green if Green had not thrown any punches, Gordon replied, "they were going at each other" because "it's a fight" (57:25-26). Gordon did not see who threw the first punch, but he believed the fight was mutual, and he thought Green was "going to go back and punch" the victim (57:26).

As Gordon further explained on cross-examination, he was trying to restrain Green by standing in front of Green with his hands on Green (57:50). But Gordon had to move from that position, because Green "was angry and he was pushing. And [Green] was saying get the fuck off me. Get off me" (57:50). Nevertheless, Gordon still kept trying to grab Green because Green kept fighting, and Gordon was trying to stop Green from fighting (57:58). Indeed, Gordon testified that Green did nothing to stop fighting, Green told Gordon to get off him, and Green tried to get back to fighting the victim, because Green wanted to continue the fight (57:58-59).

Moreover, the victim did not actually stomp on Green's head when Green was on the ground (Green's brief at 6, 22). Henderson testified that, after Green fell to the ground, the victim "was going to get ready to stomp … [Green] in the ground. I said [Victim] don't do that" (57:92). At that point, "[i]nstead of stomping him in the head, [the victim] kicked [Green] in the back" (57:93). Gordon also testified that the victim kicked Green only once when Green was on the

ground (57:50-51). Henderson also testified that Green was not even on the ground when the victim kicked him, but Green was getting up off the ground (57:95).

As further proof contradicting Green's insinuation that the victim was the only hot-head and Green had nothing to do with starting the verbal argument (Green's brief at 5), Henderson testified that the verbal argument was mutual, and although it was a "very" petty argument about which strip club was better, both men were getting very heated during the verbal argument (57:87-88). Henderson described how the verbal argument progressed:

> Back and forth, words like when they get ready to explode, I think Mr. Green told [the victim], get your shit together. [The victim] told him I got my shit together. And then they begin to get loud with each other. Whole ass nigger came out. [The victim] looked in the rear view mirror. And by this time we're on 27th and Hadley. The car get[s] pulled over.

(57:88-89).

Then, before Green even got out of the car, Green was saying things to the victim like "I'm not this, I'm not a hoe, I'm not a bitch, whatever" (57:91). When they got out of the car, Henderson attempted to calm the victim down, but then Green and the victim were "back nose to nose with each other" (57:91). Gordon was also trying to get over to the group, but before he could get there, "they begin to start fighting each other" (57:91). When asked what started the physical fight, Henderson replied,

> Like I say, when [Green] kept talking, after I had [the victim] in a bear hug trying to calm him down, the defendant kept talking, saying things. [The victim] was getting even madder than what he was. So he moved me out of the way. And he begin[s] to proceed toward Mr. Green. And that's when they begin to start fighting.

(57:91). It was a mutual physical argument (57:92), and even after the physical fight began, "words [were] coming out of [Green's] mouth still" (57:96).

Finally, Gordon testified that, although Green and the victim did not see eye to eye (57:7-9) and had had a dispute at least three years or more before the shooting, Green and the victim had been places together at least three or four times since then without any problems (57:55-57). Gordon's testimony that it was unusual for the victim to act in the manner he did on the night of the shooting (57:56-57) was further proof from which the jury could infer that the victim was not necessarily the only aggressor in the situation.

3. Sufficient evidence existed for the jury to find that Green's post-shooting act of calling 911 did not mitigate Green's utter disregard in shooting the victim.

Finally, Green argues that, like the defendant in *Miller*, he took responsibility for the shooting by immediately calling 911 and waiting for the police (Green's brief at 13). But the jury could have concluded that this one post-homicide act of calling 911 (56:18) was insufficient to negate the utter disregard that Green showed for the victim both before and during the homicide. *See, e.g., Burris*, 333 Wis. 2d 87, ¶ 34. *See also Jensen*, 236 Wis. 2d 521, ¶¶ 30-32 (sufficient evidence of "utter disregard" existed despite defendant's attempt at mitigation).

In other words, while it could be considered a positive act on Green's part that he called 911, that act in and of itself, when combined with the senseless fatal violence that Green perpetrated against the victim, did not require the jury to find that Green's conduct had not demonstrated an

utter disregard for the victim's life. *Edmunds*, 229 Wis. 2d at 78. *See also Burris*, 333 Wis. 2d 87, ¶ 34 (evidence of some regard for human life does not preclude jury finding of utter disregard, and does not require reversal of jury's determination that defendant's conduct, as a whole, evinced utter disregard).

Moreover, the jury could have just as easily concluded that Green had some other reason to call 911 besides regard for the victim's life, such as Green's own selfish desire to appear less culpable for the homicide. Or as the prosecutor argued in closing, the call may have only reflected Green's remorse after he realized he had just killed a man (59:36).

Finally, although Green admitted to police on the scene that he shot the victim and that he was the 911 caller (56:18), the evidence showed that the victim was likely already dead when Green called 911. For example, the gunshot occurred at roughly 12:38 a.m. (56:50),[9] and security footage showed that the victim fell to the ground at about 12:40 a.m. (56:106, 112, 114). Further, when first responders arrived, the victim was pulseless, not breathing, and was pronounced dead shortly thereafter (56:11-12, 52). He was also bleeding from the head and mouth (56:16).

The eyewitness similarly testified that right after the victim was shot, he fell to the ground, "like he had no life in him" (56:85). He "[j]ust dropped," with "[n]o life. He didn't even move" (56:86). The victim was not moving when the first responders put him in the ambulance (56:87).

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[9]This testimony was based upon the police department's "ShotSpotter," a radar-based system that records audio and triangulates the position of the gunshot using radar systems that are "strategically placed" in the police district (56:50).

In that sense, the 911 call was ineffectual in showing any regard for the victim's life, because Green could see that the victim had already died by the time Green called 911. *Cf. State v. Geske*, 2012 WI App 15, ¶ 18, 339 Wis. 2d 170, 810 N.W.2d 226 (last minute swerve did not negate utter disregard when legally intoxicated driver drove over 80 miles per hour through city). Calling 911 after shooting someone in the head at close range is akin to swerving at the last minute after driving intoxicated at 80 miles per hour throughout a crowded city street. *Id.* (defendant could not reasonably expect to avoid collision by swerving at last moment). Neither ineffectual act can reasonably be seen as showing regard for the victim's life. *Id.*

II. GREEN IS NOT ENTITLED TO A NEW TRIAL IN THE INTERESTS OF JUSTICE.

A. Relevant legal principles.

1. Discretionary reversal is a formidable power and should be exercised sparingly.

Under Wis. Stat. § 752.35, this court may order a new trial in the interest of justice on either of two grounds: "'that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried.'" *See State v. Cleveland*, 2000 WI App 142, ¶ 21, 237 Wis. 2d 558, 614 N.W.2d 543. To establish that the real controversy has not been fully tried, a defendant must demonstrate "'that the jury was precluded from considering 'important testimony that bore on an important issue' or that certain evidence which was improperly received 'clouded a crucial issue' in the case.'" *Id.* (quoted sources omitted).

An appellate court will exercise its discretion to grant a new trial in the interest of justice only in exceptional cases. *Id.* (citation omitted); *Vollmer v. Luety*, 156 Wis. 2d 1, 11, 456 N.W.2d 797 (1990). *See also State v. Avery*, 2013 WI 13, ¶¶ 38, 57, 345 Wis. 2d 407, 826 N.W.2d 60 (reversing court of appeals' grant of new trial in interest of justice; that the jury did not hear exculpatory scientific evidence did not make case "a truly exceptional one").

In other words, discretionary reversal is a "formidable power" that should be exercised "sparingly" and with "great caution." *State v. Tainter*, 2002 WI App 296, ¶ 23, 259 Wis. 2d 387, 655 N.W.2d 538. This caution is warranted because the "real controversy" standard does not require that the outcome be different on retrial. *Vollmer*, 156 Wis. 2d at 19.

2. Discretionary reversal should not be used to supplant ineffective-assistance claims.

Importantly, where defense counsel fails to object to errors at trial, the only context within which the defendant's claims can be considered in this court is an ineffective-assistance claim. *State v. Ndina*, 2007 WI App 268, ¶ 12, 306 Wis. 2d 706, 743 N.W.2d 722 (unobjected-to error must be analyzed under ineffective-assistance standards); *State v. Flynn*, 190 Wis. 2d 31, 48-49 n.5, 527 N.W.2d 343 (Ct. App. 1994) (Wis. Stat. § 752.35 not intended to supplant ineffective-assistance claims).

Analyzing claims under the ineffective-assistance framework, rather than the interests of justice framework, is in accordance with the long-established general rule that an appellate court does not review an error unless it has been

properly preserved. *State v. Bannister*, 2007 WI 86, ¶ 42, 302 Wis. 2d 158, 734 N.W.2d 892. The general rule gives attorneys an incentive to diligently try the case at trial because of the threat of waiver. *Id.* It also emphasizes the need for objections, which brings an issue to the court's attention and allows it to correct errors, thereby reducing the need for appeals. *Id.* The general rule also preserves for the court of appeals the role of corrector of errors actually made by circuit courts, rather than addressing issues not even raised in the circuit court. *Id.*

B. Green's claims are premised on his counsel's failures and actions, and must be analyzed as ineffective-assistance claims, not as interest-of-justice claims.

Green argues that he is entitled to a new trial in the interests of justice (Green's brief at 14-22). Specifically, Green argues that the real controversy was not fully tried because the jury instructions did not adequately explain that "imperfect" self-defense negated the element of utter disregard (*id.* at 16-18), and that allegedly key testimony was not placed into context or highlighted (*id.* at 18-20). Green concludes that he is entitled to a new trial, because there would be a substantial probability of a new result upon retrial (*id.* at 20-22).

But as the circuit court found (44:2 [A-Ap. 2]), the problem with these arguments is that Green does not even argue that his counsel was ineffective, yet his interest-of-justice arguments are all predicated on counsel's alleged errors and omissions.

For example, Green argues that the jury instructions were improper (Green's brief at 16-18), yet Green's counsel did not object to the jury instructions, and in fact, expressly

agreed to the instructions (58:81-83), as discussed further below. Thus, this court is prohibited from directly reviewing the instructions and verdict forms. *State v. Becker*, 2009 WI App 59, ¶¶ 16-18, 318 Wis. 2d 97, 767 N.W.2d 585 (absent timely objection by defendant, those claims can only be revisited as claims of ineffective assistance of counsel).

Similarly, Green argues that allegedly key testimony was not placed into context or highlighted, and an alleged key fact was never introduced (Green's brief at 18-20). Again, however, these arguments implicate Green's counsel's omissions in failing to make the arguments, and include or highlight the testimony, that Green wanted.

Therefore, this court should reject Green's attempt to frame his arguments within the interests-of-justice framework, and instead should apply the standards set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), because Green's claims of error have all been waived due to omissions of defense counsel. *Ndina*, 306 Wis. 2d 706, ¶ 12; *Bannister*, 302 Wis. 2d 158, ¶ 42; *Flynn*, 190 Wis. 2d at 48-49 n.5.

In short, Green cannot make an end-run around his burdens of proof set forth in *Strickland* simply because he has framed his arguments as interests-of-justice claims. To supplant *Strickland's* prejudice standards in favor of the lesser "real controversy" standard in Wis. Stat. § 752.35 would render *Strickland* a nullity in cases where, as here, counsel's alleged errors and omissions are at issue. This court should not use the "formidable power" of discretionary reversal authority where other remedies may lie under *Strickland*. *Tainter*, 259 Wis. 2d 387, ¶ 23 (discretionary reversal power should be exercised "sparingly" and with "great caution").

C. Whether analyzed as interest-of-justice claims or ineffective-assistance claims, Green's claims have no merit.

Regardless of how this court analyzes Green's claims, however, this court can come to the same conclusion—namely, that Green's claims have no merit. The jury instructions properly placed Green's self-defense defense before the jury, and there is no reasonable probability that Green was prejudiced by his counsel's alleged errors and omissions.

1. Under *Jensen* and *Austin*, the utter disregard and self-defense jury instructions were entirely proper.

Green argues that this court should reverse in the interests of justice because the court failed to provide the jury with the proper framework for analyzing the utter disregard element when the jury was not informed that his "imperfect" self-defense defense would "negate" a finding of utter disregard (Green's brief at 15-18). But Green is not entitled to a new trial, either in the interest of justice or based on ineffectiveness of counsel, because both the utter disregard instruction and the self-defense instruction were entirely proper, such that the jury knew how to consider Green's self-defense defense.

A circuit court has broad discretion in instructing a jury, but must exercise that discretion in order to fully and fairly inform the jury of the applicable rules of law. *State v. Groth*, 2002 WI App 299, ¶ 8, 258 Wis. 2d 889, 655 N.W.2d 163. Whether a jury instruction is appropriate, under the facts, is a legal issue subject to independent review on appeal. *Groth*, 258 Wis. 2d 889, ¶ 8. But in reviewing a claimed jury instruction error, this court does not view the

challenged words or phrases in isolation, but must view the jury instructions in the context of the overall charge. *Id.* ¶ 9.

Here, relief is not warranted because the jury instructions, when viewed as a whole, neither misstated the law nor misdirected the jury in the manner asserted by Green. *Groth*, 258 Wis. 2d 889, ¶ 9.

Contrary to Green's contention (Green's brief at 17), *Miller* does not stand for the proposition that there can be no finding of utter disregard when the defendant raises self-defense. Rather, as already discussed above, and as the circuit court found (44:3-4 [A-Ap. 3-4]), *Miller* only addressed whether sufficient evidence existed to support the jury finding of utter disregard under the totality of the circumstances. *Miller*, 320 Wis. 2d 724, ¶ 37 (rejecting bright-line rule in favor of totality of circumstances approach). *See also Burris*, 333 Wis. 2d 87, ¶ 36 (citing *Miller*).

The jury here was adequately and properly informed about how to analyze the utter disregard element (59:7), because the jury instructions closely tracked the *Jensen* language, and the *Jensen* language, in turn, tracks the pattern jury instructions for first-degree reckless homicide. *Jensen*, 236 Wis. 2d 521, ¶ 24 (citing Wis. JI-Criminal 1250).

As the circuit court instructed the jury, the jurors should consider these factors in determining whether Green's conduct showed utter disregard: "What the defendant was doing; why the defendant was engaged in that conduct; whether the conduct showed any regard for human life; and all other facts and circumstances relating to the conduct" (59:7). The circuit court also instructed jurors to consider Green's conduct "after the death to the extent it

helps you decide whether or not the circumstances showed utter disregard for human life at the time the death occurred" (59:7).

Green's main argument, however, does not pertain to the utter disregard instruction *per se*, but rather, how the utter disregard instruction and the self-defense instruction interrelated (Green's brief at 16). Specifically, Green argues that the jury was "told very little" about how to analyze his self-defense claims, and about how "imperfect" self-defense would negate the crime of first-degree reckless homicide, such that the jury was kept from "considering the heart" of his case (*id.*).

Green's claims clearly lack merit. Under *State v. Austin*, 2013 WI App 96, ¶¶ 12-18, 349 Wis. 2d 744, 836 N.W.2d 833, the jury was properly informed as to how to analyze his self-defense claim and the utter disregard element. As the parties discussed during the jury instructions conference (58:81-83), *Austin* held that the previous pattern jury instruction for self-defense in recklessness cases, Wis. JI-Criminal 801, was constitutionally deficient because it placed the burden of proof on the defendant to prove self-defense, rather than placing the burden of proof on the State to disprove self-defense. *Austin*, 349 Wis. 2d 744, ¶¶ 15-17.

As the parties also discussed during the jury instructions conference, a new pattern jury instruction for self-defense in criminal recklessness cases has not yet been created after *Austin* (58:81-83). Consequently, the parties decided to use the pattern jury instruction for self-defense in intentional homicides, Wis. JI-Criminal 805, because that instruction properly informs the jury that the State must disprove self-defense beyond a reasonable doubt (58:81-83).

And the parties then agreed to craft a modified instruction for first-degree reckless homicide, combining Wis. JI-Criminal 1017 and Wis. JI-Criminal 805 (58:81-83).

Austin does not create a new instruction, but suggests that the instruction used in Green's case was proper, because it placed the burden of proof on the State to disprove the affirmative defense of self-defense, even though Green's case involved reckless homicide, not intentional homicide. *Austin*, 349 Wis. 2d 744, ¶¶ 16-17. This court should affirm the use of the modified instruction under *Austin*. *Id.*

Green needlessly confuses the issue by referring to the old verbiage of "perfect" and "imperfect" self-defense (Green's brief at 16-18). The jury here did not need to decide whether his self-defense claim was "perfect" or "imperfect." Rather, the jury only needed to decide whether the State had proven utter disregard beyond a reasonable doubt under the *Jensen/Burris* factors; and if so, whether the State had also disproved Green's affirmative defense of self-defense beyond a reasonable doubt. *Austin*, 349 Wis. 2d 744, ¶ 12.

As *Austin* discusses, self-defense is an affirmative defense that the State must disprove beyond a reasonable doubt. *Austin*, 349 Wis. 2d 744, ¶ 12 (citing *State v. Head*, 2002 WI 99, ¶ 64, 255 Wis. 2d 194, 648 N.W.2d 413). An affirmative defense defeats the prosecution's case even if all of the criminal allegations are true. *Id.* (citing *State v. Watkins*, 2002 WI 101, ¶ 39, 255 Wis. 2d 265, 647 N.W.2d 244). The State presumes that Green means affirmative defense when he says "perfect" self-defense.

In contrast, a negative defense serves to negate the elements of the crime that the State must prove. *Austin*, 349 Wis. 2d 744, ¶ 13 (citing *Watkins*, 255 Wis. 2d 265, ¶ 40).

The State presumes that Green means negative defense when he says "imperfect" self-defense.

But *Austin* now makes clear that self-defense is an affirmative defense, not a negative defense, even in criminal recklessness cases, such that the jury must be instructed that the State must disprove self-defense beyond a reasonable doubt. *Id.* ¶¶ 16-17. In other words, in Green's case, the jury first needed to decide if the State had proven the elements of the crime beyond a reasonable doubt—and in particular, utter disregard—and then needed to decide whether the State had disproven Green's affirmative defense of self-defense beyond a reasonable doubt.

The jury did not need to decide, as Green argues (Green's brief at 16-17), whether his alleged acts of self-defense were reasonable or "imperfect" but not privileged. Post-*Austin*, self-defense cannot be "imperfect," or reasonable but not privileged, because self-defense is an affirmative defense, not a negative defense. *Austin*, 349 Wis. 2d 744, ¶¶ 12, 16-17. Green's argument presumes that self-defense can be "imperfect" in reckless homicide cases, but *Austin* held that negative defenses in reckless homicide cases created an unconstitutional burden-shifting. *Id.*

In other words, contrary to Green's argument, an "imperfect" or reasonable act of self-defense can no longer serve as a negative defense in reckless homicide cases. That is, self-defense does not negate the utter disregard element. Rather, the jury needed to decide whether, under the totality of the circumstances, the State proved utter disregard, and then whether the State disproved Green's affirmative self-defense defense.

Under *Austin*, the jury instructions in Green's case properly informed the jury about the State's burdens. First, the jury was instructed that it should first consider whether Green was guilty of first-degree reckless homicide (59:3 [A-Ap. 7]). The jury was also instructed that, if it was not satisfied that Green was guilty of first-degree reckless homicide, it must consider whether he was guilty of second-degree reckless homicide (*id.*). The court then instructed on the elements of first-degree reckless homicide, which included utter disregard (59:3-4 [A-Ap. 7-8]).

Second, the jury was then instructed that it should consider the privilege of self-defense in deciding which crime, if any, Green had committed (59:4 [A-Ap. 8]), and explained:

> [A] person is privileged to intentionally use force against another for the purpose of preventing or terminating what he reasonably believes to be an unlawful interference of his person by another person.
>
> However, he may intentionally use only such force 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 unless he reasonably believes such force is necessary to prevent imminent death or great bodily harm to himself.
>
> As applied to this case, *the effect of [the] law of self-defense is the defendant is not guilty of any homicide offense* if the defendant reasonably believed that he was preventing or terminating an unlawful interference with his person and reasonably believed that the force used was necessary to prevent imminent death or great bodily harm to himself.

(59:4-5 [A-Ap. 8-9]) (emphasis added).

The court again reiterated the elements of first-degree reckless homicide, which included the utter disregard

element (59:3-4 [A-Ap. 7-8]), and second-degree reckless homicide, a lesser-include offense which did not include the utter disregard element (59:5 [A-Ap. 9]).

Third, the court then instructed on the effect of the self-defense privilege on the charged crimes, explaining:

> Because the law provides that it is the State's burden of proof to prove all the facts necessary to constitute the crimes 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 the necessary facts to justify a finding of guilty of first or second-degree reckless homicide.

(59:5 [A-Ap. 9]) (emphasis added).

Fourth, the court then outlined the elements of first-degree reckless homicide in detail (59:6-7 [A-Ap. 10-11]), repeated the self-defense instruction (59:7-8 [A-Ap. 11-12]), and explained that the defendant's belief that deadly force was necessary can be reasonable even though it was mistaken (59:8 [A-Ap. 12]).

Finally, and most importantly, the court put it all together, and instructed the jury on exactly what the State's burdens were for proving first-degree reckless homicide:

> The State must prove by evidence which satisfies you beyond a reasonable doubt that the defendant *did not act lawfully in self-defense*.
>
> If you are satisfied beyond a reasonable doubt that the defendant caused the death of [the victim] by criminally reckless conduct and the circumstances of the conduct showed utter disregard for human life, *and the defendant did not act lawfully in self-defense*, you should find the defendant guilty of first-degree reckless homicide.

(59:8-9 [A-Ap. 12-13]) (emphasis added).

The court then instructed that, if the jury was not so satisfied, it should find Green not guilty of first-degree reckless homicide but then consider second-degree reckless homicide (59:9 [A-Ap. 13]).

The court explained that the difference between first-degree and second-degree reckless homicide was that first-degree reckless homicide required proof of utter disregard (59:9-10 [A-Ap. 13-14]). The court then instructed the jury on exactly what the State's burdens were for proving second-degree reckless homicide:

> If you are satisfied beyond a reasonable doubt that all the elements of first-degree reckless homicide were present except the element requiring the circumstances of the conduct showed utter disregard for human life, you should find the defendant guilty of second-degree reckless homicide.
>
> In other words, if you are satisfied beyond a reasonable doubt that the defendant caused the death of [the victim] by criminally reckless conduct *and that the defendant did not act lawfully in self-defense*, you should find the defendant guilty of second-degree homicide.

(59:10 [A-Ap. 14]) (emphasis added).

The court then instructed that if the jury was not so satisfied, it should find Green not guilty of second-degree reckless homicide (59:10 [A-Ap. 14]).

In short, the jury instructions properly informed the jury that the State needed to prove utter disregard beyond a reasonable doubt, and that the State needed to disprove self-defense beyond a reasonable doubt, in order for Green to be guilty of first-degree reckless homicide. *Austin*, 349 Wis. 2d 744, ¶¶ 16-18. Reversal is not warranted in the interest of justice, because the jury instructions, when viewed as a

whole, neither misstated the law nor misdirected the jury in the manner asserted by Green. *Groth*, 258 Wis. 2d 889, ¶ 9.

2. The evidence does not support Green's contention that he could not escape the situation because of the child locks, or that the victim took Green somewhere secluded in order to harm Green.

Finally, Green argues that he is entitled to a new trial in the interest of justice because the importance of the child locks was not properly highlighted or put in context to the jury (Green's brief at 11-12, 19). In particular, Green argues that he could not escape from the vehicle because of the child locks, and bizarrely implies that the victim somehow used the child locks to hold him hostage and take him to a secluded place to beat him up (*id.* at 19-21).

What Green forgets, however, is that the recklessness of Green's actions—and Green's utter disregard—are both measured by what a reasonable person in Green's shoes objectively would have known or believed about the situation, not what Green himself knew or believed. *Jensen*, 236 Wis. 2d 521, ¶ 17; *Edmunds*, 229 Wis. 2d at 77. And a reasonable person would see the child locks as a complete red herring, or non-issue.

While true that the child locks may have prevented Green from exiting the vehicle without someone opening the door from the outside (57:19), it was undisputed that the victim did actually open the door from the outside so that Green could get out before the physical altercation started (57:24, 90; 58:35, 42, 52). More importantly, however, the child locks had absolutely nothing to do with Green's actions

in shooting the victim in the head after the fight began in the street.

Moreover, there is no evidence to support Green's bizarre implication that this was a hostage-like situation, or that the victim intentionally took Green somewhere secluded after secretly discussing it with Henderson, in order to make it easier for the victim to harm Green (Green's brief at 19-21). Although Green testified that the victim said that they were going to the Cheetah Club with no discussion from anyone else (58:41), there was other evidence from which the jury could have easily concluded that it was a joint decision of all the men to go to the Cheetah Club.

For example, Henderson testified that the men all decided together to go, and agreed to go, to the Cheetah Club after going to Ricky's (57:85-86). He then described the drive to the Cheetah Club:

> We drive, go down 27th Street. Everything is fine. No problems at all. No arguments. No disagreements. Music is playing. [Gordon] and [Green] are in the back seat. They're talking. Me and [the victim] are in the front seat. We're talking. And then when we agreed, because [Green] asked to go home, he has to go to his car.
>
> ....
>
> And I said if he goes to his car, I was going to go home because his car was parked in front of my house. No reason for me to go all the way back there and go back out. So [Gordon] told Mr. Green, oh, man, just come on out with us. Man, one more beer. Just go out, or whatnot. So he agreed to.

(57:86-87). Henderson also testified that the argument did not start until they reached one block past 27th and Vliet, around 27th and Hadley (57:87, 89).

Henderson further testified on cross-examination that they had all decided to go to Cheetah's when Green said, "take him to his car and he would meet us there" (57:104). Henderson explained: "And that's when [Gordon] told Mr. Green I'll just ride with us. And, you know, one last drink. And that's -- it's over, the night is over. So we agreed to it" (57:104).

Indeed, Green himself testified that Gordon had started talking about going the Cheetah Club when the men were still at the first bar, Dale's (58:40). And even after Green told the men that he wanted to go home after the 502 bar, Green nevertheless agreed to go to Ricky's after discussing it with Gordon (58:38).

In short, whether this court analyzes Green's claims under Strickland for ineffective assistance of counsel, or under Wis. Stat. § 752.35 for a new trial in the interest of justice, Green's claims must fail, because they have no merit. Factually, there is no evidence to support Green's claim that the victim secluded him in order to harm him, such that Green's lawyer's alleged omissions were not prejudicial, and Green is not entitled to a new trial in the interest of justice. Legally, the jury was properly instructed on Green's self-defense defense and how it related to the utter disregard element, such that the jury knew how to consider both.

That the jury rejected Green's self-defense claim does not require a new trial in the interest of justice. It simply means that the evidence was sufficient to support the jury's conclusion that Green acted with utter disregard, and not in self-defense.

CONCLUSION

This court should AFFIRM the judgment of conviction and the circuit court's order denying Green's postconviction motion for relief.

Dated this 22nd day of October, 2015.

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 10,880 words.

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Sarah K. Larson
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 22nd day of October, 2015.

_____
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