STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2016AP119-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DEVIN T. WHITE,

Defendant-Appellant.

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

BRIEF OF PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Wisconsin Attorney General

DANIEL J. O'BRIEN
Assistant Attorney General
State Bar #1018324

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9620
(608) 266-9594 (Fax)
obriendj@doj.state.wi.us

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ISSUES PRESENTED

1. Did Devin T. White prove both deficient performance and actual prejudice arising out of his trial counsel's express approval of the jury instructions prepared by the trial court relating to the charged offense, the lesser-included offense, and self-defense?

White waited until after the State rested at trial to reveal his theory of defense that he shot the victim in self-defense. The trial court prepared jury instructions on the charged offense of first-degree reckless homicide, the lesser-included offense of second-degree reckless homicide, and the privilege to use deadly force in self-defense as it relates to a reckless homicide charge. The court's instructions closely tracked the pertinent pattern jury instructions. When asked by the trial court, defense counsel expressly approved of its proposed instructions.

The trial court summarily denied without an evidentiary hearing White's postconviction motion alleging ineffective assistance of counsel. It rejected White's claim that trial counsel was ineffective for approving of the court's proposed instructions. There was no deficient performance because the instructions viewed in their entirety accurately set forth the applicable law. The allegations of deficient performance and prejudice in the motion were also conclusory.

2. Has White proven that he is entitled to discretionary reversal under Wis. Stat. § 752.35?

White invokes this Court's statutory authority to grant discretionary reversal in the interest of justice.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. This case involves the application of the established principles of *Strickland v. Washington,* 466 U.S. 668 (1984), to the unique facts presented, and the case-specific issue whether White is entitled to discretionary reversal. This case may be appropriate for summary affirmance. Wis. Stat. § (Rule) 809.21.

STATEMENT OF THE CASE

After a trial held August 22–26, 2011, a Milwaukee County jury found White guilty as charged of one count of first-degree reckless homicide while using a dangerous weapon, and one count of being a felon in possession of a firearm. (11; 12; 42:5.) The court imposed concurrent sentences of 30 years of initial confinement and 15 years of extended supervision on the reckless homicide count, and 5 years of initial confinement and 5 years of extended supervision on the felon-in-possession count. (43:22–23.) The judgment of conviction was entered October 20, 2011. (16, A-App. 119–20.)

Appointed appellate counsel for White filed a no-merit notice of appeal. (25.) Counsel then filed a no-merit report. This Court issued an order July 14, 2014, directing counsel to file a supplemental no-merit report addressing an issue identified by this Court regarding possibly erroneous jury instruction. (51.) This Court issued another order September 12, 2014, rejecting the no-merit report filed by counsel, dismissing the appeal without prejudice, and extending the time to file a postconviction motion or a notice of appeal. (48.)

Counsel for White filed a motion for new trial August 10, 2015, alleging ineffective assistance of trial counsel for not objecting to the jury instructions prepared by the trial court. (66.) The State filed a response in opposition to the motion on November 3, 2015 (72), and counsel for White filed a reply (75). The trial court summarily denied the motion without an evidentiary hearing December 14, 2015. (76, A-App. 121–24.) The court held that White failed to sufficiently allege deficient performance and prejudice arising out of counsel's decision not to object to the jury instructions. The court held that the pattern instructions in their entirety properly set forth the law regarding first and second-degree reckless homicide, and correctly imposed the burden of disproving self-defense on the State. (76:2–3, A-App. 122–23.) White appeals. (78.)

Relevant facts will be developed and discussed in the argument to follow.

ARGUMENT

I. The trial court properly held that White failed to prove deficient performance and actual prejudice because counsel reasonably decided not to object to the pattern jury instructions as given by the trial court.

White maintains that his attorney engaged in prejudicially deficient performance when he approved of the jury instructions prepared by the trial court regarding first-degree reckless homicide, second-degree reckless homicide and self-defense. As the trial court correctly held, there was nothing wrong with the instructions when considered in their entirety so there was no reason to object.

A. The relevant facts.

White shot Montrealle Jackson to death around 2:30 a.m. November 21, 2010, in front of a night club near the

intersection of 35th and Villard Streets in Milwaukee. The State proved that White and two other men arrived at the scene in a white SUV driven by White and they parked near the corner of 35th and Villard with the ignition running. White got out and walked across the street toward Jackson who was standing alongside his own car. While White crossed the street, one of his two passengers got out and entered the driver's side of the SUV. White and Jackson exchanged gunfire. White sustained a shoulder wound and Jackson, who White shot in the head, died in the street. (36:26–29; 37:12, 26–34, 44–45, 53–60, 71–78, 89–101, 108–112; 38:13–14; 40:15.)

The State's theory was that White, for unknown reasons, fired five shots at Jackson who then returned fire striking White in the shoulder with one of the two rounds he got off before collapsing. White ran back to the SUV (now driven by his passenger) and they drove to his sister's house. White reluctantly went to the hospital later on for treatment of his wound. White gave a false name to hospital personnel and falsely told police that he was shot at 11th and Chambers, then somewhere on Chambers between 8th and 11th Streets, before finally admitting that the shooting occurred near 35th and Villard Streets after police truthfully told him they had surveillance video of the shooting there. White also later lied to police when he insisted that he did not have a gun and did not shoot anyone. The State argued to the jury that White did not shoot in self-defense. Rather, Jackson was the one who shot in self-defense after White fired multiple rounds at him. (38:34–38; 39:47–53, 69–74, 88–89, 91–92; 41:27–33.)

White's trial attorney, Dennis P. Coffey, reserved his opening statement until after the State rested its case on the morning of the fourth day of trial. Counsel revealed for the first time in his opening that White would claim he acted in

self-defense. (40:35–38.) It was only then, on the fourth day of trial, that counsel told the trial court he would be requesting a jury instruction on self-defense. (40:38–39.) The trial court said it would work on the instructions over the lunch break in light of these "new developments." (40:51.)

White was the only witness for the defense. White testified that he indeed drove up with two other men in the white SUV, he crossed the street to look for his brother and to speak with some women there, but was shot by Jackson for no reason. White said he returned fire in self-defense to save his own life. White admitted that he lied repeatedly to hospital personnel and police thereafter. (40:40–49, 67–77.) White admitted that he carried a loaded gun with him all day and evening, and had the loaded gun at the ready in his waistband as he crossed the street towards Jackson. (40:56–58.) White did not tell anyone until he took the witness stand at trial that he shot Jackson in self-defense. (40:72, 86–88, 91–92.)

At the jury instruction conference on the afternoon of the fourth day of trial, the trial court presented to counsel its proposed jury instructions that incorporated the approved pattern instructions for first-degree reckless homicide, second-degree reckless homicide and self-defense. *See* Wis. JI-Criminal 801 (2001), 805 (2001), 810 (2001), 815 (2001) and 1022 (2002 and 2015). The court asked defense counsel whether he was satisfied with the proposed instructions. Defense counsel responded: "Based on my review, yes, on behalf of Mr. White." (41:3, A-App. 101.) The proposed instructions were also "fine" with the prosecutor. (*Id.*) No one had anything to add or subtract. (41:4.) The court read those instructions as composed by it and as approved by the parties to the jury. (41:12–19, A-App. 102–09.) They tracked the pattern instructions almost to the letter. (72:8–14, A-App. 111–117.)

B. The applicable law.

1. No right to appellate review of allegedly erroneous but unobjected-to jury instructions.

The trial court has broad discretion in how it instructs the jury. *State v. Steffes,* 2013 WI 53, ¶ 22 n.7, 347 Wis. 2d 683, 832 N.W.2d 101. Failure to object to jury instructions is either an affirmative strategic waiver or a forfeiture of any alleged instructional error by neglect. In either situation, the lack of an objection precludes appellate review of any alleged errors in the instructions. *State v. Beasley*, 2004 WI App 42, ¶ 17, 271 Wis. 2d 469, 678 N.W.2d 600; *State v. Ward*, 228 Wis. 2d 301, 305, 596 N.W.2d 887 (Ct. App. 1999). *See* Wis. Stat. § 805.13(3). *See also State v. Pinno & Seaton,* 2014 WI 74, ¶¶ 56–66, 356 Wis. 2d 106, 850 N.W.2d 207, *cert. denied, Seaton v. Wisconsin,* 135 S. Ct. 885 (2014) (claimed denial of the structural public trial right at voir dire was forfeited by failure to timely object).

Any jury instruction error is also subject to the harmless error rule. The erroneous instruction is harmless if it is clear beyond a reasonable doubt that the jury's verdict would have been the same had the proper instruction been given. *State v. Williams,* 2015 WI 75, ¶¶ 6, 51, 59, 364 Wis. 2d 126, 867 N.W.2d 736. The appellate court views the instruction in the context of the entire trial to see if a reasonable possibility exists that the jury was misled such that the error contributed to the conviction. *State v. Gordon*, 2003 WI 69, ¶¶ 33–42, 262 Wis. 2d 380, 663 N.W.2d 765; *State v. Zelenka*, 130 Wis. 2d 34, 49–52, 387 N.W.2d 55 (1986).

Even when instructions appear to be correct yet are possibly misleading, reversal is not warranted unless there is a reasonable likelihood that the jury was actually misled

and therefore applied potentially confusing instructions in an unconstitutional manner. The appellate courts must view those possibly misleading instructions in light of the entire proceedings and not in artificialized isolation. *State v. Lohmeier*, 205 Wis. 2d 183, 193–94, 197–98, 556 N.W.2d 90 (1996).

This Court may only address waived or forfeited instructional errors under its discretionary reversal authority set out at Wis. Stat. § 752.35, *Beasley*, 271 Wis. 2d 469, ¶ 17 n.4; or in the form of a challenge to the effectiveness of trial counsel for not objecting, with the burden of proving both deficient performance and actual prejudice squarely on the defendant. *Pinno & Seaton,* 356 Wis. 2d 106, ¶¶ 81–86; *Kimmelman v. Morrison,* 477 U.S. 365, 375 (1986). White argues here both that his trial counsel was ineffective and that he is entitled to discretionary reversal.

2. The pleading requirements for alleging ineffective assistance of counsel.

The sufficiency of a postconviction motion to require an evidentiary hearing is a question of law to be reviewed by this Court de novo. *State v. Balliette*, 2011 WI 79, ¶ 18, 336 Wis. 2d 358, 805 N.W.2d 334.

The motion must allege material facts that are significant or essential to the issues at hand. *State v. Allen*, 2004 WI 106, ¶ 22, 274 Wis. 2d 568, 682 N.W.2d 433. The motion must specifically set forth within its four corners facts answering the questions who, what, when, where, why and how the defendant would prove at an evidentiary hearing that he is entitled to a new trial: "the five 'w's' and one 'h'" test. *Id.* ¶ 23. *Balliette,* 336 Wis. 2d 358, ¶ 59; *State v. Love*, 2005 WI 116, ¶ 27, 284 Wis. 2d 111, 700 N.W.2d 62.

If the motion is insufficient on its face, presents only conclusory allegations, or even if facially sufficient the record conclusively shows that the defendant is not entitled to relief, the trial court in the exercise of its discretion could as it did here deny the motion without an evidentiary hearing, subject to deferential appellate review. *Balliette,* 336 Wis. 2d 358, ¶ 50; *Allen,* 274 Wis. 2d 568, ¶¶ 9, 12; *State v. Bentley,* 201 Wis. 2d 303, 310–11, 548 N.W.2d 50 (1996).

To obtain an evidentiary hearing on his ineffective assistance of counsel claim, White had to allege with factual specificity how counsel's performance was both deficient and prejudicial. *Balliette,* 336 Wis. 2d 358, ¶¶ 20, 40; *Bentley*, 201 Wis. 2d at 313–18. He could not rely on conclusory allegations of deficient performance and prejudice, hoping to supplement them at an evidentiary hearing. *Bentley,* 201 Wis. 2d at 313, 317–18; *Levesque v. State*, 63 Wis. 2d 412, 421–22, 217 N.W.2d 317 (1974). The motion had to allege with factual specificity how and why trial counsel's performance was both deficient and prejudicial to the defense. *Balliette,* 336 Wis. 2d 358, ¶¶ 40, 59, 67–70; *Bentley*, 201 Wis. 2d at 313–18. Even when the allegations of deficient performance are specific, the trial court in its discretion may deny the motion without an evidentiary hearing if the allegations of prejudice are only conclusory. *Id.*

To establish deficient performance, it would not be enough for White to allege that his attorney's performance was "imperfect or less than ideal." *Balliette*, 336 Wis. 2d 358 ¶ 22. The issue is "whether the attorney's performance was reasonably effective considering all the circumstances." *Id.* (citing *Strickland*, 466 U.S. at 688). Counsel is strongly presumed to have rendered reasonably competent assistance. *Id.* ¶¶ 25, 27. White had to allege specific facts sufficient to overcome that strong presumption, *id.* ¶ 78,

with the understanding that "[s]trategic choices are 'virtually unchallengeable.'" *McAfee v. Thurmer,* 589 F.3d 353, 356 (7th Cir. 2009) (quoting *Strickland,* 466 U.S. at 690). White would have to show in his motion that trial counsel's specified deficiencies, if proven, sunk to the level of professional malpractice, *State v. Maloney*, 2005 WI 74, ¶ 23 n.11, 281 Wis. 2d 595, 698 N.W.2d 583, with the understanding that counsel need not even be very good to be deemed constitutionally adequate. *State v. Wright*, 2003 WI App 252, ¶ 28, 268 Wis. 2d 694, 673 N.W.2d 386; *McAfee,* 589 F.3d at 355–56.

White had to also specifically allege prejudice in his motion because it would be his burden to affirmatively prove by clear and convincing evidence at an evidentiary hearing that he suffered actual prejudice as the result of counsel's proven deficient performance. He could not speculate. *Balliette,* 336 Wis. 2d 358, ¶¶ 24, 63, 70. White would have to prove a reasonable probability that he would have received a more favorable outcome at trial but for counsel's deficient performance. *Strickland,* 466 U.S. at 687. "The likelihood of a different outcome 'must be substantial, not just conceivable.' [*Harrington v.*] *Richter*, 131 S. Ct. at 792." *Campbell v. Smith*, 770 F.3d 540, 549 (7th Cir. 2014).

Generally, and for obvious reasons, an attorney is not ineffective for agreeing to pattern jury instructions that were approved by the Wisconsin Criminal Jury Instructions Committee. *E.g., State v. Traylor,* 170 Wis. 2d 393, 404–05, 489 N.W.2d 626 (Ct. App. 1992); *State v. Teynor,* 141 Wis. 2d 187, 218, 414 N.W.2d 76 (Ct. App. 1987).

Trial counsel is not ineffective for failing to interpose meritless objections at trial. *E.g., State v. Harvey*, 139 Wis. 2d 353, 380, 407 N.W.2d 235 (1987); *State v. Berggren,* 2009 WI App 82, ¶ 21, 320 Wis. 2d 209, 769 N.W.2d 110.

C. White's motion failed to sufficiently allege deficient performance and actual prejudice.

White alleges that "no reasonable strategy exists for any of trial counsel's errors, and, but for the above errors, prejudice is shown because there exists a reasonable probability of a different result." (White's Br. 31.) He did not in his motion, and does not here, offer any evidence to back up these conclusory allegations.

1. Deficient performance.

White's attorney did not forfeit his right to challenge the trial court's proposed instructions; he expressly approved them. Counsel assured the trial court that its instructions accurately set forth the law and should be read to the jury in the form and order as proposed. (41:3.) The law presumes that this was a sound strategic decision on counsel's part, *Strickland,* 466 U.S. at 690, and White presented no facts in his motion to overcome that strong presumption. (66.) White's motion contained nothing at all from trial counsel. There was no affidavit or letter from trial counsel, and no summary of appellate counsel's discussions with trial counsel, addressing his decisional process regarding the jury instructions. White offered no explanation from trial counsel why he approved of the court's instructions and why he deemed the instructions not to be objectionable. White offers no explanation why counsel was unreasonably wrong in approving of the instructions, or what instructions counsel should have proposed instead that would have been more to White's liking yet still approved by the trial court. White asks this Court to presume without any evidence that trial counsel acted unreasonably and not strategically, but the law presumes just the opposite. *Strickland,* 466 U.S. at 690.

Wisconsin law does not allow White to rely on mere "notice pleading" to let him engage in a postconviction

evidentiary "fishing expedition," hoping to discover facts that he does not yet have to support the conclusory allegations of deficient performance and prejudice in his motion. White's claim is supported only by rank speculation. *See Balliette,* 336 Wis. 2d 358, ¶¶ 50, 78; *Bentley,* 201 Wis. 2d at 310–11. As it turns out, White no longer wants an evidentiary hearing (White's Br. 31), acknowledging that a hearing into counsel's alleged ineffectiveness "would waste judicial resources." That it would, given that White offered no evidence in his motion to overcome the presumption of reasonably competent performance.

The instructions properly set forth the law, even if they were not perfect as to form or order. As the prosecutor aptly laid out in the State's postconviction brief, the instructions as composed by the trial court tracked the applicable pattern instructions almost to the letter. (72:8–14.) Trial counsel is not ineffective for failing to object to approved pattern instructions. *E.g., Traylor,* 170 Wis. 2d at 404–05.

These instructions, when considered as a whole and not in artificial isolation, accurately set forth the law. The trial court correctly so held. (76:3, A–App. 123.) White is searching for confusion where there was none. The jury was properly instructed on the elements of first-degree reckless homicide (41:16–18), and the lesser-included offense of second-degree reckless homicide (41:18–19). The jury was properly told that one is privileged to use deadly force in self-defense if he believed that he was in imminent danger of death or great bodily harm, deadly force was necessary to prevent death or great bodily harm to himself, and his beliefs were reasonable. Those beliefs may be reasonable even though mistaken. (41:13–15.) *See* Wis. JI-Criminal 805 (2001).

Most important, the jury was correctly instructed that the State bore the burden of proving beyond a reasonable doubt that White did not act lawfully in self-defense. (41:19.) White was not required to prove his innocence. (41:21.) This alone distinguishes White's case from *State v. Austin,* 2013 WI App 96, ¶ 7, 349 Wis. 2d 744, 836 N.W.2d 833, where "there was no mention of the burden of proof relative to self-defense" in the instructions as to the charged and lesser-included criminal recklessness offenses. Moreover, the State argued in *Austin* that the defense bore the burden of proving self-defense to a charge of criminal recklessness because it is a "negative defense" that negates the elements of the charged offense. *Id.* ¶ 13. The State does not make that argument here. The State concedes that it bore the burden of disproving self-defense, and it indeed assumed that burden at White's trial. The jury was not instructed that White bore the burden of proving self-defense. Counsel for White repeatedly argued to the jury that the State failed to prove he did not act reasonably in self-defense.[1]

The jury was properly instructed that if White was acting lawfully in self-defense, his conduct was not reckless because it did not create an *unreasonable* risk of death or

[1] *State v. Austin* is also of dubious precedential value in light of *State v. McKellips*, 2016 WI 51, ¶ 52, 369 Wis. 2d 437, 881 N.W.2d 258. In *Austin,* this Court held that "it is not necessary to . . . remand for a hearing on counsel's effectiveness," and it instead granted a new trial in the interest of justice under Wis. Stat. § 752.35, "regardless of whether trial counsel's performance was prejudicial." *Austin*, 349 Wis. 2d 744, ¶ 23. It is now plain after *McKellips* that this Court may not reverse in the interest of justice unless and until it has determined that all of the defendant's other appellate challenges, including ineffective assistance of counsel, lacked merit. *McKellips*, 369 Wis. 2d 437, ¶ 52. This Court should not, therefore, have jumped to the drastic remedy of discretionary reversal without first determining that Austin's ineffective assistance challenge lacked merit.

great bodily harm to another. (41:17.) The jury was told it should also consider whether White was acting in self-defense when deciding whether he acted in utter disregard for the life of another (the element that distinguishes first-degree from second-degree reckless homicide). (*Id.*) The court correctly instructed that White had no duty to retreat and he could use deadly force even if he provoked the attack if he reasonably believed that he was in imminent danger of death or great bodily harm from the attack he provoked; or reasonably believed that he exhausted every reasonable means to escape or otherwise avoid death or great bodily harm from the attack he provoked. (41:15–16.)

Finally, in closing arguments, defense counsel emphasized that the State bore the burden of proving that White did not act in self-defense and he was not required to "turn tail and run" after Jackson shot him. (41:37–38.) It was the State's burden to prove beyond a reasonable doubt that White's actions were unreasonable. (41:39.) The State bore the burden of proof, counsel argued, White did not have to testify and the State presented no evidence that White's conduct was unreasonable. (41:42–43.) Counsel continued, imploring the jury to follow the court's instructions requiring the State to prove that White "provoked a response" from Jackson and that White "wasn't doing the best job he could to retreat as the instructions talk about." (41:43.) Defense counsel emphasized that, after being shot by Jackson, White was entitled "by law to stand there and shoot back." Counsel closed his remarks by insisting that if White had not possessed his gun that night, albeit illegally, he would have been dead. (41:43–44.) The prosecutor did not dispute defense counsel's interpretation of the court's instructions, or counsel's summary of the law of self-defense including the State's burden to disprove it. The prosecutor simply argued that the credible evidence showed that White was not acting

in self-defense; White shot first and Jackson shot back in self-defense. (41:27–33, 44–51.)

White also argues that counsel was ineffective for not being clairvoyant; counsel failed to anticipate this Court's decision issued nearly two years after White's trial in *State v. Austin*. That argument lacks merit for a variety of reasons. First, *Austin* was not an ineffective assistance case. This Court granted discretionary reversal without deciding whether trial counsel was ineffective for not objecting. Second, the jury in *Austin* was not instructed that the State bore the burden of proof with respect to self-defense as it was here. (41:19.) Third and most important, defense counsel's effectiveness is to be evaluated based on his actions and the applicable law at the time of White's trial in 2011, and not when *Austin* was decided in 2013, or when White finally got around to filing his postconviction motion. *Lockhart v. Fretwell,* 506 U.S. 364, 372–73 (1993); *State v. Silva,* 2003 WI App 191, ¶¶ 11–12, 266 Wis. 2d 906, 670 N.W.2d 385. It was reasonable for everyone—defense counsel, the prosecutor and the trial judge—to believe that the instructions hastily put together by the trial judge, after defense counsel revealed on the fourth day of trial that he would rely on self-defense, adequately set forth the law of self-defense as it related to reckless homicide. *See* Wis. JI-Criminal 801 (2014), and comment thereto (revising the 2001 version of 801 in response to the *Austin* decision). Counsel performed reasonably when he approved of the trial court's reliance on the then-applicable pattern instructions drafted as they were by the Wisconsin Criminal Jury Instructions Committee.

2. Prejudice.

White failed to sufficiently allege actual prejudice. The case presented to the jury can be distilled to two simple competing theories: (1) (the prosecutor's theory) White

walked up to Jackson and fired several shots at him first, killing Jackson with a shot to the head, and Jackson fired two rounds at the fleeing White in self-defense before he collapsed in the street; (2) (defense counsel's theory) as White walked toward him, Jackson inexplicably opened fire, striking White in the shoulder, and White returned the fatal fuselage in self-defense to save his own life.

White conceded in his motion that his shooting at Jackson "was a deliberate intentional act" in self-defense after Jackson shot him in the shoulder. (66:9–10.)[2] If the jury believed White, it would have acquitted, even with the

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[2] White curiously argued in his motion that he was "mischarge[d]" by the State with reckless homicide when he should have been charged with intentional homicide. (66:9–10.) Perhaps he is right. As the trial played out, the evidence strongly pointed to first-degree *intentional* homicide. White walked up to Jackson and shot him in the head for no apparent reason and fled in the getaway SUV now driven by his associate. In light of the jury's credibility findings against him, White plainly benefitted from the fact that the State "mischarge[d]" him with only reckless homicide: he avoided life in prison. On the other hand, had trial counsel argued that White should have been charged with intentional homicide because it would have more closely jibed with his defense theory that he shot intentionally at Jackson to save his own life, *that* might have been prejudicially deficient performance. In any event, the instruction told the jury that White could intentionally use force in self-defense that was intended "or likely to" cause death or great bodily harm. (41:14.) White's firing five rounds at Jackson was at least "likely" to cause death or great bodily harm. There is also no dispute that White intentionally shot *at* Jackson, White admitted as much on the stand, regardless whether he also intended *to kill* Jackson. (72:11–12.) *See State v. Boose,* 2010 WI App 62, ¶¶ 26–27, 324 Wis. 2d 583, 785 N.W.2d 688, 2010 WL 696073 (Ct. App. 2010) (unpublished authored opinion cited only for persuasive value distinguishing the intentional act of shooting at the victim from the intent to kill him; self-defense may apply to reckless homicide because it could negate the intent to shoot). *Id.*

instructions in the form and order as they were given, because he had the right to intentionally shoot at Jackson in self-defense. The jury believed the State's version that White fired first, amply supported as it was by the testimony of eyewitnesses, by the surveillance video and by the fact that White fired five rounds, while Jackson fired only two. The State did not need the allegedly erroneous instructions to bolster its strong case.

Any lingering doubts in his favor were eliminated when White decided to take the witness stand. The prosecutor's cross-examination of White was devastating. (40:53–88.) It established that White lied to everyone after the shooting about who he was, what happened, what he did, where he did it, whether he had a gun, and whether he shot anyone. White carried a loaded gun with him all day and night, and approached Jackson with the loaded gun at the ready in his waistband. Most important, White did not breathe a word of self-defense to anyone (apparently even to his own attorney) until he took the stand on the fourth day of trial after the State put on powerful proof that he shot Jackson in the head unprovoked.

Even assuming the instructions could have been drafted more precisely or arranged in slightly different order, the overwhelming evidence of White's guilt, and the ease with which the jury could have acquitted had they believed him, renders any error harmless as the trial court held. (76:3, A-App. 123.) It follows that White failed to sufficiently allege prejudice. Therefore, as White concedes at p.31 of his brief, there was no need for the trial court to "waste judicial resources" by holding a postconviction evidentiary hearing to let White fish for evidence of prejudicially deficient performance he does not now and never will have.

II. White is not entitled to discretionary reversal because the real controversy was full and fairly tried.

Having failed to prove deficient performance and prejudice, White presents the "last gasp" argument that this Court should nonetheless exercise its discretion under Wis. Stat. § 752.35 to award him a new trial in the interest of justice.

The discretionary reversal power is formidable and should only be exercised in "'exceptional cases.'" *State v. Avery,* 2013 WI 13, ¶ 38, 345 Wis. 2d 407, 826 N.W.2d 60.

This Court may not even consider the issue of discretionary reversal until after it has determined that all other challenges to the conviction are without merit and, even without any other meritorious ground for relief, it is that rare "exceptional case" that warrants discretionary reversal. *State v. McKellips*, 2016 WI 51, ¶ 52, 369 Wis. 2d 437, 881 N.W.2d 258. This Court also may not grant discretionary reversal until after it has balanced the compelling State interests in the finality of convictions and proper procedural mechanisms against any factors favoring discretionary reversal. *State v. Henley*, 2010 WI 97, ¶ 75, 328 Wis. 2d 544, 787 N.W.2d 350.

This is not one of those "'exceptional cases.'" *See Vollmer v. Luety*, 156 Wis. 2d 1, 11, 456 N.W.2d 797 (1990). The jury instructions when considered in their entirety properly set forth the law, as discussed above. Even assuming the instructions could have been phrased or arranged differently, trial counsel's decision not to object indicates that the error was not nearly as serious as White would now have this Court believe. *See State v. Fencl*, 109 Wis. 2d 224, 239, 325 N.W.2d 703 (1982).

The real controversy was fully tried: Did Jackson shoot first, causing White to fire back in self-defense? Or, did White shoot first, causing Jackson to fire back in self-defense before he died? The jury resolved that controversy in the State's favor because it did not believe White.[3] That task was made easier for the jury once White made the dubious decision to take the witness stand. The jury determined that White lied under oath at trial just as he lied to hospital personnel and police shortly after the shooting.

Because he failed to prove deficient performance and actual prejudice, White has not proven grounds for discretionary reversal. *McKellips,* 369 Wis. 2d 437, ¶ 52. The Wisconsin Supreme Court had in mind cases like this when, in rejecting a request for a new trial in the interest of justice it stated: "Zero plus zero equals zero." *Mentek v. State*, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976). White has not proven by clear and convincing evidence that justice miscarried in any respect. *State v. Williams*, 2000 WI App 123, ¶ 17, 237 Wis. 2d 591, 614 N.W.2d 11. It would be a miscarriage of justice to award White a new trial for the flimsy reasons put forth in his postconviction motion and in his brief to this Court.[4]

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[3] White did not testify or argue at trial that he provoked the attack by firing first, Jackson fired back, and White then used deadly force to save his own life from the attack he provoked. White testified and argued all along that Jackson provoked the attack by firing first.

[4] White also claims that the jury instructions somehow denied him the right to a fair trial, to present a defense, to a unanimous verdict, and misstated criminal liability under Wis. Stat. § 940.02. (White's Br. 2–20.) These are nothing more than creative twists on White's central claim that the instructions were erroneous and counsel should have objected to them. The State does not directly address these claims here because trial counsel waived or at least forfeited them when he expressly approved of

CONCLUSION

Therefore, the judgment of conviction and order denying postconviction relief should be AFFIRMED.

Dated: March 27, 2017.

Respectfully submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General

DANIEL J. O'BRIEN
Assistant Attorney General
State Bar #1018324

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9620
(608) 266-9594 (Fax)
obriendj@doj.state.wi.us

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the jury instructions. *Pinno & Seaton,* 356 Wis. 2d 106, ¶¶ 56–66. The State's response to these arguments is subsumed in its response to White's properly preserved claims that trial counsel was ineffective and he is entitled to discretionary reversal. One additional point: White is wrong when he argued in his motion, and argues here, that he does not have to prove *Strickland* prejudice because it is presumed. (66:8 (*see* White's Br. 30).) White must still shoulder the burden of proving actual prejudice even when the waived or forfeited constitutional error is structural. *Pinno & Seaton,* 356 Wis. 2d 106, ¶¶ 83–86, 88, 91.

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 5,346 words.

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DANIEL J. O'BRIEN
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: March 27, 2017.

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DANIEL J. O'BRIEN
Assistant Attorney General