STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2017AP1206-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

EMMANUEL EARL TRAMMELL,

Defendant-Appellant-Petitioner.

REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT I, AFFIRMING AN ORDER OF THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE JEFFREY A. WAGNER, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF THE PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

The State rephrases and reorders the issues presented in Emmanuel Earl Trammell's petition for review.[1]

1. Wisconsin Stat. § 805.13(3) provides that a party's failure to object to proposed instructions at a jury instruction conference forfeits any claim of error in the instructions. Did the court of appeals err in applying that statute and in concluding that it could not review the unobjected-to burden-of-proof instruction in this case?

The circuit court did not address this issue.

The court of appeals did not address the issue as it is presented here.

This Court should answer no.

2. Wisconsin's pattern burden-of-proof instruction, Wis. JI–Criminal 140, contains an admonishment that the jury is to search for the truth, not for doubt. Did that admonishment mislead the jury into holding the State to a burden of proof lower than proof beyond a reasonable doubt?

The circuit court answered no.

The court of appeals answered no.

This Court should answer no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As with most cases accepted for review by this Court, oral argument and publication are appropriate.

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[1] Trammell petitioned for review on the two issues presented above. (Trammell's Pet. 1–2.) His brief contains four issues. The petition is controlling. Wis. Stat. § 809.62(6).

INTRODUCTION

This case concerns an after-the-fact challenge to the use of Wisconsin's pattern instruction for the burden of proof and presumption of innocence (hereinafter "burden-of-proof instruction"). That instruction, used at Trammell's trial without objection, contains an admonishment that it is the jury's "duty to give the defendant the benefit of every reasonable doubt" but it is "not to search for doubt." Rather its duty is to "search for the truth." Wis. JI–Criminal 140.

This Court reviewed the burden-of-proof instruction some 20 years ago in *State v. Avila*, 192 Wis. 2d 870, 532 N.W.2d 423 (1995), *overruled in part on other grounds by State v. Gordon*, 2003 WI 69, ¶ 5, 262 Wis. 2d 380, 663 N.W.2d 765. There, Avila challenged the legal accuracy of the instruction, arguing that the above identified admonishment impermissibly lowered the State's burden of proof. *Id.* at 888–89. This Court rejected Avila's argument, concluding that "[t]he instruction as a whole emphasizes with great clarity that the State bears the burden of proving the defendant's guilt beyond a reasonable doubt." *Id.* at 890.

Armed with two law review articles, Trammell argues that the court of appeals should have excused his failure to object to the use of the burden-of-proof instruction, and that it is time for this Court to overrule *Avila*. Not so.

To start, Trammell forfeited direct review of his challenge to the instruction by failing to object at the jury instruction conference. The court of appeals correctly applied Wis. Stat. § 805.13(3) and *State v. Schumacher*, 144 Wis. 2d 388, 409, 424 N.W.2d 672 (1988), in concluding that it could not reach the merits of the alleged instructional error. Only this Court can review an unobjected-to instructional error when the ground for the objection should have been known at the time of the jury instruction conference. And here, the

ground for Trammell's objection was—or should have been—well known.

Moreover, this Court should not overrule *Avila*. The burden-of-proof instruction has not changed in any significant way since 1995. It accurately set forth the State's burden to prove guilt beyond a reasonable doubt then, and it still does so now. The law review articles Trammell relies upon are irrelevant to that inquiry, are inherently flawed, and are unreliable. Because the instruction accurately sets forth the law, Trammell is not entitled to a new trial. This Court should affirm.

SUPPLEMENTAL STATEMENT OF THE CASE

The State charged Trammell with one count of armed robbery and one count of operating a motor vehicle without the owner's consent. (R. 1:1.)

A. At trial, the State presented evidence that Trammell stole the victim's car at gunpoint.

The victim identified Trammell in court and testified that on July 8, 2015, the victim and his girlfriend drove to Jad's Food in his mother's Buick Regal. (R. 55:4–6.) Once they arrived at the store, the victim got out of the car and went into the store while his girlfriend waited in the car. (R. 55:5.) Trammell approached the victim in the store, talked to him, and snatched $20 out of his hand. (R. 55:5–6.) Trammell then left the store and got into the Buick. (R. 55:7.) When the victim attempted to stop him, Trammell displayed a gun and told the victim's girlfriend to get out of the car. (R. 55:7.) Trammell then drove away. (R. 55:7.)

The girlfriend testified she was riding around with the victim on July 8, 2015. (R. 55:24.) They stopped at Jad's Food. (R. 55:24.) The girlfriend saw Trammell follow the victim into the store. (R. 55:24–25.) She knew Trammell because they

had gone to middle school together. (R. 55:25.) Trammell came out of Jad's Food, got into the Buick, and told her to get out of the car. (R. 55:26.) The victim came out of Jad's Food and began arguing with Trammell. (R. 55:26.) Trammell took out a gun and pointed it at the victim. (R. 55:27.) The victim then told her to get out of the car, which she did. (R. 55:27.) Trammell drove off in the Buick. (R. 55:27–28.)

The Buick was equipped with OnStar, a service that can provide real-time assistance to drivers. (R. 55:8.) Steven Strasser, a Milwaukee Police Department officer, testified that on July 8, 2015, he heard a dispatch that OnStar had located the Buick at 34th Street and Clark in Milwaukee. (R. 55:40.) Strasser also heard over the radio that police located the Buick and were pursuing it. (R. 55:41.) Strasser joined the pursuit after activating his emergency lights and siren. (R. 55:41.)

Despite the police pursuit, the Buick did not stop. (R. 55:41–42.) Police eventually requested OnStar to cut the ignition. (R. 55:41–42.) Once that occurred and the Buick slowed to a stop, three people—two passengers and the driver—fled on foot. (R. 55:42.) Police eventually arrested all three occupants of the Buick, and the car was later processed for fingerprints. (R. 55:42–43.) Police learned that the driver was a man named Gabarie Silas; Trammell was not in the car. (R. 55:42–43.)

Pursuant to his plea agreement, Silas testified for the State at Trammell's trial. (R. 55:50–51.) He testified that on July 8, 2015, he rode to Jad's Food with Trammell and another man named Reese in Trammell's car, a Dodge.[2]

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[2] The complaint (R. 1), and court of appeals' decision identified Reese as "Reisco." *State v. Trammell*, No. 2017AP1206-CR, 2018 WL 2171486, ¶¶ 3, 4 (Wis. Ct. App. May 8, 2018) (unpublished) (per curiam). (R-App. 101, 102.)

(R. 55:47–48.) In the store, Silas saw Trammell talk to the victim, snatch some money, and leave the store. (R. 55:48.)

When Silas left the store, he saw Trammell in the Buick arguing with the victim. (R. 55:49.) He also heard the victim tell a woman who was still in the Buick to get out of the car. (R. 55:49.) After the victim and woman left the car, Trammell threw Silas the keys to the Dodge, and Silas drove off in it. (R. 55:50.) Trammell and Silas met later and switched cars. (R. 55:50.)

Eric Draeger, a Milwaukee Police Department officer, testified he monitors all jail calls. (R. 55:71–72.) He listened to a jail call made on January 6, 2016, from Trammell's account to Brittany Nunn. (R. 55:74–76.) Draeger testified that Nunn referred to the caller as "Emmanuel." (R. 55:75.) During that call, "Emmanuel" asked Nunn to offer false testimony at his trial. (R. 55:80–82.)

Trammell's counsel and the State agreed to a stipulation regarding the forensic examination of the Buick. (R. 55:89–90.) The jury was informed that a forensic examiner identified two fingerprints lifted from the Buick as Trammell's left index finger and Silas's left middle finger. (R. 55:89–90.)

Trammell did not testify at trial. (R. 55:93–94.)

B. Trammell did not object to the use of the burden-of-proof instruction.

During the jury instructions conference, the circuit court indicated it intended to give the standard burden-of-proof instruction, Wis. JI–Criminal 140. (R. 55:95.) Trammell's counsel did not object. (R. 55:95.)

On the last day of trial testimony, the court instructed the jury on the substantive crimes. (R. 55:97–109.) The

following morning, the court instructed the jury on the burden of proof, using Wis. JI–Criminal 140:

> In reaching your verdicts, examine the evidence with care and caution. Act with judgment and reason and prudence.
>
> Defendants are not required to prove their innocence. The law presumes every person charged with the commission of an offense to be innocent.
>
> This presumption requires a finding of not guilty unless, in your deliberations, you find it is overcome by evidence which satisfies you beyond a reasonable doubt that the defendant is guilty.
>
> The burden of establishing every fact necessary to constitute guilt is on the state.
>
> Before you can return a verdict of guilty, the evidence must satisfy you beyond a reasonable doubt that the defendant is guilty.
>
> If you can reconcile the evidence upon any reasonable hypothesis consistent with the defendant's innocence, you should do so and return a verdict of not guilty.
>
> The term *reasonable doubt* means a doubt based upon reason and common sense. It's a doubt for which a reason can be given arising from a fair and rational consideration of the evidence or lack of evidence.
>
> It means such a doubt that would cause a person of ordinary prudence to pause or hesitate when called upon to act in the most important affairs of life.
>
> A reasonable doubt is not a doubt which is based upon mere guesswork or speculation. A doubt which arises merely from sympathy or from fear to return a verdict of guilt is not a reasonable doubt.
>
> A reasonable doubt is not a doubt such as may be used to escape the responsibility of making a decision.

> While it is your duty to give the defendant the benefit of every reasonable doubt, you are not to search for doubt. You are to search for the truth.

(R. 56:3–5.) Again, Trammell's counsel did not object. (R. 56:5.)

The jury convicted Trammell of both counts. (R. 56:36–37.) The court sentenced Trammell to a 20-year term of imprisonment on the armed robbery, and a concurrent 30-month term of imprisonment for operating a motor vehicle without the owner's consent. (R. 57:25.)

C. The postconviction court denied Trammell's claims for relief, which were based on an alleged instructional error.

Trammell filed a postconviction motion in which he claimed that Wis. JI–Criminal 140 misstated the law and confused the jurors, resulting in Trammell being convicted upon a burden of proof lower than guilt beyond a reasonable doubt. (R. 39:6–12.) Trammell focused on the part of Wis. JI–Criminal 140 that he dubbed the "Truth Instruction": "[Y]ou are not to search for doubt. You are to search for the truth." (R. 39:6–7.) Trammell argued that tacking the "Truth Instruction" onto the reasonable doubt definition incorrectly informed the jury that the State's burden of proof was lower than proof beyond a reasonable doubt. To support that argument, he relied on two law review articles by Michael D. Cicchini and Lawrence T. White. (R. 39:7–12.)

In addition to seeking a new trial based on the above argument, Trammell also asked for a new trial in the interest of justice, claiming that the faulty instruction resulted in the real controversy—whether he was guilty beyond a reasonable doubt—not being fully tried. He further sought reversal based upon plain error, claiming that it was reasonably likely that the jury convicted him on a lesser burden of proof. (R. 39:12–14.)

The circuit court denied the motion without a hearing. (R. 40.) The court explained that it "gave the standard accepted instruction to the jury in this case and rejects the defendant's argument that the instruction misstated the law, lowered the burden of proof, or confused the jury." (R. 40:2.) It rejected Trammell's interest-of-justice and plain-error arguments on the same grounds. (R. 40:2.)

D. The court of appeals affirmed.

Trammell appealed and, by and large, raised the same arguments in the court of appeals. In a per curiam decision, the court of appeals affirmed, concluding that Trammell forfeited review of the alleged instructional error, and the court could not address it pursuant to Wis. Stat. § 805.13(3) and *Schumacher*, 144 Wis. 2d at 409. *State v. Trammell*, No. 2017AP1206-CR, 2018 WL 2171486, ¶ 13 (Wis. Ct. App. May 8, 2018) (unpublished) (per curiam). (R-App. 103.) The court also reasoned that, even if it overlooked the forfeiture, it would be bound by this Court's decision in *Avila* holding that Wis. JI–Criminal 140 accurately states the State's burden to prove guilt beyond a reasonable doubt. *Trammell*, 2018 WL 2171486, ¶¶ 15–17 (citing *Avila*, 192 Wis. 2d 870). (R-App. 103–04.)

The court of appeals also rejected Trammell's arguments that the court should reverse for plain error or in the interests of justice. *Trammell*, 2018 WL 2171486, ¶¶ 18–20. (R-App. 104.) The court concluded that, pursuant to *Schumacher*, it could not review an unobjected-to jury instruction for plain error or on the ground that the instructional error implicated the integrity of the fact-finding process. *Trammell*, 2018 WL 2171486, ¶¶ 18, 20. (R-App. 104.) The court also declined to grant a new trial in the interest of justice because, pursuant to *Avila*, Wis. JI–Criminal 140 accurately stated the law. *Trammell*, 2018 WL

2171486, ¶ 19 (citing *Vollmer v. Luety*, 156 Wis. 2d 1, 19–20, 456 N.W.2d 797 (1990)). (R-App. 104.)

Trammell petitioned for review, and this Court accepted review.

STANDARD OF REVIEW

Whether Trammell forfeited his claim of instructional error requires this Court to apply undisputed facts to a legal standard, which is a question of law that this Court reviews de novo. *Johnson v. Rogers Mem'l Hosp., Inc.*, 2005 WI 114, ¶ 31, 283 Wis. 2d 384, 700 N.W.2d 27.

Whether the burden of proof jury instruction accurately states the law is also a question of law that this Court reviews de novo. *Avila*, 192 Wis. 2d at 888–89.

ARGUMENT

I. Under Wis. Stat. § 805.13(3), Trammell forfeited his challenge to the jury instruction by not objecting to it at the jury instruction conference.

Wisconsin Stat. § 805.13(3) provides that a party's failure to object to jury instructions or verdict questions at the instruction conference constitutes forfeiture of any error in the proposed instructions or verdict. *See State v. McKellips*, 2016 WI 51, ¶ 47, 369 Wis. 2d 437, 881 N.W.2d 258 (explaining that a failure to contemporaneously object to an alleged jury instruction error results in "forfeiture"). Wisconsin Stat. § 972.11(1) makes section 805.13(3) applicable to criminal proceedings. *See Schumacher*, 144 Wis. 2d at 402 n.11. "The purpose of the rule is to give the opposing party and the circuit court an opportunity to correct any error . . . [, which] helps preserve jury verdicts and conserve judicial resources." *McKellips*, 369 Wis. 2d 437, ¶ 47 (citation omitted).

When a party so forfeits a challenge to a jury instruction, the court of appeals lacks discretionary authority to review the error. *Schumacher*, 144 Wis. 2d at 408. Instead, it is limited to exercising its discretionary power of reversal pursuant to Wis. Stat. § 752.35. *Schumacher*, 144 Wis. 2d at 408. As this Court explained, "[D]iscretionary power of reversal (as opposed to a discretionary power of review) is compatible with doing justice in the individual case, yet the limitation imposed by a discretionary power of reversal is also a limitation compatible with the fact that the court of appeals does not declare or develop the law." *Id.*

Here, when the court of appeals stated that it could not "avoid the plain language of the statute" and that it lacked "broad discretionary authority to review an unobjected-to jury instruction," it correctly applied *Schumacher*. Thus, when Trammell asserts that the court of appeals' interpretation of the statute is "absurd," what he is really saying is that *Schumacher* must be overruled.[3] (*See* Trammell's Br. 46.) According to Trammell, a defendant must be afforded review of an alleged instructional error in a postconviction proceeding if the particular ground for the objection is not known, and could not be known, at the time of the jury instructions conference. He relies heavily on *State v. Howard*, 211 Wis. 2d 269, 564 N.W.2d 753 (1997), *overruled on other grounds by Gordon*, 262 Wis. 2d 380. (Trammell's Br. 41–42.)

Howard is distinguishable. In *Howard*, this Court stated that "counsel [has] an obligation to object at the instructions conference based on incompleteness or other

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[3] Trammell's argument would also require this Court to overrule, in part, *State v. Paulson*, 106 Wis. 2d 96, 104, 315 N.W.2d 350 ("[W]e hold that the failure of defense counsel to object to the instruction, stating the grounds for the objection with particularity, on the record constitutes a waiver of any error in the instruction, pursuant to sec. 805.13(3), Stats.").

error about which he knew or should have known." *Howard*, 211 Wis. 2d at 289. However, this Court stated that the forfeiture rule in Wis. Stat. § 805.13(3) does not apply when the ground for the objection, such as a substantive change to the law, could not have been known at the time of the instruction conference. *Id.*

This is not a *Howard* case, because here, the ground for the objection—that the "dual directives"[4] of Wis. JI–Criminal 140 unconstitutionally reduce the State's burden of proof—has been known and argued for nearly a century. *See Manna v. State*, 179 Wis. 384, 399–400, 192 N.W. 160 (1923). At the instruction conference, Trammell could have objected on those grounds and asked for a modification of the pattern instruction.

Trammell asserts otherwise, claiming that *Avila* would render any such objection frivolous. (Trammell's Br. 44.) Not so. While *Avila* would likely inform the circuit court ruling on the objection, it would not bind the circuit court in a manner that prevented the court from modifying the pattern instruction. *See State v. Burris*, 2011 WI 32, ¶ 24, 333 Wis. 2d 87, 797 N.W.2d 430 ("[C]ircuit courts have broad discretion in deciding which instructions to give.").

Moreover, Trammell's position ignores the plain language of the statute. This Court does not "disregard the plain, clear words of the statute." *State v. Grandberry*, 2018 WI 29, ¶ 11, 380 Wis. 2d 541, 910 N.W.2d 214 (quoting *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110). And it "assume[s] that legislative intent is expressed in the *statutory language*." *Id.* (emphasis added) (citation omitted). Trammell simply makes

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[4] Trammell now refers to the "Truth Instruction" as the "Dual Directives." (Trammell's Br. 6.)

a thinly veiled request for this Court to read, as a policy matter, an exception into the statute providing that if some purported "evidence" supporting the known ground for an objection is not known at the time of the jury instructions conference, a failure to object does not forfeit review of the instruction. (*See* Trammell's Br. 41–46.) As this Court has explained "it is certainly not within the province of the court in effect to amend the act and prescribe limitations where the legislature prescribed none." *State v. Zimmerman*, 202 Wis. 69, 76, 231 N.W. 590 (1930).

Trammell could have stated the ground for his objection with particularity at the instruction conference, specifically, that the "dual directives" of Wis. JI–Criminal 140 unconstitutionally reduce the State's burden of proof. The particularity of his objection did not turn on new social science research. Accordingly, the court of appeals correctly applied Wis. Stat. § 805.13(3) and *Schumacher*, to the extent that it deemed Trammell's challenge forfeited and unreviewable.

II. Wisconsin JI–Criminal 140 accurately provides that the State's burden is to prove guilt beyond a reasonable doubt, and the research Trammell relies upon is not proof that the instruction mischaracterizes the State's burden.

While Wis. Stat. § 805.13(3) applies here, that does not mean that Trammell's forfeited claim evades all review. Unlike the court of appeals, this Court has discretionary authority to conduct such a review. *Schumacher*, 144 Wis. 2d at 410. This Court can exercise its discretionary review power, "disregard alleged forfeiture or waiver[,] and consider the merits of any issue" properly before the court. *State v. Beamon*, 2013 WI 47, ¶ 49, 347 Wis. 2d 559, 830 N.W.2d 681 (citation omitted).

Since this Court has accepted review, and because the issue whether the studies conducted by Cicchini and White prove that Wis. JI–Criminal 140 contains "dual directives" that lower the State's burden of proof to something less than guilt beyond a reasonable doubt is arising with some frequency, this Court should exercise its discretionary review power. In doing so, this Court should conclude that Wis. JI–Criminal 140 accurately instructs the jury on the State's burden of proof and Trammell is not entitled to a new trial.

A. Wisconsin's burden-of-proof instruction accurately sets forth the law.

In a criminal trial, due process requires the State to prove all elements of the offense charged, and every fact necessary to establish those elements, beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970).

Wisconsin's pattern jury instruction for the burden of proof and the presumption of innocence, Wis. JI–Criminal 140, explains the State's burden as follows:

> In reaching your verdict, examine the evidence with care and caution. Act with judgment, reason, and prudence.
>
> . . . .
>
> Defendants are not required to prove their innocence. The law presumes every person charged with the commission of an offense to be innocent. This presumption requires a finding of not guilty unless in your deliberations, you find it is overcome by evidence which satisfies you beyond a reasonable doubt that the defendant is guilty.
>
> . . . .
>
> 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.
>
> . . . .
>
> If you can reconcile the evidence upon any reasonable hypothesis consistent with the defendant's innocence, you should do so and return a verdict of not guilty.
>
> . . . .
>
> The term "reasonable doubt" means a doubt based upon reason and common sense. It is a doubt for which a reason can be given, arising from a fair and rational consideration of the evidence or lack of evidence. It means such a doubt as would cause a person of ordinary prudence to pause or hesitate when called upon to act in the most important affairs of life.
>
> A reasonable doubt is not a doubt which is based on mere guesswork or speculation. A doubt which arises merely from sympathy or from fear to return a verdict of guilt is not a reasonable doubt. A reasonable doubt is not a doubt such as may be used to escape the responsibility of a decision.
>
> While it is your duty to give the defendant the benefit of every reasonable doubt, you are not to search for doubt. You are to search for the truth.

Courts, parties, and attorneys have good reasons to rely on Wisconsin's pattern jury instructions. *State v. Gilbert*, 115 Wis. 2d 371, 379, 340 N.W.2d 511 (1983). Specifically, attorneys and courts have good reasons to rely on pattern instruction Wis. JI–Criminal 140 as this Court has consistently upheld its use.

The original pattern instruction, adopted in 1962, had language advising the jury that they were to search for the truth. Wis. JI–Criminal 140, Comment n.5. Although some peripheral changes have been made in this language since then, courts have routinely instructed juries in this state that they are not to search for doubt but for the truth. In fact,

Wisconsin courts have used that language with approval for almost a century. *Manna*, 179 Wis. at 399–400.

Wisconsin appellate courts have approved the part of the pattern instruction directing the jury to search for truth rather than doubt in three published opinions before Trammell's trial: *Avila*, 192 Wis. 2d at 887–90; *State v. Cooper*, 117 Wis. 2d 30, 36–37, 344 N.W.2d 194 (Ct. App. 1983); and *State v. Bembenek*, 111 Wis. 2d 617, 642, 331 N.W.2d 616 (Ct. App. 1983).

In *Avila*, this Court expressly rejected the contention that the now dubbed "dual directives" in the pattern instruction diluted the State's burden to prove guilt beyond a reasonable doubt. *Avila*, 192 Wis. 2d at 887–90. There, the defendant claimed that the "dual directives" deprived him of due process because "a juror acting reasonably would be reasonably likely to impose a lesser burden than reasonable doubt upon the State," because "finding doubt would mean not finding the truth." *Id.* at 888–89.

This Court explained that when a defendant challenges an instruction on reasonable doubt, it examines the instruction as a whole to determine "whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard." *Avila*, 192 Wis. 2d at 889 (quoting *Victor v. Nebraska*, 511 U.S. 1, 6 (1994)). And after examining the instruction as a whole, this Court concluded that "the instruction underscores that the defendant is presumed innocent and the State bears the burden of proving the defendant's guilt beyond a reasonable doubt." *Id.* at 889. "In the context of the entire instruction . . . Wis. JI—Criminal 140 (1991) . . . did not dilute the State's burden of proving guilt beyond a reasonable doubt." *Id.* at 890.

Trammell argues that this Court applied the wrong standard in *Avila* because it did not consider the instruction as a whole. (Trammell's Br. 24–26.) The State fails to follow Trammell's argument. In *Avila*, this Court repeatedly explained that its conclusion was based on review of the entire burden-of-proof instruction, which Trammell recognizes. (Trammell's Br. 25.) Yet, he asserts that the "correct 'points' are taken *out of the context* of the Dual Directives, so they may support the ruling." (Trammell's Br. 25.)

The State's best guess is that Trammell is arguing that the Court in *Avila* needed to—but did not—conclude or presume that the "dual directives" were an erroneous statement of the law and then weigh the "correct" statements against the "dual directive." But the "dual directives" are not an erroneous statement of the law, and the Court did not have to presume that they were just because Avila challenged them. Rather, the Court properly analyzed the totality of the instruction to ensure that it accurately set forth the State's burden of proof. This Court did not apply the wrong standard in *Avila*.

Trammell also argues that this Court erred in *Avila* because it did not conduct a harmless error analysis. (Trammell's Br. 25.) The State, again, fails to follow Trammell's argument. The Court in *Avila* did not need to conduct a harmless error analysis because it found no error.

Nothing of significance has changed since *Avila*. Wisconsin's burden of proof instruction is as accurate now as it was then. And contrary to Trammell's assertions, addressed below, this Court's holding in *Avila* is neither inconsistent with Supreme Court precedent nor empirically disproven by social science research.

B. This Court's holding in *Avila* is not inconsistent with Supreme Court precedent.

Trammell asserts that this Court's holding that Wis. JI–Criminal 140 accurately sets forth the State's burden of proof is contrary to *Cage v. Louisiana*, 498 U.S. 39 (1990), and *Sullivan v. Louisiana,* 508 U.S. 275 (1993). (Trammell's Br. 19–23.)

In *Cage* and *Sullivan* the Court reviewed an instruction that directed the jury that reasonable doubt "must be such doubt as would give rise to a grave uncertainty" and "is an actual substantial doubt." *Cage*, 498 U.S. at 40; *Sullivan*, 508 U.S. at 277 (alteration in original). The instruction further directed the jury that "[w]hat is required is not an absolute or mathematical certainty, but a *moral certainty*." *Id.*

The Court reasoned that "[i]t is plain to us that the words 'substantial' and 'grave,' as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable-doubt standard." *Cage*, 498 U.S. at 41. And "with the reference to 'moral certainty,' rather than evidentiary certainty . . . a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause." *Id.*

The language at issue in *Cage* and *Sullivan* is not present in Wisconsin's instruction, nor did the Court address "dual directives" in those cases. *Cage* and *Sullivan* concerned an instruction that incorrectly defined reasonable doubt as moral certainty.

Here, the question is whether directing the jury to search for truth rather than doubt unconstitutionally lowers the State's burden of proof. It does not. Truth and doubt are different concepts. Truth is what happened; it means

"conformity to *fact* or actuality." *See Truth*, The American Heritage Dictionary of the English Language (5th ed. 2011) (emphasis added). Doubt is uncertainty about what happened; it is the "state of being uncertain about the truth or reliability of something." *See Doubt*, The American Heritage Dictionary of the English Language (5th ed. 2011). Stated another way, "the purpose of a trial is to ascertain the facts and not the ascertainment of doubt, which is the negation of a fact." *Manna*, 179 Wis. at 400. Wisconsin's instruction properly defines reasonable doubt to mean that the truth cannot be found with sufficient evidentiary certainty to warrant a conviction. It does not portray the reasonable doubt standard as a means of hiding the truth or risk lessening the State's burden like the challenged language in *Cage* and *Sullivan*.

Cage and *Sullivan* are unhelpful to Trammell, and certainly do not call this Court's holding in *Avila* into question.

C. Social science research has not undercut this Court's holding in *Avila*.

1. Social science research, no matter how reliable, can never inform whether a jury instruction accurately sets forth the law.

"There are two types of jury instruction challenges: those challenging the legal accuracy of the instructions, and those alleging that a legally accurate instruction unconstitutionally misled the jury." *Burris*, 333 Wis. 2d 87, ¶ 44. Trammell, and the defense bar generally, have latched onto two studies conducted by Cicchini and White for the proposition that Wis. JI–Criminal 140 misstates the reasonable doubt standard and misleads the jury. As discussed below, those studies are inherently flawed.

Regardless, no opinion of legal scholars or experts based on social science research can inform whether a jury instruction accurately sets forth the law. That determination, a question of law, is left to the judiciary; any opinion, even an expert one, is superfluous. *See State v. Pico*, 2018 WI 66, ¶¶ 42–44, 382 Wis. 2d 273, 914 N.W.2d 95 (the court, alone, interprets the law) (compiling cases). "Interpreting . . . the law . . . is the judiciary's responsibility, a responsibility it shares with no other when acting in its judicial capacity." *Id.* ¶ 43. "The court can, *and must*, reserve to itself the exercise of this responsibility in every case." *Id.* ¶ 44 (emphasis added).

Along the same lines, the Court must determine, based on the facts of the case before it, whether it was reasonably likely that the jury instructions misled the jury such that it applied the instructions in an unconstitutional manner. *State v. Lohmeier*, 205 Wis. 2d 183, 193, 556 N.W.2d 90 (1996). The Court will "*not reverse a conviction simply because the jury possibly could have been misled*; rather, a new trial [is] ordered only if there is a reasonable likelihood that the jury was misled and therefore applied potentially confusing instructions in an unconstitutional manner." *Id.* at 193–94 (emphasis added). The court "view[s] the jury instructions in light of the proceedings as a whole, instead of viewing a single instruction in artificial isolation." *Id.* at 194.

Experts hypothesizing that a jury could possibly be misled by the burden-of-proof instruction, by necessity, view that "single instruction in artificial isolation." *See id.* at 194. They apply their theory to hypothetical cases; they do not review the challenged proceeding as a whole. Hence, their opinions are not helpful or relevant.

The effects of a particular action on a hypothetical trial is nothing more than "informed speculation." *See Pico*, 382 Wis. 2d 273, ¶ 47. If Wis. JI–Criminal 140 accurately sets forth the law, a defendant cannot seek relief based on the use

of that particular instruction absent specific facts that the jury in that defendant's case, was confused and applied the instruction in an unconstitutional manner. Conjecture or speculation based upon any social science study is insufficient to overcome that presumption. "The reasonable likelihood standard *demands* that the defendant articulate something more than an ambiguity or a possibility that the jury was misled." *Burris*, 333 Wis. 2d 87, ¶ 62 n.13 (emphasis added).

Trammell's argument requires this Court to overlook the superfluous nature of the "evidence" he presents. He challenges Wis. JI–Criminal 140 as legally inaccurate, claiming that two social science studies prove that the instruction misstates the law by instructing the jury on "dual directives." (Trammell's Br. 10–19.) This Court should reject Trammell's argument. Not only is his "evidence" superfluous, he also relies on assertions of "facts" and assertions of "reliability" that have not been tested in any court.

Trammell believes that this Court has approved the use of social science research to inform a question of law in *State v. Dubose*, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582. (Trammell's Br. 17–19.) While the Court in *Dubose* did use social science research to inform its decision, it did so in considering a mixed question of law and fact, not a question of law like the one presented here.

In *Dubose*, the State asked the court to reaffirm its adherence to Supreme Court decisions interpreting the Due Process Clause to allow the use of evidence from an impermissibly suggestive out-of-court identification if the identification was reliable. *Dubose*, 285 Wis. 2d 143, ¶ 28. Dubose, in contrast, asked the court to break from its adherence to that case law and announce a per se rule excluding impermissibly suggestive out-of-court identifications. *Id.*

In reaching its holding, the *Dubose* court discussed social science research, explaining that "[o]ver the last decade, there have been extensive studies on the issue of identification evidence, research that is now impossible for us to ignore," and cited to multiple publications by multiple authors. *Dubose*, 285 Wis. 2d 143, ¶ 29. And while the Court did not adopt a per se rule, it did announce a new rule based on state constitutional grounds. *Id.* ¶ 42.

The court's reliance on social science research in *Dubose* was—and is—controversial. The majority noted that the Supreme Court had relied on "modern studies" to support its legal conclusion in *Brown v. Board of Education*, 347 U.S. 483 (1954), and reasoned that it had "no trouble following the lead of *Brown*." *Dubose*, 285 Wis. 2d 143, ¶¶ 43–44. But the dissent criticized that statement, noting that "the *Brown* holding was not made in reliance on a social science theory, nor was *Brown* the earliest or the latest case to refer to a social science report." *Id.* ¶ 93 (Roggensack, J., dissenting). "Rather, *Brown* is preeminent because it *judicially proclaimed* that the enormity of suffering that generation after generation of African-Americans were forced to endure by the doctrine of 'separate but equal' simply because they were a different color, was unconstitutional." *Id.* (emphasis added). Justice Wilcox, in a separate dissent, also criticized the majority for using the studies because "recent social science 'studies' . . . presented by advocacy groups, [do not] justify [a] departure from stare decisis." *Dubose*, 285 Wis. 2d 143, ¶ 65 (Wilcox, J. dissenting).

The State agrees with the dissenting Justices in *Dubose*. While courts may acknowledge social science research, it is the court's duty alone to resolve a question of law, and recent social science studies, without more, should not be used to justify a departure from the principles of stare decisis. To the extent that the *Dubose* court allowed social

science studies to inform a mixed legal question, this Court should hold, consistent with this Court's recent determination in *Pico*, that the opinions of Cicchini and White relied upon by Trammell do not inform a question of law.

2. The studies Trammell relies upon are unreliable.

Even if social science research has some relevance to the legal question whether a jury instruction accurately states the law, Trammell's studies are not on the same level as the research presented in *Dubose*. Far from a decade's worth or "extensive studies" to support his contentions, *see Dubose*, 285 Wis. 2d 143, ¶ 29, Trammell presents two nearly identical articles published in law reviews, not scientific journals. *See* Michael D. Cicchini and Lawrence T. White, *Truth or Doubt? An Empirical Test of Criminal Jury Instructions*, 50 U. of Rich. L. Rev. 1139 (2016); Michael D. Cicchini and Lawrence T. White, *Testing the Impact of Criminal Jury Instructions on Verdicts: A Conceptual Replication*, 117 Colum. L. Rev. Online 22 (2017). The articles are authored by the same two individuals, one of whom is a prominent defense attorney.

Moreover, these articles and their data do nothing to call into doubt this Court's holding in *Avila*.

As a threshold matter, Trammell does not make clear how he wants the Court to use these studies. Possibly, Trammell believes that the studies are akin to an expert opinion because he consistently characterizes them as "scientific evidence" that this Court can take judicial notice of

because those facts are "not subject to reasonable dispute."[5] (Trammell's Br. 13 n.16.)[6]

When used in the traditional sense, expert testimony is admissible if the expert is qualified to give it, and the expert testimony would help the jury to understand the evidence or determine a fact in issue. Wis. Stat. § 907.02(1). Again, this case does not concern an issue of fact, and the State maintains that social science evidence is superfluous to the legal issue presented here. However, if this Court disagrees, there must be some test for screening out unreliable social science research. If not, the courts will be at the whim of any self-proclaimed "scientist" publishing results from an online "experiment."

Thus, it is appropriate for this Court to analyze whether social science "evidence" satisfies *Daubert*. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). "The court's gate-keeper function under the *Daubert* standard is to ensure that the expert's opinion is based on a reliable foundation." *State v. Giese*, 2014 WI App 92, ¶ 18, 356 Wis. 2d 796, 854 N.W.2d 687. The court is to decide "whether the testimony is based upon sufficient facts or data, whether the testimony is the product of reliable principles and methods, and whether the witness has applied the principles and methods reliably to the facts of the case." *In re Commitment of Jones*, 2018 WI 44, ¶ 32, 381 Wis. 2d 284, 911 N.W.2d 97.

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[5] As demonstrated in the following subsections, the conclusion of the studies is subject to reasonable dispute.

[6] Trammell, in a footnote, relies upon a circuit court decision in an unrelated case that is not included in his appendix filed in this Court. This is improper. *See Disciplinary Proceedings Against Nora*, 2018 WI 23, ¶ 25 n.11, 380 Wis. 2d 311, 909 N.W.2d 155. Moreover, a circuit court decision has no precedential effect. *Raasch v. City of Milwaukee*, 2008 WI App 54, ¶ 8, 310 Wis. 2d 230, 750 N.W.2d 492. Thus, the State will not address it.

"The [*Daubert*] standard is flexible but has teeth." *Giese*, 356 Wis. 2d 796, ¶ 19. Its purpose is to prevent the use of "conjecture dressed up in the guise of expert opinion." *Id.* "Relevant factors include whether the scientific approach can be objectively tested, whether it has been subject to peer review and publication, and whether it is generally accepted in the scientific community." *Id.* ¶ 18. The party seeking to introduce an expert opinion bears the burden of demonstrating that the standard is satisfied. *See Daubert*, 509 U.S. at 592 & n.10.

Trammell cannot meet that burden. The "evidence" which he relies upon is not the product of reliable principles and methods. The studies have not been subject to peer review[7] and have only been published in law review articles. And a review of the studies reveals that the conclusions drawn therefrom are not reliable.

a. The University of Richmond Law Review article and study.

The University of Richmond Law Review article, *Truth or Doubt? An Empirical Test of Criminal Jury Instructions*, contends that "tacking on" the direction to search for truth rather than doubt is confusing to jurors. Cicchini & White, 50 U. of Rich. L. Rev. at 1143–45. The Richmond study,

[7] To the extent it has, it has been rejected. In 2016, after the publication of the Richmond Law Review article, the Wisconsin Criminal Jury Instructions Committee, "received several inquiries about the phrase 'you are to search for the truth,' some based on" the article and study. *See* note 5 to Wis. JI–Criminal 140 (2017). The committee noted that it gave those inquires "careful consideration" before deciding not to change the text of the instruction. Thus, the results of the Richmond study have been rejected by the legal community. And the second study, the Columbia study, adds nothing of value.

conducted for the purpose of supporting the premise of the article, is flawed for several reasons.

First, Cicchini is not a neutral "scientist." He is a defense lawyer who is searching for evidence to back his contention that an instruction that urges jurors to search for truth will lead to more convictions than an instruction that urges jurors to search for doubt. Cicchini & White, 50 U. of Rich. L. Rev. at 1150. This initial bias likely affected both the way the study was conducted and the way the results were construed.

Second, the study—an online experiment—lacked sufficient controls. Cicchini & White, 50 U. of Rich. L. Rev. at 1150–51. The participants were recruited from Amazon Mechanical Turk. Cicchini & White, 50 U. of Rich. L. Rev. at 1150. Wikipedia describes Amazon Mechanical Turk as a crowdsourcing Internet marketplace where employers are able to post jobs involving human intelligence tasks. *See Amazon Mechanical Turk,* Wikipedia, https://en.wikipedia.org/wiki/Amazon_Mechanical_Turk#socialscienceexperiment (last visited January 10, 2019). Prospective "Workers" can browse among the jobs posted and take a job they select in return for a monetary payment. *Id*. Amazon Mechanical Turk "offers access to a virtual community of Workers." *See Amazon Mechanical Turk*, https://www.mturk.com/product-details (last visited January 10, 2019).

The online participants were asked to read the materials, which described the evidence in a hypothetical case, and render an individual verdict of guilty or not guilty. Cicchini & White, 50 U. of Rich. L. Rev. at 1151–52. Thus, the researchers necessarily had to assume that the virtual community of participants did—and understood—what they were asked to do. That is not a sufficiently controlled study. There is no way of knowing if the participants read the materials or how seriously they took the task. Thus, contrary

to Trammell's contention, this study does not exhibit the hallmarks of reliability. (*See* Trammell's Br. 14.)

Third, the participants were not randomly drawn from a fair cross-section of the community. Although this Internet marketplace may be capable of recruiting a diverse sample, this limited self-selection is not a random sampling, which is the foundation of valid empirical research, as well as fair and impartial juries. The participants were not screened for bias or otherwise admonished to try their best to provide unbiased answers. Cicchini & White, 50 U. of Rich. L. Rev. at 1164. The only participant requirement was that the participants had to be adult citizens of the United States. Cicchini & White, 50 U. of Rich. L. Rev. at 1151. Thus, unlike real jurors that are subjected to voir dire, it is possible that participants in the Richmond study had preconceived ideas that prevented them from fairly and impartially considering the facts of the scenario that was presented.

Trammell asserts, relying on three other journal articles (one authored by White), that the reliability of the study is ensured because the study used mock jurors. (Trammell's Br. 14–15.) Trammell does not explain why that is so. Even if that were true, which the State doubts, the participants did not act as mock jurors in the traditional sense. The participants were not subject to screening, they did not deliberate, and they were not required to reach a unanimous verdict. The study may label its participants as "mock jurors" but that is a misnomer.

Fourth, the article provides little information about the facts from the hypothetical case that the participants were asked to consider. The article discloses only that the defendant was alleged to have touched a teenage girl's buttocks over her clothing for the purpose of sexual arousal or gratification. Cicchini & White, 50 U. of Rich. L. Rev. at 1151. The "evidence" presented to the participants—a "625-word

synopsis of court testimony" of the child, her mother, and the defendant—is not included in the article. *Id.* (emphasis added).

This scenario readily lends itself to preconceived notions about sexual assault. Undoubtedly, there are some in contemporary American society who view the act of touching a female outside her clothing as falling somewhere on a range between harmless and offensive, but not criminal. The study methodology does not account for participants who may have shared this attitude.

Furthermore, in situations where the word of one person is pitted against the word of another person, the credibility of the witnesses is critical in arriving at a just result. Yet, those who chose to participate in the study had no means of assessing the credibility of either the victim or the defendant from the brief *synopsis* of their testimony on a printed page. "The credibility of a witness is determined by more than a witness's words." *State v. Turner*, 186 Wis. 2d 277, 285, 521 N.W.2d 148 (Ct. App. 1994). "Tonal quality, volume and speech patterns all give clues to whether a witness is telling the truth." *Id.* Thus, it is critical for each juror, whether real or mock, to hear the testimony from each witness and relate that testimony to the witness's demeanor. *See id. See also, State v. Owens*, 148 Wis. 2d 922, 929–30, 436 N.W.2d 869 (1989) (noting that the trier of fact assesses credibility through things such as demeanor and body language of the witness, the words used, nuances in the questions and answers as indicated by the emphasis, volume, and intonations of the speakers).

While the article acknowledges that the results could be different in a case where there is more evidence of guilt and if the evidence was presented in a different manner, Cicchini & White, 50 U. of Rich. L. Rev. at 1160–62, it fails to acknowledge the seriousness of this flaw.

Finally, the authors discuss "conviction rate[s]" based upon the conclusions of *individual* participants. Cicchini & White, 50 U. of Rich. L. Rev. at 1157. The participants were not assigned to juries: there was no group deliberation, there was no unanimous verdict. There is no valid way to extract a "conviction rate" from this study.

The authors recognize these flaws and others, but they do not take them seriously. Cicchini & White, 50 U. of Rich. L. Rev. at 1159–65. The authors suggest that trials are inherently unreliable, so the research need not be held to a higher standard. *Id.* The authors' cavalier dismissal of serious foundational flaws is a large red flag regarding the reliability of the research and conclusions.

And the stakes are high: any flaw in a social science study suggesting that Wis. JI–Criminal 140 is invalid deserves serious attention. If that instruction inaccurately states the law, nearly every criminal trial conviction obtained since 1962 (and some before) will hang in the balance.

Trammell's proffered evidence is unreliable.

b. The Columbia Law Review article and study.

The Columbia Law Review article and study suffer from the same methodological problems. In *Testing the Impact of Criminal Jury Instructions on Verdicts: A Conceptual Replication*, the authors admit that some participants rendered their decisions in less than three minutes. Cicchini & White, 117 Colum. L. Rev. Online at *28. Although the authors discarded those results, the haste of some participants raises questions about the other participants and how much attention they paid to the project. How many simply provided some answer, regardless of what it was, in order to get their money?

The fact scenario of the Columbia study was similar to the Richmond study. It was another hypothetical case that pitted the credibility of the victim against the credibility of the defendant based on a brief, written synopsis of their testimony. Cicchini & White, 117 Colum. L. Rev. Online at *28–29. The claim was that the defendant "sexually touch[ed]" an adult woman with whom he interacted at a party, without her consent. *Id.* at *28.

The exact nature of the touching is not known. The article does not state what part of the woman's body was touched, or for how long, or in what manner, or for what purpose. Nor does the article detail the kind of interaction that the man and the woman were having. However, both persons were drinking, and the defendant also consumed other drugs. Cicchini & White, 117 Colum. L. Rev. Online at *29. One additional fact was that the defendant admitted he had not told the truth on a previous occasion. *Id.* at *29.

Again, participants were given a short *summary* of testimony of the victim and the defendant, but this time the participants were not provided with closing arguments. Cicchini & White, 117 Colum. L. Rev. Online at *28–29. Undoubtedly, some people would never convict a person of a crime for touching someone at a party where both persons were drinking and engaging in some kind of consensual interaction with each other. Without any mock voir dire, it is not known how many of these people participated in the study.

As in the Richmond study, less than one-third of the participants in the Columbia study determined that the defendant was guilty. Cicchini & White, 117 Colum. L. Rev. Online at *30–31. The authors think that it is significant that 28 percent of the participants who were instructed to look for truth instead of doubt agreed with the proposition that "[e]ven if I have a reasonable doubt about the defendant's guilt, I may

still convict the defendant if, in my search for the truth, the evidence shows the defendant is guilty." *Id.* at *30–32.

But agreement with this proposition does not necessarily mean, as the authors suppose, that these participants believed that they could convict the defendant even if they had a reasonable doubt about his guilt. That is so because participants were instructed that the initial presumption of the defendant's innocence "is not overcome unless from all the evidence in the case you are convinced beyond a reasonable doubt that the defendant is guilty." Cicchini & White, 117 Colum. L. Rev. Online at *30. Given this instruction, it is possible that the 28 percent of participants who agreed with the proposition were indicating, in accordance with the instruction, that if they started out with reasonable doubt about the defendant's guilt, they could convict him if the evidence they considered in their search for the truth overcame this doubt.

And it is entirely possible that many of the participants understood the proposition in this way. Indeed, 15 percent of those participants who were not instructed to look for truth, but who were instructed that the presumption of innocence could be overcome by the evidence, still agreed that they could convict the defendant if, in their search for the truth, the evidence showed that the defendant was guilty. Cicchini & White, 117 Colum. L. Rev. Online at *29, *32.

Thus, the new study adds nothing to the first study. And like the first study, the second is admittedly flawed. Cicchini & White, 117 Colum. L. Rev. Online at *34–35. The authors cannot reliably reach a conclusion that an instruction to look for truth instead of doubt misleads jurors about the burden of proof.

In sum, Trammell's "scientific evidence" does not pass *Daubert*'s gate-keeping test. It is unreliable, and this Court should not consider it.

D. Wisconsin's burden of proof instruction is not "constitutionally crippled."

Trammell now asserts that there are multiple flaws that "constitutionally cripple" Wis. JI–Criminal 140. (Trammell's Br. 26–37.) Trammell did not raise this issue in his petition for review and this Court should not address it. To the extent that it is a sub-issue of a raised issue, this Court should reject it.

Trammell picks out specific phrases in Wis. JI–Criminal 140 and argues that those phrases shift the burden to the defendant or impermissibly lower the State's burden. Trammell's piecemeal approach lacks force, given that this Court reviews challenged jury instructions as a whole. *Avila*, 192 Wis. 2d at 889. Nonetheless, the State will briefly address his assertions.

First, contrary to Trammell's assertion, the part of the instruction defining reasonable doubt as something that "would cause a person of ordinary prudence to pause or hesitate when called upon to act in the most important affairs of life" does not have a burden-reducing effect. (Trammell's Br. 26–28.) The Supreme Court agrees. *See Victor*, 511 U.S. at 20–21 (this language has been "repeatedly approved" by the Supreme Court as "giv[ing] a common sense benchmark for just how substantial such a doubt must be"). To that end, the Supreme Court has "never held that the concept of reasonable doubt is undefinable, or that trial courts should not, as a matter of course, provide a definition." *Id.* at 26 (Justice Kennedy, concurring).

Nor do *United States v. Jaramillo-Suarez*, 950 F.2d 1378 (9th Cir. 1991), and *People v. Johnson*, 9 Cal. Rptr. 3d

781 (2004), assist Trammell. In *Jaramillio-Suarez*, the court reviewed a jury instruction directing the jury that a conviction requires "evidence so convincing that an ordinary person would be *willing to make the most important decisions in his or her own life* on the basis of such evidence." *Jaramillo-Suarez*, 950 F.2d at 1386 (emphasis added). The Ninth Circuit deemed the language regarding a willingness to act to be problematic, remarking that it had previously made "clear that [it] preferred *Holland*'s 'hesitate to act' formulation to an instruction" as opposed to an instruction "requiring proof 'such as you would be willing to act upon in the most important and vital matters relating to your own affairs.'" *Id.* (citing *Holland v. United States*, 348 U.S. 121, 140 (1954)).

In contrast, Wisconsin's instruction uses the permissible hesitation language: "would cause a person of ordinary prudence *to pause or hesitate* when called upon to act in the most important affairs of life." Wis. JI–Criminal 140 (emphasis added).

Johnson also involved a challenge to language that does not appear in Wisconsin's jury instruction. In *Johnson*, the appellate court was concerned with the trial court's amplification of the "concept of reasonable doubt" that included: "We take vacations; we get on airplanes. We do all these things because we have a belief beyond a reasonable doubt that we will be here tomorrow or we will be here in June, in my case, to go to Hawaii on a vacation." *Johnson*, 9 Cal. Rptr. 3d at 1170–72. Wisconsin's pattern instruction uses no such language, and the circuit court did not go off-script; it read the pattern instruction verbatim to the jury.[8]

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[8] Trammell also cites to additional "studies" (Trammell's Br. 28), but his argument is undeveloped. The State will not develop it for him, and this Court should decline to address it. *State v. Pettit*,

Next Trammell mentions three "flaws" in the instruction. First Trammell asserts that the directive to find the defendant not guilty if the evidence can be reconciled with a "reasonable hypothesis consistent with the defendant's innocence" reduces the State's burden or shifts the burden of proof to the defendant. (Trammell's Br. 28–29.) Trammell's argument—two bullet points—is undeveloped and this Court should decline to address it. *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). Moreover, this language has long been approved as an appropriate explanation of the reasonable doubt standard. *See, e.g., Hopt v. People*, 120 U.S. 430, 439 (1887).

Second, Trammell asserts that the language explaining that "[a] doubt which arises merely from sympathy or from fear to return a verdict of guilt is not a reasonable doubt," shifts the burden to the defense to refute unreasonable doubts. (Trammell's Br. 30.) It does not; the Supreme Court has approved of similar language. *See Victor*, 511 U.S. at 16.

Finally, Trammell asserts that the search-for-truth language lowers the State's burden. (Trammell's Br. 30–31.) As this Court correctly held in *Avila*, it does not. *Avila*, 192 Wis. 2d at 890.

There is no flaw in Wisconsin's burden-of-proof instruction. It is constitutionally sound.

E. Wisconsin's burden-of-proof instruction soundly instructs the jury.

Again, "when a defendant contends that the interplay of legally correct instructions impermissibly misled the jury," this Court must determine "whether there [was] a reasonable

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171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (courts do not consider undeveloped arguments).

likelihood that the jury applied the challenged instructions in a manner that violate[d] the constitution." *Lohmeier*, 205 Wis. 2d at 193. This Court will "not reverse a conviction simply because the jury possibly could have been misled; rather, a new trial [is] ordered only if there is a reasonable likelihood that the jury was misled and therefore applied potentially confusing instructions in an unconstitutional manner." *Id.* at 193–94. The court "view[s] the jury instructions in light of the proceedings as a whole, instead of viewing a single instruction in artificial isolation." *Id.* at 194.

The burden of proof instruction is not internally inconsistent and, as decided in *Avila*, the instruction does not mislead the jury. "Having defined 'reasonable doubt,' the instruction again reminds the jury that 'it is your duty to give the defendant the benefit of every reasonable doubt.'" *Avila*, 192 Wis. 2d at 890. "The instruction as a whole emphasizes with great clarity that the State bears the burden of proving the defendant's guilt beyond a reasonable doubt, and that a defendant is presumed innocent until that burden is met." *Id.*

Nothing of significance has changed since *Avila*.

Trammell asserts that the instruction is confusing and trials are not about truth. (Trammell's Br. 32–37.) He also argues, for the first time, that the burden-of-proof instruction somehow infected the instructions on the elements of the crime. (Trammell's Br. 33–34, 36.) While he asserts that he presented "plentiful" evidence that he did not intend to permanently deprive the victim of the car he took at gunpoint (Trammell's Br. 33–34), he provides no record citations to support that argument.

Nor does the record support this claim. Indeed, the relevant citations in Trammell's statement of the case are to the testimony of Officer Joseph Pribish, not Silas. (Trammell's Br. 3–4.) Silas, Trammell's confederate, did testify that he

thought Trammell was taking the car as collateral (R. 55:60), but the victim testified to the contrary (R. 55:11–12). The disputed testimony of a known confederate is not "plentiful" evidence. And the jury was not required to accept it.

Trammell has not met his burden of establishing a reasonable likelihood that the jury was misled. "The reasonable likelihood standard *demands* that the defendant articulate something more than an ambiguity or a possibility that the jury was misled." *Burris*, 333 Wis. 2d 87, ¶ 62 n.13 (emphasis added). Trammell's argument fails.

F. Discretionary reversal is not warranted.

This Court has authority to reverse in the interest of justice and may do so when the real controversy has not been fully tried or when it is probable that justice has miscarried. *State v. Maloney*, 2006 WI 15, ¶ 14, 288 Wis. 2d 551, 709 N.W.2d 436.

The first (the "not-fully-tried") theory of the interest-of-justice analysis applies in situations where the jury was erroneously prevented from hearing testimony bearing an important issue of the case or when the jury had before it improperly admitted evidence that "so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried." *State v. Hicks*, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996).

Under the second (the "miscarriage-of-justice") theory of the interest-of-justice analysis, justice has miscarried when there is a substantial probability of a different result on retrial. *Schumacher*, 144 Wis. 2d at 401. Thus, the defendant must meet a higher threshold under a miscarriage-of-justice theory than a not-fully-tried theory to receive a new trial. *Maloney*, 288 Wis. 2d 551, ¶ 14 n.4.

Despite the lack of an evidentiary challenge in this case, Trammell claims he is entitled to a new trial in the interest of justice under the not-fully-tried theory[9]—and relies heavily on *State v. Perkins*, 2001 WI 46, 243 Wis. 2d 141, 626 N.W.2d 762. (Trammell's Br. 47–50.) In that case, Perkins was charged with and convicted of threatening a judge in violation of Wis. Stat. § 940.203(2). Perkins argued on appeal that the evidence was insufficient to show that he had uttered a "true threat[ ]" and that the jury instruction inadequately informed the jury of its obligation to evaluate whether he had uttered a true threat. *Id.* ¶¶ 8, 19.

The pattern jury instruction informed the jury that to render a guilty verdict, it must find that six elements were present, the first being that the defendant threatened to cause bodily harm to a person. *Perkins*, 243 Wis. 2d 141, ¶ 33. The court found that the instruction was deficient with regard to that element because it did not instruct the jury that it had to apply an objective test to determine whether the defendant had threatened to cause bodily harm. *Id.* ¶ 37. Under the pattern instruction, the court held, the jurors "would have concentrated simply on the subjective intent of the defendant

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[9] Instructional error does not involve evidence, so it is difficult to see how Trammell can satisfy either component of the not-fully-tried theory of the interest-of-justice test. As Justice Abrahamson observed in her concurring opinion in *Schumacher*, "only the second ground [of the reversal in the interest of justice] is available because this case [involving only instructional error] does not involve erroneous exclusion or inclusion of evidence." *State v. Schumacher*, 144 Wis. 2d, 418, 424 N.W.2d 672 (1988) (Abrahamson, J., concurring). Justice Abrahamson further observed that as a result of *Schumacher*, it is probably incorrect to reverse a judgment on the "real controversy was not fully and fairly tried" aspect based on error related to the instructions, "not to the inclusion or exclusion of evidence." *Id.* at 418 n.1. To be consistent with *Schumacher*, instructional error must fall under the miscarriage-of-justice theory.

to make the threatening statement and would have failed to consider" whether the statement was a true threat under the objective, reasonable person standard. *Id.* ¶ 44.

Because the pattern jury instruction *was an incomplete statement of the law*, this Court held, there was a danger that the jury may have used the common definition of "threat," thereby violating the defendant's constitutional right to freedom of speech. *Perkins*, 243 Wis. 2d 141, ¶ 43. The court concluded that the deficiency in the jury instructions meant that the controversy had not been fully tried and that Perkins was entitled to a new trial. *Id.* ¶¶ 2, 49.

In contrast, this case does not involve an incomplete statement of the law. And, as addressed above, the instruction in this case was not erroneous. Moreover, the burden-of-proof instruction does not define the elements of the offense, so it is difficult to see how Trammell can satisfy either component of the not-fully-tried prong of interest of justice. The burden-of-proof instruction could not prevent the real controversy from being fully tried because it would not implicate the erroneous prevention of testimony that bore on an important issue of the case or erroneous admission of evidence. *Hicks*, 202 Wis. 2d at 160.

Again, only the miscarriage-of-justice theory applies here. *Schumacher*, 144 Wis. 2d at 418 (Abrahamson, J., concurring). By all appearance, Trammell advances the not-fully-tried theory to evade the burden he would otherwise have of demonstrating a substantial probability of a different result on retrial, a burden he likely cannot satisfy. Here, two eyewitnesses testified that Trammell stole a Buick from the victim at gunpoint. (R. 55:7, 26–28.) Both eyewitnesses identified Trammell as the person who stole the Buick. (R. 55:9–10, 29–30.) One of the eyewitnesses had known Trammell since middle school. (R. 55:25.) Trammell's accomplice, Silas, testified that Trammell stole the Buick.

(R. 55:49–50.) Silas also testified he and Trammell switched cars, (R. 55:50), and Silas was later arrested while driving the Buick (R. 55:42). Police found both Trammell's and Silas's fingerprints on the Buick. (R. 55:89–90.) Lastly, Trammell attempted to convince Nunn to falsely testify for him. (R. 55:75–76, 80–82.)

A reversal in the interest of justice "is not intended to put the reviewing court in the shoes of the trier of fact in a way that is otherwise not permitted." *State v. Kucharski,* 2015 WI 64, ¶ 36, 363 Wis. 2d 658, 866 N.W.2d 697. The State's proof of Trammell's guilt in this case was overwhelming. Discretionary reversal is not warranted.

CONCLUSION

For the reasons given above, this Court should affirm.

Dated this 28th day of January, 2019.

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 10,822 words.

Dated this 28th day of January, 2019.

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TIFFANY M. WINTER
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TIFFANY M. WINTER
Assistant Attorney General

Supplemental Appendix
State of Wisconsin v. Emmanuel Earl Trammell
Case Number 2017AP1206-CR

SUPPLEMENTAL APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix.

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