STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2017AP1723-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KEITH J. BROOKS,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE STEPHANIE ROTHSTEIN, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Were Keith Brooks' defense attorneys ineffective for presenting the theory that Brooks' torment pushed his wife to suicide because they should have comprehended whether the jurors could misconstrue the argument, disregard the jury instructions, and thus convict him of reckless homicide?

The circuit court found that Brooks' assertion that his attorneys should be able to "eliminate the risk of jurors taking something the wrong way" was inappropriate, that neither attorney performed deficiently, and given the overwhelming evidence against Brooks there was no possibility of prejudice.

This Court should affirm the circuit court.

2. Did the standard jury instruction on reasonable doubt, Wis. JI—Criminal 140 (1991), misstate the law, confuse the jurors, lower the State's burden of proof and deprive Brooks of due process because it instructs the jurors to search for truth?[1]

The circuit court rejected this argument and noted that Wis. JI—Criminal 140 is the standard instruction and it was properly given.

This Court should affirm the circuit court.

3. Should this Court order a new trial in the interest of justice because the jury instruction and counsel's performance prevented the real controversy from being fully tried or amounted to a miscarriage of justice?

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[1] Brooks' brief states these as three separate claims. The State combines them here for clarity and simplicity.

This circuit court determined that the real controversy was fully tried.[2]

This Court should affirm the circuit court.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State asserts that neither oral argument nor publication are warranted. This case involves only the application of well-settled law to the facts, which the briefs should adequately address.

INTRODUCTION

Brooks' claim that he received ineffective assistance of counsel amounts to nothing more than an assertion that because he was convicted, his attorneys must have performed deficiently. He says nothing about the overwhelming evidence against him. That is precisely the type of claim that the United States Supreme Court warned against in *Strickland v. Washington*. His ineffective assistance claim is meritless and the circuit court properly denied it.

His jury instruction claims fare no better. He expressly asks this Court to disregard the Wisconsin Supreme Court's holding in *State v. Avila*, and this Court's holdings in two other published cases, that the standard jury instruction on reasonable doubt does not dilute the State's burden of proof. He does so based on two scientifically flawed studies that

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[2] Below, Brooks sought a new trial in the interest of justice from the circuit court pursuant to *State v. Henley*, 2010 WI 97, ¶¶ 73-74, 328 Wis. 2d 544, 787 N.W.2d 350, on the ground that "justice was not fairly administered." (R.103:16.) Brooks does not appear to be asking this Court to review that decision, but rather to exercise its own discretionary reversal power pursuant to Wis. Stat. § 752.35.

prove nothing. Even if this Court could disregard *Avila* and the other cases, which it cannot, the studies he cites would be a poor reason to do so.

Finally, his request that this Court order a new trial in the interest of justice is merely a conglomeration of conclusory statements rehashing his ineffective assistance and jury instruction claims. As those claims fail, so does his interest of justice claim.

This Court should affirm the circuit court.

STATEMENT OF THE CASE

On January 27, 2013, Milwaukee police responded to a report of a shooting at an apartment. (R.1:1.) When they arrived, they found the apartment in disarray and a screaming toddler on the couch. (R.1:1-2.) In the back bedroom, they found Keith Brooks yelling. (R.1:2.) He was kneeling on the floor attempting CPR on the body of his wife, Anita. (R.1:2.) Anita was dead from a gunshot wound to the back of her head behind her right ear. (R.1:3.)

The State charged Brooks with one count of first-degree intentional homicide and one count of misdemeanor battery. (R.1:1.) Two public defenders, Attorney Deborah Vishny and Attorney J.C. Moore, were appointed to represent Brooks. (*See* R.146:11, 46.) Brooks waived a preliminary hearing and the court bound him over for trial. (R.132:4.)

The trial and sentence

At trial,[3] Brooks' theory of defense was that Anita committed suicide. In support, he argued that Anita had a

[3] Brooks' record citations are incorrect. The information he cites to cannot be found at the locations he indicates (*See* Brooks' Br.3 (indicating closing argument at R.141:30-48)) and some of his

history of clinical depression, that there were serious marital problems, and that Brooks engaged in a course of mentally abusive conduct toward Anita in the days leading up to her death. (R.146:13-14.) In its opening argument the defense told the jury that "[i]t's an unfortunate tragedy, but she shot herself; and you will find him not guilty." (R.138:85.)

The State first called two of the police officers who responded to the 911 call to testify about what they found at the scene. (R.138:88-136.) Sergeant David Ligas testified he found Brooks in the back bedroom straddling Anita "and appeared to be doing chest compressions." (R.138:90.) He said Brooks told him that "she had a gun, I couldn't get to her fast enough; and she shot herself." (R.138:91.) Ligas said he asked Brooks where the gun was and Brooks motioned to a plastic storage bin. (R.138:91.) On cross-examination Ligas reiterated that when he first arrived, he found Brooks trying to take care of Anita. (R.138:104-05.)

Officer Miles Kowalik testified that when he arrived, Brooks was in the living room holding his toddler. (R.138:107.) Kowalik attempted to get some basic information from Brooks and a statement. (R.138:108-09.) He testified that Brooks kept staring at the back wall. (R.138:109-10.) Kowalik testified that eventually Brooks gave him a short statement, claiming that he and Anita had been arguing for a while about her cheating on him, that she went into the bedroom, and a while later Brooks heard a gunshot. (R.138:111-12.) Kowalik said that Brooks never told him that he heard a click, witnessed Anita's death, or that he tried to prevent it. (R.138:112-13.)

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citations point to portions of the transcript that do not exist (*See* Brook's Br. 3 (citing to "139:238-290"; document 139 is only 179 pages long)).

The State then called Lawrence Lewis, Brooks' neighbor. (R.138:137.) Lewis said that on the night of the shooting he was awakened by a loud bang. (R.138:144-45.) Lewis said the noise alarmed him and he got up and looked out the window to see if it was a car door, but did not see anything. (R.138:146.) He sat and listened for a moment, but did not hear anything else. (R.138:147.) After about 20 minutes, he went back to bed. (R.138:147.)

Officer Robert Smith testified that he responded to the scene after the 911 call and checked the apartment for other potential suspects or witnesses. (R.138:175.) He testified that he found a small marijuana-growing operation hidden in the basement. (R.138:178-80.) Officer Thomas Ackley testified that he found clothing in the sink with what looked like blood and bleach all over it. (R.138:190-94.) Detective David Chavez testified about the scene and the defense elicited that there was a bag of Brooks' prescriptions and a pile of men's clothes, some still on hangers, on the bed. (R.139:37.) The State moved photos of all of these things into evidence. (*See* R.23.)

Officer Matthew Mengel testified that shortly after securing the scene, Officer Ackley moved Brooks into the back seat of Mengel's squad car. (R.138:199-200.) Mengel said that while Brooks was in the back of the car, he volunteered that he and Anita had been fighting for days and that he had hit her. (R.138:200.) He also told Mengel that there was marijuana in the house that he had tried to hide before the police arrived. (R.138:201.) Brooks also said that he told Anita to kill herself, and asked Mengel if that was a crime. (R.138:201.) Mengel testified that Brooks was in the car for a little over an hour, and that during that time sometimes he was crying uncontrollably, sometimes he was yelling profanities, "and you could see that he was visibly angry." (R.138:204.) Detective David Chavez testified that he

recovered the gun from the room with a full magazine but no bullet in the chamber. (R.138:240-41.)

The State introduced pictures showing the location of the gunshot wound on the back of Anita's head and bruises on her body. (R.138:231-33.) Detective Robert Rehbein, who had interviewed Brooks at the police station, testified about the interview. (R.139:118.) Audio of the interview was played for the jury, as well. (R.139:134.) In the interview, Brooks admitted to telling Anita to kill herself and to making interrogation videos of Anita the day before. (R.37:9-10.) He also claimed that he ran out of the apartment screaming for help and called the police after about five seconds. (R.37:12.) Brooks admitted to bleaching and urinating on Anita's sorority clothes, taunting her about him having sex with other people, and having destroyed a gift from her grandfather. (R.139:144-47.) The defense brought forth that Brooks was discharged from the military due to his reaction to Anita's infidelity and that he told detectives that she had some mental health issues. (R.139:156-59.) Brooks also told detectives that Anita had attempted suicide before and that they had an appointment at the Veteran's Hospital to get her some help. (R.139:159-60.) The defense also elicited that Brooks said he had been packing his things to leave and had volunteered a lot of disparaging information but consistently denied shooting Anita. (R.139:168-76; 140:6-16.)

The State called the three medical examiners who had performed Anita's autopsy. (R.140:77-143; 141:6-118; 142:70-128.) All three testified that due to the lack of muzzle imprint or soot in and around the wound, they were convinced to a reasonable degree of medical certainty that the gun was not near Anita's head when it was fired. (*See, e.g.*, R.140:105-07; 141:13-17; 142:127-28.) A forensic firearm and tool mark examiner from the State Crime Lab, Mark Simonson, testified that he test-fired the gun found at Brooks' home. (R.141:119-30.) He testified that a bullet

would automatically recycle from the magazine into the chamber after the gun was fired. (R.141:139.) The only way a bullet would not be in the chamber after the gun was fired was if the gun was fired with the magazine out or the bullet was removed from the chamber. (R.141:140.) He said he fired the gun at a white cloth from different distances to determine the gunpowder patterns this particular gun would leave. (R.141:141-64.) His testimony and the pictures showed that the gun left a significant amount of powder marks until it was fired over 18 inches away from the cloth. (R.141:144; Ex. 123-29.) All four of these experts were intensely cross-examined about their methods and findings.

The State called multiple family members and friends of Anita who testified that she was making plans for the future, that she loved her daughter, and that her demeanor and outlook were inconsistent with suicide. (R.140:45-65; 141:239-56, 257-91.) The State's final witness was a digital electronic device examiner to testify about the contents of Brooks' and Anita's phones. (R.142:11-13.) The State played the "interrogation" videos for the jury. (R.142:15-21; 49:Ex. 146-47; 50:Ex.148.) The jury heard Brooks berating and abusing Anita, calling her names, and "disciplining" her by making her kneel on the floor. (R.50:1-4.)

The defense began by having the jurors read poems Anita had penned discussing suicide and depression. (R.142:31; 49:1-5.) The defense called two medical examiners. (R.140:144; 141:173.) Both testified that they believed Anita died from a near-contact gunshot wound. (R.140:150-51; 141:180.) The defense brought forth testimony from various witnesses that Anita had recently broken up with another woman with whom she was alleged to have had a romantic relationship. (R.142:54.)

At the jury instruction conference they came to an agreement about instructions requested by both parties. (R.142:3-10; *see also* 22:1-8.) The court rejected the defense's

request for an assisted suicide instruction because that instruction related to the crime of helping someone commit suicide pursuant to Wis. Stat. § 940.12, which was not at issue. (R.142:7; 143:86-91.) The parties jointly recommended lesser-included offense instructions on first- and second-degree reckless homicide, which the court gave. (R.142:8-9; 22:3-6; 143:15-23.) It also informed the jury that "evidence has been presented that Anita Brooks died by suicide. You may consider this when determining whether Keith Brooks is guilty or not guilty." (R.143:16.) The court gave the jury the standard instruction on reasonable doubt. (R.143:27-28.)

In closing, the State noted that the evidence showed Anita was making plans for her future, had been fine on her own without Brooks while he was deployed, had a zest for life, and would not have committed suicide. (R.143:32-45.) It also pointed out that the medical and forensic testimony showed that Anita did not shoot herself. (R.143:46-48.)

The defense read a poem Anita wrote about having thoughts "that not ought cross my mind in this lifetime or next." (R.143:49.) The defense admitted "right out" that Brook treated Anita horribly in the days leading up to her death, but argued that even though the jury,

> may hate Keith Brooks and you may find him despicable and there are no questions that his actions were despicable and no decent person could condone the things he did. But what you have to decide is did those despicable actions cause a woman who had a history of depression from her youth on forward to take her own life? And what you really have to decide is has it been proven to you beyond a reasonable doubt that Keith Brooks is the one that pulled this trigger because if there's a doubt, the law requires you to find him not guilty.
>
> Now, he drove her over the edge. I don't have any doubt that Keith and Anita Brooks had been living the life that she had been living. The other

> times before that last week she would not have killed herself, he drove her over the edge to a suicide . . . .

(R.143:50-51.) The defense reiterated that Anita took an overdose of pills in 2004, read from her medical record about it, and said she was a person who hid her feelings. (R.143:52, 63-64.) It discussed the defense's forensic experts who believed Anita died of a contact wound. It reread Anita's poem, argued that this time "[s]he did more than entertain thoughts and it's not a pill. There was no coming back. That 911 call is not fake. It's horrible. . . . I'm sorry you had to listen to it but this case was not proven beyond a reasonable doubt." (R.143:79.)

On rebuttal, the State argued that all of the evidence indicated that Brooks was the unstable one, not Anita. (R.142:98-102.) It emphasized that the gun showed that the magazine was fully loaded but there was no bullet in the chamber, which the forensic experts testified meant the gun had been manipulated after being fired. (R.143:103.) It argued that possibly Brooks had tried to clear the gun by taking the magazine out but forgot about the bullet in the chamber and shot her. (R.143:104.) But, it emphasized, all of the evidence was consistent with Brooks being the shooter. (R.143:104-05.)

The jury found Brooks guilty of the lesser-included offense of first-degree reckless homicide and battery. (R.144:12.) The court sentenced him to the maximum sentence of 60 years on the first-degree reckless homicide charge, consisting of 40 years of initial confinement and 20 years of extended supervision. (R.145:74.)

Postconviction proceedings

Brooks filed a postconviction motion seeking a new trial.[4] (R.103:1.) As relevant here, he asserted that his trial attorneys "caused Brooks' conviction of reckless homicide" because they admitted that he "relentlessly abused Anita before her death" and presented evidence showing that she was a fragile person and Brooks taunted her into suicide. (R.103:7-8.) He claimed that this "effectively required the jury to convict of reckless homicide based on the defense's own arguments and evidence" and therefore the theory of defense, coupled with the lesser-included offense instruction,[5] amounted to ineffective assistance of counsel. (R.103:8-9.) He also claimed that the standard jury instruction on reasonable doubt confused the jury and impermissibly lowered the State's burden of proof. (R.103:12-16.) Finally, he asked the court to order a new trial in the interest of justice, claiming that justice was not "fairly administered" because of his other claims. (R.103:17.)

The circuit court reviewed all of the transcripts and denied all of Brooks' claims without a hearing except his claim that his trial attorneys were ineffective for asking for or failing to object to the lesser-included homicide instructions. (R.112:22.) The court ordered a *Machner*

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[4] Brooks' motion included multiple claims that he has not pursued on appeal, therefore the State does not discuss them.

[5] It is not clear from the record which party requested the instruction. At one point the court said the State requested it, but reckless homicide appears in the instructions the defense prepared, and the court then states it was a joint recommendation. (R.22:3-6; 142:8.) At the Machner hearing, the State and court determined that the State requested the instruction, and Brooks conceded that it would have been given regardless of who requested it. (R.146:72-73, 106, 111.)

hearing to hear testimony about counsels' strategy in requesting the instruction. (R.112:22.)

The *Machner* hearing testimony and decision.

Both of Brooks' trial attorneys testified at the *Machner* hearing. (*See* R.146:11-80.) Vishny testified that she had been a public defender for over 30 years, that she is the head of the homicide practice group, and she has conducted over 100 homicide trials. (R.146:32-33.) She said that Brooks always stated that Anita committed suicide. (R.146:12.) She said they discussed a plea early on, but Brooks was not interested. (R.146:13.) They therefore prepared to proceed to trial with the theory of defense that Anita had a history of depression and Brooks' mentally abusive conduct pushed her to suicide, but he did not kill her. (R.146:13-14.)

When asked how they decided on that defense, Vishny explained that Brooks' conduct leading up to the shooting presented a series of very detrimental, emotional "facts beyond change" that "weren't going away" and weighed heavily in favor of the prosecution. (R.146:15.) She said the theory of defense had to explain those bad facts in a way that was still consistent with Brooks' claim that he did not kill Anita. (R.146:16.) She testified that she explained this to Brooks, who agreed. (R.146:20.) Vishny said that in her opinion "[i]t was the only viable theory of the case" and "the only possible way to defend this case and have any possibility of an acquittal." (R.146:18.) Postconviction counsel asked if she ever considered that it might "come across to some jurors, not a lawyer but a juror maybe, as an admission that that conduct was a substantial factor in Anita's death by suicide?" (R.146:22.) Vishny answered "[n]o. I do not believe that to be true and I do not believe that to be the state of the law." (R.146:22.)

Vishny also said they discussed requesting the lesser-included offense instruction with Brooks before trial and

explained the benefit of avoiding a life sentence if the jury believed he shot her but that it was not intentional. (R.146:25-27.) She said Brooks consented to requesting the instruction. (R.146:27-28.) She further testified that she researched cases where a defendant was charged with causing a death and the theory of defense was suicide. (R.146:30-31.) She testified that "based on the jury instructions and the law" telling the jury that Brooks pushed Anita over the edge was arguing that he "didn't cause her to kill herself. She made a choice to pick up a firearm and pull the trigger." (R.146:37.)

Moore testified consistently with Vishny. (R.146:45-79.) Moore said they had to come up with a theory of defense that would "own" Brooks' bad behavior. (R.146:50.) He said that "was the best way to be able to acknowledge those things and still make a credible argument that [Brooks] should not be held responsible for [Anita's] death." (R.146:50.) He also recounted explaining this strategy to Brooks and discussing it with him "constantly." (R.146:51.) When asked if Brooks ever opposed, Moore said "no." (R.146:51-52.)

When asked if he worried that admitting that Brooks abused Anita for days "might precipitate . . . a conviction of reckless homicide," Moore said he did not recall specifics but noted that on the defense's proposed instructions they had asked for an instruction that encouragement of suicide is not a crime. (R.146:52-55.) He said he did not remember why they proposed that, but he assumed "it had something to do with the possibility that a jury might take it the wrong way." (R.146:55-56.) On cross-examination, the State asked him to explain. (R.146:72.) Moore said that they were concerned "that the jury would want to hold [Brooks] responsible for what he did based on the conduct that was placed on the record through the evidence." (R.146:72.) However, "[m]y understanding was that . . . his conduct could not be

considered a substantial factor for the reckless homicide." (R.146:72.)

When asked about requesting the reckless homicide instruction, Moore noted that the prosecution suggested that Brooks may have been hitting Anita with the gun and it went off. (R.146:61.) He said that they were concerned that the jury may agree with the State that this was steadily escalating conduct and that Brooks shot Anita. Moore said that if this happened, they wanted to give the jury an option to find Brooks not guilty of first-degree intentional homicide. (R.146:62.)

Brooks testified that his communication with his attorneys was good and that he told them he did not kill Anita. (R.146:84.) He said his "most important goal" at trial was to be found not guilty of any homicide but that reducing his prison exposure was also an important goal. (R.146:84-85, 91.) He said he remembered discussing the theory of defense with his attorneys and discussing the lesser-included offense instruction. (R.146:86.) He said he consented to the lesser-included offense instruction on the direction of Vishny. (R.146:92.)

After the testimony, postconviction counsel argued that while it was a reasonable strategy to build credibility with the jury by embracing the facts, "its execution was unreasonable because it took the form of an extreme embracement . . . of those facts" that facilitated a reckless homicide conviction. (R.146:98.) Postconviction counsel claimed that trial counsels should not have used the terminology "pushed the victim over the edge" and therefore performed deficiently. (R.146:99-100.)

The State pointed out that first, there could not be any prejudice here because the State also requested the instruction. (R.146:106.) Because there was evidence to support the instruction, the court would have given the

instruction even if the defense objected. (R.146:106.) At any rate, the State argued, there was "ample evidence that there was no ineffective objectively unreasonable strategy or tactics employed by the attorneys on this case." (R.146:106.) They made "the best argument they could make when they have those bad facts to deal with," and made clear in closing argument that encouraging someone to suicide is not equal to guilt. (R.146:107.) The State pointed out that there is always going to be a chance that some juror will disregard the instructions, but the law presumes that they do not. It argued that Brooks' goal to be acquitted of everything "puts him pretty much in the category of every other defendant who goes to trial. They all want to be found not guilty and the lesser included isn't the top of their wish list." (R.146:110.)

The circuit court denied Brooks' motion. The court explained that it had also presided over the trial and at all times the attorneys exhibited "an appropriate level of familiarity with facts and the applicable law." (R.146:116.) The court deemed it "inappropriate . . . to engage in the kind of speculation that is being advocated here by the defense . . . there is no way anyone on God's green earth can eliminate the risk of jurors taking something the wrong way . . . with regard to the strategies employed by the defense attorneys in this matter is they did the best with what they had." (R.146:116-18.) The court then said that even if it were incorrect and Brooks' trial attorneys were deficient, postconviction counsel had "completely ignored" the vast array of physical evidence and testimony in the case and there was no possibility of prejudice to Brooks. (R.146:119.) Brooks appeals.

ARGUMENT

I. Brooks' trial attorneys made a reasonable strategic decision to pursue Brooks' only viable theory of defense and Brooks has failed to show deficient performance or prejudice.

A. Standard of review.

Whether a defendant was denied the constitutional right to effective assistance of counsel presents a mixed question of law and fact. *State v. Mayo*, 2007 WI 78, ¶ 32, 301 Wis. 2d 642, 734 N.W.2d 115 (citation omitted). A reviewing court upholds a circuit court's findings of fact "unless they are clearly erroneous." *Id.* (citation omitted). "Whether counsel's performance was deficient and prejudicial to his or her client's defense is a question of law" reviewed de novo. *Id.* (citation omitted).

B. Relevant law.

It is well-settled that the right to counsel contained in the United States Constitution[6] and the Wisconsin Constitution[7] includes the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). A defendant who asserts ineffective assistance must demonstrate: (1) counsel performed deficiently, and (2) the deficient performance prejudiced the defendant. *Id.* at 687. "The defendant has the burden of proof on both components" of the *Strickland* test. *State v. Smith*, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997) (citing *Strickland*, 466 U.S. at 688).

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[6] U.S. Const. amends. VI, XIV.

[7] Wis. Const. art. I, § 7.

To prove deficient performance, a defendant "must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. "Counsel need not be perfect, indeed not even very good, to be constitutionally adequate." *State v. Thiel*, 2003 WI 111, ¶ 19, 264 Wis. 2d 571, 665 N.W.2d 305 (citation omitted). "Judicial scrutiny of counsel's performance must be highly deferential, and a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 669. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Id*. at 690.

"The defendant may not presume the second element, prejudice to the defense, simply because certain decisions or actions of counsel were made in error." *State v. Balliette*, 2011 WI 79, ¶ 24, 336 Wis. 2d 358, 805 N.W.2d 334. To prove prejudice, the defendant "must show that [counsel's deficient performance] actually had an adverse effect on the defense." *Strickland*, 466 U.S. at 693 (emphasis added). "It is not sufficient for the defendant to show that his counsel's errors 'had some conceivable effect on the outcome of the proceeding.'" *State v. Domke*, 2011 WI 95, ¶ 54, 337 Wis. 2d 268, 805 N.W.2d 364 (citation omitted). Brooks "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *State v. Love*, 2005 WI 116, ¶ 30, 284 Wis. 2d 111, 700 N.W.2d 62.

C. Counsels' choice of trial strategy was the reasonable product of a thorough investigation of the law and the facts, and is therefore "virtually unchallengeable."

Brooks' attorneys did not perform deficiently in crafting and arguing the theory of defense that Brooks' conduct pushed Anita to suicide, nor in requesting or failing to object to the lesser-included reckless homicide instruction. Their testimony at the *Machner* hearing shows that they made a thorough investigation of the law and the facts before deciding on a trial strategy. They explained to Brooks why arguing that Brooks drove his mentally unstable wife to suicide was the "only viable theory of the case." (R.146:18.) Brooks claims that his attorneys performed deficiently because they did not recognize that the jurors could misinterpret the reckless homicide statute and presented a defense that "encouraged" a verdict that Brooks committed reckless homicide by urging Anita to suicide. He is wrong.

The plain meaning of "homicide" and "suicide" defeat Brooks' argument. The common-usage, dictionary definition of homicide is "a person who kills another," or "a killing of one human being by another." *Homicide*, merriam-webster.com, https://www.merriam-webster.com/dictionary/homicide (last visited January 18, 2017). The definition of suicide is "the act or an instance of taking one's own life voluntarily and intentionally." *Suicide*, merriam-webster.com, https://www.merriam-webster.com/dictionary/suicide. A person cannot kill a person who voluntarily kills herself. Ergo, a person cannot commit homicide against a person who commits suicide. Brooks' attorneys did not need to "cite[ ] legal authorities supporting their legal conclusion" that Brooks could not be convicted of homicide if Anita committed suicide. (Brooks' Br. 15.) By definition, the two

are mutually exclusive.[8] Simply charging Brooks with a homicide informed the jurors that they could not find Brooks guilty if Anita committed suicide. Brooks' attorneys did not misstate the law and repeatedly emphasized to the jury in closing argument that Brooks could not be found guilty of homicide if Anita committed suicide.

Brooks' entire argument on this point rests on his misunderstanding of "causes the death" in the definition of reckless homicide.[9] (*See* Brooks' Br. 15-22.) "Cause of death" is a term that is both medically and legally understood as "[t]he happening, occurrence, or condition that makes a person die; the injury, disease, or medical complication that results directly in someone's demise." *Cause of Death*, Black's Law Dictionary (10th ed. 2014). A person "causes the death" of the victim pursuant to the reckless homicide statute if his conduct "was a substantial factor in producing the death" even if it was not the final action producing death.[10] *Cranmore v. State*, 85 Wis. 2d 722, 775, 271 N.W.2d 402 (Ct. App. 1978). However, to be a "substantial factor in

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[8] This Court has stated that *a defendant's* suicide attempts "are not mutually exclusive" with the defendant committing homicide. *See State v. Vollbrecht*, No. 2012AP49-CR, 2012 WL 5392831, ¶ 13 (Wis. Ct. App. Nov. 6, 2012). (R-App. 103.) However, a defendant killing the victim is indeed mutually exclusive with the victim killing herself.

[9] The first-degree reckless homicide statute states that a person commits first-degree reckless homicide if he or she "recklessly causes the death of another human being under circumstances which show utter disregard for human life." Wis. Stat. § 940.02(1).

[10] For example, this Court has rejected the notion that doctors, rather than those who inflicted a victim's injuries, "cause the death" of victims when life support is withdrawn at the hospital. *See Cranmore v. State*, 85 Wis. 2d 722, 774-75, 271 N.W.2d 402 (Ct. App. 1978).

producing death," death must be the "natural result" of the defendant's conduct. *State v. Serebin*, 119 Wis. 2d 837, 848-49, 350 N.W.2d 65 (1984). The Wisconsin Supreme Court has further recognized that in order to be a "substantial factor" in causing death, "an accused's conduct must at least be a *physical cause of the harmful result*." *Id.* at 849 (emphasis added).

Here, the "cause of death" was the gunshot wound to Anita's head. (*See* R.140:100, 150; 141:180.) Accordingly, for Brooks' conduct to be a substantial factor in her death, he had to have *physically caused the gunshot* in some way. Verbally and emotionally abusing Anita until she committed suicide is not reckless homicide under Wisconsin law because death is not the natural result of such abuse, and it would not show that Brooks physically caused Anita's death. *Cf. Serebin*, 119 Wis. 2d at 849-50. Indeed, the State was unable to locate even one Wisconsin case where a defendant has been convicted of reckless homicide under Wis. Stat. § 940.02(1) without physically causing harm to the victim.

Brooks claims that a juror could conclude or a prosecutor could argue that Brooks' conduct in this case "caused the death" of Anita. (Brooks' Br. 18.) He seems to argue that this is so because under a broad definition of the word "cause," pushing someone to suicide "causes" his or her death. (*See* Brooks Br. 16-17.) But he does not cite to a single case or other authority supporting his position that in Wisconsin, a person can commit homicide by mentally pushing someone to suicide. (*See* Brooks' Br. 8-24.) Brooks instead simply italicizes the language about causation from the jury instructions. (Brooks' Br. 16 n.9.) He otherwise relies entirely on a cursory recital of an internet news report about a case from Massachusetts, where a jury found Michelle Carter guilty of involuntary manslaughter for

urging her boyfriend to suicide.[11] (*See* Brooks' Br. 18-21.) He then claims that because Carter was convicted of involuntary manslaughter in Massachusetts, Brooks' attorneys' interpretation of Wisconsin law "was incorrect, unreasonable, and thus deficient." (Brooks' Br. 20.) A Massachusetts jury convicting a defendant under Massachusetts' interpretation of its involuntary manslaughter law has absolutely no relation to Wisconsin's interpretation of its reckless homicide statute and how a Wisconsin attorney should reasonably have interpreted it. And even if Carter's case were relevant, it did not exist until 2017. Brooks' trial was in 2014. Brooks fails to explain how his attorneys could be deficient for failing to recognize a theory of prosecution that was unheard of in any state until three years after Brooks' trial. *Cf. State v. Breitzman*, 2017 WI 100, ¶ 84 (attorneys are not deficient for failing to argue unsettled points of law). His suggestion that his attorneys performed deficiently by failing to alter their trial strategy based on news reports about a case from another state that did not exist at the time of Brooks' trial is farcical.

Brooks' attorneys' strategy was sound, based on the correct reading of the law, and was carefully executed. As his attorneys explained, Brooks adamantly maintained that he

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[11] He claims that another internet news article about a case in Minnesota supports his claim that Wisconsin law permits a conviction for homicide if someone commits suicide. (*See* Brooks' Br. 20 n.13.) This news article no longer exists. But his own description of the case does not support Brooks' claim. Brooks states that though the prosecutor attempted to charge the defendant with murder charges on the theory that his abuse directly contributed to his girlfriend's death by suicide, the district court dismissed the charges because that was not sufficient to charge someone with homicide. Even if it were relevant, it would support trial counsels', not Brooks', interpretation of this case.

did not shoot Anita. But they knew that the jury was going to hear and see evidence showing terrible behavior by Brooks. Before trial, the parties litigated the admission of Brooks' statements to police where he admitted to abusing and berating Anita, destroying her things, interrogating her, and calling her names. (*See* R.134.) They litigated admission of the "interrogation videos" found on Brooks' and Anita's phones. (*See* R.135.) They litigated whether state of mind witnesses and evidence of Anita's former suicide attempt would be admissible. (R.135.) Brooks' attorneys therefore determined "this was the best way to be able to acknowledge those things and still make a credible argument that he would not be held responsible for her death." (R.146:50.)

At trial, Brooks' attorneys introduced or elicited on cross-examination plentiful evidence to support the claim that Anita committed suicide. They then argued vociferously at closing argument that "what you really have to decide is has it been proven to you beyond a reasonable doubt that Keith Brooks is the one that pulled this trigger because if there's a doubt, the law requires you to find him not guilty." (R.143:50-51.) They said his behavior in calling 911, performing CPR, asking if it's a crime to tell someone to kill themselves, and volunteering to the police that he'd abused Anita was the behavior of an innocent person, a person who did not pull the trigger. (R.143:54-60.) They recounted the medical records from Anita's previous suicide attempt and read some of the darker lines of her poetry. (*See, e.g.*, R.143:64-70.) They discussed the contradictory medical examiner testimony. They emphasized over and over that the evidence showed that Anita was depressed and suicidal, and no matter how terrible the jury found Brooks, Anita committed suicide and "suicide is not homicide." (R.143:50; *see also* R.143:75, 77-80.)

His attorneys also testified that they discussed the ramifications of the lesser-included offense instruction with

Brooks. Moore testified that the issue of whether to seek a lesser-included offense instruction is "pretty routine." (R.146:68.) And because Brooks could not be convicted of reckless homicide without having pulled the trigger, it was still consistent with the theory of defense. Brooks admitted at the *Machner* hearing that reducing his prison exposure was important to him. (*See* R.146:84-85, 91.) That being convicted of a lesser-included offense was not Brooks' "primary goal" merely puts him, as the State noted, "in the category of every other defendant who goes to trial." (R.146:110.) Brooks' attorneys' rationale for pursuing the theory of defense and for acquiescing to the lesser-included offense instruction show reasoned decision-making based on an evaluation of the law and the facts. There was nothing deficient about the theory of defense they presented or failing to object to the instruction on reckless homicide.

Brooks' argument that his counsels were deficient because they or the jury could have misunderstood the law and convicted him of reckless homicide even if they believed Anita committed suicide is a complete deviation from the standards articulated in *Strickland*. As the circuit court concluded, Brooks "seeks to impose a most unrealistic burden on trial counsel that they should . . . be able to guard against all misperceptions by any particular juror." (R.146:120.) Wisconsin law is clear that pushing someone to suicide is not a commission of homicide. But just because Brooks has misunderstood the law does not mean his trial attorneys or the jury did. Pursuing this theory of defense was a reasonable strategic decision made by two very experienced defense attorneys with an extremely unsympathetic client, and the defense was executed with care and precision. The "defense attorneys in this case did the best with what they had." (R.146:118.) His attorneys' conduct is the definition of objectively reasonable

professional assistance and is therefore "virtually unchallengeable." *Strickland*, 466 U.S. at 690.

D. Brooks has not alleged anything showing that but for counsels' defense strategy there is a reasonable probability of a different result at trial.

Brooks has failed to allege any facts showing prejudice to the defense. He has not even mentioned any of the evidence introduced at trial. (*See* Brooks Br. 8-24.) Instead, he simply makes a series of general, conclusory statements reiterating that he believes his defense was unviable under his erroneous view of the law. (*See* Brooks' Br. 23-24 ("counsels in effect admitted . . . responsibility for A.B.'s death, conceding that he caused A.B.'s death recklessly"; "[c]ounsels . . . met the State's burden of proving that charge, by proving facts meeting its elements"; "[s]elf-defeat -- thus prejudice -- ensued when the *defense's* Strategy, evidence, arguments, and jury instruction -- in concert -- opened a broad, straight path to a reckless homicide conviction").) He then claims that he has shown that his attorneys "failed to subject the prosecution's case to meaningful adversarial testing," amounting to per se prejudice pursuant to *United States v. Cronic*, 466 U.S. 648, 659 (1984). (*See* Brooks' Br. 23-24.)

Even a cursory review of the record disproves this claim. This was a seven-day jury trial. (*See* R.137-144.) The State produced 22 witnesses including police officers, medical examiners, forensic experts, and character witnesses. The defense vigorously cross-examined every witness. The defense also put forth its own experts and character witnesses that directly refuted the State's theory of the case. (*See* R.140:144-203; 141:173-234; 142:32-68.) And the defense gave a lengthy and comprehensive closing argument emphasizing the evidence that they believed proved Anita committed suicide. (R.143:49-80.) Under no

reasonable view of the record can it be said that Brooks' attorneys "fail[ed] to subject the prosecution's case to meaningful adversarial testing." *Cronic*, 466 U.S. at 659.

Nor can Brooks show prejudice under *Strickland*. As explained, this was a multi-day jury trial with an enormous amount of witnesses. There were over 150 exhibits introduced at trial. The State put forth particularly damning testimony from three expert medical examiners who had been involved in Anita's autopsy, all of whom said that she could not have committed suicide. There was overwhelming evidence against Brooks. Even if his attorneys had somehow "otherwise ensure[d]" that the jury was specifically instructed that suicide resulting from mental and verbal abuse could not constitute reckless homicide, Brooks has fallen fall short of showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

II. The Wisconsin Supreme Court has already rejected Brooks' argument that the standard jury instruction on reasonable doubt impermissibly lowers the State's burden of proof, and therefore all Brooks' claims about the instruction fail.

The standard Wisconsin jury instruction on reasonable doubt, Wis. JI—Criminal 140, states,

> 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.

Brooks claims that telling the jurors that they are "not to search for doubt" but "to search for the truth" impermissibly "allowed the jurors erroneously to conclude that the State's burden of proof is lower than 'beyond a reasonable doubt' and allows conviction even when reasonable doubt exists." (Brooks' Br. 25 (emphasis omitted).) He claims that he was therefore deprived of due process of law under *In re Winship*, 397 U.S. 358 (1970).

Ordinarily, the question of whether a jury instruction properly states the law is one this Court would review de novo. *State v. Neumann*, 179 Wis. 2d 687, 699, 508 N.W.2d 54 (Ct. App. 1993). However, the Wisconsin Supreme Court has already considered and rejected Brooks' exact challenge to Wis. JI—Criminal 140. *State v. Avila*, 192 Wis. 2d 870, 887-90, 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.

In *Avila*, the defendant claimed that the search for the truth language 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 not mean finding the truth." *Avila*, 192 Wis. 2d at 888-89. The Wisconsin Supreme Court analyzed the instruction as a whole and observed that "[t]hroughout, 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. After a meticulous review of the language

of the instruction, the court held that "[i]n the context of the entire instruction, we conclude that Wis. JI—Criminal 140 (1991) . . . did not dilute the State's burden of proving guilt beyond a reasonable doubt." *Id.* at 890.

Additionally, the part of the pattern instruction directing the jury to look for truth rather than doubt was approved in two published opinions from this Court before Brooks' trial in January 2014. *See State v. Cooper*, 117 Wis. 2d 30, 36-37, 344 N.W.2d 194 (Ct. App. 1983); *State v. Bembenek*, 111 Wis. 2d 617, 642, 331 N.W.2d 616 (Ct. App. 1983).

Brooks acknowledges that *Avila* exists, but claims that its holding is "empirically disproven"[12] by two law review articles from 2016 and 2017. (*See* Brooks' Br. 26-27 (citing Michael D. Cicchini & Lawrence T. White, *Truth or Doubt? An Empirical Test of Criminal Jury Instructions*, 50 U. of Rich. L. Rev. 1139 (2016), and Michael D. Cicchini & Lawrence T. White, *Testing the Impact of Criminal Jury Instructions on Verdicts: A Conceptual Replication*, 117 Colum. L. Rev. Online 22 (2017)).) He asks this Court to therefore "take judicial notice" of the articles' empirical data and vacate his convictions. (Brooks' Br. 29, 32.) Judicial notice or not, this Court is bound by *Avila*, *Cooper*, and *Bembenek*, and cannot overrule or disregard them. *Cook v. Cook*, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997) (the supreme court is the only state court with the power to overrule, modify, or withdraw language from a previous supreme court or published court of appeals opinion). This Court cannot vacate Brooks' convictions on a legal premise that the supreme court has expressly rejected.

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[12] Brooks' Br. 28.

In the alternative, Brooks asks this Court to certify to the Wisconsin Supreme Court the issue of whether *Avila* should be revisited in light of the articles. (Brooks' Br. 32.) But the articles on which he relies are inconsistent with controlling Wisconsin law, and the empirical studies conducted for the purpose of supporting the premise of the article are scientifically flawed. Certification based on these articles would be inappropriate.

A. The articles on which Brooks relies assert positions that are inconsistent with controlling law and are scientifically flawed.

1. The 2016 article.

The first article on which Brooks relies contends that "tacking on" to an instruction on reasonable doubt a direction to search for truth rather than doubt is confusing. Cicchini & White, *supra*, at 1143-45.

But the instruction is only confusing to those who are searching for confusion. The instruction plainly advises jurors that they are to search for the truth rather than for doubt, but that if their search is inconclusive and leaves them with a reasonable doubt about what may or may not be true, they are to give the defendant the benefit of that doubt. Wis. JI—Criminal 140.

As the article acknowledges, truth and doubt are separate concepts. Truth is what happened. *See Mayo*, 301 Wis. 2d 642, ¶ 32. Doubt is uncertainty about what happened. *See Manna v. State*, 179 Wis. 384, 400, 192 N.W. 160 (1923). Being uncertain about what actually happened may be intellectually unsatisfying but it is not conceptually confusing.

The instruction does not portray the reasonable doubt standard as a means of hiding the truth. Reasonable doubt is

not treated as a means, but as an end. The instruction properly depicts reasonable doubt as a conclusion that the truth cannot be found with sufficient certainty to warrant a conviction.

The article faults the instruction for suggesting that searching for doubt about the truth is inconsistent with searching for the truth. Cicchini & White, *supra*, at 1144. But they are inconsistent. Attempting to find what the truth is not is the opposite of attempting to find what the truth is. *See Manna,* 179 Wis. at 400.

Reasonably understood, the instruction does not suggest that there is anything inconsistent about searching for the truth but not finding it. It does not suggest that there is anything inconsistent about searching for the truth but finding a reasonable doubt as to what the truth is.

The article asserts that urging the jury to find the truth lowers the State's burden of proof. Cicchini & White, *supra*, at 1144-45.

To the extent that, in the abstract, an unadorned directive to find the truth may suggest a finding by a preponderance of the evidence, any such suggestion is dispelled by concrete instructions that the truth must be found beyond a reasonable doubt. *United States v. Gonzalez-Balderas*, 11 F.3d 1218, 1223 (5th Cir. 1994). That is why the supreme court expressly rejected the contention that the instruction on finding truth reduces the burden of proof. *Avila*, 192 Wis. 2d at 887-90.

According to the article, practicing defense lawyers contend that trials are not about searching for the truth. Cicchini & White, *supra*, at 1145-47. But the courts disagree. *E.g., Nix v. Whiteside*, 475 U.S. 157, 166, 171, 174 (1986) (the very nature of a trial is a search for the truth); *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 416 (1966) (the basic purpose of a trial is the determination of truth); *State*

v. McClaren, 2009 WI 69, ¶¶ 5, 49, 318 Wis. 2d 739, 767 N.W.2d 550 (ascertainment of the truth is the primary objective of a trial); *State v. Scott*, 2000 WI App 51, ¶ 29, 234 Wis. 2d 129, 608 N.W.2d 753 (the search for truth is the highest priority at a trial); *State v. Watkins*, 40 Wis. 2d 398, 405, 162 N.W.2d 48 (1968) ("a criminal trial is a search for the truth, not a sporting game in which one side tries to outwit the other"); *United States v. Harper*, 662 F.3d 958, 961 (7th Cir. 2011) ("trials *are* searches for the truth; the burden of proof is just a device to allocate the risk of error between the parties").

The fact that some rules of evidence may exclude evidence that criminal defendants would like to present does not pervert the trial from a purpose to search for the truth. Indeed, the stated purpose of the rules is ascertaining the truth to secure a just determination. Wis. Stat. § 901.02; Fed. R. Evid. 102.

For example, some evidence, such as hearsay, is excluded because it is unreliable, and therefore does not further the search for truth. *See State v. Myren*, 133 Wis. 2d 430, 437, 395 N.W.2d 818 (1986). Some evidence is excluded because its probative value, i.e., its value for determining truth, is outweighed by its potential for prejudice, i.e., its tendency to divert the jury from a search for the truth. *See State v. Payano*, 2009 WI 86, ¶ 89, 320 Wis. 2d 348, 768 N.W.2d 832. In addition, some evidence is excluded because its use would adversely impact other important societal values. For example, the exclusionary rule enjoins the government from benefitting from evidence it has obtained unlawfully. *United States v. Crews*, 445 U.S. 463, 475 (1980). Evidentiary privileges, such as the attorney-client privilege, are designed to encourage important communications. *See State ex rel. Dudek v. Circuit Court for Milwaukee County*, 34 Wis. 2d 559, 578-79, 150 N.W.2d 387 (1967). Some privileges are designed to prevent vulnerable persons from

being victimized by the legal system. *See State v. Gilbert*, 109 Wis. 2d 501, 505-06, 326 N.W.2d 744 (1982).

It is a fallacy to suggest that trials are not a search for truth just because society recognizes legitimate reasons to put reasonable restrictions on the search for truth.

The article asserts that the jury's job is not to try to find the truth. Cicchini & White, *supra*, at 1147. But if the purpose of a trial is to find the truth, as numerous cases have stated, then the job of the jury, as finder of fact, is to find the truth.

The article asserts that most courts admit that "truth-related mandates are not consistent with the examination of evidence for reasonable doubt." Cicchini & White, *supra*, at 1147. Although the article cites one or two cases from other jurisdictions that might support such a proposition, as discussed above, the courts of this state have rejected the contention that the pattern Wisconsin instruction misstates the law regarding reasonable doubt. *Avila*, 192 Wis. 2d at 887-90; *Cooper*, 117 Wis. 2d at 36-37; *Bembenek*, 111 Wis. 2d at 642; *Manna*, 179 Wis. at 399-400. *Accord Harper*, 662 F.3d at 960-61.

The study conducted for the purpose of supporting the premise of the article is also scientifically flawed for several reasons, the first of which is that it was biased from the start. The authors were not searching for truth. They were not looking to see what effect various instructions might have in a mock trial situation. Instead, they were searching for evidence to back their contention, well-established in the preceding legal section of the article, 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, *supra*, at 1150. This initial bias likely affected both the way the study was conducted and the way the results were construed.

Second, jurors should be randomly drawn from a fair cross-section of the community. *Brown v. State*, 58 Wis. 2d 158, 163, 205 N.W.2d 566 (1973). But the mock jurors in the article's study were not drawn from anything resembling a fair cross-section. Rather, they were recruited from Amazon Mechanical Turk. Cicchini & White, *supra*, at 1150.

Wikipedia describes Amazon Mechanical Turk as a crowdsourcing Internet marketplace where employers are able to post jobs involving human intelligence tasks. https://en.Wikipedia.org/wiki/Amazon_Mechanical_Turk#Social_science_experiments. Prospective employees can browse among the jobs posted and take a job they select in return for a monetary payment. Although this Internet marketplace is capable of recruiting a diverse sample, it is not that good at recruiting a representative sample of the population as a whole. This limited self-selection is the antithesis of random sampling, which is the foundation of valid empirical research, as well as fair and impartial juries.

In addition, there is nothing to suggest that the participants were screened for preconceived ideas or otherwise were incentivized to provide unbiased answers. The fact that participants are paid for their services provides an incentive to give the answers they think that the employers want to hear. Moreover, real jurors, while selected randomly, are subjected to voir dire, where those with preconceived ideas about a case can be identified and, if necessary, excused. The Turkers, as they are called, who participated in the jury instructions job were never examined to determine whether they had any preconceived notions that might have made it problematical for them to perform fairly and impartially the job they chose, and were paid, to do.

The article provides little information about the facts that the participants were asked to consider. The article just states generally 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, *supra*, at 1151. The only evidence presented to the participants, the brief written summary of the testimony of the child, her mother, and the defendant is not included in the article.

But regardless of what anyone had to say about the facts, this sort of scenario readily lends itself to decision on the basis of preconceived notions about sexual assault. Undoubtedly, there are some in contemporary American society who view the act of grabbing a female outside her clothing as falling somewhere on a range between harmless and offensive, but, importantly, not criminal. The methodology of the study 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 abstract of their testimony on a printed page.

"The credibility of a witness is determined by more than [the] 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." *Turner*, 186 Wis. 2d at 285. 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." *Turner*, 186 Wis. 2d at 285.

It is well-settled that a court cannot engage in the methodology used by the study. *See State v. Poellinger*, 153 Wis. 2d 493, 504, 506, 451 N.W.2d 752 (1990). A court must defer to the trier of fact that can see the demeanor and body

language of the witness, that can hear the words that are simply printed in the transcript, including the nuances in the questions and answers as indicated by the emphasis, volume, and intonations of the speakers. *State v. Owens*, 148 Wis. 2d 922, 929-30, 436 N.W.2d 869 (1989). The trier of fact can discern that answers may be uttered with such hesitation, vagueness, discomfort, arrogance or defiance as to show that the witness is fabricating. *State v. Nichelson*, 220 Wis. 2d 214, 223, 582 N.W.2d 460 (Ct. App. 1998); *Matter of Dejmal's Estate*, 95 Wis. 2d 141, 152, 289 N.W.2d 813 (1980).

Making a decision about guilt or innocence from nothing more than a few words on a printed page ensures unreliable results. The article acknowledges that the results could be different in a case where there is more evidence of guilt. Cicchini & White, *supra*, at 1162.

What is striking about the results of the study is that less than one-third of the participants, regardless of how they were instructed, thought that the defendant should be convicted of a crime. Cicchini & White, *supra*, at 1154-55. Even two-thirds of the participants in the study who were never instructed on the need for proof beyond a reasonable doubt found that the defendant was not guilty. Cicchini & White, *supra*, at 1154. Someone with a different preconceived perspective might find empirical support here for a hypothesis that an instruction on reasonable doubt is not necessary to properly determine guilt or innocence.

In any event, the best that can be said for this study is that it shows that people who are instructed on reasonable doubt will likely find reason to doubt when their decision is based on brief competing paper accounts, one saying that the defendant did it, the other saying that he did not do it. Those who are not told that truth matters are more likely to find doubt in these dubious circumstances.

2. The 2017 article.

The second article is no more persuasive than the first. The new article admits that some Turkers rendered their decisions in less than three minutes. Cicchini & White II, *supra*, at 28. Although these results were discarded, the haste of some participants raises questions about the amount of attention paid to the project by other paid participants. How many had a principal interest in simply giving some answer, regardless of what it was, in order to get their money?

The second fact situation is similar to the first, but arguably worse for a valid study. It is another case that pits the credibility of the victim against the credibility of the defendant based on a brief written synopsis of their testimony. Cicchini & White II, *supra*, at 28-29. The claim is that the defendant sexually touched an adult woman with whom he interacted at a party, without the woman's consent. Cicchini & White II, *supra*, 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 II, *supra*, at 29. The defendant admitted he had not told the truth on a previous occasion. Cicchini & White II, *supra*, at 29.

Undoubtedly, there are some people who would never convict anyone 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 first study, less than one-third of the participants determined that the defendant was guilty. Cicchini & White II, *supra*, at 30-31. But more of those who were instructed to look for truth instead of doubt than those who were instructed only on doubt made this finding. Cicchini & White II, *supra*, at 30-31. Again this shows that people who are instructed only on reasonable doubt will likely find reason to doubt when their decision is based on two brief paper accounts, one saying that the defendant did it, the other saying that he did not do it. Those who are not told that truth matters are more likely to find doubt in these dubious circumstances.

The new article thinks 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 that the defendant is guilty." Cicchini & White II, *supra*, at 30-32. But agreement with this proposition does not necessarily mean, as the article supposes, that these participants believed that they could convict the defendant even if they had a reasonable doubt about his guilt at the time they convicted him.

Participants were instructed that the initial presumption that the defendant is innocent "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 II, *supra*, at 30. It is possible that participants who agreed with the proposition were indicating, in accord with this instruction, that if they started out with a 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 ultimately convinced them that the defendant was guilty beyond a reasonable doubt.

Indeed, it is quite likely that many of the participants understood the proposition in this way since 15 percent of those who were not instructed to look for truth instead of doubt, 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 II, *supra*, at 29, 32.

The new study adds nothing to the first one. It cannot reliably reach a conclusion that an instruction to look for truth instead of doubt misleads jurors about the burden of proof, or that mistakes about that burden result in improper convictions.

Brooks' brief does not make any additional arguments or cite any additional relevant authority. So it is no more persuasive than the articles it digests. The studies relied on by Brooks together cannot overcome the conclusion of the courts of this state that the pattern Wisconsin instruction does not misstate the law regarding reasonable doubt. *Avila*, 192 Wis. 2d at 887-90; *Cooper*, 117 Wis. 2d at 36-37; *Bembenek*, 111 Wis. 2d at 642; *Manna*, 179 Wis. at 399-400. *Accord Harper*, 662 F.3d at 960-61. And because his complaints about Wis. JI—Criminal 140 are all based entirely on these two articles, they all must fail. (*See* Brooks' Br. 25-40.)

III. This case does not warrant a new trial in the interest of justice.

A. Relevant law.

"The court of appeals has the discretionary power to reverse a conviction in the interest of justice." *State v. Avery*, 2013 WI 13, ¶ 23, 345 Wis. 2d 407, 826 N.W.2d 60. This Court may order a new trial under Wis. Stat. § 752.35 if it appears that: "(1) the real controversy has not been fully

tried, or; (2) it is probable that justice has for any reason miscarried." *State v. Jones*, 2010 WI App 133, ¶ 43, 329 Wis. 2d 498, 791 N.W.2d 390 (citation omitted). This discretionary reversal power "should be exercised sparingly and with great caution." *State v. Williams*, 2006 WI App 212, ¶ 36, 296 Wis. 2d 834, 723 N.W.2d 719 (citation omitted).

Brooks argues that the real controversy was not fully tried and that justice has miscarried. (*See* Brooks' Br. 41-45.) There are two primary situations in which a real controversy was not fully tried: "when the jury was erroneously not given the opportunity to hear important testimony that bore on an important issue of the case; and when the jury had before it evidence not properly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried." *In re Commitment of Smalley*, 2007 WI App 219, ¶ 7, 305 Wis. 2d 709, 741 N.W.2d 286 (citation omitted). Justice has miscarried under Wis. Stat. § 752.35 "if there is a substantial probability that a new trial would produce a different result." *State v. Kucharski*, 2015 WI 64, ¶ 5, 363 Wis. 2d 658, 866 N.W.2d 697.

Additionally, this Court exercises its discretionary reversal power only "in exceptional cases." *See Kucharski*, 363 Wis. 2d 658, ¶ 23. This Court and the Wisconsin Supreme Court have held that such cases exist when a "pivotal" piece of evidence was later discredited, or such evidence was withheld from the jury at trial. *Id.* ¶¶ 37-58 (discussing exceptional cases).

B. Brooks has failed to present any facts or legal argument that would meet the requirements for this Court to grant a new trial in the interest of justice and instead merely rehashes his other claims.

Brooks has not alleged that the jury was erroneously prevented from hearing important testimony or that it had

before it improperly admitted evidence that clouded a crucial issue in the case. (*See* Brooks' Br. 39-42.) Nor has he presented any argument or facts showing there is a substantial probability of a different result at a new trial. (Brooks' Br. 39-42.) He further has failed to allege that a pivotal piece of evidence was discredited or withheld from the jury, or that this case is otherwise exceptional in any way. (Brooks' Br. 39-42.) Instead, he merely rehashes his claims that Wis. JI—Criminal 140 "misinformed and confused" the jurors based on the Cicchini and White articles, (Brooks' Br. 41 (emphasis omitted)), and repeats his conclusory assertions that his attorneys' defense strategy "facilitate[ed] a reckless homicide conviction" (Brooks' Br. 44). But those claims are meritless, and therefore Brooks' interest of justice claim is also meritless. *See Mentek v. State*, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976) ("Zero plus zero equals zero.").

As explained, both the State and the defense presented an enormous amount of evidence in this case. The parties litigated the admissibility of every remotely controversial piece of evidence, and Brooks has challenged none of the court's admissibility rulings on appeal. The defense rigorously cross-examined all of the State's witnesses. The jury received the standard instruction on reasonable doubt and Wisconsin courts have considered and rejected Brooks' precise objection to it. The real controversy was fully tried. Additionally, as shown, there was an overwhelming amount of evidence against Brooks and there is no probability, let alone a substantial one, of a different result at a new trial. Brooks has failed to allege any facts or make any argument showing otherwise, and this Court should therefore reject his request that this Court order a new trial in the interest of justice.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm the decision of the circuit court.

Dated this 30th 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 10,964 words.

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LISA E.F. KUMFER
Assistant Attorney General

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 30th day of January, 2018.

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LISA E.F. KUMFER
Assistant Attorney General

Supplemental Appendix
State of Wisconsin v. Keith J. Brooks
Case No. 2017AP1723-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.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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LISA E.F. KUMFER
Assistant Attorney General

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Dated this 30th day of January, 2018.

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