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

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

ANDREW J. JARMUZ
The Law Office of Andrew J. Jarmuz, LLC
State Bar No. 1089369

P.O. Box 24537
Edina, MN 55424
(262) 446-3380
andrew@jarmuzlaw.com

Attorney for Defendant-Appellant-Petitioner

ARGUMENT

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

The circuit court 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 court made an erroneous distinction regarding self-defense when 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, and the only reasonable conclusion is that the jury was misled and made an erroneous distinction when considering the separate instructions.

The State's attempt to explain away the critical distinctions is unpersuasive. In the self-defense instruction for the grouped charges of First and Second Degree Reckless Homicide, the State highlights that the court included "or was criminally negligent conduct" as a way to try to show that the self-defense defense instruction for those two charges applied to all charges. (State's Brief at 20). The argument is unpersuasive because the court separately attempted to instruct the jury on self-defense for the charge of Homicide by Negligent Handling of a Dangerous Weapon, and singled out criminally negligent conduct. (78:11, App. 156). The court did not incorporate its prior self-defense instruction. The court attempted, but failed to properly instruct on self-defense on the charge of Homicide by Negligent Handling of a Dangerous Weapon. On this charge, the court erroneously instructed the jury by omitting the entire section of the self-defense instruction that tells the jury to consider the evidence of self-defense in deciding whether the defendant's conduct created an unreasonable risk to another, that instructs that the prosecution must prove the absence of self-defense once

raised, and that explains that "if the state succeeds in proving the absence of self-defense, the jury still must be satisfied by all the evidence that the defendant's conduct created an unreasonable risk of death or great bodily harm. WIS-JI-CRIMINAL 801, cmt 6; *State v. Austin*, 2013 WI App 96, 349 Wis.2d 744, 836 N.W.2d 833. This improperly shifted the burden from the State to Mr. Langlois.

The State is also unpersuasive when it claims that the self-defense instruction on the charges of First and Second Degree Reckless Homicide was entirely incorporated into the self-defense instruction on the charge of Homicide by Negligent Handling of a Dangerous Weapon when a partial section of the instruction dealing with when one is allowed to "threaten or intentionally use force against another" uses the transition phrase "As I previously indicated." (State's Brief at 21, 78:11, App. 156). Judge Reilly, in his dissent in the Court of Appeals, 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." *State v. Langlois*, 377 Wis. 2d 302, ¶56. (App. 124).

This distinction in the instructions misstates the law, misleads the jury, and would not lead a reasonable jury to conclude that the entire self-defense instruction for the charges of First and Second Degree Reckless Homicide was being incorporated into the self-defense instruction for the charge of Homicide by Negligent Handling of a Dangerous Weapon.

Also, *State v. Austin* is on point, and was correctly decided. 2013 WI App 96, 349 Wis.2d 744, 836 N.W.2d 833. *Austin* and the present case are similar because they deal with a self-defense instruction as it relates to a case involving alleged criminal recklessness or criminal negligence. The *Austin* court correctly determined that "when a defendant successfully makes self-defense an issue, the jury must be instructed as to the State's burden of proof regarding the nature of the crime, even if the defense is a negative defense." *State v. Austin*, 2013 WI App 96, ¶16, 349 Wis.2d 754-55,

836 N.W.2d 833 citing *State v. Schulz*, 102 Wis.2d 423, 429–30, 307 N.W.2d 151 (if defense is attack on element of crime, "the [S]tate bears the burden of proving this element beyond a reasonable doubt" and when a negative defense is asserted, "the burden of persuasion cannot be placed upon the defendant without violating his right to due process"); see also *State v. Pettit*, 171 Wis.2d 627, 640, 492 N.W.2d 633 (Ct. App. 1992) (If a defendant successfully raises a negative defense, "the burden is upon the [S]tate to prove beyond a reasonable doubt that defendant's evidence did not negate an element necessary to convict."). Applying the *Austin* decision to the present case, the circuit court, through its omissions in the self-defense instruction for the charge of Homicide by Negligent Handling of a Dangerous Weapon, failed to place the burden upon the State to prove beyond a reasonable doubt that Mr. Langlois did not act lawfully in self-defense.

When the jury instructions are considered as a whole, the jury was instructed to make an erroneous distinction when considering the self-defense instruction for First and Second

Degree Reckless Homicide, and considering the self-defense instruction for Homicide by Negligent Handling of a Dangerous Weapon. Joseph Langlois was prejudiced because the jury was misled and improperly instructed on self-defense, and he was consequently convicted on the charge based on the erroneous instructions given to the jury.

The State in its brief also mischaracterized the interaction between Joseph and Jacob Langlois. (State's Brief at 25). The State misleadingly states that after Joseph Langlois reentered the room, he "started…wrestling" with Jacob. *Id.* In reality, when Joseph Langlois was asked, "Did [Jacob] attack you[,]" he replied, "I think so. I didn't start anything. All I know is the next thing that he was getting me into a headlock and everything and I was trying to get out of it." (158:111-112, App. 194-195). Jacob was the aggressor.

Similarly, the State mischaracterizes Joseph Langlois's testimony when stating he "got up furious…took the filet knife [and] held it up threateningly." (State's Brief at 25). He actually testified that he "was furious and as well other emotions." (158:170). Joseph Langlois had earlier testified

that he was defending himself when he had picked up the fillet 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 State's mischaracterization of Joseph Langlois's testimony continues when it states that Joseph did not think Jacob would attack him again. (State's Brief at 25-26, 28-29). He actually testified that at the moment he picked up the knife, he was thinking he "didn't want Jacob to keep attacking me and my mom and –maybe my mom and I wanted him to stop and stop attacking and being so hostile." (158:123; App. 206). He explained that after holding up the knife in a defensive position, he didn't think Jacob would attack him again. *Id.* The State wrongly states that there was "no belief on Langlois's part that he was in danger." (State's Brief at 26). In fact, Joseph Langlois stated twice that he picked up the knife to get Jacob to stop attacking him, and he testified that he was afraid of being put in another choke hold. (158:123; App. 206).

Additionally, the State is simply wrong when it claims that self-defense was not a central issue in the case. Joseph Langlois's statements about defending himself are set forth above, and trial counsel 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 properly instructed about unreasonable risk and the State's burden 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, and counsel's ineffective assistance destroyed the integrity of the fact finding process, and led to a miscarriage of justice.

Regarding the instruction on accident, Judge Reilly, in his dissent, explained that WISCONSIN JI—CRIMINAL 772 advises the court to "describe mental state" within the definition of accident, and "the court properly did so for the charges of first- and second-degree reckless homicide as it specifically referenced 'criminally reckless conduct.'" *Langlois*, 377 Wis. 2d 302 at ¶59. (App. 126). He describes the circuit court's error, stating that "the court's instruction as to accident for homicide by negligent handling of a dangerous weapon did not reference criminal negligence, and instead inserted a definition of criminal negligence that was erroneous as it omitted the requirement that the 'risk of death or great bodily harm' be 'unreasonable and substantial.'" *Id.*

He explained that the error was 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." *Id.* at ¶60. He notes that the instruction on accident for the charge of homicide by negligent handling of a

dangerous weapon does not refer the jury back to the preceding definition of criminal negligence, and does not include the phrase "criminal negligence. *Id.* Therefore, because the accident instruction is erroneous and lessens the State's burden, one cannot say that the State met its burden on the charge.

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

It is disingenuous for the State to claim that the jury knew that the State carried the burden of disproving self-defense on all of the charges. (State's Brief at 32). The court separately instructed the jury on the law of self-defense as applicable to homicide by negligent handling of a dangerous weapon, but omitted the portion related to the State's burden. By omitting a whole paragraph of the self-defense instruction, including the State' burden, on the charge of 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." *Langlois*, 377 Wis. 2d 302 at ¶56. (App. 124). The jury was told, by inference, to treat this charge differently. The problems with the accident instruction are set forth above. The instructions, as a whole, misled the jury and violated Joseph Langlois's due process rights.

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

The State misses the point when it states that "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." (State's Brief at 36).

Joseph Langlois's act of picking up the fillet 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 fillet 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. He had no duty to retreat. 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.

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

This is an exceptional case warranting a reversal in the interests of justice. 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 this prevented the real controversy from being fully tried.

Also, 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. Among other omissions, the jury was not informed of a critical burden of the state: 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.

Despite the erroneous instructions that improperly shifted the burden of proof from the State to Mr. Langlois, the lower courts refused to order a new trial. Mr. Langlois asks this Court to vacate the judgment and order a new trial in the interests of justice.

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 9th day of February, 2018.

Respectfully submitted,

ANDREW J. JARMUZ
The Law Office of Andrew J. Jarmuz, LLC
State Bar No. 1089369

P.O. Box 24537
Edina, MN 55424
(262) 446-3380
andrew@jarmuzlaw.com

Attorney for Defendant-Appellant-Petitioner

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 2464 words.

Dated this 9th day of February, 2018.

Signed:

ANDREW J. JARMUZ
The Law Office of Andrew J. Jarmuz, LLC
State Bar No. 1089369

P.O. Box 24537
Edina, MN 55424
(262) 446-3380
andrew@jarmuzlaw.com

Attorney for Defendant-Appellant-Petitioner

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 9th day of February, 2018.

Signed:

ANDREW J. JARMUZ
The Law Office of Andrew J. Jarmuz, LLC
State Bar No. 1089369

P.O. Box 24537
Edina, MN 55424
(262) 446-3380
andrew@jarmuzlaw.com

Attorney for Defendant-Appellant-Petitioner

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 February 9, 2018. I further certify that the brief and appendix were correctly addressed and postage was pre-paid.

Dated this 9th day of February, 2018.

Signed:

_____

ANDREW J. JARMUZ
The Law Office of Andrew J. Jarmuz, LLC
State Bar No. 1089369

P.O. Box 24537
Edina, MN 55424
(262) 446-3380
andrew@jarmuzlaw.com

Attorney for Defendant-Appellant-Petitioner