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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REPLY BRIEF OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions, Rules, and Statutes

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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

Both the state and Green agree that "[t]he 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 v. Virginia***, 443 U.S. 307, 319 (1979)); Brief of Plaintiff-Respondent at 2-3.

The issue here is whether the state proved beyond a reasonable

doubt that Green showed "utter disregard for human life." *See* Wis. Stats. §940.02(1). The state incorrectly appears to argue that examination of the totality of circumstances precludes courts from finding insufficiency of the evidence in imperfect self-defense claims. *See* Brief of Plaintiff-Respondent at 5-9. And yet, in ***State v. Miller***, 2009 WI App 111, 320 Wis.2d 724, 772 N.W.2d 188, this Court found the evidence presented to the jury to be insufficient to establish "utter disregard."

Specifically, this Court held that the actual belief that one's actions are necessary in self-defense "is inconsistent with conduct evincing utter disregard." 2009 WI App 111, ¶40. In ***Miller***, as here, the defendant was acting in self-defense even if unreasonably such that he was not entitled to acquittal based on perfect self-defense. Here, as in ***Miller***, no surrounding circumstances independently established utter disregard. As with Miller, Green was the victim of an unprovoked physical attack and was the one who called the authorities.

Moreover, none of the cases that the state cites in this regard are relevant. None of them involve self-defense of any kind. ***State v. Jensen***, 2000 WI 521, ¶1, 736 Wis.2d 521, 613 N.W.2d 170, is a "shaken baby" case and the issue was whether the defendant had to know that shaking the baby "posed an extreme risk of death." ***State v. Edmunds***, 229 Wis.2d 67, 598 N.W.2d 290 (Ct. App. 1999), also is a "shaken baby" case. No one argued in either case that the defendant shook the baby in any type of self-defense.

Nor did ***State v. Burris***, 2011 WI 32, 333 Wis.2d 87, 797 N.W.2d 430, involve self-defense. Although the defendant in ***Burris*** shot the victim, his defense was that the shot was fired by accident, not that he shot in self-defense. The issue was the weight to be given to conduct after the incident as opposed to conduct before the incident. ***Id***., ¶7. This Court's answer was that such a factor was not assigned a particular weight. ***Id***. Nor does it seem particularly compelling for Burris that he expressed remorse and stated that the shot was unintentional when, unlike Green, he left the scene and, also unlike Green, he evaded police. *See* ***id***., ¶3.

An objective standard does not mean that everything Green did had to be reasonable, contrary to the state's suggestions. *See*, *e.g.*, Brief of Plaintiff-Respondent at 14. Both first degree reckless homicide and second degree reckless homicide require that the conduct be reckless. Compare Wis. Stats. §940.02 with §940.06. "Criminal recklessness," as used in these particular statutes, means "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." ***Id***. §939.24(1). Utter disregard therefore must mean something more than that Green created an unreasonable risk of death.

Nor is it relevant whether a reasonable person would believe that deadly force was necessary. The argument here is that Green's actions constituted *imperfect* self-defense and acting in *imperfect* self-defense does not show utter disregard. The concept of imperfect self-defense is that a person actually believes himself to be acting in self-defense, but that his perceptions are unreasonable either as to the need for force or as to the amount of force needed. *See* ***State v. Head***, 2002 WI 99, ¶¶68-69, 255 Wis.2d 194, 648 N.W.2d 413. If Green's actions and beliefs were completely reasonable, he would not be guilty at all because he would satisfy the requirements for self-defense. *See* Wis. Stats. §939.48.

In addition, the idea that use of an objective standard renders Green's subjective beliefs irrelevant also is error. Although"utter disregard" is evaluated on an objective standard, *see* ***State v. Jensen,*** 2000 WI 84, 236 Wis.2d 521, 613 N.W.2d 170, the use of an objective standard does not mean that the situation is evaluated from the perspective of a third party such as Shaquita Glover, who viewed the scene from above. Instead, the use of an objective standard requires consideration of the perspective of the defendant, because juries are to evaluate

> all the factors relating to the conduct... includ[ing]... 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.

Id., ¶24 (citing Wis JI-Crim 1250) (emphasis added).

Perspective matters in this case. Whether others were or were not trying to break things up matters only if a reasonable person in Green's position would have known that they were trying to do so. Henderson, by his own testimony, was *behind* Banks (R57:118) and there is no evidence that Green saw him. In fact, what evidence there is supports the inference that Green did not see Henderson. (R58:44-45, 37-58). Moreover, by his own testimony, Gordon was not pulling on Green and did not have his hands on Green. (*See* R57:31). Gordon's hands were up. (*Id*.) Even if Gordon was attempting to stop the fight, Green would not have known it.

Similarly, the issue is not whether Banks[1] stopped attacking Green or even if Banks intended to stop attacking Green, but whether a reasonable person in Green's position would perceive Banks to be stopping. No one could reasonable infer from the testimony presented that Banks was done attacking Green. There is no dispute that Banks originally initiated the assault after abruptly pulling the car over (R57:48, 89-91, 112; R58:42), so Green could reasonably infer Banks might continue.

More important, even at the time of the supposed pause, Banks was in a fighting posture and not simply standing nearby. (R57:31, 53, 96). Gordon testified that Banks was in a fighting stance, ready to throw a jab. (*Id*.:28, 31, 53). Henderson testified that Banks was in a fighting stance that Banks had "grabbed away from" Henderson to get into. (*Id*.:96). Moreover, although Glover, the woman who was watching from her window, did not see Banks in a fighting stance, she also did not testify that he was stopping or pulling away from the group at that point. (R56:82).

Other evidence also indicated that no reasonable juror could infer that Banks had ceased his attack. Banks had not moved away much at all. Ms. Glover said she saw the men huddled up from her window. (R56:99). Dr. Tlmoak believed that the stippling indicated that

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[1] Contrary to the state's suggestion, the use of this name is not in violation of any Rule of Appellate Procedure. Banks is not a "victim" as that term is defined in Wis. Stats. (Rule) 809.86(3).

they were only feet away from each other. (R57:122, 124, 131). Even Henderson placed the men within four or five feet of each other (*id*.:118-119), which is barely an arm-span away.

None of the state's distortions of the evidence or overreaching changes the validity of Green's basic argument. *See* Brief of Plaintiff-Respondent at 15-16. Contrary to the state's assertions, Green did not run away after Banks took his fighting stance because running was not an option. As was just noted, the men were close to each other and Banks's assault had, at best, momentarily paused. In fact, the full context of Green's explanation as to why he did not run was:

> Q. Yeah. Did you back up away from Ernest?
>
> A. Yes. I think I stepped back a little bit.
>
> Q. Did you try to run out of there?
>
> A. No.
>
> Q. Why not?
>
> A. Why would I run? I don't think I did anything wrong.
>
> Q. You would have had the opportunity to run away from Ernest, right?
>
> A. What you mean? You said run away from him?
>
> Q. Yes.
>
> A. No. I didn't have a chance to run away from him once I was getting up off the ground. He was up on me again.
>
> I didn't have a chance to get -- go anywhere.

(R58:67).

Nor did Green speak angry words after the incident as the state suggests. *See* Brief of Plaintiff-Respondent at 18. Ms. Glover, the only witness who heard Green speak and the only witness who could hear his tone, thought he spoke frightened words. (R56:103). She spontaneously indicated that she thought "he was scared" (*id*.) and that "he was just shocked that he did that" (*id*.:86).

In any event, a full, objective examination of the totality of the circumstances means focusing on what happened before the incident, what happened during the incident and what happened after the incident. *See* ***Jensen,*** 2000 WI 84. What happened before the incident is that Banks became angry enough to pull his car over for no apparent reason. What happened before the incident was that Banks forced and dragged Green out of the car and assaulted him. What happened before was that Banks and Banks alone wanted a fight.

What happened immediately before the incident is that Henderson may have tried, but decidedly failed, to stop the fight. What happened immediately before the incident is that Green was on the ground and Banks tried to stomp on Green's head. What happened immediately before the incident is that Banks was in a fighting stance, looking as though he would throw a jab.

What happened during the incident is that Green fired a single shot. Not two shots. Not multiple shots. A single shot. No more shots than were needed to stop Banks.

What happened after the incident is that Green–and only Green–stayed on the scene. What happened after the incident is that Green–not Henderson or Gordon–called the police. What happened after the incident is that Green walked up to police and turned himself in.

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.

Green's opening brief demonstrated that, even if the Court should conclude that the evidence was marginally sufficient for

conviction, Green is entitled to a new trial in the interests of justice under Wis. Stat. §752.35, either because: (1) the real controversy has not been fully tried; or (2) it is probable that justice has for any reason miscarried. Brief of Defendant-Appellant at 14-22. Nothing in the state's response undermines that showing.

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

As explained in Green's opening brief at 14-18, the real controversy was not fully tried in this case because the jury was not informed that, under Wisconsin law, the actual, subjective belief that one's actions are necessary in self-defense, "is inconsistent with conduct evincing utter disregard," ***State v. Miller***, 2009 WI App 111, ¶40, 320 Wis.2d 724, 772 N.W.2d 188 (citation omitted), and thus negates the "utter disregard" element of first degree recklessness even when that belief is unreasonable so as to justify denial of a complete defense. Rather, as the state concedes, *see* State's Brief at 34-37, the jury was only told that Green's self-defense claim was relevant to the issue of perfect self-defense once the elements of the offense were found.

The jury cannot reasonably be deemed to have decided an issue that it was not told was even relevant to its decision. *See, e.g.*, ***Vollmer v. Luety***, 156 Wis.2d 1, 22, 456 N.W.2d 797 (1990) ("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"); ***State v. Austin***, 2013 WI App 96, ¶23, 349 Wis.2d 744, 836 N.W.2d 833 (reversing in interests of justice where jury instructions "failed to provide it with the proper framework for analyzing" Austin's self-defense claim).

The state's primary argument to the contrary - that reversal in the interests of justice is inappropriate where the same claim could have been raised as an ineffective assistance of counsel claim, State's Brief at 27-29 - is a non-starter. As the Supreme Court has held repeatedly, that is not the law. Rather the appellate courts'

> discretionary reversal power, although to be invoked in exceptional circumstances, is plenary and not necessarily restrained by any other possible means of relief.

State v. Armstrong, 2005 WI 119, ¶114, n.26, 283 Wis.2d 639, 700 N.W.2d 98. *See also* ***State v. Perkins***, 2001 WI 46,¶¶12-13, 243 Wis.2d 141, 626 N.W.2d 762 (reversal in interests of justice appropriate despite counsel's failure to object to error in jury instructions); ***State v. Hicks***, 202 Wis.2d 150, 549 N.W.2d 435 (1996) (reversing in interests of justice despite related ineffectiveness claim); ***State v. Cuyler***, 110 Wis.2d 133, 327 N.W.2d 662 (1983) (reversing in interests of justice despite trial counsel's failure properly to object to exclusion of exculpatory evidence); ***Logan v. State***, 43 Wis.2d 128, 168 N.W.2d 171 (1969) (granting reversal in interests of justice where counsel's confusion resulted in exclusion of evidence which would have corroborated defendant's testimony and, therefore "went directly to the crux of the case -- the credibility of the defendant as contrasted with the credibility of the complaining witness"); ***Austin***, 2013 WI App 96, ¶23 (reversing in interests of justice based on faulty instruction regarding application of self-defense to recklessness, despite counsel's failure to object).

Although relying upon contrary language in ***State v. Ndina***, 2007 WI App 268, 306 Wis.2d 706, 743 N.W.2d 722, State's Brief at 27, the state fails to note that the Supreme Court rejected this Court's forfeiture analysis on further review, ***State v. Ndina***, 2009 WI 21, ¶¶3-6, 315 Wis. 2d 653, 761 N.W.2d 612, and it is not apparent that Ndina even raised an interests of justice argument. Also, this Court did not hold in ***State v. Flynn***, 190 Wis.2d 31, 527 N.W.2d 343 (Ct. App. 1994), that §752.35 was "not intended to supplant ineffective assistance claims." State's Brief at 27. Rather, it merely held that defendants could not use §752.35 to raise an alternative defense not raised at trial. 190 Wis.2d at 48 n5.

Moreover, even if the state's argument is not viewed as asking the Court to ignore 46 years of established precedent, adopting the state's position as a matter of discretion - rejecting interests of justice claims that might have been raised as ineffectiveness - likewise is

contrary to established authority. *See* ***State v. Martin***, 100 Wis.2d 326, 302 N.W.2d 58 (Ct. App. 1981) (preconceived policy limiting discretion is abuse of discretion).

Although muddled, the state's substantive argument appears to be that ***Miller's*** recognition that a subjective belief in the need to act in self-defense negates the "utter disregard" required for first degree reckless was somehow overruled by ***Austin***, *supra*, such that "self-defense does not negate the utter disregard element" and is *only* relevant to whether Green has a complete defense to the charges. State's Brief at 34; *see id.* at 28-38. First, that argument fails because ***Austin*** said no such thing. Merely because an instruction is deemed to be defective on one ground (there, by placing the burden on the defense to prove perfect self-defense) does not mean it is antiseptic on any and all other grounds not addressed. Second, ***Austin*** could not have overruled ***Miller*** in the manner suggested by the state in any event. ***Cook v. Cook***, 208 Wis.2d 166, 560 N.W.2d 246 (1997) (This Court cannot modify, limit, or overrule its prior decisions).

Although it quibbles with available conflicting inferences regarding a few of the many pieces of evidence supporting Green's defense, State's Brief at 38-40, the state does not suggest that reversal in the interests of justice would be inappropriate if, as it must, this Court should reject its legal arguments that interests of justice cannot apply where the claim could be raised on ineffectiveness grounds or that the fatally incomplete instructions were somehow adequate for the real controversy to be fully tried. The state accordingly has conceded the point and, since its legal arguments are baseless, reversal and a new trial are appropriate in the interests of justice. *E.g.*, ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis.2d 97, 108-09, 279 N.W.2d 493 (Ct. App. 1979) (that not disputed is deemed conceded).

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

Although Green also argued that, given the closeness of the case on the issue of self-defense and the absence of a proper instruction on the relationship of his belief in the need to act in self-defense to the

"utter disregard" element of the offense, reversal also was appropriate in the interests of justice on the grounds that there is a "substantial probability of a different result on retrial." Green's Brief at 20-22. The state, however, chose not to respond to that argument, and thus once again has conceded the point. *E.g.*, ***Charolais Breeding Ranches, Ltd.***, 90 Wis.2d at 108-09 (that not disputed is deemed conceded).

CONCLUSION

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

Dated at Milwaukee, Wisconsin, November 10, 2015.

Respectfully submitted,

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

I hereby certify that this reply brief conforms to the rules contained in Wis. Stat. (Rules) 809.19(8)(b) and (c) for a reply brief produced with a proportional serif font. The length of this brief is 2991 words.

_____
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.

_____
Ellen Henak

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 10th day of November, 2015, I caused 10 copies of the Reply Brief 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.

_____
Ellen Henak

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