STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2016AP1409-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOSEPH T. LANGLOIS,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING A MOTION FOR POST-CONVICTION RELIEF, ENTERED IN THE WASHINGTON COUNTY CIRCUIT COURT, THE HONORABLE JAMES K. MUEHLBAUER, PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

BRAD D. SCHIMEL
Wisconsin Attorney General

DONALD V. LATORRACA
Assistant Attorney General
State Bar #1011251

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2797
(608) 266-9594 (Fax)
latorracadv@doj.state.wi.us

TABLE OF CONTENTS

Page

ISSUES PRESENTED 1

STATEMENT ON ORAL ARGUMENT AND PUBLICATION 1

SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS 2

SUMMARY OF THE ARGUMENT 9

ARGUMENT 11

I. Trial counsel was not ineffective for failing to object to the self-defense or accident defense instructions and the circuit court properly denied Langlois's ineffective assistance claim without a *Machner* hearing. 11

A. General legal principles. 11

1. Ineffective assistance of counsel. 11

2. A postconviction challenge to an unobjected to jury instruction. 13

3. Appellate review of a challenge to jury instructions. 14

B. Trial counsel was not ineffective for failing to object to the self-defense instruction. 14

Page

1. Trial counsel's performance was not deficient because the instructions as a whole placed the burden on the State to disprove that Langlois acted in self-defense. 15

2. The circuit court instructed the jury that self-defense was an issue on all charges and properly informed it of the State's burden of proof. 17

3. Trial counsel's performance did not prejudice Langlois because Langois failed to present sufficient evidence to support a self-defense instruction. 19

C. Trial counsel was not ineffective for failing to object to the accident instruction. 22

II. Langlois is not entitled to a new trial in the interest of justice. 24

III. The circuit court's self-defense and accident instructions did not violate Langlois's right to due process. 26

IV. Sufficiency of the Evidence 29

A. General legal principles. 29

1. A challenge to the sufficiency of the evidence. 29

Page

2. Homicide by negligent handling of a dangerous weapon. 30

B. The State presented sufficient evidence for the jury to find Langlois guilty of homicide by negligent handling of a dangerous weapon. 31

1. The circuit court's assessment of Langlois's challenge to the sufficiency of the evidence. 31

2. The evidence was still sufficient despite his proffered defenses. 36

CONCLUSION 38

TABLE OF AUTHORITIES

Cases

Cook v. Cook,
208 Wis. 2d 166, 560 N.W.2d 246 (1997) 16

State v. Allen,
2004 WI 106, 274 Wis. 2d 568,
682 N.W.2d 433 13

State v. Austin,
2013 WI App 96, 349 Wis. 2d 744,
836 N.W.2d 833 ..... 15, 16, 17, 20

State v. Avery,
2013 WI 13, 345 Wis. 2d 407,
826 N.W.2d 60 24

Page

State v. Beamon,
2013 WI 47, 347 Wis. 2d 559,
830 N.W.2d 681 36

State v. Bodoh,
226 Wis. 2d 718, 595 N.W.2d 330 (1999) 33

State v. Burris,
2011 WI 32, 333 Wis. 2d 87,
797 N.W.2d 430 ..... 26, 27

State v. Carter,
2010 WI 40, 324 Wis. 2d 640,
782 N.W.2d 695 13

State v. Cockrell,
2007 WI App 217, 306 Wis. 2d 52,
741 N.W.2d 267 13

State v. Curtis,
218 Wis. 2d 550,
582 N.W.2d 409 (Ct. App. 1998) 13

State v. Ellington,
2005 WI App 243, 288 Wis. 2d 264,
707 N.W.2d 907 14

State v. Erickson,
227 Wis. 2d 758, 596 N.W.2d 749 (1999) 13

State v. Gonzalez,
2011 WI 63, 335 Wis. 2d 270,
802 N.W.2d 454 27

State v. Kucharski,
2015 WI 64, 363 Wis. 2d 658,
866 N.W.2d 697 ..... 24, 25

State v. Machner,
92 Wis. 2d 797,
285 N.W.2d 905 (Ct. App. 1979) 11

Page

State v. Mayo,
2007 WI 78, 301 Wis. 2d 642,
734 N.W.2d 115 25

State v. McKellips,
2016 WI 51, 369 Wis. 2d 437,
881 N.W.2d 258 ..... 14, 16, 25, 26

State v. Mertes,
2008 WI App 179, 315 Wis. 2d 756,
762 N.W.2d 813 30

State v. Poellinger,
153 Wis. 2d 493, 451 N.W.2d 752 (1990) 29, 30, 36

State v. Sanchez,
201 Wis. 2d 219, 548 N.W.2d 69 (1996) 11, 12

Strickland v. Washington,
466 U.S. 668 (1984) 11, 12

Vollmer v. Luety,
156 Wis. 2d 1, 456 N.W.2d 797 (1990) 24

Constitutions

U.S. Const. amend VI 11

Wis. Const. art. I, § 7 11

Statutes

Wis. Stat. § 752.35 ..... 24, 25

Wis. Stat. § 805.13(3) 13

Wis. Stat. § 939.22(10) 33

Wis. Stat. § 939.24 18

Page

Wis. Stat. § 939.25 18

Wis. Stat. § 939.63(1)(b) 2

Wis. Stat. § 940.02(1) 2

Wis. Stat. § 940.06(1) 2

Wis. Stat. § 940.08 2

Wis. Stat. § 940.08(1) 30

Wis. Stat. § 972.10(1)(b) 13

Other Authorities

Wis. JI-Criminal 801 3

Wis. JI-Criminal 1175 (2011) 30

ISSUES PRESENTED

1. The circuit court granted Joseph T. Langlois's request to instruct the jury on the defenses of accident and self-defense. Was his trial counsel ineffective for failing to object to the language of those instructions as the circuit court provided them to the jury?

Trial court answered: No. (130:8-9.)

2. Is Langlois entitled to a new trial in the interest of justice because the accident and self-defense instructions prevented the real controversy from being tried?

Trial court answered: No. (130:7-8.)

3. Did the accident and self-defense instructions violate Langlois's due process rights?

Trial court answered: No. (130:7.)

4. Did the State present sufficient evidence from which the jury could find that Langlois was guilty of homicide by negligent handling of a dangerous weapon?

Trial court answered: Yes. (116:1-3; 130:7.)

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State believes that neither oral argument nor publication is necessary. The parties have fully developed the arguments in their briefs and the issues presented involve the application of well-settled legal principles to the facts.

SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

Langlois's appeal centers on his claim that the circuit court erroneously instructed the jury on his defenses of self-defense and accident. The State's supplemental statement details the procedural history regarding the jury instructions and Langlois's postconviction challenges to his conviction based on a claim of instructional error.

The State charged Joseph Langlois with first degree reckless homicide of his brother Jacob Langlois[1] while using a dangerous weapon. (1:1.) Wis. Stat. §§ 940.02(1) & 939.63(1)(b). At the conclusion of the trial, the State requested the circuit court to instruct the jury on the lesser included offenses of second-degree reckless homicide while using a dangerous weapon under Wis. Stat. §§ 940.06(1) and homicide by negligent handling of a dangerous weapon under Wis. Stat § 940.08. (158:243-44.) Langlois also requested instructions on the defenses of self-defense and accident. Based on Langlois's request for the self-defense instruction, the State also requested an instruction for retreat. (158:244.)

After consulting with the parties, the circuit court prepared jury instructions that incorporated the State's request for the lesser-included offense and retreat instructions and Langlois's request for self-defense and accident instructions. (159:2; 78:1-23, A-App. 119-141.[2])

---

[1] Throughout the brief, the State will refer to the defendant Joseph Langlois as "Langlois," Jacob Langlois as "Jacob," and their mother Karen Langlois as "Karen."

[2] Langlois has reproduced the circuit court's instructions in the appendix to his brief. (Langlois Br. A-App 119-141.)

Neither the State nor Langlois objected to the circuit court's proposed instructions. (159:2, 9.) Langlois's counsel stated, "I'm good with all of it." (159:9.)

The Jury Instructions

In conjunction with the instruction for first-degree reckless homicide, the circuit court provided the standard self-defense instruction. (159:20-22; 78:3-5, A-App. 121-23.) *See* Wis. JI-Criminal 801. The instruction informed the jury that self-defense was at issue with respect to homicide charges based on negligence as well as recklessness.

Self-Defense[3]

> Self-defense is an issue in this case. In deciding whether the defendant's conduct was criminally reckless conduct which showed utter disregard for human life or was criminally reckless conduct or was criminally negligent conduct, you should also consider whether the defendant acted lawfully in self defense.
>
> The law of self-defense allows the defendant to threaten or intentionally use force against another only if:
>
> - the defendant believed that there was an actual or imminent unlawful interference with the defendant's person; and

[3] The circuit court prepared written instructions for the parties. (78, A-App. 119-41.) It read the instructions to the jury. (159:15-41.) It then provided a written set of the instructions to the jury for its use during deliberations. (159:15, 103.) The instructions as transcribed do not substantively deviate from the written instructions provided to the jury. Throughout its brief, the State will refer to the written instructions rather than the instructions as transcribed.

- the defendant believed that the amount of force the defendant used or threatened to use was necessary to prevent or terminate the interference; and

- the defendant's beliefs were reasonable.

The defendant may intentionally use force which is intended or likely to cause death or great bodily harm only if the defendant reasonably believed that the force used was necessary to prevent imminent death or great bodily harm to himself.

(78:3-4, A-App. 121-22 (footnote added).)

After discussing retreat and the elements of first-degree reckless homicide (78:5, A-App. 123), the court returned to the self-defense standard and explained the State's burden of proof:

> You should consider the evidence relating to self-defense in deciding whether the defendant's conduct created an unreasonable risk to another. If the defendant was acting lawfully in self-defense, his conduct did not create an unreasonable risk to another. The burden is on the state to prove beyond a reasonable doubt that the defendant did not act lawfully in self defense. And, you must be satisfied beyond a reasonable doubt from all the evidence in the case that the risk was unreasonable.

(78:6, A-App. 124).

After it provided the self-defense instruction, the circuit court instructed the jury as to the accident defense in conjunction with the first-degree reckless homicide charge. (78:6, A-App. 124.)

The circuit court informed the jury that if it could not unanimously agree as to Langlois's guilt on the first-degree reckless homicide charge, it should consider whether he is

guilty of second-degree reckless homicide. (78:8-9, A-App. 126-27.) It did not reinstruct the jury with respect to the self-defense or accident defense. (78:8-10, A-App. 126-28.)

The circuit court informed the jury that if it could not unanimously agree that Langlois was guilty of second-degree reckless homicide, it should consider whether he was guilty of homicide by negligent handling of a dangerous weapon. (78:10, A-App. 128.) The circuit court reminded the jury that it had previously informed it of the law of self-defense. It provided:

> As I previously indicated, the law of self-defense allows the defendant to threaten or intentionally use force against another only if:
>
> - the defendant believed that there was an actual or imminent unlawful interference with the defendant's person; and
>
> - the defendant believed that the amount of force the defendant used or threatened to use was necessary to prevent or terminate the interference; and
>
> - the defendant's beliefs were reasonable.
>
> The defendant may intentionally use force which is intended or likely to cause death or great bodily harm only if the defendant reasonably believed that the force used was necessary to prevent imminent death or great bodily harm to himself.

(78:11, A-App. 129.) The instruction did not include language that it had previously provided advising the jury that the State had the burden of proving beyond a reasonable doubt that Langlois did not act lawfully in self-defense. (78:6, A-App. 124).

The circuit court then advised the jury of the elements of homicide by negligent handling of a dangerous weapon.

State's Burden of Proof Concerning Elements of Homicide by Negligent Handling of a Dangerous Weapon

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

Elements of the Crime That the State Must Prove

1. The defendant operated or handled a dangerous weapon.

2. The defendant operated or handled a dangerous weapon in a manner constituting criminal negligence.

3. The defendant's operation or handling of a dangerous weapon in a manner constituting criminal negligence caused the death of Jacob Langlois.

"Cause" means that the defendant's act was a substantial factor in producing the death.

Meaning of "Dangerous Weapon"

Once again, "dangerous weapon" means any device or instrumentality which, in the manner it is used or intended to be used, is likely to produce death or great bodily harm. "Great bodily harm" means serious bodily injury.

Meaning of "Criminal Negligence"

"Criminal negligence" means:

- the defendant's operation or handling of a dangerous weapon created a risk of death or great bodily harm; and

- the risk of death or great bodily harm was unreasonable and substantial; and

- the defendant should have been aware that his operation or handling of a dangerous weapon created the unreasonable and substantial risk of death or great bodily harm.

(78:12-13, A-App. 130-31.)

The circuit court reinstructed the jury on the accident defense.

Accident

The defendant contends that he was not aware of the risk of death or great bodily harm required for a crime, but rather that what happened was an accident.

If the defendant was not aware of the risk of death or great bodily harm required for a crime, the defendant is not guilty of that crime.

Before you may find the defendant guilty of Homicide by negligent operation of a dangerous weapon, the State must prove by evidence that satisfies you beyond a reasonable doubt that the defendant should have been aware of the risk of death or great bodily harm.

(78:13-14, A-App. 131.)

The circuit court then reminded the jury that it could not find Langlois guilty of homicide by negligent operation of

a dangerous weapon unless it was "satisfied beyond a reasonable doubt that all three elements of the offense" were present. (78:13-14, A-App. 131-32.)

Langlois's post-verdict motion for a judgment notwithstanding the verdict

Following the jury's guilty verdict on the homicide by negligent handling of a dangerous weapon charge (85),[4] Langlois moved for a judgment not withstanding verdict. He asserted that the State presented insufficient evidence to convict him on the homicide charge. (95:2-4.) He also asserted that the circuit court's instruction on his accident defense violated is due process rights. (95:4-6.) Specifically, he complained that while the State must prove that Langlois was aware that the risk of death or great bodily harm was "unreasonable and substantial," the accident language referenced the risk without reference to the phrase "unreasonable and substantial." (95:5.)

The circuit court denied Langlois's motion. It rejected his sufficiency of the evidence challenge with a detailed discussion of the evidence that supported his conviction. (116:1-3.) The circuit court also rejected Langlois's argument that the accident defense instruction misstated the law or misdirected the jury. It noted that it gave the instruction "exactly" as the defense requested over the State's objections. (116:4.) It denied Langlois's request for a new trial in the interest of justice based on a claimed error in the instructions. (116:4.)

[4] The circuit court withheld sentence and placed Langlois on probation for a period of five years with several conditions of supervision. (119.)

Langlois's postconviction motion

Langlois moved for postconviction relief, seeking a judgment of acquittal based on a challenge to the sufficiency of the evidence. Alternatively, he requested a new trial in the interest of justice, alleging that trial counsel was ineffective for failing to object to improper jury instructions and that the erroneous jury instructions violated his due process rights. (125:1.)

The circuit court denied Langlois's postconviction motion. (130.) It found that the evidence did not support his request for a self-defense instruction. (130:2-5.) It also found that it correctly instructed the jury that "'the burden is on the state to prove beyond a reasonable doubt that the defendant did not act lawfully in self defense.'" (130:5.) It also rejected Langlois's challenge to the accident instruction. It concluded that, viewing the accident in conjunction with the substantive elements of the crime, "there was no reasonable likelihood the jury was misled or that the instructions were confusing in an unconstitutional manner." (130:7.)

SUMMARY OF THE ARGUMENT

Langlois raises four issues, each related to his core claim that the circuit court erroneously instructed the jury on his defenses of accident and self-defense. He contends that the self-defense instruction, as provided in conjunction with the homicide by negligent handling of a dangerous weapon instruction, failed to place the burden on the State of disproving self-defense. Langlois also asserts that the accident instruction omitted the words "unreasonable and substantial" before the words "risk of death or great bodily harm."

Based on these alleged instructional errors, Langlois argued that: (1) his trial counsel rendered ineffective assistance of counsel for failing to object to the defense instructions; (2) the instructional errors prevented the real controversy from being tried; (3) the jury instructions violated his due process rights; and (4) the evidence was insufficient to convict Langlois.

The circuit court properly denied Langlois's postconviction motion. The instructions as a whole properly placed the burden on the State to disprove self-defense. Further, when read in conjunction with one another, the accident instruction and homicide by negligent handling of a dangerous weapon instruction correctly told the jury that it had to find that Langlois's conduct created as "unreasonable and substantial" risk of death or great bodily harm.

Because these instructions were not erroneous, Langlois's trial counsel did not render ineffective assistance for failing to object to the instructions. Further, because the record does not support Langlois's request for a self-defense instruction, trial counsel's failure to object to the instruction did not prejudice him. Because the instructions as a whole were not erroneous, there was no reasonable likelihood that the instructions prevented the real controversy from being tried or violated Langlois's due process rights. Finally, the State presented sufficient evidence from which the jury could reasonably conclude that Langlois committed homicide by negligent handling of a dangerous weapon.

ARGUMENT

I. Trial counsel was not ineffective for failing to object to the self-defense or accident defense instructions and the circuit court properly denied Langlois's ineffective assistance claim without a *Machner*[5] hearing.

Langlois asserts that the circuit court erred when it instructed the jury as to his self-defense and accident defenses as it related to his conviction on the lesser included offense of homicide by negligent handling of a dangerous weapon. (Langlois Br. 9-22.) He contends that the self-defense instruction was flawed because it failed to instruct the jury that the burden was on the State to disprove his claim of self-defense beyond a reasonable doubt. (Langlois Br. 15-21.) Langlois also argues that the accident defense instruction was flawed because it misstated the mental state required for a conviction for homicide by negligent handling of a dangerous weapon. (Langlois Br. 10-14.)

The circuit court properly denied Langlois postconviction motion without a hearing, finding that trial counsel's performance was neither deficient nor prejudicial. (130:8-10.) The record supports the circuit court's decision.

A. General legal principles.

1. Ineffective assistance of counsel.

The United States Constitution's Sixth Amendment right of counsel and its counterpart under article I, § 7 of the Wisconsin Constitution encompass a criminal defendant's right to the effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 686 (1984); *State v. Sanchez*, 201

[5] *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

Wis. 2d 219, 226-36, 548 N.W.2d 69 (1996). The Sixth Amendment right to counsel protects a criminal defendant's fundamental right to a fair trial. *Strickland,* 466 U.S. at 684-86. A defendant alleging ineffective assistance of trial counsel must prove that trial counsel's performance was deficient and that he suffered prejudice as a result of that deficient performance. *Id.* at 687. If a court concludes that a defendant has not established one prong of the test, the court need not address the other prong. *Id.* at 697.

To prove deficient performance, the defendant must show that his counsel's representation "fell below an objective standard of reasonableness" considering all of the circumstances. *Id.* at 688. The defendant must demonstrate that specific acts or omissions of counsel fell "outside the wide range of professionally competent assistance." *Id.* at 690.

To demonstrate prejudice, the defendant must affirmatively prove that the alleged deficient performance prejudiced his defense. *Strickland*, 466 U.S. at 693. The defendant must show something more than that counsel's errors had a conceivable effect on the proceeding's outcome. *Id.* Rather, the defendant must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

When an evidentiary hearing is unnecessary. A circuit court may deny a postconviction motion alleging ineffective assistance of counsel without a *Machner* hearing unless the motion alleges sufficient facts to entitle a defendant to relief. The circuit court may still deny an evidentiary hearing if the record conclusively demonstrates that a defendant is not entitled to relief. A circuit court must exercise its independent judgment and support its decision denying a

hearing through a written decision based upon a review of the record and pleadings. *State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433.

If the circuit court improperly denies a defendant an evidentiary hearing, a reviewing court will remand the matter for a Machner hearing. *State v. Curtis*, 218 Wis. 2d 550, 554-55, 582 N.W.2d 409 (Ct. App. 1998).

Standard of review. A claim of ineffective assistance of counsel presents a mixed question of law and fact. *State v. Carter*, 2010 WI 40, ¶ 19, 324 Wis. 2d 640, 782 N.W.2d 695. While this Court must uphold the circuit court's findings of fact unless clearly erroneous, the ultimate determination of whether counsel's assistance was ineffective presents a legal question that this Court reviews de novo. *Id.*

2. A postconviction challenge to an unobjected to jury instruction.

Under Wis. Stat. § 805.13(3), a party's failure to timely object to the circuit court's proposed instructions "constitutes a waiver of any error in the proposed instructions or verdict." *See also* Wis. Stat § 972.10(1)(b). This Court generally does not have the power to review challenges to jury instructions on appeal when a party did not properly preserve them in the circuit court. *State v. Cockrell*, 2007 WI App 217, ¶ 36, 306 Wis. 2d 52, 741 N.W.2d 267. But this Court may grant relief based on forfeited claims of trial court error under its discretionary power to reverse in the interest of justice or under the rubric of ineffective assistance of trial counsel. *Id.* ¶ 36 n.12; *State v. Erickson*, 227 Wis. 2d 758, 766, 596 N.W.2d 749 (1999).

3. Appellate review of a challenge to jury instructions.

A circuit court has broad discretion when it instructs a jury. This Court independently reviews whether the instructions that the circuit court gave accurately stated the law. This Court does not review an instruction in isolation. Instead, it analyzes "the instructions as a whole to determine their accuracy, viewing them in the context of the overall charge." *State v. McKellips*, 2016 WI 51, ¶ 30, 369 Wis. 2d 437, 881 N.W.2d 258. When a jury instruction misstates the law, then the circuit court has erroneously exercised its discretion. *Id.* But this Court should not deem a jury instruction erroneous unless it is "'persuaded that the instructions, when viewed as a whole, misstated the law or misdirected the jury.'" *State v. Ellington*, 2005 WI App 243, ¶ 7, 288 Wis. 2d 264, 272, 707 N.W.2d 907 (quoted sources omitted).

B. Trial counsel was not ineffective for failing to object to the self-defense instruction.

Langlois asserts that the self-defense instruction as provided in conjunction with the homicide by negligent handling of a dangerous weapon instruction because it improperly shifted the burden of proof from the State to Langlois. (Langlois Br. 15.)

The circuit court found that trial counsel was not deficient because the jury instructions were not objectionable. It also concluded that Langlois failed to demonstrate a reasonable probability that the trial's outcome would have been different. (130:9.) It rejected Langlois's challenge to the self-defense instructions on two different grounds.

First, based on its review of the record, the circuit court found that Langlois was not even entitled to a self-defense instruction because the evidence did not support it. (130:3-4.) Second, it noted that it "instructed the jury that 'The burden is on the state to prove beyond a reasonable doubt that the defendant did not act lawfully in self defense.' . . . The correct burden of proof explanation was given by the court and not restricted to any particular charge." (130:5.) The record supports the circuit court's determination.

1. Trial counsel's performance was not deficient because the instructions as a whole placed the burden on the State to disprove that Langlois acted in self-defense.

Langlois claims that the self-defense instruction as incorporated into the homicide by negligent handling of a weapon charge failed to include language requiring the State to disprove that he acted in self-defense beyond a reasonable doubt. He contends that his trial counsel performed deficiently by failing to object to the omission of this language from the instruction. (Langlois's Br. 5-17.)

Langlois relies on *State v. Austin*, 2013 WI App 96, 349 Wis. 2d 744, 836 N.W.2d 833. But his reliance on *Austin* is misplaced. In *Austin*, the State charged Austin with two counts of first-degree reckless endangering safety with a dangerous weapon. The circuit court instructed the jury on both first-degree recklessly endangering safety and the lesser-included offense of second-degree recklessly endangering safety. It also instructed the jury on self-defense and defense of others. *Id.* ¶¶ 2-3.

With respect to the self-defense instruction, this Court observed that "there was no mention of the burden of proof

relative to self-defense" for either first-degree or second-degree recklessly endangering safety. *Id.* ¶¶ 7, 9. With respect to the defense-of-others instruction, the circuit court provided the burden of proof language with respect to the first-degree recklessly endangering safety charge, but not with respect to the second-degree recklessly endangering safety charge. *Id.* ¶¶ 9, 10. Because the instruction implied that Austin must establish that he was acting in self-defense, it removed the burden from the State to establish that Austin had engaged in criminally reckless conduct. *Id.* ¶ 17. This Court concluded that the instructions did not provide a proper statement of the law of self-defense or defense of others. *Id.* ¶¶ 18-19. Rather than deciding the case on ineffective assistance grounds, this Court granted Austin a new trial in the interest of justice. *Id.* ¶ 23.

Here, Langlois focuses exclusively on the circuit court's discussion of self-defense within the homicide by negligent handling of a dangerous weapon instruction. (Langlois Br. 15.) When viewed in isolation, that self-defense language, as it is incorporated into the homicide by negligent handling instruction, fails to adequately inform the jury of the State's burden and is arguably flawed under *Austin*. But a reviewing court must view the instructions as a whole. *McKellips*, 369 Wis. 2d 437, ¶ 30. And as the State argues below, unlike in *Austin*, the self-defense instructions as provided by the circuit court here placed the burden on the State to disprove self-defense.[6]

[6] If this Court disagrees that *Austin* is distinguishable from Langlois's case, the State alternatively contends that this Court wrongly decided *Austin* and seeks to preserve this issue should either party seek supreme court review. *See Cook v. Cook,* 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997) (this Court may not overrule, modify or withdraw language from a published opinion).

(continued on next page)

2. The circuit court instructed the jury that self-defense was an issue on all charges and properly informed it of the State's burden of proof.

In its closing instructions, the circuit court identified what crimes the jury would have to consider: first-degree reckless homicide, second-degree reckless homicide, and homicide by negligent handling of a dangerous weapon. (78:2; A-App. 120.) In conjunction with its instruction of the first-degree reckless homicide charge, the circuit court instructed the jury on self-defense. However, it did not limit the jury's consideration of the self-defense instruction to first-degree reckless homicide. It informed the jury that self-defense was at issue with respect to all of the homicide charges.

> Self-defense is an issue in this case. In deciding whether the Defendant's conduct was criminally reckless conduct which showed utter disregard for human life or was criminally reckless

---

In *Austin*, the State argued that in a prosecution for a crime based on recklessness that self-defense is a negative defense rather than an affirmative defense. Because a negative defense negates the elements of a crime that the State must prove, the instruction on the burden of proof is not required. *State v. Austin*, 2013 WI App 96, ¶ 13, 349 Wis. 2d 744, 836 N.W.2d 833.

In advancing its argument, the State relied on the comments of the Jury Instruction Committee that explained why the privilege of self-defense applies differently in cases involving recklessness or negligence. It stated, "A risk of harm is not unreasonable if the conduct undertaken is a reasonable exercise of the privilege of self defense." *Id.* ¶ 15. This Court nonetheless rejected the Committee's analysis, holding that the instruction implied that the defendant had the burden of showing he acted in self-defense. *Id.* ¶¶ 16-17. The State disagrees, for the reasons it advanced in *Austin*, that this Court's decision was correct.

> conduct *or was criminally negligent conduct*, you should also consider whether the defendant acted in lawful self defense.

(159:20; 78:3-4, A-App. 121-22 (emphasis added).)

After discussing the concept of self-defense and the elements of first-degree reckless homicide, the circuit court then returned to the self-defense instruction. It provided:

> You should consider the evidence relating to self-defense in deciding whether the defendant's conduct created an unreasonable risk to another. If the defendant was acting lawfully in self-defense, his conduct did not create an unreasonable risk to another. The burden is on the state to prove beyond a reasonable doubt that the defendant did not act lawfully in self defense. And, you must be satisfied beyond a reasonable doubt from all the evidence in the case that the risk was unreasonable.

(78:6, A-App. 124; 159:23-24).

The "unreasonable risk" requirement is an element common to offenses based on recklessness and negligence. *See* Wis. Stat. §§ 939.24 & 939.25 (unreasonable and substantial risk of death or great bodily harm). The only difference is the requisite degree of knowledge that a defendant must possess to be found guilty. In the case of recklessness, the defendant must be aware of the risk. In the case of negligence, the defendant "should realize" the risk. *Id*.

Under the circuit court's instructions with respect to each homicide offense, the State had to prove that Langlois's conduct created an unreasonable and substantial risk of death or great bodily harm. (78:5, 9, 13, A-App. 123, 127, 131.) And as it was initially instructed, the jury was informed that one who acts in self-defense has not created

an unreasonable risk to another and that the State had the burden of proving that Langlois did not act in self-defense. (78:6, A-App. 124.)

The circuit court again instructed the jury on self-defense when it discussed the elements of homicide by negligent handling of a dangerous weapon. (78:11, A-App. 129.) While it did not restate the State's burden, it referenced the jury back to the original self-defense instruction. "Self-defense is an issue in this case that also applies to the charge of Homicide by Negligent Handling of a Dangerous Weapon . . . *As I previously indicated*, the law of self-defense allows . . . ." (*Id.* (emphasis added).) The circuit court's self-defense language as incorporated in the negligent homicide instruction did not undermine its initial instruction regarding self-defense. The initial self-defense instruction correctly stated the burden of proof and "was not restricted to any particular charges." (130:5.)

So, unlike in *Austin*, the instructions as a whole informed the jury that (a) self-defense negated "unreasonable risk of death or great bodily harm" element, common to each of the homicide charges, and (b) the State had the burden of disproving self-defense beyond a reasonable doubt. Under the circumstances, Langlois has failed to demonstrate that trial counsel's performance was deficient for failing to object to the self-defense instruction.

3. Trial counsel's performance did not prejudice Langlois because Langois failed to present sufficient evidence to support a self-defense instruction.

Langlois reliance on *Austin*'s application to his case is misplaced for another reason. This Court's decision in *Austin* rests on the assumption that "Austin presented enough

evidence to successfully raise both self-defense and defense of others as issues for the jury's consideration." *Austin*, 349 Wis. 2d 744, ¶ 2. In contrast, the circuit court here found that it had erroneously instructed the jury on self-defense because Langlois failed to present sufficient evidence to support the defense. (130:3-5.) If Langlois was not entitled to a self-defense instruction, then he could not be prejudiced by trial counsel's failure to object to an instruction that contained erroneous language.

In denying postconviction relief, the circuit court concluded that Langlois was not even entitled to a self-defense instruction. It reached this conclusion based on its review of Langlois's trial testimony.

- Langlois first entered Jacob's bedroom to "look for things of mine" and retrieve a "little hammock thing." [(158:106.)]
- Langlois entered Jacob's bedroom a second time to get an "Xbox." [(158:110.)]
- Langlois entered Jacob's bedroom a third time to contribute to a verbal argument between Jacob and his mother, but Jacob "pushed me out. [(158:111.)]
- Langlois then entered Jacob's bedroom a fourth time when Langlois "pushed through the door." [(158:111.)]
- Langlois and Jacob then "started wrestling" and Jacob got Langlois in a headlock. [(158:112.)]
- With Langlois in a headlock, Jacob asked Langlois twice, "Are you done?" Langlois agreed that he was done. [(158:113.)] At this point, Langlois was closest to the bedroom door and could have walked out of the room. [(158:169.)]
- Rather than leave, Langlois admits he "got up furious, took the filet knife [and] held it up threateningly." [(158:169-70; 76:1-2, Ex. 50.)]

- Langlois held the filet knife up high in his right hand with the blade end pointed out. [(158:116.)]
- When asked[,] "Did you feel that he [Jacob] may attack you again?" Langlois testified, "I didn't think he would, no." [(158:123.)]
- With the knife in his hand, Langlois testified, "Well, after I had it – the knife in my hand, I yelled it at Jake and said that I never liked him and that I always hated him. That's what I said." [(158:142.)]
- After Langlois yelled at his brother Jacob, Jacob did not yell back. "All I heard is myself yelling. I didn't hear anything else." [(158:143.)]
- Langlois went on to testify that the reason he picked up and unsheathed the knife was to be in a superior position. " ... what I meant by superior in position is that I really just wanted Jake to stop and stop being so hostile and angry and aggressive and I really just wanted him to stop moving and just be able to talk normally without trying to attack me." [(158:149-50.)][7]
- In explaining the actual stabbing, Langlois testified, "Well, I reacted. I meant like it was an instant reaction, like flinching or something of that nature. It wasn't deliberate or thought out or anything. It was just a natural reaction, a flinch." [(158:144.)]

(130:3 (footnote added).)

[7] During an interview, Washington County Sheriff's Detective Joel Clausing asked Langlois why he took the knife out. Langlois responded that Jacob "was like superior in position and I wanted to be superior I guess and like make him scared, so he could back down." (72:3, Ex. 46; 157:174.)

Based on its review of the trial record, the circuit court found that the evidence simply did not support a self-defense instruction.

> Langlois' *own version of what happened, which is the evidence most favorable to him*, provides no basis for Langlois having a need to defend himself. There was no actual or imminent unlawful interference, no use or threatened use of force against Langlois, and no belief on Langlois' part that he was in danger.
>
> . . . .
>
> . . . Langlois' decision to arm himself with a knife occurred at a point in time when Langlois was not being threatened or attacked and "*didn't think*" his brother would attack him.

(130:4 (emphasis in original).)

Finally, the circuit court observed that Langlois essentially abandoned self-defense in his closing argument. Langlois gave only lip service to the defense, focusing only on accident as a defense to the charges. (130:4; 159:82.)

Because Langlois was not entitled to a self-defense instruction, he has failed to demonstrate that his trial counsel's failure to object to the self-defense instruction prejudiced him.

C. Trial counsel was not ineffective for failing to object to the accident instruction.

Langlois next contends that his trial counsel was ineffective when he failed to object to the jury instruction on the defense of accident because it omitted the phrase "unreasonable and substantial" before the phrase "risk of death or great bodily harm." (Langlois's Br. 11-12.)

But the circuit court properly denied this claim. It noted that the instructions, when viewed as whole, rather than fractured segments taken out of context, correctly instructed the jury as to Langlois's accident defense. (130:6-7.) The circuit court observed that immediately before it instructed the jury on accident, it defined the type of risk necessary to establish criminal negligence. (130:6.)

> "Criminal Negligence" means:
>
> - the defendant's operation or handling of a dangerous weapon created a risk of death or great bodily harm; and
>
> - the risk of death or great bodily harm was *unreasonable and substantial*; and
>
> - the defendant should have been aware that his operation or handling of a dangerous weapon *created the unreasonable and substantial* risk of death or great bodily harm.

(78:13, A-App. 131 (emphasis added).) Further, in the accident instruction itself, the circuit court twice qualified the words "the risk of death or great bodily harm" with the phrase "required for a crime." (*Id.*) The risk "required for a crime" was the "unreasonable and substantial" risk that the circuit court articulated when it defined criminal negligence. (*Id.*)

The instructions as a whole identified the risk of death or great bodily harm that the State must establish: "unreasonable and substantial." The accident instruction explained that if Langlois was not aware of the risk, as required for the crime, then what happened was merely an accident and Langlois was not guilty of a crime. (*Id.*) The accident instruction also required the State to demonstrate beyond a reasonable doubt that Langlois was unaware that

his conduct created a risk of "death or great bodily harm." (78:14, A-App. 132.) Finally, the instruction provided that the jury could only find Langlois guilty if the State proved beyond a reasonable doubt all three elements of homicide by negligent operation of a dangerous weapon. (*Id.*) And proof of negligent handling of a dangerous weapon required proof of criminal negligence, which is predicated on conduct that creates an "unreasonable and substantial risk of death or great bodily harm." (78:12-13, A-App. 130-31.)

Because the instructions as a whole properly informed the jury of the nature of the risk, trial counsel was not deficient for failing to object to the instruction. In addition, because no error occurred, trial counsel's failure to object to the instruction did not prejudice Langlois's defense.

II. Langlois is not entitled to a new trial in the interest of justice.

Langlois argues that he is entitled to a new trial because instructional errors prevented the real controversy from being tried. (Langlois Br. 22-27.) The circuit court denied his motion for a new trial in the interest of justice because it concluded that the instructions were not erroneous and did not prevent the real controversy from being tried. (130:7.)

Wisconsin Stat. § 752.35 confers discretionary authority this Court to review an otherwise waived error, reverse a judgment, and order a new trial in the interest of justice. *Vollmer v. Luety*, 156 Wis. 2d 1, 17-19, 456 N.W.2d 797 (1990). But a reviewing court should exercise this discretionary authority "infrequently and judiciously," only in "exceptional cases." *State v. Avery*, 2013 WI 13, ¶ 38, 345 Wis. 2d 407, 826 N.W.2d 60 (citations omitted); *see also State v. Kucharski*, 2015 WI 64, ¶ 41, 363 Wis. 2d 658, 866 N.W.2d

697 ("[R]eversals under Wis. Stat. § 752.35 are rare and reserved for exceptional cases."). It should only exercise its authority in the "exceptional case, after all other claims are weighed and determined to be unsuccessful." *Id.* ¶ 43.

Here, Langlois advances the same argument in support of his request for a new trial in the interest of justice that he advanced in support of his argument that trial counsel was ineffective for failing to object to the jury instructions. When a defendant seeks a new trial on the grounds that his trial counsel's errors prevented the real controversy from being tried, "the *Strickland* test is the proper test to apply." *State v. Mayo*, 2007 WI 78, ¶ 60, 301 Wis. 2d 642, 734 N.W.2d 115. If Langlois's argument fails under a *Strickland* analysis then they should fail under a Wis. Stat. § 752.35's analysis.

When read in conjunction with all of the substantive instructions, the instructions on self-defense and accident did not misstate the law. With respect to self-defense, the instructions as a whole placed the burden of proving that Langlois did not act in self-defense on the State. With respect to accident, the instructions as a whole identified the risk of death or great bodily harm that an accident negates as one that is "unreasonable and substantial."

To the extent that the instructions were erroneous, any error was harmless. *McKellips*, 369 Wis. 2d 437, ¶ 50. Any error was harmless with respect to the self-defense instruction because the evidence did not support the self-defense instruction and the State presented strong evidence that Langlois's conduct was indeed negligent. *See* Sec. I.B.2., above, and Sec. IV.B., below. Any error was also harmless with respect to the accident instruction. The evidence demonstrates that Langlois's conduct was not an accident. Langlois deliberately picked up a knife, unsheathed it, and

pointed it outwards toward Jacob, after Jacob released him following a physical confrontation. *See* Sec. I.B.2., above, and Sec. IV.B., below. The accident instruction still required the State to negate Langlois's state of mind beyond a reasonable doubt. Langlois should have been aware that his conduct created an unreasonable and substantial risk of death or great bodily harm.

In sum, Langlois has failed to meet his burden of demonstrating that his case falls within the narrow class of exceptional cases that warrant a reversal in the interest of justice. *McKellips*, 369 Wis. 2d 437, ¶ 52.

III. The circuit court's self-defense and accident instructions did not violate Langlois's right to due process.

Langlois also asserts that the self-defense and accident jury instructions violated his due process rights because they relieved the State of proving the elements of the offenses beyond a reasonable doubt. (Langlois Br. 27-33.) The circuit court properly denied this claim, finding that the jury instructions were not "confusing in an unconstitutional manner." (130:7.)

Langlois may challenge a legally accurate instruction on the ground that it unconstitutionally misled the jury. *State v. Burris*, 2011 WI 32, ¶ 44, 333 Wis. 2d 87, 797 N.W.2d 430. "A jury is *unconstitutionally* misled if there is a reasonable likelihood that the instruction was applied in a manner that denied the defendant 'a meaningful opportunity for consideration by the jury of his defense . . . . to the detriment of a defendant's due process rights.'" *Id.* ¶ 50. A jury has applied an instruction in an unconstitutional manner when it believes that the instruction precludes it from considering constitutionally relevant evidence. *Id.*

The defendant bears the burden of establishing a reasonable likelihood that the jury unconstitutionally applied the instruction. *Id*. ¶ 46. "In determining whether there is a reasonable likelihood that the jury was misled and applied the potentially confusing instructions in an unconstitutional manner, an appellate court 'should view the jury instructions in light of the proceedings as a whole, instead of viewing a single instruction in artificial isolation.'" *State v. Gonzalez*, 2011 WI 63, ¶ 25, 335 Wis. 2d 270, 802 N.W.2d 454 (citation omitted). But a court should "'not reverse a conviction simply because the jury possibly could have been misled; rather a new trial should be ordered only if there is a reasonable likelihood that the jury was misled and therefore applied potentially confusing instructions in an unconstitutional manner.'" *Burris*, 333 Wis. 2d 87, ¶ 49 (citation omitted).

Langlois has failed to establish a reasonable likelihood that the instructions, when viewed in light of the proceedings as a whole, misled the jury, prompting it to apply the instructions in an unconstitutional manner. Here, the circuit court asked the jury to consider whether Langlois was guilty of first-degree reckless homicide, second-degree reckless homicide, and homicide by negligent handling of a dangerous weapon. (78:2, A-App. 120.) In conjunction with the first-degree reckless homicide instruction, the circuit court also instructed the jury on Langlois's requested defenses of self-defense and accident. (78:3-7, A-App. 121-125.) It explained that if Langlois acted in self-defense, then Langlois's conduct did not create an unreasonable risk to Jacob, a necessary prerequisite to finding Langlois guilty of reckless or negligent homicide. It also instructed the jury that the State had to disprove self-defense beyond a reasonable doubt. (78:6, A-App. 124.) The jury acquitted Langlois of first-degree reckless homicide. (81.)

The circuit court also instructed Langlois on the elements of second-degree reckless homicide. It did not reinstruct the jury on self-defense or accident. (78:8-10, A-App. 126-128.) Even without repeating the instruction for either defense, the jury acquitted Langlois of second-degree reckless homicide. (80.)

Unable to agree that Langlois was guilty of either reckless homicide charge, the jury then considered whether Langlois was guilty of homicide by negligent handling of a dangerous weapon. It reminded the jury that it had previously instructed it on self-defense and restated the elements of self-defense, explaining that Langlois could use force intended or likely to cause death or great bodily harm if he reasonably believed that the force was necessary to prevent imminent death or great bodily harm to himself. (78:11, A-App. 129.)

The circuit court's self-defense instruction as incorporated into the negligent homicide instruction should be read in conjunction with its initial instruction on self-defense. There, the circuit court explained that Langlois was raising self-defense with respect to the reckless and negligent homicide charges. (78:3-4, A-App. 121-22.) The initial instruction also informed the jury that Langlois did not create an unreasonable risk of death or great bodily harm if he acted in self-defense and the State had the burden of proving that he did not act in self-defense. (78:6, A-App. 124.) Because the creation of an unreasonable risk of death or great bodily harm is a necessary and common element of both the reckless and negligent homicide charges, the jury knew that the State carried the burden of

disproving self-defense with respect to each homicide charge.[8]

The circuit court also informed the jury that Langlois claimed that the incident was an accident and that if it was an accident, then he was not aware that his conduct created a risk of death or great bodily harm. Further, it understood from the definition of criminal negligence, that the risk of death or great bodily harm must be "unreasonable and substantial." (78:13, A-App. 131.) Finally, the circuit court also reminded the jury that the State was required to disprove Langlois's accident claim beyond a reasonable doubt and prove the elements of the crime beyond a reasonable doubt. (78:14, A-App. 132.)

The instructions did not mislead the jury and did not violate Langlois's due process rights.

IV. Sufficiency of the Evidence

A. General legal principles.

1. A challenge to the sufficiency of the evidence.

A court reviews a challenge to the sufficiency of the evidence in the light most favorable to the conviction. A reviewing court should not reverse a conviction based upon the insufficiency of the evidence unless the evidence is "so lacking in probative value and force" that no reasonable jury could have found guilt beyond a reasonable doubt. *State v.*

[8] In asserting a due process violation, Langlois contends that self-defense was a "critical part" of his defense. (Langlois's Br. 31.) The circuit court disagreed, noting that Langlois did not even present sufficient evidence to warrant a self-defense instruction and Langlois barely mentioned self-defense in closing and instead focused on the defense of accident. (130:2-5.)

Poellinger, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). If more than one reasonable inference may be drawn from the evidence, the reviewing court must adopt the inference that supports the verdict. *Id*. at 503-04.

> 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.

Id. at 507 (citation omitted). "Once the jury accepts the theory of guilt, an appellate court need only decide whether the evidence supporting that theory is sufficient to sustain the verdict." *State v. Mertes*, 2008 WI App 179, ¶ 11, 315 Wis. 2d 756, 762 N.W.2d 813 (citation omitted).

2. Homicide by negligent handling of a dangerous weapon.

Wisconsin Stat. § 940.08(1) prohibits homicide by negligent handling of a dangerous weapon. The circuit court used Wis. JI-Criminal 1175 (2011) to instruct the jury as to the elements of this offense. It informed the jury that that the State must prove the following three elements:

> [1.] The Defendant operated or handled a dangerous weapon.
>
> [2.] The Defendant operated or handled a dangerous weapon in a manner constituting criminal negligence.
>
> [3.] The Defendant's operation or handling of a dangerous weapon in a manner constituting criminal negligence caused the death of Jacob Langlois. Cause means that the Defendant's act was a substantial factor in producing the death.

> Once again, dangerous weapon means any device or instrumentality which in the manner it is used or intended to be used is likely to . . . produce death or great bodily harm. Great bodily harm means serious bodily injury.
>
> Criminal negligence means the Defendant's operation or handling of a dangerous weapon created a risk of death or great bodily harm and the risk of death or great bodily harm was unreasonable and substantial and the defendant should have been aware that his operation or handling of a dangerous weapon created an unreasonable and substantial risk of death or great bodily harm.

(159:30-31; 78:12-13.)

B. The State presented sufficient evidence for the jury to find Langlois guilty of homicide by negligent handling of a dangerous weapon.

1. The circuit court's assessment of Langlois's challenge to the sufficiency of the evidence.

Following his conviction, Langlois challenged the sufficiency of the evidence. (95:2-3; 125:12-15.) The circuit rejected his challenge. It found that the "undisputed evidence presented concerning the circumstances surrounding Jacob's death was more than sufficient to allow the jury to conclude beyond a reasonable doubt that Langlois was criminally negligent by creating an unreasonable and substantial risk of death or great bodily harm." (116:2.) It relied upon the following facts when it rejected Langlois' sufficiency of the evidence challenge:

> (1) Langlois voluntarily decided to enter Jacob's bedroom several times that day, in Langlois words, to "contribute" to an argument with

Jacob regarding items Jacob was packing while preparing to leave to join the National Guard;

(2) During the first encounter, there was a physical fight in which Jacob prevailed, getting Langlois "to submit" and leave the room;

(3) Langlois admitted that he was "furious" that Jacob had gotten the better of him during the first encounter;

(4) After the first encounter, Langlois came back into Jacob's room a second time, only to be pushed back out by Jacob;

(5) After being pushed out, Langlois entered Jacob's room again;

(6) Langlois admits that when he re-entered Jacob's room, he was closest to the door and could have left, but chose not to do so;

(7) In re-entering Jacob's room, Langlois picked up, unsheathed, and held the knife in right his hand, at shoulder height, with the point aimed at Jacob;

(8) Jacob did not have any weapon;

(9) It was only after Langlois armed himself with the knife that Jacob kicked Langlois;

(10) The knife Langlois was holding entered Jacob's chest;

(11) Jacob died from the knife wound.

(116:2.)

The record supports the circuit court's analysis. Here, the record demonstrates that (1) Langlois handled the knife; (2) he handled it in a criminally negligent manner; and (3) his handling of the knife in a criminally negligent manner caused Jacob's death.

Langlois handled a dangerous weapon. The manner and nature in which Langlois used the fillet knife is determinative of whether the fillet knife was a dangerous weapon. *See State v. Bodoh*, 226 Wis. 2d 718, 727, 595 N.W.2d 330 (1999).

At Karen Langlois's request, Jacob removed a sheathed fillet knife from his duffle bag. Karen placed the sheathed knife on the nightstand. (156:271-72.) Langlois picked up the knife and unsheathed it after a confrontation with Jacob in Jacob's room. (158:114.) Langlois wielded the knife with his right arm held high toward his shoulder with the blade pointed out. (158:115-16.) At trial, he identified the knife as the knife that he used to stab Jacob. (158:177-78.) The fillet knife itself had a sheath because it was sharp. (158:165.) Its blade was six inches long. (157:149, 151; 62:14.)

Based upon the knife's characteristics and the manner in which Langlois wielded it, the jury reasonably concluded that the fillet knife constituted a dangerous weapon because it was an instrument that caused great bodily harm and produced death in the manner that Langlois handled it. Wis. Stat. § 939.22(10).

Langlois handled the weapon in a manner that constituted criminal negligence. At some point, Langlois pushed Jacob's door open and entered Jacob's bedroom. (158:111.) The two began to wrestle. Jacob got the better of Langlois. The wrestling stopped after Jacob placed Langlois in a headlock or chokehold. (156:274-75; 158:111-12.)

Langlois got up when Jacob let him go. Langlois was confused, angry, and furious. (158:114, 169.) He saw the fillet knife on the dresser, picked it up, and unsheathed it. (158:114.) Langlois described wielding the knife with his

right arm held high towards his shoulder with the blade pointed out. (158:115-16.) He acknowledged holding up the knife threateningly. (158:170, 172.) Langlois yelled at Jacob, telling him that he "never liked him" and "always hated him." (158:142.) Karen confirmed that Langlois and Jacob were yelling at each other during the 20 second period between the time that Langlois picked up the knife and Jacob got stabbed. (157:47.)

Langlois testified that Jacob then kicked him in the left side. When they collided, Langlois flinched. (158:116.) He later explained that he "just instinctively" tried to block the kick and was moving his arms in a "defensive motion." (158:124.)

Detective Joel Clausing interviewed Langlois shortly after his arrest. (157:164-65.) In his written statement to Clausing (157:190; 76:1), Langlois explained what happened after he and Jacob wrestled. "I got up, furious, and took a fillet knife he had taken from my dad. I held it up, threateningly. I didn't plan on attacking, but he kicked me with his left foot in my side, and I reacted, stabbing his chest once." (76:1.)

During a recorded interview, Langlois demonstrated how he held the knife before, during, and after Jacob kicked him. Clausing prepared a series of still photographs from the recorded interview. (157:183-4; 71:1-8, Exs. 51-61.) While seated during the interview, Langlois demonstrated that he was holding the knife in his right hand at his shoulder, where he was kicked on the right side, and how his right hand and arm moved in an extended stabbing motion. (157:185-87; 71:1-10, Exs. 52-60.)

After he provided a written statement (157:193), Langlois again demonstrated what happened, this time

while standing in the interrogation room (157:195-96; 71:11-18, Ex. 62-69). The snapshots again show Langlois with his right hand held at his shoulder, as though he were holding a knife. It then shows Clausing reenacting Jacob's kick with his left foot to Clausing's side. The still shots then show Langlois extending his right forearm forward as he demonstrates the stabbing motion. (158:197-198; 71:11-18, Ex. 62-69.)[9]

Based on the record, the jury could reasonably conclude that Langlois's handling of the fillet knife was criminally negligent. Langlois's handling of the weapon in this manner and under these conditions created an unreasonable and substantial risk of death or great bodily harm. And any reasonable, prudent person, including Langlois, should have been aware of the risk that he created by arming himself with an unsheathed fillet knife in Jacob's bedroom.

Langlois handling of the dangerous weapon in a manner that constituted criminal negligence caused Jacob's death. Dr. Zelda Okia, a forensic pathologist, performed an autopsy on Jacob. (157:132, 140.) Okia described the path of the stab wound through Jacob's chest and into his lung. (157:140-41.) The wound was six inches deep. (157:143.) Okia also noted that the fillet knife's blade was six inches long. (157:149, 151.) Okia opined to a

[9] Langlois asserts that he was "reasonably defending himself" when he picked up the fillet knife after Jacob placed him in a choke hold and kicked him in the stomach. (Langlois Br. 36.) By claiming that he armed himself with a knife to defend himself against further harm, Langlois is effectively acknowledging that he handled the weapon in a manner under circumstances that could potentially result in its use.

reasonable degree of medical certainty that Jacob died from a stab wound to the chest. (157:152.)

Viewing the evidence in a light most favorable to the conviction, the State presented sufficient evidence to convict Langlois of homicide by negligent handling of a weapon.

2. The evidence was still sufficient despite his proffered defenses.

In challenging the sufficiency of the evidence, Langlois asserts that the circuit court's improper instructions on his self-defense and accident defenses prevented the jury from acquitting him. (Langlois Br. 37.) The State disagrees with Langlois's assertion that the circuit court improperly instructed the jury on his defenses. *See* Sec. I.B.2, above.

When an instruction is erroneous, a court reviews the sufficiency of evidence by comparison to what the statute requires. *State v. Beamon*, 2013 WI 47, ¶ 3, 347 Wis. 2d 559, 830 N.W.2d 681 (applied when instruction erroneously incorporates an additional requirement). And here, even if the jury had been instructed on self-defense and accident as Langlois proposed, the jury could still have found Langlois guilty of homicide by negligent handling of a dangerous weapon.

With respect to his self-defense claim, Langlois asserts that the circuit court failed to instruct the jury that the burden was on the State to demonstrate that Langlois did not act in self-defense. (Langlois Br. 37.) But even if the circuit court had provided the jury with the beyond-a-reasonable-doubt language, the jury was still free to reject Langlois's self-defense claim. *See Poellinger,* 153 Wis. 2d at 501. And here, the jury could have reasonably concluded that Langlois did not properly act in self-defense when, after

they stopped wrestling and Jacob released him, Langlois drew the knife from its sheath and brandished it at his shoulder. It was free to conclude that Langlois unnecessarily injected a deadly instrument into a situation when he could have just as easily retreated from Jacob's room.

With respect to his accident claim, Langlois asserts that if the court had properly instructed the jury, the jury would have found that a reasonably prudent person in his position would have been unaware that his conduct created an unreasonable risk of death or great bodily harm. (Langlois Br. 38-39.) Further, while conceding that his act of "picking up the fillet knife may have created a risk of death or great bodily harm," Langlois asserts that it did not create an "unreasonable and substantial" risk because he was protecting himself under the circumstances. (Langlois Br. 38-39.) But whether the risk was "unreasonable and substantial" is precisely the question that the jury was asked to consider in this case. (78:13.)

And again, the jury was free to conclude that: (1) Langlois's deliberate decision, while in an agitated condition, to remove the fillet knife from its sheath and brandish it created an "unreasonable and substantial" risk of death or great bodily harm; and (2) Langlois should have been aware of that risk when he picked up the knife. The jury was free to reject Langlois's assertion that his act of causing Jacob's death with the fillet knife was merely an accident.

* * * * * *

In sum, the State presented sufficient evidence to prove that Langlois handled the knife in criminally negligent manner and that his handling of the knife caused Jacob's death. Neither his claim of accident nor claim of self-defense undermines the sufficiency of this evidence.

Accordingly, Langlois is not entitled to relief on his challenge to the sufficiency of the evidence.

CONCLUSION

The State respectfully requests this Court to affirm Langlois's judgment of conviction and order denying his motion for postconviction relief.

Dated this 18th day of January, 2017.

Respectfully submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General

DONALD V. LATORRACA
Assistant Attorney General
State Bar #1011251

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2797
(608) 266-9594 (Fax)
latorracadv@doj.state.wi.us

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 9282 words.

_____
DONALD V. LATORRACA
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 18th day of January, 2017.

_____
DONALD V. LATORRACA
Assistant Attorney General