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STATE OF
WISCONSIN COURT
OF APPEALS
DISTRICT I

Appeal Number:
2016AP000119-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

-vs-

Milwaukee County
Case No. 2010-CF-004776

DEVIN WHITE,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF CONVICTION AND DECISION AND ORDER DENYING POST CONVICTION RELIEF ENTERED IN

THE MILWAUKEE COUNTY CIRCUIT COURT, BRANCH 40, THE HONORABLE REBECCA F. DALLET, PRESIDING

REPLYBRIEF OF DEFENDANT-APPELLANT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Publication is warranted for several reasons. First because of the Constitutional violations and the additional errors in the 801 line of self-defense instructions not resolved by *State v. Austin,* 2013 WI App 96. Second, the instructions are still contrary to this Court's decision in *State v. Harp,* 150 Wis.2d 861 (CA 1989),[1] which is consistent with *Austin.* Third, the standard self-defense instructions do not define for the jury that self-defense actual beliefs and excessive force are factual and legal exceptions to utter disregard. And fourth, the State erroneously believes that *Austin* created a new law when in fact, it did not. A recent decision by the Honorable Judge Joseph M. Donald in *State v. Darryl A. Flynn,* Milwaukee County Case No. 2004CF2483 correctly held that *Austin* "did not announce a new rule on the burden of proof for self-defense claims. The sole focus of the decision was the jury instructions, which the court found did not properly state the law of self-defense." April 26, 2017 Decision and Order Denying Motion for Postconviction Relief (App 103).

A Published decision will resolve these issues and provide guidance for judges, prosecutors, defense attorneys, and the public.

ARGUMENT

I. THE STATE CONCEDES INSTRUCTIONAL ERROR.

This Court must resist the State's factual and legal misrepresentations. First, the State's Brief at 3 asserts, "The court held that White failed to sufficiently allege deficient performance and prejudice." This is false-nowhere did the court suggest that White's motion was insufficiently pleaded. In reality, the court addressed some issues and, like the State, overlooked others. *Id.*

Second, no eyewitness testified, and no video showed, White firing first. *Id.* at 16. As the undisputed record proves, and White's Brief at 1 asserted, "[No] witness saw who shot first…" See R37:97-99, 104, 109, 111-14. However, even if he shot first, under §939.48 a person may apply force to "prevent" or "terminate" an unlawful interference.

Third, the State's Brief at 16 asserts, "White did not breathe a word of self-defense to anyone (apparently even his own attorney) until he took the stand." This is a purely speculative attempt to discredit the defense by suggesting that White, with counsel, manufactured a defense after watching the State's case. The State couldn't actually know what counsel's strategy was or what he advised

[1] *Harp* was modified on other grounds by *State v. Camacho,* 176 Wis.2d 860, 874 (1993) (modifying defendant's burden of production to receive imperfect self-defense instruction).

White concerning the defense.

White's Brief at 2-19 argued that the instructions violated his Constitutional rights and what the State was required to prove and disprove on §940.02 once self-defense is raised. In response, the State's Brief at 5, 9, 11-14 ignored these claims and instead suggests that, since everyone relied on pattern instructions (without showing how they were correct). No error occurred as if the Instruction Committee has the final say on what the law is and as if its belated correction of instructions has not caused Constitutional error. *See Cole v. Young,* 817 F.2d 412, 420-423 (CA7 1987).

The State ignores that pattern instructions may incorrectly state the law, *State v. Camacho,* 170 Wis.2d 53, 67 n.8 (CA 1992),[2] and doesn't dispute that the instructions omitted the self-defense actual beliefs elements, contrary to *Harp*. Moreover, the State doesn't dispute that §940.02 and utter disregard doesn't reach conduct motivated by self-defense actual beliefs or excessive force. As shown below, the State's silence concedes all of White's claims. *Charolais Breeding Ranches, Ltd. V. FPC Secs. Corp.,* 90 Wis.2d 97, 109 (CA 1979).

In trying to distinguish this case from *Austin,* the State admits Constitutional error. First, the State's Brief at 12 asserts:

…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 elements of the charged offense.

In other words, before *Austin,* a defendant bore the burden of proving innocence on reckless crimes since proof of self-defense negated criminal elements although the instructions didn't explicitly place this burden on a defendant. But the *Austin* error is present here and this admission proves Due Process was violated and runs afoul of White's presumption of innocence under §939.70 and *In re Winship,* 397 U.S. 358, 364 (1970); and also *Mullaney v. Wilbur,* 421 U.S. 684, 702-703 (1975), which requires the State disprove self-defense if it negates a criminal element. *See Austin* at ¶16 (*citing State v. Schulz,* 102 Wis.2d 423, 429-30 (1981); *Hankerson v. North Carolina,* 432 U.S. 233, 244-45 (1977); *Reed v. Ross,* 704 F.2d 705, 709 (CA3 1983) *aff'd by Ross v. Reed* 468 U.S. 1 (1984).

Second, the State's Brief at 11 makes a conclusory assertion "[the instructions properly set forth the law" without disputing that *Harp* is controlling or demonstrating where in the instructions was the State's additional self-defense burden and negative elements are on §940.02. The

[2] Modified on other grounds by *State v. Camacho,* 176 Wis.2d 860, 874 (1993).

State's failure to negate actual beliefs is proof of its failure to negate perfect and imperfect self-defense. *Harp* at 844-85. "*Harp* makes clear that the jury should be instructed that, if the State fails to prove that the defendant lacked an actual belief that the force used was necessary in self-defense, then it must acquit the defendant of [§940.02]." *Camacho*, 170 Wis.2d at 68. The State concedes by "not squarely address[ing] the issue of actual versus reasonable belief in its appellate brief." *Id.* at 67.

Moreover, the State fails to cite any case holding that a defendant can be convicted of §940.02 with actual beliefs and/or using excessive force, doesn't dispute that the 1987 Homicide Revision didn't enlarge §940.02, and thus fails to show how these omissions didn't enlarge §940.02 and violate White's Due Process rights under *Bouie v. Columbia,* 378 U.S. 347, 353-55 (1964).

Third, this case goes further than *Austin* did since *Austin* didn't address missing unanimity on the absence of self-defense elements as it is raised here. For example, under J.I. 1016 the State must unanimously disprove the self-defense elements beyond a reasonable doubt on §940.01 (actual beliefs) and §940.05 (reasonable beliefs), but no self-defense elements or unanimity requirement on §940.02. This error is present in 801 revised after *Austin,* and counsel is ineffective if a defendant is convicted without jury unanimity since there exists no strategic reason for allowing such a conviction. *State v. Marcum,* 166 Wis.2d 908, 921-25 (CA 1992); *Kubat v. Theriet,* 867 F.2d 351, 369-74 (CA7 1989).

Fourth, the State's concession proves that White was denied a jury trial on whether the State has disproved the self-defense elements, contrary to §939.45, §939.70, §972.02, and *Duncan v. Louisiana,* 391 U.S. 145 (1968). Telling the jury to "consider" self-defense on §940.02 (R41:14, 17) doesn't represent the reasonable doubt standard. *Corrigan v. U.S.,* 548 F.2d 879, 882-83 (CA7 1977).

And fifth, the State's concession compounds the instant errors since, assuming the jury applied 801 in a manner implying that White had to prove self-defense on §940.02 (R41:17) like the State argued in *Austin* (only part of the *Austin* error), the jury was then told that the State had to prove White didn't act lawfully in self-defense on §940.06 (still incorrect under *Harp*). R41:19. Thus, the self-defense burden was on or implied to White on §940.02, but then on the State on §940.06. The Washington Supreme Court has held that shifting the self-defense burden back-and-forth like this would be "unbearably complicated" and "reliev[e] the State of its obligation to prove that the defendant's use of force was unlawful." *State v. Acosta,* 101 Wn.2d 612, 617-19 (1984).

The State's frail attempt to suggest that *Austin* created new law (Br at 14) must be rejected since, as White proved (Br at 16-18, 29-30), *Austin's* lawyer filed a No-Merit Report by presuming 801 correctly defined that State's self-defense burden when in fact, it didn't. There are no cases holding that self-defense is an affirmative defense on intentional crimes where the State had the burden to disprove, but a negative defense on reckless crimes where the State had no burden. Yet the Instruction Committee made up this artificial distinction in 1993, without any law, by creating the 801 line for instructions with no self-defense burden (compared to the 805 line) for what is by law an additional State burden to any crime once raised. But even if self-defense was a negative defense on reckless crimes, the State was still required to negate it beyond a reasonable doubt under *Mullaney, Schulz,* and *State v. Pettit,* 171 wis.2d 627, 640 (CA 1992). Simply proving the crime doesn't, without more, simultaneously disprove self-defense whether an affirmative or negative defense. *See U.S. v. Read,* 658 F.2d 1225, 1239 (CA7 1981) (burden of proving crime not same as burden of disproving defense).

That the bench and bar didn't catch the *Austin* error before this Court did doesn't make *Austin* "new," and White's lawyer didn't have to be "clairvoyant…to anticipate" *Austin* (State's Br at 14). He needed only to research the law and know that the instructions were incorrect by omitting the self-defense elements, burden of proof, and unanimity for the State, and instead suggested that self-defense was White's burden. This law was preordained *decades* before trial. *See* White's Br at 2-3, 6-11, 14-18. The instructions didn't hold the State to even a general self-defense beyond a reasonable doubt on §940.02.

Moreover, the State ignored the obstacle that its self-defense burden of proof was included on §940.06 but not on §940.02 since the jury was instructed to *not* consider §940.06 *unless* the evidence was insufficient on §940.02. R41:18. This, if the jury honored its oath to follow the instructions, it reached at §940.02 verdict (sans self-defense burden) without even considering §940.06, which contained a self-defense burden (albeit incorrect under *Harp*).

But even if *Austin* is "new," White is entitled to relief on Due Process and Equal Protection grounds since his conviction isn't final. *E.g., Hicks v. Oklahoma,* 447 U.S. 343, 346-47 (1980); *cf, State v. Howard,* 211 Wis.2d 269 (1998).

That the State didn't "dispute defense counsel's interpretation of the court's instructions, or counsel's summary of the law of self-defense" (Br at 13) is unavailing. As the State notes, defense counsel exacerbated the error by arguing the wrong *"reasonable"* beliefs (versus actual under *Harp)* standard and by

arguing that it was the State's burden to prove beyond a reasonable doubt that White's actions were *unreasonable." Id. See State v. Tee & Bee, Inc.,* 229 Wis.2d 446, 455-56 (CA 1999) (error compounded once State argued higher standard). But even if White had actual beliefs or used unreasonable excessive force, he was entitled to a §940.02 acquittal. *Harp* at 884-86. Furthermore, the State wouldn't argue for a higher self-defense burden when it sought a lower burden before the 1987 Revision.

Since White has proved that the instructions were unconstitutional in many ways, counsel *would be* ineffective for agreeing, or failing to object, to instructions that didn't correctly state the law. This Court has held that an instruction lacking an element violates *Winship* and "is fundamentally unfair and established [*Strickland*] prejudice." *State v. Krueger,* 2001 WI App 14, ¶¶10-15. *See Reagan v. Norris,* 365 F.3d 616, 621-22 (CA8 2004) (same); *McGurk v. Stenberg,* 163 F.3d 470, 474-75 (CA8 1998) (prejudice presumed when deficient performance caused structural error and no jury trial); *Harding v. Davis,* 878 F.2d 1341, 1344-46 (CA11 1989) (same, directed verdict).

Counsel's Failure to Object to the Instructions Doesn't Bar Review

The State didn't address why the waiver exception in *State v. Peete,* 185 Wis.2d 4, 14 (1994) doesn't apply here. Yet *Peete* applies and there is no waiver where, like here, the main issues is what the State is required to prove when several Statutes are at issue.

Second, the State doesn't dispute that since there is no crime of §940.02 with actual beliefs or excessive force, and the instructions allowed for such a conviction by omission, the conviction is jurisdictionally void and cannot be waived even if counsel requested the instructions or failed to object. *State v. Briggs,* 218 Wis.2d 61, 68-69 (CA 1998); *cf, State v. Dillard,* 2014 WI 123, ¶¶33, 76-81, 91-103 (counsel ineffective for allowing conviction on legal and factual impossibility); *Bousley v. U.S.,* 523 U.S. 614, 622-24 (1998) (actually innocent of conduct no Statutorily proscribed); *Davis v. U.S.,* 417 U.S. 333, 346-47 (1974) (conviction cannot be affirmed on unknown crime); *Rewis v. U.S.,* 401 U.S. 808, 814 (1971); *Dunn v. U.S.,* 422 U.S. 100, 106 (1979); *Chiarella V. U.S.,* 445 U.S. 222, 236, 239 (1980).

Third, the State doesn't dispute that since the missing self-defense reasonable doubt instruction is "structural" under *Sullivan v. Louisiana,* 508 U.S. 275, 277-82 (1993), "such error could not be waived and there was therefore no reason for an ineffective assistance of counsel claim." *State v. Carprue,* 2004 WI 111, ¶57. *See State v. Gudgeon,* 2006 WI App 143, ¶5 (structural error raised on collateral review); *Harrison v. McBride,* 428 F.3d 652, 668 (CA7 2005); *Fowler v.*

Butts, 829 F.3d 788, 794 (CA7 2016) ("structural error…may be noticed at any time.").

Lastly, the State doesn't dispute that this Court may review instructions "which raise federal constitutional questions going to the integrity of the fact-finding process." *State v. Zelenka,* 130 Wis.2d 34, 44 (1986).

II. THE STATE CONCEDES THAT WHITE DIDN'T WAIVE HIS RIGHT TO A UNANIMOUS VERDICT AND TRIAL ON THE SELF-DEFENSE ELEMENTS.

By "not directly address[ing] these claims…because trial counsel waived or at least forfeited them when he expressly approved…the jury instructions" (Br at 18 n.4), the State concedes this issue. *Charolais Breeding Ranches, supra.* First, this Court doesn't "consider an argument mentioned only in a footnote to be adequately raised or preserved for appellate review." *State v. Santana-Lopez,* 2000 WI App 122, ¶6 n.4.

Second, the State ignores the difference between no jury finding because of instructional error under *Harp,* and no finding because a defendant didn't waive a jury trial. *State v. Villareal,* 153 Wis.2d 232, 336 (CA 1989). Counsel may "waive" the former; only the defendant can waive the latter: *Id.* Contrary to the State's Brief at 18-19, *State v. Pinno,* 2014 WI 74, ¶¶2, 57-63 doesn't apply here since those defendants knew the courtroom was closed to some members of the public for a limited period. In contrast, there is no evidence that White knew he had a right to a unanimous jury finding the State disproved the self-defense elements beyond a reasonable doubt especially with the State's admission that, before *Austin,* it had no self-defense burden on reckless crimes under 801. Since there was no trial or waiver, "the proper remedy is a new trial-not a postconviction hearing." *State v. Livingston,* 159 Wis.2d 561, 569 (1991).

III. THE STATE CONCEDES THAT THE INTEREST OF JUSTICE REQUIRES REVERSAL.

Contrary to the State's Brief at 18, *State v. McKellips,* 2016 WI 51, ¶52, doesn't apply since in that case the Supreme Court was concerned that this court 1) took a "shortcut" and reversed without any §752.53 request from the defendant, 2) didn't address the claims he raised, and 3) didn't employ the §752.35 analysis. Since the State's premise that the instructions were correct is invalid, so is its assertion that the interests of justice don't require reversal here. State's Brief at 17-18 *See* White's Brief at 23-26.

IV. THE STATE CONCEDES THAT COUNSEL WAS INEFFECTIVE

Counsel is ineffective under *Strickland v. Washington,* 466 U.S. 668 (1984), for allowing a conviction under instructions that fail to identify the exceptions to murder raised by the evidence, *Sanders v. Cotton,* 398 F.3d 572, 581-83 (CA7 2005), for allowing a conviction with missing elements, *Krueger, supra,* and without unanimity. *Marcum* and *Kubat, supra.* All of these Constitutional violations occurred here. Also, counsel's failure to know the law is "deficient performance as a matter of law." *State v. Thiel,* 2001 WI 111, ¶51. *See State v. Felton,* 110 Wis.2d 485, 513-18 (1983).

The State's Brief at 14 admits that the court "hastily" assembled the instructions. This haste contributed to the instructional errors, plus everyone erroneously believed the instructions were correct before *Austin.* The State's brief at 9 asserts that counsel isn't "ineffective for agreeing to pattern instructions…approved by the Instructions Committee," and that if any error existed, "it was harmless." *Id.* at 16. This misses the point. White agrees generally with the cases the State cites because this Court found that the instructions correctly stated the law. Here, the instructions don't correctly state the law, and those cases predate *Sullivan, supra,* where the Court held that a defective reasonable doubt instruction is structural error; not subject to harmless error analysis. *See Jackson v. Virginia,* 443 U.S. 307, 320 n.14 (1979) (missing reasonable doubt standard "never harmless").

However, even if harmless error analysis applies, White was prejudiced since this Court has thrice held that an incorrect self-defense burden of proof isn't harmless. *See Austin* at ¶¶15-20, *Harp* 150 Wis.2d at 889-90; *State v. Harp,* 161 Wis.2d 773, 774, 783 (CA 1991). For harmlessness, the State must prove beyond a reasonable doubt that the jury *would have* convicted but for the error. *State v. Gordon,* 2003 WI 69, ¶36. In contrast, under *Strickland,* a defendant need only show a reasonable probability of a different result, not that it is more likely than not he would have been acquitted. 466 U.S. 668, 693-94. Since the jury heard White testify that he feared for his life and fired in self-defense (R40:42-44, 46-47, 74, 77, 83), and had the right to credit this testimony *Sanders,* 398 F.3d at 582-83, and trigger the State's burden of unanimously disproving self-defense beyond a reasonable doubt (which didn't happen), and since the instructions suggested it was White's burden, he suffered *Strickland* prejudice. Accordingly, the State cannot meet its burden of proving harmless error especially since finding §940.02 is consistent with a finding of self-defense, *Harp, supra* at 844-86; *State v. Watkins,* 2002 WI 101, ¶39, because the proper exercise of self-defense requires a threat, injury, or death to terminate an unlawful interference. Incessantly writing "the instructions properly set forth the law," "the jury was correctly [and] properly instructed" (State's Brief at 11-12), doesn't prove counsel effective, harmless error, or that the jury was properly instructed.

Since White has proved the instructions were contrary to law in many ways and deprived him of myriad rights, counsel was prejudicially ineffective as a matter of law. *Williams v. Taylor,* 529 U.S. 362, 392-94 (2000). Likewise, since "defense counsel has a…responsibility to ensure that the record of jury waiver is developed and failure to meet this responsibility can sometimes be considered inadequate representation," *Livingston, supra* at 570-71, and since "the proper remedy is a new trial," *Id.* at 596, *Strickland* prejudice must be presumed since no reasonable strategy exists for any of the errors.

Contrary to the State's assertion that White "concedes…there was no need" for a *Machner* hearing (Br at 16), no *Machner* testimony can justify these errors, and the State cannot "construct strategic defenses which counsel doesn't offer." *Davis v. Lambert,* 338 F.3d 1052, 1064 (CA7 2004).

CONCLUSION

For these reasons and those in his initial brief, White respectfully requests a *Machner* hearing or that this Court reverse the judgment of conviction and circuit court's order denying him a new trial.

Dated at Milwaukee, Wisconsin this 27th day of June 2017.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules Rule §809.l9.

The length of this brief is 2,986 words.

I hereby certify that attached to this brief is an appendix that complies with the minimum requirements contained in Rule §809.l9(2)(a).

_____

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APPENDIX

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E-FILING CERTIFICATE OF COMPLIANCE

State v. Devin White
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Court of Appeals District 1

I, Thomas W. Kurzynski, certify that this brief is identical to the paper version submitted on June 27, 2017.

Date June 27, 2017

Signature THOMAS W. KURZYNSKI
"s/" Thomas W. Kurzynski
Attorney for the Defendant-Appellant

CERTIFICATION OF MAILING

I certify that this brief or appendix was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least as expeditious, on (date of mailing) 6/27/2017. I further certify that the brief or appendix was correctly addressed and postage was pre-paid.

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I certify that on (date of delivery to carrier) _____, this brief or appendix was delivered to a third-party commercial carrier for delivery to the Clerk of the Court of Appeals within 3 calendar days. I further certify that the brief or appendix was correctly addressed.

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