STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2016AP1409-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOSEPH T. LANGLOIS,

Defendant-Appellant-Petitioner.

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

PLAINTIFF-RESPONDENT'S BRIEF

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TABLE OF CONTENTS

Page

Page

Page

TABLE OF AUTHORITIES

Cases

Page

Page

Constitutional Provisions

Statutes

Page

Other Authorities

ISSUES PRESENTED

The State reorders the issues.[1]

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 self-defense and accident instructions that the circuit court gave the jury?

Trial court answered: No.

The court of appeals answered: No.

This Court should answer: No.

2. Did the accident and self-defense instructions violate Langlois's due process rights because they misled the jury?

Trial court answered: No.

The court of appeals answered: No.

This Court should answer: No.

3. 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.

The court of appeals answered: Yes.

This Court should answer: Yes.

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[1] Langlois raises his interest of justice claim as his second issue. This Court has stated that a court should not address a discretionary reversal claim until "*after all other claims are weighed and determined to be unsuccessful*." *State v. McKellips*, 2016 WI 51, ¶ 52, 369 Wis. 2d 437, 881 N.W.2d 258 (citation omitted).

4. 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.

The court of appeals answered: No.

This Court should answer: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case merits oral argument and publication.

INTRODUCTION

Joseph Langlois and his older brother Jacob got into a fight in front of their mother Karen.[2] After Jacob released Langlois, Langlois picked up a fillet knife from a nightstand. He removed it from its sheath and held it in his right hand at his shoulder with the point aimed at Jacob, who was unarmed. Jacob kicked Langlois, who reacted by stabbing Jacob in the chest. Jacob died from a stab wound to the chest.

The State charged Langlois with first-degree reckless homicide. The circuit court granted the State's request to instruct the jury on the lesser-included charges of second-degree reckless homicide and homicide by negligent handling of a dangerous weapon. The circuit court also instructed the jury on Langlois's requested instructions on

[2] 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."

self-defense and accident. The jury found Langlois guilty of homicide by negligent handling of a dangerous weapon.

Langlois's core argument is that the circuit court erroneously instructed the jury on accident and self-defense. He contends that the self-defense instruction, as provided in conjunction with the instruction for the lesser-included offense of homicide by negligent handling of a dangerous weapon, 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."

Langlois raises four claims based on these alleged instructional errors: his counsel rendered ineffective assistance for failing to object to the instructions; the instructional errors prevented the real controversy from being tried; the jury instructions violated his due process rights; and the evidence was insufficient to convict him.

Both the circuit court and the court of appeals properly rejected these claims. 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 an "unreasonable and substantial" risk of death or great bodily harm.

Because the instructions were not erroneous, Langlois's counsel did not render ineffective assistance for failing to object to them. Because the instructions accurately stated the law, the instructions did not violate Langlois's due process rights. The State presented sufficient evidence from which the jury could reasonably conclude that Langlois committed homicide by negligent handling of a dangerous

weapon. Finally, Langlois is not entitled to discretionary reversal because there is no reasonable likelihood that the instructions prevented the real controversy from being tried.

STATEMENT OF THE CASE

I. Statement of facts.

On February 4, 2014, Langlois, a high school senior, decided to stay home from school. (R. 156:236, 253-54.) His brother Jacob, who was also home, had enlisted in the National Guard and was scheduled to leave for boot camp the following week. (R. 156:242-43, 255.) Jacob planned to spend the following week with friends before leaving for boot camp. (R. 156:256.)

Jacob told Langlois that he was getting ready to leave, which prompted Langlois to enter Jacob's room to see if Jacob had packed anything that did not belong to him. (R. 158:106.) Langlois retrieved a hammock that belonged to him. Jacob saw Langlois, told him to get out of the room, took the hammock from Langlois, and threw it at Langlois as Langlois backed out of the door. (R. 158:106.)

The brothers' mother, Karen, came home from work. (R. 158:108.) Langlois told Karen that Jacob had packed things that did not belong to him including an Xbox, DVD games, and their father's fillet knives. (R. 156:268; 158:108-09.) Karen went to Jacob's room. (R. 156:269.) She told Jacob that she understood that he was packing things that did not belong to him, including the Xbox and fillet knives. (R. 156:270.) Langlois walked in, took the Xbox, and left. (R. 156:270.) Jacob then took a fillet knife from a box and willingly handed it to Karen. (R. 156:271.) Karen placed the fillet knife, which was sheathed, on a nightstand. (R. 156:272.)

Langlois re-entered Jacob's room and looked in the box and a duffle bag. (R. 156:273.) Jacob jumped Langlois from behind and grabbed him around the neck. The two wrestled and rolled on the floor. (R. 156:274.) Karen asked Jacob and Langlois if they were done. Langlois responded and Jacob lightened his grip and released Langlois. (R. 156:274.) Langlois sat up, took a deep breath, and walked out of the room. (R. 156:275.)

As Karen and Jacob argued about Jacob's behavior (R. 156:275), Langlois attempted to reenter Jacob's room. (R. 156:277.) Jacob used the door to push Langlois back out into the hallway. (R. 156:277.)

Langlois then walked back in when Karen was speaking to Jacob about his behavior. (R. 156:277.) Jacob shoved Langlois and kicked him in the stomach. (R. 156:278.) When Langlois got up, Karen saw Langlois pick up the knife from the nightstand. The knife was no longer sheathed. (R. 156:279.) Langlois held the knife in his right hand with its handle against his right shoulder and the sharp end pointed out. (R. 156:279-80, 282.)

Jacob and Langlois yelled at each other. (R. 156:280.) Karen saw Jacob kick Langlois, striking him in the abdomen. (R. 156:281.) Both Langlois and Jacob came forward at the same time. (R. 156:282.) Karen did not see what happened with the knife. (R. 156:283.) But she saw Jacob step back and saw blood on Langlois's leg. She asked Langlois if he was ok. (R. 156:287.) Langlois dropped the knife. (R. 56:2.) Langlois did not respond. Jacob stood up, grabbed the side of his chest and said, "No, mom, it's me." (R. 156:287.)

Detective Joel Clausing interviewed Langlois. (R. 157:163.)[3] Langlois described the argument, saying that Jacob shut the door on him while Jacob and his mother were inside. When Langlois tried to open it, Jacob held it shut. (R. 77:27.) Langlois was angry. (R. 77:28.) He saw that his mother had the fillet knife and it was in a sheath. (R. 77:28.) Langlois stated that at one point, he and Jacob began to wrestle in Jacob's room. Jacob placed Langlois in a headlock and Langlois hit Jacob in the head with his fist. (R. 77:30.) Jacob asked Langlois if he was done. Langlois got up and saw the knife. Langlois removed the knife from the sheath. (R. 77:31.) He explained that he picked up the knife because he was "angry and lost and [Jacob] had grabbed [him] around the neck . . . and I wanted him to back off and I wanted to be like more threatening." (R. 73:8.) While holding the knife in his right hand, Langlois told Jacob that he never liked him. (R. 77:31.) Jacob then kicked Langlois in the arm with his left leg. Langlois "just stabbed him and that's what happened." (R. 77:32.) Langlois explained that he "just reacted" because Jacob kicked him. (R. 72:4; 77:32.)

During the interview, Langlois showed Detective Clausing how he held the knife. (R. 157:184-86.) Screenshots from the video recording show Langlois holding his right fist at his right shoulder with his forearm facing forward. The photographs then show his right arm extending forward. (R. 71:1-18.)

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[3] Detective Clausing recorded his interview with Langlois to a DVD, which is in the record. (R. 66; 157:171.) A complete transcript of the recording and a page of transcript corrections were prepared and received as exhibits without objection. (R. 67; 68; 157:172-73.) The jury heard selected excerpts of the recording and the transcribed portions of the played recordings were offered into evidence. (R. 69; 72; 73; 74; 157:173-76, 179-82.)

In a written statement, Langlois stated that he and Jacob got into an argument. They were wrestling and Jacob got him to submit. (R. 76:1; 157:190.) Langlois said that he "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." (R. 72:2; 76:1.)

At trial, Langlois testified that Jacob put him in a chokehold while they wrestled. (R. 158:112-13.) Jacob asked Langlois if he was done. Langlois said yes and Jacob released him. (R. 158:113.) Langlois said that he felt lightheaded, confused, angry, and scared. When he was crouching over, he saw the fillet knife on the dresser. He picked it up and unsheathed it as he stood up. (R. 158:114.) Langlois held it near his shoulder with the blade end pointed out. (R. 158:116.) Langlois remembered shouting at Jacob and saying that he hated him. (R. 158:116, 151.) Jacob kicked him and "somehow we both collided and I . . . kind of flinched." (R. 158:116.) Langlois said that he instinctively tried to block the kick, moving his arms in kind of a defensive motion. (R. 158:124.) But he recalled his arm coming forward. (R. 158:155.) Langlois believed that less than five seconds elapsed between the time when he held up the knife and when Jacob was stabbed. (R. 158:125.)

Langlois did not believe that he had created a situation in which he thought Jacob could get hurt, but he also acknowledged that he did not think that Jacob would attack him again. (R. 158:123.) Langlois said that he could have left the room but did not. (R. 158:169.) Langlois acknowledged inconsistencies between his and Karen's testimony in part because he did not remember things. (R. 158:117.)

Dr. Zelda Okia, a forensic pathologist, performed an autopsy on Jacob. (R. 64; 157:129, 140.) Okia described the path of the stab wound through Jacob's chest and into his lung. (R. 157:140-41.) The wound was six inches deep. (R. 157:143.) The fillet knife had a six-inch blade. (R. 51:6.) Okia opined to a reasonable degree of medical certainty that Jacob died from a stab wound to the chest. (R. 157:152.)

II. Procedural history.

A. The jury instructions.

The State charged Langlois with first degree reckless homicide of Jacob while using a dangerous weapon. (R. 1:1.) Wis. Stat. §§ 940.02(1) & 939.63(1)(b). At trial, the State asked 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. (R. 158:243-44.) Langlois requested instructions related to self-defense and accident. Based on his request for the self-defense instruction, the State requested the retreat instruction. (R. 158:244.)

The circuit court prepared jury instructions that incorporated the requests for instructions on the lesser-included offenses, self-defense, accident, and retreat. (R. 78:1-23, A-App. 146-168; 159:2.)[4] Neither the State nor

[4] The circuit court prepared written instructions. (R. 78, A-App. 146-68.) Langlois has reproduced the circuit court's instructions in the appendix to his brief. (Langlois's Br. A-App 130-68.) The circuit court read the instructions to the jury. (R. 159:15-41.) It provided a written set of the instructions to the jury for its use during deliberations. (R. 159:15, 103.) The instructions as transcribed do not substantively deviate from the written instructions provided to the jury. For consistency, the

Langlois objected to the circuit court's proposed instructions. (R. 159:2, 9.) Langlois's counsel stated, "I'm good with all of it." (R. 159:9.)

In conjunction with the instruction for first-degree reckless homicide, the circuit court provided the standard self-defense instruction. (R. 78:3-5, A-App. 148-50.) *See* Wis. JI-Criminal 801 (2014). The instruction informed the jury that self-defense was at issue with respect to both the reckless and negligent 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 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
>
> - 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

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State will refer to the written instructions rather than the transcribed instructions.

> believed that the force used was necessary to prevent imminent death or great bodily harm to himself.

(R. 78:3-4, A-App. 148-49.)

After discussing retreat and the elements of first-degree reckless homicide (R. 78:5, A-App. 150), 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.

(R. 78:6, A-App. 151.)

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. It explained that if "what happened was an accident," then Langlois could not be criminally reckless and was not guilty. (R. 78:6, A-App. 151.) It also reminded the jury that the State had the burden of proving beyond a reasonable doubt that Langlois had engaged in "criminally reckless conduct." *Id*.

The circuit court then informed the jury that it must find Langlois not guilty of first-degree reckless homicide if it was "not satisfied beyond a reasonable doubt that the defendant caused the death of Jacob Langlois by criminally reckless conduct and that the circumstances of the conduct showed utter disregard." (R. 78:8, A-App. 153.)

If the jury found Langlois not guilty of first-degree reckless homicide, the circuit court directed it to consider whether Langlois was guilty of second-degree reckless homicide. (R. 78:8, A-App. 153.) It instructed the jury on the elements of second-degree reckless homicide and explained how it differed from first-degree reckless homicide, but it did not reinstruct the jury on self-defense or accident. (R. 78:8-10, A-App. 153-55.)

The circuit court told the jurors that if they did 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. (R. 78:10, A-App. 155.) The circuit court then told the jury:

> Self-defense is an issue in this case that also applies to the charge of Homicide by Negligent Handling of a Dangerous Weapon. In deciding whether the defendant's conduct was criminally negligent conduct, you should also consider whether the defendant acted lawfully in self-defense.
>
> 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.

(R. 78:11, A-App. 156.) It reinstructed the jury on retreat. (R. 78:12, A-App 157.) It did not reinstruct the jury that the State had the burden of proving beyond a reasonable doubt that Langlois did not act lawfully in self-defense. (R. 78:11-12, A-App. 156-57).

The circuit court then advised the jury of the 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.
>
> . . . .
>
> 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.
>
> . . . .
>
> "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.

(R. 78:12-13, A-App. 157-58.)

The circuit court reinstructed the jury on the accident defense.

> 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.

(R. 78:13-14, A-App. 158-59.)

The circuit court 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. (R. 78:13-14, A-App. 158-59.) It later instructed the jury that: "The burden of establishing every fact necessary to constitute guilt is upon the State. Before you can return a verdict of guilty, the evidence must satisfy you beyond a reasonable doubt that the defendant is guilty." (R. 78:15, A-App. 160.)

Following the jury's guilty verdict on the homicide by negligent handling of a dangerous weapon charge (R. 85), the circuit court withheld sentence and placed Langlois on

probation for a period of five years with several conditions of supervision (R. 119).

B. Postconviction proceedings.

Langlois moved for a judgment notwithstanding verdict. He argued that the State presented insufficient evidence to convict him of the negligent homicide charge. (R. 95:2-4.) He also asserted that the circuit court's instruction on his accident defense violated his due process rights. (R. 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." (R. 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. (R. 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. (R. 116:4.) It denied Langlois's request for a new trial in the interest of justice based on his claim that the instructions were erroneous. (R. 116:4.)

Langlois then moved for 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 counsel was ineffective for failing to object to improper jury instructions and that the erroneous jury instructions violated his due process rights. (R. 125:2.)

The circuit court denied Langlois's postconviction motion without an evidentiary hearing. (R. 130:10.) It found that the evidence did not support his request for a self-

defense instruction. (R. 130:2-5.) It also found that it correctly instructed the jury that "'[t]he burden is on the state to prove beyond a reasonable doubt that the defendant did not act lawfully in self[-]defense.'" (R. 130:5.) It also rejected Langlois's challenge to the accident instruction. It concluded that, viewing the accident instruction 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." (R. 130:7.) Therefore, the circuit court determined that the real controversy had been tried and declined Langlois's request to exercise its discretionary authority to reverse in the interest of justice. (R. 130:7-8.) The circuit court also rejected Langlois's claim that the evidence was insufficient to support his conviction. (R. 130:7.) Finally, because Langlois's claim of ineffective assistance was conclusory, the circuit court determined that the record conclusively demonstrated that Langlois was not entitled to relief and denied his claims without an evidentiary hearing. (R. 130:9-10.)

C. The court of appeals decision.

On appeal, Langlois renewed the same claims related to instructional error that he raised in his postconviction motions. The court of appeals rejected each claim. The court of appeals determined that trial counsel's failure to object to the jury instructions did not constitute deficient performance because, viewed in their entirety, they were not erroneous. *State v. Langlois*, 2017 WI App 44, ¶¶ 33-36, 377 Wis. 2d 302, 901 N.W.2d 768. Because they were not erroneous, the court of appeals determined that the real controversy was tried and Langlois was not denied due process. *Id.* ¶ 37. Finally, the court of appeals determined that the State presented legally sufficient evidence to support Langlois's conviction. *Id.* ¶¶ 45-50.

ARGUMENT

I. Trial counsel was not ineffective and the circuit court properly denied Langlois's ineffective assistance claim without a hearing.

A. Legal principles.

1. Ineffective assistance of counsel.

A criminal defendant is guaranteed effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 7 of the Wisconsin Constitution. *State v. Lemberger*, 2017 WI 39, ¶ 16, 374 Wis. 2d 617, 893 N.W.2d 232.

A claim of ineffective assistance of counsel presents a mixed question of law and fact. "The factual circumstances of the case and trial counsel's conduct and strategy are findings of fact." *State v. Breitzman*, 2017 WI 100, ¶ 37, ___Wis. 2d___, 904 N.W.2d 93. This Court will not overturn the circuit court's factual findings unless they are clearly erroneous. *Id.* Whether counsel's performance was ineffective presents a legal question that this Court reviews independently, benefiting from the lower courts' analysis. *State v. Jenkins*, 2014 WI 59, ¶ 38, 355 Wis. 2d 180, 848 N.W.2d 786.

A defendant alleging ineffective assistance of counsel has the burden of proving both that counsel's performance was deficient and that counsel's deficient performance prejudiced him. *Strickland v. Washing*ton, 466 U.S. 668, 687 (1984).

To prove deficient performance, the defendant must show that his counsel's representation "fell below an objective standard of reasonableness" considering all 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 him. *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.

A circuit court may deny a defendant's postconviction motion without a hearing if the motion fails to allege sufficient facts to raise a factual question, presents only conclusory allegations, or if the record conclusively demonstrates that a defendant is not entitled to relief. *State v. Allen*, 2004 WI 106, ¶¶ 2, 12, 274 Wis. 2d 568, 682 N.W.2d 433. If a reviewing court determines that the circuit court erroneously denied a defendant a *Machner* hearing, the proper remedy is to remand the case for a hearing. *See State v. Curtis*, 218 Wis. 2d 550, 554-55, n.3, 582 N.W.2d 409 (Ct. App. 1998).

2. Post-conviction review of unobjected to jury instructions.

A party has a duty to object to jury instructions, specifying "with particularity how the instruction is insufficient or does not state the law or to what particular language there is an objection." Wis. Stat § 972.10(5). 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." Wis. Stat. § 805.13(3). A

reviewing 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. "[T]he normal procedure in criminal cases is to address waiver within the rubric of the ineffective assistance of counsel." *State v. Erickson*, 227 Wis. 2d 758, 766, 596 N.W.2d 749 (1999).

When an appellate court reviews an ineffective assistance of counsel claim related to instructional error, it first decides whether the circuit court correctly instructed the jury. *State v. Ziebart*, 2003 WI App 258, ¶ 15, 268 Wis. 2d 468, 673 N.W.2d 369. A circuit court has broad discretion when it instructs a jury. An appellate court independently reviews whether the instructions that the circuit court gave accurately stated the law. When a jury instruction misstates the law, then the circuit court has erroneously exercised its discretion. *State v. McKellips*, 2016 WI 51, ¶ 30, 369 Wis. 2d 437, 881 N.W.2d 258. But an appellate 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." *Id.* An instruction is not erroneous unless, "the instructions, when viewed as a whole, misstated the law or misdirected the jury." *Ziebart*, 268 Wis. 2d 468, ¶ 16 (citation omitted). If the instruction did not misstate the law, then the ineffective assistance of counsel claim fails. *Id.* ¶ 17.

Even if counsel performed deficiently for failing to object to erroneous instructions, an ineffective assistance claim fails if the instructions did not prejudice the defendant. The effect of erroneous instructions may be "ameliorated by the jury having heard multiple correct statements of the law" and by the totality of circumstances

in the record. *State v. Beamon*, 2013 WI 47, ¶¶ 38-39, 347 Wis. 2d 559, 830 N.W.2d 681.[5]

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

The circuit court denied Langlois's ineffective assistance of counsel claim without a hearing because the instructions correctly stated the law. (R. 130:9-10.) The court of appeals agreed. It determined counsel was not deficient because the record conclusively demonstrated "that the court's instructions to the jury, when viewed in their entirety and not in isolation, were not erroneous." *Langlois*, 377 Wis. 2d 302, ¶ 36. The record supports the lower courts' decisions.

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.

In its closing instructions, the circuit court identified the crimes the jury would have to consider: first-degree reckless homicide, second-degree reckless homicide, and homicide by negligent handling of a dangerous weapon. (R. 78:2, A-App. 147.) In conjunction with its instruction of

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[5] While *Beamon* addresses application of the harmless error analysis to erroneous jury instructions, *Beamon*, 347 Wis. 2d 559, ¶ 24, its analysis for assessing harmless error applies to assessments of prejudice under *Strickland*. The harmless error analysis is "essentially consistent" with the *Strickland* test for actual prejudice. *State v. Harvey*, 2002 WI 93, ¶ 41, 254 Wis. 2d 442, 647 N.W.2d 189. The only distinction is that the defendant bears the burden of proving prejudice in an ineffective assistance of counsel claim. *Id.*

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 each homicide charge. "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 in lawful self[-]defense." (R. 78:3-4, A-App. 148-49 (emphasis added); 159:20.)

After discussing self-defense and the elements of first-degree reckless homicide, the circuit court returned to the self-defense instruction. It informed the jury that Langlois did not create an "unreasonable risk to another" if he was "acting lawfully in self-defense." (R. 78:6, A-App. 151). The circuit court then reminded the jury that the State had the burden of proving beyond a reasonable doubt that Langlois "did not act lawfully in self-defense" and "that the risk was unreasonable." (*Id*.)

The "unreasonable risk" requirement is an element common to offenses based on recklessness and negligence. 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 that he created. Wis. Stat. § 939.24. In the case of negligence, the defendant "should realize" the risk that he created. Wis. Stat. § 939.25.

With respect to each homicide charge, the circuit court instructed the jury that the State had to affirmatively prove that Langlois's conduct created an unreasonable and substantial risk of death or great bodily harm. (R. 78:5, 9, 13, A-App. 150, 154, 158.) In its initial instruction, the circuit court also informed the jury 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 lawfully in self-defense. (R. 78:6, A-App. 151.)

The circuit court again instructed the jury on self-defense when it discussed the elements of homicide by negligent handling of a dangerous weapon. (R. 78:11, A-App. 156.) While it did not restate the State's burden, it referred 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 into the negligent homicide instruction did not undermine its initial instruction regarding self-defense. The initial self-defense instruction correctly placed the burden of proof on the State and "was not restricted to any particular charges." (R. 130:5.)

The instructions as a whole informed the jury that self-defense negated "unreasonable risk of death or great bodily harm" element, common to each of the homicide charges, and the State had the burden of disproving self-defense beyond a reasonable doubt.

2. Langlois fails to consider the instructions as a whole.

As the court of appeals aptly noted, Langlois views the circuit "court's instruction to the jury in snippets without considering the instructions as a whole." *Langlois*, 377 Wis. 2d 302, ¶ 25. Langlois repeats the same mistake here, focusing on his counsel's failure to object to the self-defense instruction within the confines of the homicide by negligent handling of a dangerous weapon instruction without reference to the instructions as a whole. He relies on *State v.*

Austin, 2013 WI App 96, 349 Wis. 2d 744, 836 N.W.2d 833 (Langlois Br. 20-22), but that case is inapt.

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. *Id.* ¶¶ 2-3. 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. The court of appeals concluded that the instructions did not provide a proper statement of the law of self-defense or defense of others. *Id.* ¶¶ 18-19.

Austin does not help Langlois here.

First, unlike in *Austin*, the circuit court's self-defense instructions as a whole placed an affirmative burden on the State to prove that Langlois created a substantial and unreasonable risk and to disprove self-defense. Langlois focuses exclusively on the circuit court's discussion of self-defense as incorporated in the homicide by negligent handling of a dangerous weapon instruction. His approach fails to assess the instructions as a whole. *State v. McKellips*, 2016 WI 51, ¶ 30, 369 Wis. 2d 437, 881 N.W.2d 258. The instructions here, as a whole, informed the jury that self-defense negated the "unreasonable risk of death or great bodily harm" element common to each of the homicide charges, and that the State had the burden of disproving self-defense beyond a reasonable doubt. (R. 78:5, A-App. 150.) Further, unlike in *Austin*, where the circuit court

provided the burden with respect to one instruction but not the self-defense instruction, the jury had no reason here to infer that Langlois had the burden to show one defense but not the other.

Second, should this Court disagree that *Austin* is distinguishable, this Court should decide that the court of appeals wrongly decided *Austin*.[6] In *Austin*, the court of appeals rejected the State's argument that because self-defense is a negative defense to a crime involving recklessness, inclusion of the burden of proof language in the self-defense instruction is not required. *Austin*, 349 Wis. 2d 744, ¶¶ 13, 17. The *Austin* court got it wrong.

An affirmative defense is "a defendant's assertion raising new facts and arguments that, if true, will defeat the plaintiff's or prosecutions claim even if all of the allegations in the complaint are true." *State v. Watkins*, 2002 WI 101, ¶ 39, 255 Wis. 2d 265, 647 N.W.2d 244 (emphasis omitted). "[A]n affirmative defense does not implicate proof of any of the elements of the crime." *Id*. ¶ 40 (citation omitted). In contrast, a negative defense negates an element of a crime that requires proof of negligence or recklessness. A crime grounded in criminal negligence or recklessness requires the State to affirmatively prove beyond a reasonable doubt that a defendant created an "unreasonable risk" of death or great bodily harm. Wis. Stat. §§ 939.24(1) & 939.25(1). As the Jury Instruction Committee noted, when a defendant lawfully acts in self-defense, he does not create an "unreasonable risk of harm." *Austin*, 349 Wis. 2d 744, ¶ 15 (citation omitted).

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[6] The State questioned *Austin*'s correctness in its court of appeals' brief. Brief of Plaintiff-Respondent, 16 n.6.

Here, if Langlois lawfully acted in self-defense, an underlying element of the crime—negligence—is disproved because he did not create an unreasonable risk of harm. By proving beyond a reasonable doubt that Langlois acted with criminal negligence, in part by proving that his actions created an unreasonable risk of harm, the State proved beyond a reasonable doubt that Langlois did not act in self-defense. Because self-defense negates an element of homicide by negligent handling of a dangerous weapon that the State was required to affirmatively prove beyond a reasonable doubt, i.e., an unreasonable risk of harm, a self-defense instruction omitting the burden of proof language is not erroneous.

Third, *Austin* was decided on interest of justice grounds, not ineffective assistance grounds. *Id.* ¶ 23. As the State argues in Section IV.B. below, this is not an exceptional case warranting this Court's exercise of its discretionary reversal authority.

Austin is inapt for another reason. While 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, Langlois did not do that here.

3. Langlois has not demonstrated that his counsel's performance prejudiced him.

The circuit court found that Langlois's counsel's failure to object to the self-defense instruction did not prejudice Langlois because he was not entitled to the instruction.[7] The

[7] The court of appeals declined to address the prejudice prong because it determined that counsel's performance was not deficient. *Langlois*, 377 Wis. 2d 302, ¶ 36.

circuit court determined that the evidence most favorable to Langlois did not demonstrate that he needed 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." (R. 130:4.) "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." (R. 130:4.) The record supports the circuit court's determination.

Langlois had entered Jacob's room several times. (R. 130:3.) Langlois attempted to enter a third time, but Jacob pushed him out. (R. 158:111.) Langlois "pushed through the door" a fourth time and "started . . . wrestling" with Jacob. (R. 158:111-12.) When Jacob had Langlois in a headlock, Jacob asked, "[A]re you done?" and Langlois agreed that he was. (R. 158:113.) Langlois was closest to the bedroom door and could have left. (R. 158:169.) Instead, he "got up furious . . . took the filet knife [and] held it up threateningly." (R. 158:169-70; 76:1.) He held the knife up high in his hand with the blade pointed out. (R. 158:116.) When asked, "Did you feel that he [Jacob] may attack you again?" Langlois testified, "I didn't think he would, no." (R. 158:123.) Langlois yelled at Jacob. "All I heard is myself yelling. I didn't hear anything else." (R. 158:143.)

When Detective 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." (R. 72:3; 158:115.) He explained, "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." (R. 158:149-50.) When Langlois

explained the actual stabbing, "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." (R. 158:144.)

When Jacob released Langlois, he was neither using nor threatening the use of force, much less deadly force, against Langlois. Langlois acknowledged that he did not think that Jacob would attack him again. (R. 158:123.) There was no actual or imminent unlawful interference and no belief on Langlois's part that he was in danger. Langlois became the aggressor when he picked up the knife. Langlois's testimony did not support the self-defense instruction.

Contrary to Langlois's assertion, self-defense was not a "central issue" in this case. (Langlois's Br. 21.) In fact, as the circuit court observed (R. 130:4), Langlois essentially abandoned self-defense in his closing argument: "[C]ertainly you should consider self-defense. It would be important for you to consider, but I don't even think you need to get there in this case. There's an instruction on accident . . . That's what happened" (R. 159:82-83).

Because Langlois was not entitled to self-defense and self-defense was not central to his defense, Langlois has failed to demonstrate that his 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's counsel was not ineffective for failing to object to the accident instruction simply because it omitted the phrase "unreasonable and substantial" before the phrase "risk of death or great bodily harm." (*See* Langlois's Br. 16-19.) As the circuit court correctly noted, the instructions, when viewed as whole, correctly instructed the jury as to

Langlois's accident defense. (R. 130:6-7.) The court of appeals observed that Langlois "views the court's instructions on accident in isolation rather than as whole." *Langlois*, 377 Wis. 2d 302, ¶ 34. The record supports the lower courts' determinations.

While accident is not an enumerated defense in the criminal code, it was a defense recognized at common law and previously codified as a form of excusable homicide. *Watkins*, 255 Wis. 2d 265, ¶¶ 33-37. The accident defense is subsumed under the general privilege in Wis. Stat. § 939.45(6) and remains a valid defense. *Watkins*, 255 Wis. 2d 265, ¶ 37. Accident is a negative defense rather than an affirmative defense because it only operates to negate the mental element of the crime. *Id.* ¶ 41. The State "disproves accident in [negligent homicide], if it *proves* all the elements of [negligent] homicide or it *disproves* that the defendant was acting lawfully or that the defendant was acting without criminal negligence." *Id.* ¶ 43.

Here, the instructions were not erroneous because they required the State to affirmatively prove beyond a reasonable doubt that Langlois handled a dangerous weapon in a manner that constituted criminal negligence. (R. 78:12, A-App. 157.) The negligent homicide instruction correctly defined criminal negligence to mean that Langlois handled a dangerous weapon that created an "unreasonable and substantial risk of death or great bodily harm" and that Langlois should have realized that his handling of the dangerous weapon created this risk. (R. 78:13, A-App. 158.) The circuit court then proceeded to instruct on accident. It 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 in the

preceding paragraph 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 instruction explained that if Langlois was not aware of this risk, 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 aware that his conduct created a risk of "death or great bodily harm." (78:14, A-App. 159.) 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. 157-28.)

The instructions as a whole properly informed the jury of the nature of the risk that Langlois's handling of the dangerous weapon created must be "unreasonable and substantial." Because the State had to affirmatively prove an element that negated Langlois's accident defense, counsel was not deficient for failing to object to the circuit court's omission of the phrase "unreasonable and substantial."

Even if the accident instruction was erroneous, it did not prejudice Langlois. As the State argues in Section III.B., it presented substantial evidence that demonstrated that Langlois caused Jacob's death through his criminally negligent handling of the fillet knife. After the physical altercation ended and Jacob released Langlois, Langlois was furious and wanted to be in a superior position and make Jacob scared. (R. 158:115, 169-70.) Even though he did not

think that Jacob would attack him again (R. 158:123), Langlois picked up and unsheathed the knife, holding it at his shoulder with the blade pointed out (R. 158:116). Because Langlois should have been aware that his conduct created an unreasonable and substantial risk of harm, he has not demonstrated a reasonable probability that the jury would have found him not guilty had his counsel objected to the accident instruction.

* * * * *

Because the instructions as a whole placed the burden on the State to prove the elements of negligent homicide and disprove Langlois acted in self-defense or that Jacob's death was an accident, the circuit court properly denied Langlois's ineffective assistance of counsel claim without a hearing.

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

A. Legal principles.

A defendant 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).

B. Langlois has not demonstrated a reasonable likelihood that the jury unconstitutionally applied the instructions.

Both the circuit court and court of appeals rejected Langlois's claim that the jury instructions violated his due process rights because they relieved the State of proving every element of the offense beyond a reasonable doubt. (Langlois's Br. 33-38.) The circuit court properly determined that the jury instructions were not "confusing in an unconstitutional manner." (R. 130:7.) The court of appeals correctly denied this claim because the instructions were not erroneous. *Langlois*, 377 Wis. 2d 302, ¶ 37. The record supports those determinations.

Langlois has failed to establish a reasonable likelihood that the instructions, when viewed in light of the proceedings as a whole, prompted the jury to apply the instructions in an unconstitutional manner. 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. (R. 78:2, A-App. 147.) 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. (R. 78:3-7, A-App. 148-152.) It explained that if Langlois acted in self-defense, then his 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. (R. 78:6, A-App. 151.) The jury acquitted Langlois of first-degree reckless homicide. (R. 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 (R. 78:8-10, A-App. 153-55), but the jury acquitted Langlois of second-degree reckless homicide (R. 80).

The jury then considered whether Langlois was guilty of homicide by negligent handling of a dangerous weapon. The court 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. (R. 78:11, A-App. 156.)

In the instruction on self-defense, the circuit court explained that Langlois was raising self-defense with respect to the reckless and negligent homicide charges. (R. 78:3-4, A-App. 148-49.) That 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. (R. 78:6, A-App. 151.) 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.

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 said that the definition of criminal negligence requires that the risk of death or great bodily harm must be "unreasonable and substantial." (R. 78:13, A-App. 158.) Finally, the circuit court 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. (R. 78:14, A-App. 159.)

Viewing the instructions in light of the proceedings as a whole, the instructions did not mislead the jury and did not violate Langlois's due process rights.

III. The State presented sufficient evidence to support Langlois's conviction.

A. Standard of review.

Whether the State presented sufficient evidence to the jury to sustain its verdict presents a legal question that this Court independently reviews. *State v. Booker*, 2006 WI 79, ¶ 12, 292 Wis. 2d 43, 717 N.W.2d 676.

B. Sufficiency of the evidence standard.

This Court must decide whether, when viewing the facts in a light most favorable to conviction, "any rational trier of fact could have found the essential elements of the

crime beyond a reasonable doubt." *State v. LaCount*, 2008 WI 59, ¶ 25, 310 Wis. 2d 85, 750 N.W.2d 780 (citations omitted). This Court will not substitute its judgment for that of the jury, "unless the evidence, viewed most favorable to the state and the conviction, is so lacking in probative value and force that no [jury], acting reasonably, could have found guilt beyond a reasonable doubt." *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). If more than one reasonable inference may be drawn from the evidence, this Court adopts the inference that supports the verdict. *Id.* at 503-04.

Ordinarily, this Court reviews the sufficiency of the evidence by comparison to the jury instructions. *Beamon*, 347 Wis. 2d 559, ¶ 22. But when the instructions are erroneous, this Court reviews the sufficiency of evidence by comparison to what the statute requires. *Id.* ¶¶ 3, 40.

The defendant "bears a heavy burden to show the evidence could not reasonably have supported a finding of guilt." *Id.* ¶ 21.

C. The courts below correctly determined that the evidence was sufficient to support Langlois's conviction.

In a decision detailing the evidence presented at trial, the circuit court rejected Langlois's challenge to the sufficiency of the evidence. (R. 116:2.) It concluded 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." (R. 116:2.) Likewise, the court of appeals determined

that the evidence was sufficient to support Langlois's conviction. *Langlois*, 377 Wis. 2d 302, ¶¶ 40-50.

The record supports the lower courts' determinations that the State presented sufficient evidence to convict Langlois.

1. The instructions correctly stated the elements of the negligent homicide charge.

Relying on Wis. JI-Criminal 1175 (2011), the circuit court properly instructed the jury of the elements of homicide by negligent handling of a dangerous weapon. Consistent with Wis. Stat. § 940.10, the circuit court identified the three elements that the State was required to prove.

First, Langlois "operated or handled a dangerous weapon." (R. 78:12; 159:30.) Consistent with Wis. Stat. § 939.22(10), the circuit court defined a dangerous weapon as "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." (R. 78:13.)

Second, Langlois "operated or handled a dangerous weapon in a manner constituting criminal negligence." (R. 78:12.) Consistent with Wis. Stat. § 939.25, the circuit court told the jury that Langlois's operation or handling of a dangerous weapon was criminally negligent if it "created a risk of death or great bodily harm and the risk of death or great bodily harm was unreasonable and substantial" and that Langlois "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." (R. 78:13.)

Third, Langlois's "operation or handling of a dangerous weapon in a manner constituting criminal negligence caused the death of Jacob Langlois." (R, 78:12.) It defined "cause" to mean that Langlois's "act was a substantial factor in producing the death." (R. 78:12.)

2. The fillet knife was a dangerous weapon.

The manner and nature in which Langlois used the fillet knife is determinative of whether it was a dangerous weapon. *See State v. Bodoh*, 226 Wis. 2d 718, 727, 595 N.W.2d 330 (1999). At trial, Langlois identified the knife that he used to stab Jacob. (R. 158:177-78.) The fillet knife had a six-inch long blade. (R. 62:14; 157:149, 151.) Langlois acknowledged that the fillet knives were sheathed because they are sharp. (R. 158:165.) Langlois picked up the knife and unsheathed it after Jacob released him. (R. 158:114.) Langlois wielded the knife with his right arm held high toward his shoulder with the blade pointed out. (R. 158:115-16.) On this record, a rational jury could have found the fillet knife was a dangerous weapon based on the manner and nature in which Langlois used it.

3. Langlois handled the weapon in a manner that constituted criminal negligence.

Based on the record, a rational jury could reasonably have found that Langlois handled the fillet knife in a criminally negligent manner. When Jacob released Langlois, Langlois could have left the room. Instead, he picked up the knife, removed it from the sheath, and held it at his shoulder with the blade pointing outward. 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 after a physical confrontation with Jacob.

Langlois recalled that after Jacob let him go, he saw the fillet knife on the dresser, picked it up, and unsheathed it. (R. 158:114.) Langlois described wielding the knife with his right arm held high towards his shoulder with the blade pointed out. (R. 158:115-16.) He acknowledged holding up the knife threateningly. (R. 158:170, 172.) Langlois yelled at Jacob, telling him that he "never liked him" and "always hated him." (R. 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. (R. 157:47.) Langlois told Detective Clausing that 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." (R. 76:1.)

Langlois showed Detective Clausing how he held the knife before, during, and after Jacob kicked him. In the series of screenshots that Clausing prepared from the interview DVD, (R. 71:1-8; 157:183-84), Langlois demonstrated how he held 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 (R. 71:1-10; 157:185-87). After Langlois provided his written statement (R. 157:193), he again demonstrated what happened (R. 71:11-18; 157:195-96). The screenshots show Langlois with his right hand held at his shoulder, as though he were holding a knife. They then show Clausing reenacting Jacob's kick with his left foot to Langlois's side.

The screen shots then show Langlois extending his right forearm forward as he demonstrates the stabbing motion. (R. 71:11-18; 157:197-198.)

4. Langlois's criminally negligent handling of the fillet knife caused Jacob's death.

Dr. Zelda Okia, a forensic pathologist, performed an autopsy on Jacob. (R. 157:129, 140.) Okia described the path of the stab wound through Jacob's chest and into his lung. (R. 157:140-41.) The wound was six inches deep. (R. 157:143.) Okia noted that the fillet knife's blade was six inches long. (R. 157:149, 151.) Okia opined to a reasonable degree of medical certainty that Jacob died from a stab wound to the chest. (R. 157:152.)

* * * * *

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). Viewed in the light most favorable to the conviction, the evidence was sufficient to convict Langlois of homicide by negligent handling of a weapon.

D. The evidence was sufficient despite Langlois's 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's Br. 39-40.) The State disagrees with Langlois's assertion that the circuit court improperly instructed the jury. *See* Sec. I.B.2, above. But even if the jury had been instructed on self-defense and accident as Langlois

has suggested, a reasonable 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's Br. 42-43.) 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 Jacob let him go, Langlois drew the knife from its sheath and brandished it at his shoulder. It was free to conclude that Langlois unnecessarily created an unreasonable and substantial risk of death or great bodily harm by injecting a deadly instrument into a tense 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, it 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's Br. 44.) 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's Br. 44.) But whether the risk was "unreasonable and substantial" is precisely the question that the jury was asked to consider. The jury could not find Langlois guilty unless the State proved beyond a reasonable doubt that Langlois's handling of the dangerous weapon created an "unreasonable

and substantial risk of death or great bodily harm." (R. 78:13, A-App. 158.)

And again, the jury was free to conclude first, that Langlois's deliberate decision to remove the fillet knife from its sheath and brandish it created an "unreasonable and substantial" risk of harm; and second, 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.

Langlois repeatedly asserts that the "only reasonable conclusion" is that there was insufficient evidence to convict him. (Langlois's Br. 43-44.) Langlois's argument focuses on evidence favorable to his defenses and ignores competing inferences inconsistent with his claim of innocence. In essence, he is asking this Court to apply the hypothesis of innocence rule. But that rule does not apply to a challenge to the sufficiency of the evidence. While a jury is free to choose among competing inferences and reject an inference consistent with innocence, this Court accepts and follows "the inference drawn by the [jury] unless the evidence on which that inference is based is incredible as a matter of law." *Poellinger*, 153 Wis. 2d at 507. Because reasonable inferences from the evidence support the guilty verdict, this Court should defer to the inferences the jury made.

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

Wisconsin Stat. § 751.06 confers discretionary authority on this Court to review an otherwise waived error, reverse a judgment, and order a new trial in the interest of justice. *State v. Maloney*, 2006 WI 15, ¶ 14, 288 Wis. 2d 551, 709 N.W.2d 436. This Court may exercise its discretionary

authority to reverse if it determines "that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried . . ." Wis. Stat. § 751.06. But this Court exercises this 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.").[8] This Court will only exercise its authority in the "exceptional case, after all other claims are weighed and determined to be unsuccessful." *Id.* ¶ 43.

When a court exercises its discretionary authority, it may not reweigh the evidence. *Id.* ¶¶ 10, 26-27, 36. To hold otherwise, "would allow any sufficiency of the evidence claim to be converted to an interest of justice claim, thereby evading the stringent standard for reviewing findings by the trier of fact." *Id.* ¶ 36.

A party's waiver of objections to jury instructions does not deprive it of its authority to exercise its discretionary authority to reverse in the interest of justice. *See State v. Myers*, 158 Wis. 2d 356, 361–62, 461 N.W.2d 777 (1990). But even if a particular instruction was erroneous, this Court

[8] This Court has concluded that the court of appeals' discretionary authority under Wis. Stat. § 752.35 is identical to this Court's discretionary authority under Wis. Stat. § 751.06. "Accordingly, cases of this court which interpret the supreme court's power to reverse judgments, notwithstanding waived error, under sec. 751.06, are equally applicable as interpretations of the court of appeals' power to reverse judgments under sec. 752.35." *Vollmer v. Luety,* 156 Wis. 2d 1, 19, 456 N.W.2d 797, (1990).

will decline to exercise its discretionary reversal authority if the instructions as a whole accurately stated the law. *McKellips*, 369 Wis. 2d 437, ¶¶ 51-53.

Langlois has failed to demonstrate that this is the exceptional case that warrants this Court's exercise of its discretionary authority. Both the circuit court and court of appeals correctly determined that because the instructions were not erroneous, the real controversy was tried. *Langlois*, 377 Wis. 2d 302, ¶ 37. (R. 130:7.) Langlois's ineffective assistance, due process, and sufficiency of the evidence claims are without merit. An interest of justice claim does not rescue arguments that fail on other grounds.

When a defendant seeks a new trial on the grounds that his 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. Because Langlois's argument fails under a *Strickland* analysis, then it should fail under a Wis. Stat. § 751.06's analysis. Likewise, if the concern is that the instructions unconstitutionally violated Langlois's due process, then the *Burris* due process test provides the framework for analyzing this claim. Finally, discretionary reversal should not be a basis to reweigh the evidence not allowed under sufficiency claim.

Because the instructions as a whole accurately stated the law of criminal negligence, self-defense, and accident, the real controversy was tried. Langlois has not met his burden of demonstrating that his case is an exceptional case that warrants a reversal in the interest of justice.

CONCLUSION

The State respectfully requests this Court to affirm the court of appeals' decision affirming the circuit court's entry of the judgment of conviction and order denying Langlois's motion for postconviction relief.

Dated this 31st day of January, 2018.

Respectfully submitted,

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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 10,845 words.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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 31st day of January, 2018.

_____
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