STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2016AP001409 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOSEPH T. LANGLOIS,

Defendant-Appellant.

APPEAL FROM THE JUDGMENT OF CONVICTION AND THE ORDER DENYING APPELLANT'S MOTION FOR POSTCONVICTION RELIEF IN WASHINGTON COUNTY CIRCUIT COURT, THE HONORABLE JAMES K. MUEHLBAUER, PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE JURY INSTRUCTIONS FOR ACCIDENT AND SELF DEFENSE ON THE CHARGE OF HOMICIDE BY NEGLIGENT HANDLING OF A DANGEROUS WEAPON.

The circuit court misstated the law and misdirected the jury when it made a critical distinction between self-defense for the charges of First and Second-Degree reckless homicide (which were grouped together), and self-defense for the charge of Homicide by Negligent Handling of a Dangerous Weapon. The self-defense instruction for the latter charge is incomplete and shifts the burden of proof to the defendant from the State. (78:13-14; App. 131-132). The whole section of the 801 instruction that applies to Criminal Negligence is missing for this charge. Without the section, the jury was misled and misdirected into believing that self-defense was to be considered differently on the charge of Homicide by Negligent Handling of a Dangerous Weapon.

On this charge, the court omitted the entire section of the self-defense instruction that tells the jury to consider the evidence of self-defense in deciding whether the defendant's conduct created an unreasonable risk to another, that instructs that the prosecution must prove the absence of self-defense once raised, and that explains that "if the state succeeds in proving the absence of self-defense, the jury still must be satisfied by all the evidence that the defendant's conduct created an unreasonable risk of death or great bodily harm. WIS-JI-CRIMINAL 801, cmt 6; *State v. Austin*, 2013 WI App 96, 349 Wis.2d 744, 836 N.W.2d 833.

State v. Austin is precedential, and in accord with this case. 2013 WI App 96, ¶ 20, 349 Wis. 2d 744, 836 N.W.2d 833. In this case, as in *Austin*, we know that the jury acquitted on the other charges that were instructed differently regarding self-defense, but we do not know why. *Id.* Given the evidence that Defendant Joseph Langlois had just been choked and assaulted by Jacob Langlois, it is possible that the jury determined that the State had not adequately disproved self-defense on the charges of First and Second Degree

Reckless Homicide and, having been properly instructed on that defense relative to the first-degree and second-degree charges, acquitted Joseph Langlois of those charges while convicting on the differently-instructed charge of Homicide by Negligent Handling of a Dangerous Weapon.

Similar to the court in *Austin*, the circuit court, through its erroneous instructions, told the jury to treat self-defense on the charges of First and Second Degree Reckless Homicide differently than on the charge of Homicide by Negligent Handling of a Dangerous Weapon. The court made a distinction, and so the only reasonable conclusion is that the jury made a distinction when considering the separate instructions on self-defense.

The State's attempt to explain away the critical distinction is unpersuasive. In the self-defense instruction for the grouped charges of First and Second Degree Reckless Homicide, the State highlights that the court included "or was criminally negligent conduct" as a way to try to show that the self-defense defense instruction for those two charges applied to all charges. (State's Brief at 18). The argument is

unpersuasive because the court later attempted to instruct the jury on self-defense for the charge of Homicide by Negligent Handling of a Dangerous Weapon, but improperly instructed the jury by omitting the section, described above, that is required by *Austin*.

The State is also unpersuasive when it claims that the self-defense instruction on the charges of First and Second Degree Reckless Homicide was entirely incorporated into the self-defense instruction on the charge of Homicide by Negligent Handling of a Dangerous Weapon when a partial section of the instruction dealing with when one is allowed to "threaten or intentionally use force against another" uses the transition phrase "As I previously indicated." (State's Brief at 19, 78:11, App. 129). So one section of the self-defense instruction for the charge of Homicide by Negligent Handling of a Dangerous Weapon alludes to the earlier instruction, but another section dealing with the critical issue of the burden of proof is entirely omitted. This distinction in the instructions misstates the law, misleads the jury, and would not lead a reasonable jury to conclude that the entire self-defense

instruction for the charges of First and Second Degree Reckless Homicide was being incorporated into the self-defense instruction for the charge of Homicide by Negligent Handling of a Dangerous Weapon. If that were the goal, why were they being instructed on self-defense again, and why were there differences between the two self-defense instructions including on the issue of burden of proof?

When the jury instructions are considered as a whole, the jury was instructed to make an erroneous distinction when considering the self-defense instruction for First and Second Degree Reckless Homicide, and considering the self-defense instruction for Homicide by Negligent Handling of a Dangerous Weapon.

Additionally, the State's reliance on the circuit court's erroneous findings of fact and conclusions in its decision on the postconviction motions is misplaced. The circuit court erroneously claimed that it should not have even given the self-defense instruction, and erroneously concluded that the problems with the jury instructions should be ignored. (130: 4-5; App. 106-107).

The circuit court cited Joseph Langlois's trial testimony in support of its conclusion that Joseph was not even entitled to a self-defense instruction, but it omitted critical, relevant testimony that showed that Joseph Langlois reasonably defended himself.

The court erroneously excluded from its findings Joseph Langlois's trial testimony regarding his brother Jacob Langlois having him in a choke hold moments prior to Joseph defending himself. Joseph Langlois testified,

> I'm not sure where my head was, but all I know was that it was against some sort of skin of his and I couldn't breathe because of a combination of him holding me tightly against his side and not being able to breathe like that.

(158:112, App. 168).

The court ignored Joseph Langlois' testimony that he may have blacked out because he couldn't breathe while his brother was choking him, and he was having trouble responding to his brother's questions while being choked because he was "slowly trying to understand what he was saying." (158:113, App. 169).

The court misleads regarding trial testimony by writing: "When asked[,] 'Did you feel that he [Jacob] may attack you again?' Langlois testified, 'I didn't think he would, no.'" (130:3, 158:123, App. 179). The complete testimony of this exchange, which should be reviewed by this Court, shows the accurate explanation. (158:122-123, App. 178-179). Joseph Langlois explains that when he picked up the knife, "All I was thinking at the moment is that I didn't want Jacob to keep attacking me and my mom and – maybe my mom and I wanted him to stop and stop attacking and being so hostile." (158:123, App. 179). He explains that he held the knife up in a defensive position, and that his intent when he picked up the knife was:

> [t]o get [Jacob] to stop and stop attacking me and my mom and – or maybe my mom and stop attacking me. And he was really angry and I wanted him to stop being extremely angry towards me. And I was pretty much just afraid of being put in another choke hold as well.

Id.

Further, the court mischaracterized Joseph Langlois's testimony regarding yelling at his brother after being choked

and picking up the knife. He explained that in the heat of the moment he yelled that he never liked his brother, but that he didn't really mean it and in fact loved him. (158:142-143).

The court accurately quoted Joseph Langlois's testimony that he picked up the knife because he wanted his brother to "stop being so hostile and angry and aggressive" and he just wanted to "be able to talk normally without [Jacob] trying to attack me." (158:149-50). However, despite the fact that Joseph had just been choked to the point of possibly losing consciousness and picked up the knife so that his brother would stop trying to attack him, the court erroneously concluded that Joseph Langlois was not entitled to a self-defense instruction. (130:5, App. 107).

The court also erroneously found that Langlois's trial counsel only mentioned self-defense once during closing argument and "essentially abandoned the argument." (130:4, App. 106). This is inaccurate. Trial counsel states that after Joseph was choked, he does what "any reasonable person would do in that circumstance. He picks up a weapon…to say, Jake, back off. Just don't come at me any more. I'm

holding up this knife to sort of even the odds. Stay away. Back off. To *defend himself. Nothing more."* (159:71 Emphasis added). Trial counsel cites Joseph Langlois's statements that "I wanted Jake to stop attacking me…Not kick me again, but back down." (159:79).

Trial counsel states that there is a self-defense instruction and "I think it applies. If you even believe that there is a scintilla of evidence to support reckless conduct or negligent conduct on behalf of Joe, certainly you should consider self defense." (159:82). He states, "So I ask you to evaluate the self defense instruction if you have to or if you think it's necessary." (159:83).

Ignoring the testimony and other evidence, the court erroneously concluded that there was "no actual or imminent lawful interference, no use or threatened use of force against [Joseph] Langlois, and no belief on Langlois' part that he was in danger." (130:4, App. 106). Neither the State nor this Court should rely on the circuit court's erroneous findings and conclusions.

On the accident defense, trial counsel was deficient for failing to object to the instructions on the charge of Homicide by Negligent Handling of a Dangerous Weapon. As stated before, the mental state should have been explained to the jury as "criminal negligence," which would have referred them back to the definition of criminal negligence in the Instructions. This phrasing regarding the proper mental state would have been consistent with the instruction for First and Second Degree Reckless Homicide. (78:6; App. 124). Instead, the jury was misled and misdirected on the law when the Accident instruction used language about whether he "was aware of the risk of death or great bodily harm" instead of whether he "should have been aware of the unreasonable and substantial risk of death or great bodily harm." (78:13, App. 131).

The insertion of the "criminal negligence" language in the Accident instruction would have clearly indicated to the jury that they should reference the proper standard, which was directly above the Accident instruction. The "required for a crime" language relied upon by the State is vague, and

misleads and misdirects the jury because it was combined with misleading language about being "aware of the risk of death or great bodily harm" language when the wording needed to be that he did not act with criminal negligence.

If trial counsel had provided proper representation and objected to and corrected the instructions, a reasonable probability exists that the result would have been different. This was not a strategy by trial counsel. It was improper conduct: failure to object to obvious and strong problems with the jury instructions including instructions that improperly shifted the burden of proof to the defendant and misled the jury about the law.

II. A NEW TRIAL IS WARRANTED IN THE INTEREST OF JUSTICE BECAUSE THE ERRONEOUS JURY INSTRUCTIONS, AS A WHOLE, PREVENTED THE REAL CONTROVERSY FROM BEING TRIED.

The State wrongly claims that the erroneous instructions were harmless. The circuit court incredibly and erroneously claimed that there was "no evidence" of self-

defense in this case when self-defense was presented at every step of the trial. (130:4; App. 106). Self-defense was a critical part of the defense, as detailed above, with extensive testimony and argument by both sides. However, a critical section of the self-defense instruction relating to burden of proof was not given to the jury on the charge at issue, and so the jury was misled and misdirected on the law, and was unable to properly evaluate the defense, and who had the burden. This prevented the real controversy from being fully tried.

Additionally, the instructions on the charge at issue misled and misdirected the jury on the defense of accident, as detailed above, relating to whether Joseph Langlois *should* have been aware that his conduct created an *unreasonable* and *substantial* risk of death or great bodily harm. The error was not harmless.

This is an exceptional case warranting reversal. The circuit court simply ignored the errors and the evidence supporting the defenses. This Court should order a new trial in the interest of justice.

III. THE ERRONEOUS JURY INSTRUCTIONS ON ACCIDENT AND SELF DEFENSE VIOLATED MR. LANGLOIS'S DUE PROCESS RIGHTS.

There is a reasonable likelihood that the instructions, as a whole, misled the jury and caused it to apply the instructions in an unconstitutional matter. The State fails to fully describe the situation when it states that on the charge of Second Degree Reckless Homicide, the court "did not reinstruct the jury on self-defense and accident," but the jury still acquitted on the charge. (State's Brief at 28). It did not reinstruct because the First and Second Degree charges were grouped together, and simply stated that there was a difference of one element, and therefore a repetition of the defenses was not necessary. (78:9, App. 127). Meanwhile, the court distinguished the Homicide by Negligent Handling of a Dangerous Weapon charge and gave materially different and erroneous instructions on accident and self-defense.

The accident instruction on the Negligent Handling charge erroneously instructed the jury to consider whether

Mr. Langlois should have been aware of the risk of death or great bodily harm instead of the proper higher standard: whether he should have been aware of the unreasonable and substantial risk of death or great bodily harm or, alternatively, whether he acted with criminal negligence, thereby referring the jury back to the definition of criminal negligence. The instruction given to the jury created an improper, lower standard for the State to meet regarding mental state, and made the jury misinterpret and misapply the law regarding Accident.

The instruction on Self-Defense for the charge of Homicide by Negligent Handling of a Dangerous Weapon relieved the State of proving every element of the charge beyond a reasonable doubt. As described above, it is incomplete and improperly shifts the burden of proof from the State to the defendant.

The court made improper and materially misleading differences between the different instructions on self-defense and accident, and the jury instructions, as a whole, misled the jury. There is a reasonable likelihood that the jury was

misled by the errors to the detriment of the defendant's due process rights.

IV. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT MR. LANGLOIS OF HOMICIDE BY NEGLIGENT HANDLING OF A DANGEROUS WEAPON.

The circuit court erroneously found, without citation to the record, that Joseph and Jacob Langlois got into a physical altercation, and that Joseph Langlois left and then reentered the bedroom two more times before picking up a knife. (116:2). This unsupported finding conflicts with the statements and testimony of Karen Langlois and Joseph Langlois.

Karen Langlois testified that after Jacob shoved and kicked Joseph in the stomach, Joseph picked up the knife and held "the knife up defensively." (156: 279-280; App. 153-154). She explained that Jacob Langlois kicked Joseph again, with a roundhouse kick, and Joseph, who had the knife in his hand, fell back, and then fell forward as Jacob Langlois came forward, and "that's when the accident happened." (156:282;

App. 156). Joseph Langlois testified that he had picked up the filet knife and held it in a defensive position, and he wanted to get Jacob to stop attacking him, and was afraid of Jacob choking him again. (158: 123; App. 179).

The State is wrong when it states that "any reasonable, prudent person should have been aware of the risk that he created by arming himself with the fillet knife." (State's Brief at 35). Joseph's act of picking up the filet knife was reasonable under the circumstances, and did not expose another to an *unreasonable and substantial* risk of death or great bodily harm, and no reasonable jury could have found otherwise.

A normally prudent person under the same circumstances would not have reasonably foreseen that his act of picking up the knife to defend himself after being attacked exposed another to "unreasonable and substantial" risk of death or great bodily harm under the circumstances. There was not an unreasonable and substantial risk because Joseph Langlois was reasonably defending himself after being attacked by his brother.

The State claims that the jury was instructed to consider whether the risk was "unreasonable and substantial," but in reality the instruction on accident for the charge at issue erroneously instructed the jury to consider whether Mr. Langlois should have merely been aware of the risk of death or great bodily harm instead of the proper higher standard: whether he should have been aware of the unreasonable and substantial risk of death or great bodily harm or, alternatively, whether he acted with criminal negligence. (State's Brief at 37).

The only reasonable conclusion is that there was insufficient evidence to prove beyond a reasonable doubt that a normally prudent person *under the same circumstances of Mr. Langlois* should have been aware that his handling of the fillet knife created an unreasonable and substantial risk of death or great bodily harm.

CONCLUSION

Mr. Langlois respectfully requests that the court vacate the finding of guilt and enter a judgment of acquittal on the charge of Homicide by Negligent Handling of a Dangerous Weapon, or vacate the judgment of conviction and order a new trial on the charge of Homicide by Negligent Handling of a Dangerous Weapon, or remand for a *Machner* hearing.

Dated this 5th day of February, 2017.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,947 words.

Dated this 5th day of February, 2017.

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CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 5th day of February, 2017.

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CERTIFICATION OF MAILING

I hereby certify that this reply brief 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 February 5, 2017. I further certify that the reply brief was correctly addressed and postage was pre-paid. I further certify that the Respondent's Brief was served by mail, and the date of service, the date it was received by mail, was January 21, 2017.

Dated this 5th day of February, 2017.

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