STATE OF WISCONSIN

SUPREME COURT

Appeal No. 2016AP001409-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOSEPH T. LANGLOIS,

Defendant-Appellant-Petitioner.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS, DIVISION II, AFFIRMING JUDGMENTS AND ORDERS ENTERED IN THE WASHINGTON COUNTY CIRCUIT COURT, THE HONORABLE JAMES K. MUEHLBAUER, PRESIDING

BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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STATEMENT OF THE ISSUES

1. Was trial counsel ineffective when he failed to object to the jury instructions for Accident and Self Defense on the charge of Homicide by Negligent Handling of a Dangerous Weapon?

   Answer by the Circuit Court and Court of Appeals: No.

2. Is a new trial warranted in the interest of justice because the erroneous jury instructions, as a whole, prevented the real controversy from being tried?

   Answer by the Circuit Court and Court of Appeals: No.

3. Did the erroneous jury instructions on Accident and Self Defense violate Mr. Langlois's due process rights?

   Answer by the Circuit Court and Court of Appeals: No.

4. Was there insufficient evidence to convict Mr. Langlois of Homicide by Negligent Handling of a Dangerous Weapon?

   Answer by the Circuit Court and Court of Appeals: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By granting review, this court has deemed this case appropriate for both oral argument and publication.

STATEMENT OF THE CASE

On February 6, 2014, Mr. Langlois was charged with First Degree Reckless Homicide, Use of a Dangerous Weapon involving the death of his brother, Jacob Langlois. (1:1-5). Later, an Information was filed, and a trial was held from July 14, 2015 to July 17, 2015. (20, 156-159).

Testimony and exhibits were presented to the jury including testimony from the two eyewitnesses: Karen Langlois, who is the mother of Joseph and Jacob Langlois, and Defendant Joseph Langlois.

Karen Langlois testified that on February 4, 2014 she had returned to her home, and her two sons were there. (156: 268; App. 169). Defendant Joseph Langlois told her that his brother, Jacob Langlois, who was packing to leave for the National Guard, had packed numerous items that didn't belong to him. *Id.* These items included video games and fishing knives that belonged to other members of the family. *Id.* Karen Langlois explained that she went to her son Jacob's room, where she found him, and he was very aggravated and agitated. *Id.* at 270; App. 171. She explained to Jacob that she heard that he was taking items that didn't belong to him, and then Joseph removed the Xbox system from Jacob's room and Jacob gave her a filet knife that he, Jacob, had taken. *Id.* at 270-271; App. 171-172. She indicated she then set the filet knife down on a table in the room in front of a Milwaukee toolbox. *Id.* at 273; App. 174.

Karen Langlois explained that her son, Joseph Langlois, returned to the room after removing the Xbox and told Jacob that he wanted to see what else Jacob had that belonged to Joseph, and that is when Jacob jumped Defendant

Joseph Langlois from behind and grabbed him around the neck. *Id.* Karen Langlois explained that her two sons went down to the floor and Jacob was choking Defendant Joseph Langlois for fifteen to twenty seconds to the point that Joseph was struggling to breathe. *Id.* at 274, 276; App. 175, 177. Jacob continued to have Joseph in a choke hold, and Joseph was not responding, and then Jacob loosened his hold and thereafter released his hold around Defendant Joseph Langlois's neck after Joseph did not respond to his mother. *Id.* at 274; App. 175.

Joseph was not able to get out of Jacob's chokehold. *Id.* at 274-275; App. 175-176. She stated that after Jacob released the hold around Joseph's neck, Joseph "sort of opened his eyes, sat up, took a deep breath and walked out of the room." *Id.* at 275; App. 176. Karen Langlois stated she remained in the room with Jacob and they argued about the Xbox and Jacob's behavior. *Id.* She explained that Jacob was pretty much in her face while she argued with him about the Xbox and his behavior. *Id.* at 278; App. 179. Defendant Joseph Langlois tried to come back into the room at that time,

but Jacob Langlois pushed Joseph and then used the door to push Joseph back out of the room. *Id.* at 277; App. 178.

Karen Langlois explained that Defendant Joseph Langlois again came into the room while she was arguing with Jacob. *Id.* at 278; App. 179. She explained that Jacob shoved and then kicked Defendant Joseph Langlois in the stomach. *Id.* Karen Langlois testified that after Jacob shoved and kicked Joseph, Joseph came up from being bent over by the kick and now had the filet knife from the table, which he had not had when he entered the room. *Id.* at 278, 279; App. 179, 180. She explained that Joseph held "the knife up defensively, up against his right shoulder," with the sharp end pointed out. *Id.* at 279-280; App. 180-181.

Karen Langlois testified that her sons were yelling at each other, and Jacob Langlois kicked Defendant Joseph Langlois 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." *Id.* at 282; App. 183. She saw blood on Defendant Joseph Langlois's leg and asked him if he was

okay, but then Jacob grabbed his chest and said, "No, mom, its me," and he moved his hand and she saw the wound. *Id.* at 287; App. 188. The knife had gone into Jacob's chest. 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 putting him in another chokehold. (158: 123; App. 206).

Karen Langlois ran to find a phone to call 911 and did so, and Jacob followed her to the kitchen. Joseph Langlois put pressure on his brother's wound, and later started chest compressions after Jacob lost consciousness. (156: 290; App. 191). Jacob Langlois died as a result of the wound to his chest.

After the close of evidence, the State requested that in addition to the charge of First Degree Reckless Homicide, that the jury also be instructed on new charges of Second Degree Reckless Homicide, and Homicide by Negligent Handling of a Dangerous Weapon, and the request was granted by the court. (158: 244-245, 260). The jury instructions were discussed, and Defendant's trial counsel

failed to object to omissions and erroneous instructions related to the charge of Homicide by Negligent Handling of a Dangerous Weapon. (159: 9, 78: 13-14; App. 211, 158-159).

Mr. Langlois was acquitted by the jury on the charges of First and Second Degree Reckless Homicide, but was convicted on the charge of Homicide by Negligent Handling of a Dangerous Weapon. (80, 81, 85). The court ordered a withheld sentence that included, among other conditions, five years of probation. (110, 119). Mr. Langlois's trial counsel made a motion to reconsider the motion for judgment notwithstanding the verdict and for a new trial. (95: 1-8, 113: 1-8). The trial court denied the motions. (116).

Mr. Langlois moved for postconviction relief based upon ineffective assistance of counsel for failing to object to the erroneous jury instructions and failing to advocate for the proper jury instructions, in the interests of justice based on multiple errors in the jury instructions, violation of his due process rights due to erroneous instructions, and insufficient evidence to convict on the charge of Homicide by Negligent Handling of a Dangerous Weapon. (125, 129). The trial

court refused to grant an evidentiary hearing on the motions, including on the issue of ineffective assistance of counsel, and denied all of the issues set forth in Mr. Langlois's motion for postconviction relief. (130: 1-11; App. 130-140).

Joseph Langlois appealed these issues to the Court of Appeals. The Court of Appeals affirmed the Judgments and Orders of the circuit court, with Judge Reilly dissenting. (App. 102-127). This Court granted Mr. Langlois's petition for review.

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.

Counsel is ineffective if he or she performed deficiently and this deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687-96 (1984). The moving party has the burden of proving both that

the counsel's performance was deficient and that the deficient performance was prejudicial. *State v. Roberson*, 2006 WI 80, ¶24, 292 Wis. 2d 280, 717 N.W.2d 111. Under the second prong, the Defendant is required to show "'that there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Strickland*, 466 U.S. at 694; *State v. Johnson*, 153 Wis. 2d 121, 128 (1990). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

When a postconviction motion alleges sufficient material facts that, if true, would entitle the defendant to relief, the circuit court must hold an evidentiary hearing. *State v. Bentley*, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996); *State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433 (citations omitted). Whether a postconviction motion meets this standard is a question of law which this Court reviews de novo. *Bentley*, 201 Wis. 2d 303 at 310. A circuit court may, in its discretion, deny a motion without a hearing if the motion does not raise a question of

fact, presents only conclusory allegations, or if a review of the record conclusively demonstrates that the defendant is not entitled to relief. *Allen*, 274 Wis. 2d 568, ¶¶ 9, 12. This discretionary decision is subject to deferential review under the erroneous exercise of discretion standard. *Id.*, ¶ 9. A proper exercise of discretion requires the court to examine relevant facts, apply proper legal standards and engage in rational decision process. *Bentley*, 201 Wis. 2d at 318. An ineffective assistance of counsel claim presents a mixed question of fact and law. *State v. Thiel*, 2003 WI 111, ¶ 21, 264 Wis. 2d 571, 665 N.W.2d 305. A circuit court's findings of fact are upheld unless clearly erroneous. *Id*. Whether counsel was ineffective is a question of law that is reviewed de novo. *Id*.

This case involves unobjected-to, erroneous instructions that corrupted the integrity of the fact-finding process. The breakdown began when the State, after resting its case at trial, realized that it had likely failed to prove the charged offense of first-degree reckless homicide, and requested that the court give instructions on two less serious

charges: second-degree reckless homicide and homicide by negligent handling of a dangerous weapon. Due to the State's last minute addition of charges, and ineffective assistance of trial counsel, the jury was erroneously instructed that the law of self-defense and the law of accident for homicide by negligent handling of a dangerous weapon are different than the law of self-defense and the law of accident for first- and second-degree reckless homicide.

The trial court did not give one complete, proper instruction on self-defense, or one complete, proper instruction on accident, but instead it gave one set of instructions for first- and second-degree reckless homicide, and distinctly different instructions for homicide by negligent handling of a dangerous weapon. The instructions on the defenses for homicide by negligent handling of a dangerous weapon, as described below, were erroneous and corrupted the integrity of the fact-finding process.

The trial court properly told the jury to consider the first-degree reckless homicide charge, and only if it found Mr. Langlois not guilty of that charge was it to move on to

consider second-degree reckless homicide. (159:18). The jury was also properly instructed that if it found Mr. Langlois not guilty of second-degree reckless homicide, only then was it to consider the charge of homicide by negligent handling of a dangerous weapon. *Id.* The jury found Mr. Langlois not guilty of both first- and second-degree reckless homicide, but convicted on the erroneously instructed charge of homicide by negligent handling of a dangerous weapon.

The Court of Appeals majority seems to claim that since the instructions on self-defense and accident were proper for the charges of which Mr. Langlois was acquitted, the erroneous self-defense and accident instructions on the charge of which Mr. Langlois was convicted were cured due to incorporation of the instructions on the already disposed of charges. As Judge Reilly aptly states in his dissent, it is illogical and disingenuous for the majority to believe that "a jury may utilize instructions for crimes not under consideration to fix erroneous instructions for the crime under consideration." (App. 122, ¶52). The dissent correctly states that the "majority's suggestion that the court's use of the

phrase '[a]s I previously indicated'" incorporated the court's instructions on the previous charges is "an erroneous invitation that juries may search out laws applicable to other crimes so as to convict on a crime under deliberation." (App. 124, ¶56).

As a result of these instructional errors, the burden to disprove self-defense was erroneously removed from the State on the homicide by negligent handling of a dangerous weapon charge, and erroneously placed on Mr. Langlois. Also, the erroneous instructions describing the requisite mental state for the defense of accident impermissibly lessened the State's burden on the same charge.

Consequently, Mr. Langlois was acquitted on the first- and second-degree reckless homicide charges, but convicted on the erroneously instructed charge of homicide by negligent handling of a dangerous weapon. Mr. Langlois was prejudiced by his counsel's failure to object to the erroneous instructions, as described below, because there is a substantial probability of a different result given that the jury found him not guilty of first- and second-degree reckless homicide when

it was correctly instructed on self-defense and accident for those charges.

As Judge Reilly stated in his dissent in this case, "[t]he justice system fails whenever a defendant fails to receive his constitutional right to effective assistance of counsel." (App. 123, ¶54). Mr. Langlois did not receive effective assistance from his counsel because his counsel failed to object to the clearly erroneous jury instructions on the homicide by negligent handling of a dangerous weapon charge.

This Court should use its discretionary authority to review and its discretionary authority of reversal to correct the miscarriage of justice created by trial counsel's deficient performance of failing to object to erroneous jury instructions. Trial counsel's performance was deficient because he failed to object to the jury instructions on Accident (WIS-JI-CRIMINAL 772) and Self-Defense (WIS-JI-CRIMINAL 801) relating to the charge of Homicide by Negligent Handling of a Dangerous Weapon despite the fact that the instructions were obviously inaccurate and the objections would have been strong because the accident

instruction, as given to the jury, misstates the requisite mental state to the detriment of Mr. Langlois, and the self-defense instruction, as given to the jury, was incomplete and improperly shifts the burden of proof, by omission, from the State to Mr. Langlois. (78: 13-14; App. 158-159). When the court asked trial counsel if he had any comments or objections to the jury instructions, he replied, "I'm good with all of it, Judge." (159: 9, l. 24; App. 211).

Trial counsel's failure to object to these jury instructions was improper and not based on a reasonable strategy. The accident and self-defense instructions given to the jury clearly deviated from the recommended instructions in material ways, and trial counsel failed to comment or object to them despite the fact that the instructions dealt with Mr. Langlois's defenses in the case: accident and self defense.

Due to trial counsel's failure to object to these instructions, the jury was misled about the defense of Accident. The jury was misled about the proper mental state when told:

> "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; App. 158-159; Emphasis added).

The accident instruction that was given to the jury misstated the mental state to the detriment of Mr. Langlois, and misled the jury. The mental state in Instruction 772 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 type of explanation regarding the proper mental state would have been consistent with the instruction for First Degree Reckless Homicide. (78:6; App. 151). The instruction with the proper mental state would have read:

> The defendant contends that he *did not act with criminal negligence*, but rather that what happened was an accident.
>
> If the defendant *did not act with the criminal negligence* required for a crime, the defendant is not guilty of that crime.
>
> Before you may find the defendant guilty of Homicide by negligent *handling* of a dangerous weapon, the State must prove by evidence that satisfies you beyond a reasonable doubt that the defendant *acted with criminal negligence*.

Alternatively, the jury should have been instructed about whether the defendant was aware of the "*unreasonable and substantial* risk of death or great bodily harm." This would have read:

> The defendant contends that he *was not aware of the unreasonable and substantial 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 unreasonable and substantial 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 *handling* 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 unreasonable and substantial risk of death or great bodily harm.*

As Judge Reilly explained in his dissent, the error in the instruction on Accident is plain. "Two key elements were completely removed from the instruction—unreasonable and substantial—and those missing words changed the application of the law and lessened the State's burden." (App. 126, ¶60).

Trial counsel's deficient performance, his failure to object to the instruction, prejudiced Mr. Langlois because it allowed the jury to be improperly instructed and improperly created a lower burden for the State to meet as the jury considered the defense of Accident, and Mr. Langlois's guilt or innocence. The jury heard from Karen Langlois and Joseph Langlois that Joseph picked up the filet knife after having been choked by his brother, Jacob Langlois. (156: 278-279; App. 179-180). According to Karen Langlois, Joseph picked it up after Jacob shoved and kicked him. *Id.* at 278; App. 179. Karen Langlois testified that Joseph held "the knife up defensively, up against his right shoulder," with the sharp end pointed out. *Id.* at 279-280; App. 180-181. Karen Langlois testified that Jacob Langlois kicked Joseph again

with a roundhouse kick, and Joseph fell back, and then fell forward as Jacob Langlois came forward, and "that's when the accident happened." *Id.* at 282; App. 183.

Accident was the primary defense argued by trial counsel along with self-defense. Trial counsel's deficient performance by failing to object to the Accident instruction changed the outcome of the trial and prejudiced Mr. Langlois by allowing the jury to be misled about the proper standard, and caused the jury to improperly discard the defense of Accident and convict Mr. Langlois based on a lower standard: that the defendant should have been aware of the *risk* of death or great bodily harm instead of the proper standard: that the defendant should have been aware of the *unreasonable and substantial risk* of death or great bodily harm.

The text message from Juror Joyce Janes to Karen Langlois, and the letter from Juror Wendy Kempf to the court show that the jury was focused on the defense of accident, but trial counsel's deficient performance by failing to object to the instruction prejudiced Mr. Langlois because it allowed the jury to improperly apply and discard the defense of accident

and convict based upon a lower standard. (97: 1-3, 95: 7-8; App. 141-143, 144-145) Based on the testimony, referenced above, there is a substantial probability, but for counsel's unprofessional errors in failing to object to the erroneous instructions, the result of the trial would have been different. The instructional errors destroyed the integrity of the fact finding process, and resulted in a miscarriage of justice.

Trial counsel's performance was also deficient because he failed to object to the self-defense jury instruction on the charge of Homicide by Negligent Handling of a Dangerous Weapon despite the fact that the instruction, as given to the jury, is incomplete and shifts the burden of proof from the State to Mr. Langlois. (78:13-14; App. 158-159). The objection was obvious and strong because a whole section of the 801 instruction that applies to Criminal Negligence is omitted for this charge.

Without the section, the jury was not instructed, on the charge of Homicide by Negligent Handling of a Dangerous Weapon, to consider the evidence of self-defense in deciding whether the defendant's conduct created an unreasonable risk

to another, it fails to specifically state that the prosecution must prove the absence of self-defense once raised, and fails to explain 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.

Trial counsel's performance was deficient because the objection was strong and obvious, and deals with a central issue in this case: self-defense. Wisconsin Jury Instruction – Criminal 801 explains what should have been included, but was omitted in this case:

> FOR ALL OFFENSES INVOLVING CRIMINAL RECKLESSNESS OR CRIMINAL NEGLIGENCE, ADD THE FOLLOWING TO THE DEFINITION OF THE RECKLESSNESS OR NEGLIGENCE ELEMENT:
>
> 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.

The last two sentences were added in response to the decision in *State v. Austin*, 2013 WI App 96, 349 Wis.2d 744, 836 N.W.2d 833, "in which the court ordered a new trial for a person convicted of 2nd degree recklessly endangering safety." WIS-JI-CRIMINAL 801 cmt. 6. The court held that the instructions were deficient because they did not specifically state that the prosecution must prove the absence of self-defense once raised. *Id.* Trial counsel was deficient for failing to object to the instruction that had this section omitted. Wisconsin Jury Instruction – Criminal 801 explains what should have been included, and why, but trial counsel did nothing to include the necessary section. Judge Reilly concisely described the error in his dissent. "By omitting the above paragraph for homicide by negligent handling of a dangerous weapon, the court, by inference, removed from the State its burden to disprove self-defense and erroneously

placed the burden to prove self-defense upon Langlois." (App. 124, ¶56). He concludes that "[c]ounsel was deficient for not objecting. Langlois was prejudiced as there is a reasonable probability of a different result given the jury found Langlois not guilty of first- and second-degree reckless homicide when it was correctly instructed on self-defense." (App. 125, ¶57).

This deficient performance prejudiced Mr. Langlois because self-defense was a critical part of the defense in this case. Karen Langlois testified that Joseph picked up the filet knife after having been strangled by his brother, Jacob Langlois, to the point of being unable to respond. (156: 274; App. 175). Karen Langlois testified that Joseph picked the filet knife up after also being shoved and kicked by Jacob Langlois, and Joseph held "the knife up defensively, up against his right shoulder." *Id.* at 278-280; App. 179-181. Joseph Langlois testified that he was defending himself when he stated that he had picked up the filet knife and held it in a defensive position, and he did so to get Jacob to stop

attacking him, and explained that he was afraid of Jacob putting him in another chokehold. (158: 123; App. 206).

The prosecution argued against self-defense, but made no reference to the requirement that it must prove the absence of self-defense once raised. (159: 57; App. 217). Trial counsel also argued self-defense, and stated that the Defendant picked up the knife "to defend himself," and asked the jury to "evaluate the self-defense instruction if you have to or if you think its necessary." *Id.* at 71, 83; App. 219, 225.

Self-defense was central to this case, and Mr. Langlois's conduct did not create an unreasonable risk under the circumstances. He was defending himself after being kicked in the stomach. However, the jury was not instructed about unreasonable risk in the self-defense instruction for this charge. Trial counsel's failure to object to the instruction prejudiced Mr. Langlois by lessening the State's burden.

Based on trial counsel's deficient performance by failing to object to the Accident and Self-Defense jury instructions on the charge of Homicide by Negligent Handling of a Dangerous Weapon, Joseph Langlois was

prejudiced because the jury was misled and improperly instructed on those defenses and he was consequently convicted on the charge based on the erroneous instructions given to the jury. Trial counsel's ineffective assistance destroyed the integrity of the fact finding process, and led to a miscarriage of justice. If trial counsel had provided proper representation and objected to and corrected the instructions, a substantial probability exists that the result would have been different as Mr. Langlois was acquitted on the properly instructed charges. There can be no faith in the integrity of the fact finding process when trial counsel fails 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.

The trial court failed to act as a proper check, and erroneously exercised its discretion by failing to hold an evidentiary hearing regarding ineffective assistance of counsel. A motion for a *Machner* hearing may be denied at the discretion of the trial court if the motion "fails to allege sufficient facts to raise a question of fact, presents only

conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief." *State v. Roberson*, 2006 WI 80, ¶43, 292 Wis. 2d 280, 717 N.W.2d 111. The trial court erroneously exercised its discretion by failing to hold an evidentiary hearing on the issue of ineffective assistance of trial counsel because sufficient and significant facts have been raised about the multiple strong and obvious objections that trial counsel failed to make regarding the jury instructions, and the defendant is entitled to relief from these significant errors that misled the jury, shifted burdens of proof, destroyed the integrity of the fact finding process, and led to a miscarriage of justice. The trial court, in its decision on the postconviction motions, incredibly claimed that it should not have even given the self-defense instruction, and thereby concluded that the problems with the jury instructions should be ignored. (130: 4-5; App. 133-134). The trial court's conclusion about self-defense is contrary to all of the evidence presented at trial, and is a complete reversal of the court's own rulings at the time of trial. *Id.*

The court erroneously exercised its discretion by refusing to hold an evidentiary hearing on the issue of ineffective assistance of counsel because evidence of accident and self-defense were presented throughout the trial, as stated above, and argued by both parties, but trial counsel performed deficiently by failing to object to the obviously erroneous instructions that misled the jury related to these defenses on the charge of Homicide by Negligent Handling of a Dangerous Weapon. But for trial counsel's unprofessional errors regarding the erroneous instructions, there is a substantial probability of a different result.

This Court has a dual imperative in this exceptional case: to review the jury instructions which go to the integrity of the fact-finding process, and to ensure justice is done. This Court should use its inherent power and express statutory authority to reverse the judgment of conviction and remit the case for a new trial in the interest of justice, even where the lower courts have denied a new trial. *State v. Shah*, 134 Wis.2d 246, 254, 397 N.W.2d 492 (1986); *State v. Hicks*, 202 Wis.2d 150, 159, 549 N.W.2d 435 (1996); *State v.*

Armstrong, 2005 WI 119, ¶ 113, 283 Wis.2d 639, 700 N.W.2d 98; *State v. Schumacher*, 144 Wis.2d 388, 406, 424 N.W.2d 672 (1988); Wis. Stat. § 751.06.

Mr. Langlois asks this Court to use its broad discretionary authority to review the integrity of the fact-finding process, and its discretionary authority of reversal to correct the miscarriage of justice created by trial counsel's deficient performance of failing to object to the erroneous jury instructions. He requests vacation of the judgment of conviction and a new trial. Alternatively, if the court needs additional information despite the substantial record, a *Machner* hearing is requested.

II. A NEW TRIAL IS WARRANTED IN THE INTEREST OF JUSTICE DUE TO THE ERRONEOUS JURY INSTRUCTIONS.

This Court has the discretion to set aside a verdict and order a new trial in the interest of justice where it appears from the record that the real controversy has not been fully tried, or that it is probable that justice for any reason has been miscarried." Wis. Stat. § 751.06.

In *Vollmer v. Luety*, 156 Wis.2d 1, 456 N.W.2d 797 (1990), this Court considered whether the court of appeals may order a new trial on grounds that the real controversy has not been fully tried, where the underlying reason was an unobjected-to instructional error. The Court discussed several cases where it had exercised that power to order a new trial on grounds that the real controversy had not been fully tried. The examples included cases with unobjected-to instructional errors on significant issues. *State v. Harp*, 161 Wis. 2d 773, 781, 469 N.W.2d 210 (Ct. App. 1991) (citing *In the Interest of C.E.W.*, 124 Wis.2d 47, 59, 368 N.W.2d 47, 53 (1985); *Air Wisconsin, Inc., v. North Central Airlines, Inc.*, 98 Wis.2d 301, 318, 296 N.W.2d 749, 756 (1980); *Clark v. Leisure Vehicles, Inc.*, 96 Wis.2d 607, 620, 292 N.W.2d 630, 636 (1980); *Gyldenvand v. Schroeder*, 90 Wis.2d 690, 699-700, 280 N.W.2d 235, 239-40 (1979)). The *Harp* court held that "under *Vollmer*, the trial court's authority to order a new trial in the interest of justice was not limited to evidentiary errors, but that it had the power to do so where the erroneous jury instruction prevented the real controversy from being

tried." *Harp*, 161 Wis. 2d at 782. The *Harp* court also held that "where the trial court exercises its discretion to order a new trial because the real controversy was not fully tried, no showing of a probable likelihood of a different result at the second trial is required." Id. at 779.

In this case, the real controversy was not fully tried due to the unobjected-to erroneous jury instructions relating to accident and self-defense for the charge of Homicide by Negligent Handling of a Dangerous Weapon. The accident instruction 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 jury was misled about Accident, and due to the fact that this defense was argued extensively and supported by the evidence as noted above, the real controversy was not fully tried.

Additionally, the self-defense instruction for the charge of Homicide by Negligent Handling of a Dangerous Weapon is incomplete and shifts the burden of proof from the State to Mr. Langlois. The omission of the entire section noted above makes the jury instructions, as a whole, erroneous, and prevented the real controversy from being fully tried. Due to the omitted section, the jury was not instructed to consider the evidence of self-defense in deciding whether the defendant's conduct created an unreasonable risk to another, and the jury was not informed of a critical burden of the state: that the prosecution must prove the absence of self-defense once raised. Furthermore, due to the omitted section, the jury was never informed 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.

The *Austin* case was the impetus for adding the last two sentences of the section to the pattern jury instruction that

is referenced above, but were omitted from the instructions in this case. Self-defense was a critical part of the defense, as noted above, with extensive testimony and argument by both sides. However, a key portion of the self-defense instruction was not given to the jury, and so the jury was misled and was unable to properly evaluate the defense, and who had the burden. This prevented the real controversy from being fully tried.

Discretionary reversals are rare and reserved for exceptional cases. *State v. Kucharski*, 2015 WI 64, ¶23, 363 Wis.2d 658, 866 N.W.2d 697 (citing *State v. Armstrong*, 2005 WI 119, ¶ 114, 283 Wis.2d 639, 700 N.W.2d 98; *State v. Avery*, 2013 WI 13, ¶ 38, 345 Wis.2d 407, 826 N.W.2d 60).

This is an exceptional case. The jury instructions for the defenses of self-defense and accident on the charge of Homicide by Negligent Handling of a Dangerous Weapon were erroneous, misled the jury, and improperly shifted the burden of proof from the State to Mr. Langlois. Yet, the trial court summarily and wrongly claims that the instructions for self-defense and accident on the charge were "a correct

statement of the law." (130: 7; App. 136). The Court of Appeals improperly ignored the erroneous distinctions made between the self-defense and accident instructions for first- and second-degree reckless homicide, and the self-defense and accident instructions for homicide by negligent handling of a dangerous weapon. Due to the fact that the erroneous jury instructions, as a whole, prevented the real controversy from being tried, and the fact that there is a substantial probability that a different result would be likely on retrial, Mr. Langlois requests reversal, vacation of the judgment of conviction, and a new trial.

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

A circuit court has wide discretion to give jury instructions based on the facts of a case. *State v. McCoy*, 143 Wis.2d 274, 289, 421 N.W.2d 107 (1988). The court may exercise this discretion regarding both the language and emphasis of the instruction. *Id.* (citing *State v. Vick*, 104

Wis.2d 678, 690, 312 N.W.2d 489 (1981)). "The court's discretion should be exercised to 'fully and fairly inform the jury of the rules of law applicable to the case and to assist the jury in making a reasonable analysis of the evidence.'" *McCoy*, 143 Wis.2d at 289, 421 N.W.2d 107 (quoting *State v. Dix*, 86 Wis.2d 474, 486, 273 N.W.2d 250 (1979)). However, a jury instruction is erroneous if "a reasonable juror could misinterpret the instructions to the detriment of a defendant's due process rights." *State v. Dodson*, 219 Wis. 2d. 65, 86, 580 N.W.2d 181 (1998). Due Process under the Fifth Amendment requires proof beyond a reasonable doubt. *State v. Harvey*, 2002 WI 93, ¶22, 254 Wis. 2d 442, 647 N.W.2d 189. Jury instructions that relieve the State of proving every element of the offense charged beyond a reasonable doubt are unconstitutional under the Fifth and Sixth Amendments. *Id.* at ¶23. Mr. Langlois was harmed by the erroneous instructions.

The accident and self-defense instructions for the charge of Homicide by Negligent Handling of a Dangerous Weapon were erroneous and violated Mr. Langlois's due

process rights because they misled the jury, communicated incorrect statements of law, and relieved the State of its burden to prove every element of the offense charged beyond a reasonable doubt.

The accident instruction 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 missing language, "unreasonable and substantial," caused the mental state necessary to find Mr. Langlois guilty of the Homicide by Negligent Handling of a Dangerous Weapon charge to be misstated to the detriment of Mr. Langlois. The instruction given to the jury created an improper, lower standard for the State to meet, and made the jury misinterpret and misapply the law regarding Accident. The instruction relieved the State of proving every element of the charge beyond a reasonable doubt, and violated Mr.

Langlois's due process rights. He was harmed because the jury was misled on the law of Accident relating to mental state, and the jury was therefore prevented from making a proper conclusion relating to the defense of Accident and consequently found him guilty. This shatters the integrity of the fact finding process, and necessitates reversal.

Also, the self-defense instruction 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, and violated Mr. Langlois's due process rights. The instruction given to the jury is incomplete and shifts the burden of proof from the State to Mr. Langlois. A proper instruction would have inserted the following after the definition of criminal negligence:

> 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.

(WIS JI-CRIMINAL 801).

The omission of this entire section creates an erroneous jury instruction. As a result of the omission, the jury was not instructed to consider the evidence of self-defense in deciding whether the defendant's conduct created an unreasonable risk to another, and the jury was not informed that the prosecution must prove the absence of self-defense once raised. The jury was also not informed on this charge 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.

Self-defense was a critical part of the defense in this case, but the erroneous instruction relieved the State of its burden to prove every element of the offense charged beyond a reasonable doubt. The testimony of Karen Langlois, and

the arguments of counsel on this point are detailed above. The erroneous instruction, which omitted the section relating to the State's burden, relieved the State of its burden to prove every element of the offense charged beyond a reasonable doubt, and Mr. Langlois was harmed by the State being relieved of its burden. Consequently, the jury was not able to properly consider self-defense on this charge.

Due to these multiple, critical instruction errors relating to Mr. Langlois's defenses, the jury instructions, as a whole, misled the jury, communicated an incorrect statement of law, and violated Mr. Langlois's due process rights. There can be no confidence in the integrity of the fact finding process, and there was a miscarriage of justice. If the instructional errors are corrected, there is a substantial probability that a different result would be likely on retrial as shown by his acquittal on the correctly instructed charges. Therefore, based upon this Court's broad discretionary authority, Mr. Langlois requests vacation of the judgment of conviction and a new trial.

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

When considering sufficiency of the evidence to sustain a finding of guilt in a criminal prosecution, a reviewing court can reverse a conviction if "the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990).

The evidence was so insufficient in probative value and force that no trier of fact, acting reasonably, could have found, beyond a reasonable doubt, that Mr. Langlois was guilty of Homicide by Negligent Handling of a Dangerous Weapon. A properly instructed jury could not have found beyond a reasonable doubt that Mr. Langlois operated or handled a dangerous weapon in a manner constituting criminal negligence. In other words, no trier of fact could

have found beyond a reasonable doubt that Mr. Langlois's handling of the filet knife created a risk of death or great bodily harm, and the risk of death or great bodily harm was *unreasonable and substantial*, and that Mr. Langlois 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. "The degree of negligence required for criminal culpability is different from ordinary negligence in that the negligent conduct must in general create a risk of serious consequences, e.g. death or great bodily harm, and there must be a high probability that the serious consequences will result from the conduct. *State v. Schutte*, 2006 WI App 135, ¶21, 295 Wis. 2d 256, 720 N.W.2d 469.

The chance of death or great bodily harm resulting from the conduct must "be considered great by the ordinary person, having in mind all the circumstances of the case, including the seriousness of the probable consequences." *Id.* An objective standard is used, in which "a defendant's acts are measured against whether a normally prudent person

under the same circumstances should reasonably have foreseen such conduct exposed another to *unreasonable risk and high probability* of bodily harm." *State v. Barman*, 183 Wis. 2d 180, 199, 515 N.W.2d 493 (Ct. App. 1994). (Emphasis added).

The State did not prove beyond a reasonable doubt that a normally prudent person under the same circumstances should reasonably have foreseen that such conduct exposed another to unreasonable risk and high probability of bodily harm. Karen Langlois testified that after Jacob shoved and kicked Joseph in the stomach, Joseph picked up the knife and held "the knife up defensively, up against his right shoulder," with the sharp end pointed out. (156: 279-280; App. 180-181). 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." *Id.* at 282; App. 183. 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. 206).

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. Joseph Langlois was reasonably defending himself with the filet knife after having been choked to the point of not being able to breathe, shoved, and kicked in the stomach by Jacob Langlois. Jacob Langlois kicked Joseph a second time, and came forward as Joseph fell forward, and the knife went into Jacob's chest.

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. There was a risk, but not an unreasonable and substantial risk because Joseph Langlois was reasonably defending himself after being attacked by his brother. Unfortunately, and to the detriment of Mr. Langlois,

the jury was improperly instructed on Accident and Self Defense on the charge of Homicide by Negligent Handling of a Dangerous Weapon, and consequently the jury was prevented from coming to the only reasonable conclusion: that he was not guilty of the charge.

The erroneous instructions failed to explain to the jury that for this charge they should consider the evidence relating to self-defense in deciding whether the defendant's conduct created an *unreasonable* risk to another. The instructions failed to explain that if the defendant was acting lawfully in self-defense, his conduct did not create an *unreasonable* risk to another. Critically, the instructions failed to explain on this charge that the burden is on the state to prove beyond a reasonable doubt that the defendant did not act lawfully in self-defense, and that they must be satisfied beyond a reasonable doubt from all the evidence in the case that the risk was *unreasonable*. No trier of fact, if it had been properly instructed on self-defense, could have found guilt beyond a reasonable doubt on the charge.

Also, no trier of fact, if it had been properly instructed on accident, could have found guilt beyond a reasonable doubt. The accident instruction for this charge 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, thereby referring the jury back to the definition of criminal negligence.

The only reasonable conclusion from the evidence 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 of the *unreasonable and substantial* risk of death or great bodily harm. Mr. Langlois's conduct in picking up the filet knife may have created a risk of death or great bodily harm, but the risk was not unreasonable and substantial under the circumstances because Mr. Langlois was protecting himself after being strangled, shoved, and kicked in the stomach by

Jacob Langlois. No trier of fact, if it had been properly instructed on accident, could have found guilt beyond a reasonable doubt on the charge.

The jury only convicted Joseph Langlois of Homicide by Negligent Handling of a Dangerous Weapon because the jury instructions, as a whole, misled the jury, and communicated incorrect statements of law. No trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt on the charge. Joseph Langlois was lawfully defending himself, and his brother's death was an accident. Mr. Langlois respectfully requests that the court find that the evidence presented at trial was insufficient to support Mr. Langlois's conviction for Homicide by Negligent Handling of a Dangerous Weapon, vacate the finding of guilt, and enter a judgment of acquittal on the charge.

CONCLUSION

For the foregoing reasons, Mr. Langlois respectfully requests that this Court vacate the finding of guilt and enter a judgment of acquittal on the charge of Homicide by Negligent

Handling of a Dangerous Weapon. Alternatively, he respectfully requests that this Court vacate the judgment of conviction and order a new trial, or, alternatively, if further fact finding is needed despite the extensive record before this Court, remand for a *Machner* hearing.

Dated this 8th day of January, 2018.

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 7961 words.

Dated this 8th day of January, 2018.

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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 8th day of January, 2018.

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CERTIFICATION OF MAILING

I hereby certify that this brief and appendix were deposited in the United States mail for delivery to the Clerk of the Supreme Court by first-class mail, or other class of mail that is at least as expeditious, on January 9, 2018. I further certify that the brief and appendix were correctly addressed and postage was pre-paid.

Dated this 9th day of January, 2018.

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