STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2018 AP 2318

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ALAN M. JOHNSON,

Defendant-Appellant.

DEFENDANT-APPELLANT'S OPENING BRIEF AND SHORT APPENDIX

Appeal from Entry of Judgement of Conviction,
Honorable Kristine E. Drettwan Presiding,
Walworth County Circuit Court Case No. 2016 CF 422

ALAN M. JOHNSON,
Defendant-Appellant

Stephen P. Hurley
Wisconsin Bar No. 1015453
Jonas B. Bednarek
Wisconsin Bar No. 1032034
Marcus J. Berghahn
Wisconsin Bar No. 1026953

HURLEY BURISH, S.C.
33 E. Main Street
Madison, WI 53703
(608) 257-0945

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ISSUES

The Circuit Court's pretrial rulings limited Alan Johnson's presentation of evidence at trial. The limits imposed by the Court affected Johnson's rights to remain silent, to cross-examination, to confrontation, as well as his right to present a complete defense at trial.

The Circuit Court's pretrial rulings also limited Johnson's presentation of *McMorris* evidence, which would have informed the jury as to Johnson's state of mind at the time he allegedly committed the charged offenses.

Lastly, the Circuit Court, despite having elucidated an ample factual basis, did not instruct the jury on self-defense and other offenses that Alan Johnson requested, thus limiting the jury's ability to reasonably analyze the evidence, while at the same time, giving the jury instruction that referenced self-defense but with no definition of it.

1. The Circuit Court's pretrial order (reinforced during trial) precluded Alan Johnson from raising any aspect of his claim of self-defense until after he testified at trial, and the Circuit Court determined that Johnson had met the evidentiary standard for such evidence. The pretrial order was clear insofar as it forced Alan Johnson to waive his right to remain silent and to testify, prior to a determination of whether evidence of self-defense could be presented to the jury.

> [I]f the defendant shows a sufficient factual basis for self-defense and the only way this can be done—***the only way a sufficient factual basis for self-defense can be shown***

> ***given these circumstances here is through the defendant's testimony***. ... There is no other evidence to show a sufficient factual basis for self-defense but the defendant testifying. It's the only possible logical and legal conclusion that this Court can reach.

R229:6-7 (emphasis added).

2. Alan Johnson offered evidence that KM possessed child pornography at the time that Johnson searched his computer prior to their confrontation to explain his state of mind about why he entered the home and to corroborate his testimony. The Circuit Court ruled that whether there was child pornography located on KM's computer

> is not relevant. It's not relevant or admissible character trait of the victim and it's not relevant to establishing any fact that's of issue here. And even if it were, it would fail under 904.03. It would be completely and unfairly prejudicial with little to no probative value other than to try and paint the victim in a bad light, and it certainly would not substantially over–substantially outweigh that unfair prejudice. I also think it would cause undue delay in the trial and it would be very misleading to the jury. So there will be no evidence allowed about what, if anything, the defendant saw on the victim's computer that night and/or what the police found or did not find on the computer.

Id. at 13-15.

> You can ask him why did you spend two whole hours on the computer because I'm assuming he will have already testified he went there to look for child pornography. His answer can be I went there to look for child pornography. There will be no evidence, however, about what if anything he found.

Id. at 18.

3. The Circuit Court having found a *prima facie* case for self-defense allowed the admission of evidence of self-defense and, nevertheless, refused to instruct the jury on self-defense.

> Because an objective reasonable person would find that the victim had a lawful right to interfere with the defendant [...] I don't think an objective reasonable person would buy that... I don't think a jury would find that the state failed to meet its burden on that prong. The second prong is would the objective threshold of reasonably believing that the force the defendant used was necessary to prevent imminent death or great bodily harm. [...] So I don't think a jury would conclude that the state had failed to meet its burden to disprove that element either. So for those reasons I will not allow those instructions that deal with perfect self-defense. I will allow as already noted the imperfect.

R239:50-52.

4. Johnson requested that the Circuit Court instruct the jury on charges other than first degree homicide or first degree reckless homicide. Despite having presented sufficient evidence that would support consideration of other charges, his request was denied.

> I'm going to be giving lesser included here. The question is which ones I'm going to give and how they will be structured because there certainly is the standard for a lesser included offense is whether there is reasonable basis in the evidence for a jury to acquit on the greater offense and convict on a lesser. And given all of the facts obviously the jury will have to determine the credibility in which ones they find persuasive.

R239:7.

> So I'm going to allow the lesser included of first degree reckless but that's as far as I'm letting it go because ... it's not reasonable. ... There is not a reasonable basis in this evidence for a jury to acquit on first degree intentional homicide and convict of second degree reckless. So obviously I'm not going to allow negligent homicide. ... By any stretch of the imagination a jury here – there is no reasonable basis in the evidence for a jury to acquit on one of these highers such as the first degree intentional and convict of negligent homicide here.

Id. at 35-38.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The issues raised in this appeal can be fully addressed by briefing, but if the Court has questions, Alan Johnson welcomes the opportunity for oral argument. The decision of the Court should be published if the matter is decided by three judges, as is this Court's practice.

STANDARD OF REVIEW

Usually, whether to admit or exclude evidence is within the trial court's discretion. *State v. Richard G.B.*, 2003 WI App 13, ¶ 7, 259 Wis. 2d 730, 656 N.W.2d 469. But not all evidentiary rulings are discretionary. For example, if an evidentiary issue requires construction or application of a statute to a set of facts, a question of law is presented and then the review is de novo. *State v. Jensen*, 2007 WI App 256, ¶ 9, 306 Wis. 2d 572, 743 N.W.2d 468; *Palisades Collection LLC v. Kalal*, 2010 WI App 38, ¶ 14, 324 Wis. 2d 180, 189, 781 N.W.2d 503, 508. Further, whether a defendant was denied constitutional rights, such as the right to present a defense, through the exclusion of evidence is a question of constitutional fact, which is reviewed de novo. *State v. St. George*, 2002 WI 50, ¶ 16, 252 Wis. 2d 499, 643 N.W.2d 777.

Review of all other discretionary decisions of the trial court, as it relates to evidentiary decisions, is highly deferential. The question is not whether the reviewing court would have permitted the evidence to come in, but whether the trial court exercised its discretion in accordance with accepted legal standards and in accordance with the facts of record. *McCleary v. State*, 49 Wis. 2d 263, 182 N.W.2d 512 (1971). Said another way: was appropriate discretion exercised? *State v. Wollman*, 86 Wis. 2d 459, 464, 273 N.W.2d 225 (1979). If there is a rational basis for a trial court's decision, the reviewing court will not find an erroneous exercise of discretion. *State v. Hammer*, 2000 WI 92, ¶ 43, 236 Wis. 2d 686, 613 N.W.2d 629. But if the trial court fails to provide reasoning for its evidentiary decision, then independent review of the record follows to determine whether the trial court properly exercised its discretion. *Id.* at 343, 340

N.W.2d 498; *Martindale v. Ripp*, 2001 WI 113, ¶¶ 28-29, 246 Wis. 2d 67, 86–87, 629 N.W.2d 698, 705–06.

A trial court has broad discretion in deciding whether to give a particular jury instruction, and the court must exercise its discretion to "fully and fairly inform the jury of the rules of law applicable to the case and to assist the jury in making a reasonable analysis of the evidence." *State v. Coleman,* 206 Wis. 2d 199, 212, 556 N.W.2d 701 (1996) (citation omitted). However, independent review of whether a jury instruction is appropriate is made applying the specific facts of a given case. *State v. Groth,* 2002 WI App 299, ¶ 8, 258 Wis. 2d 889, 655 N.W.2d 163, *overruled on other grounds by State v. Tiepelman,* 2006 WI 66, ¶ 31, 291 Wis. 2d 179, 717 N.W.2d 1.

STATEMENT OF THE CASE

Nature of the Case. This is an appeal from the judgment of conviction entered in Walworth County Circuit Court by the Honorable Kristine Drettwan, following a nine day jury trial. The jury returned a guilty verdict, finding Alan Johnson guilty of first degree reckless homicide, by use of a dangerous weapon. The jury acquitted on first degree intentional homicide and burglary. The Circuit Court adjudicated Alan Johnson guilty and sentenced him to a total sentence of 35 years (25 years initial confinement and 10 years extended supervision).

Procedural Status. Alan Johnson was charged with first degree intentional homicide after his uncle, KM, was found dead in his home in Whitewater, Wisconsin, on October 25, 2016. R1. Investigation led to Alan Johnson, who, during a meeting with investigators "stood up and said, 'Arrest me, I killed him.'" *Id.*

Before trial, Johnson gave notice of other acts he intended to offer. R16. This meant that Johnson's defense was revealed before the State's case began. Having seen the defense, the State then tried to restrict it even before a witness was sworn. R25.

Despite making an offer of proof before trial, R47, the Circuit Court ruled that Johnson was barred from questioning witnesses on the subject of self-defense until after (and only after) Johnson testified and the Circuit Court determined that he had made a sufficient showing of self-defense. R229. Too, the Circuit Court barred Johnson from presenting *McMorris* evidence to explain his state of mind, including evidence that, shortly before the confrontation between KM and Johnson, Johnson

had found the evidence of child pornography on KM's computer that he had been searching for.[1] *Id.*

The evidence played-out over the course of a nine day jury trial, at which Johnson testified.

The Circuit Court instructed the jury on armed burglary, first degree intentional homicide, second degree homicide and first degree reckless homicide, which referenced self-defense. R102. But the Court did not instruct on or define self-defense. *Id.* The jury convicted Johnson only of first degree reckless homicide. R180.

Facts. When finally permitted by the court, Alan Johnson's testimony at trial established that he was the third of four children born to Eric and Cathy Johnson. R236:175. He had two older sisters: Christine and Kim. Kim was eleven years older than Alan Johnson. *Id.* at 176. She was married to KM. He also had a younger sister, Nicole. She was married and had a young daughter. Alan did not have a good relationship with his father. *Id.* Eric Johnson was described as physically and emotionally abusive, R236:200, a view shared by Alan's siblings. R238:97-99.

After graduating from high school, Alan Johnson attended the University of Wisconsin Madison. He graduated in five years with degrees in mathematics and computer science. R236:180.

Alan Johnson met KM for the first time when he was about seven or eight years old. From early on he feared KM. R236:197-98. Basically for his entire life. *Id.*

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[1] *See McMorris v. State*, 58 Wis. 2d 144, 205 N.W.2d 559 (1973).

"Growing up he was a bully." *Id.* at 198. He described a number of incidents involving KM. In one, KM grabbed Alan, "My back was to his front and he had his arm around me and he held me there with his arm around my torso and then he reached down my pants." *Id.* KM placed his hand into his underwear. "I was completely powerless. Like I couldn't—couldn't do anything. I was afraid to tell anyone. I—I was, like, I was ashamed of it." *Id.* at 200.

In another incident, KM struck Alan Johnson in the chest while Johnson was in the back seat of a car.

> I remember we were on Highway 59, headed in that direction from Whitewater, and I was sitting in the back seat. And I don't know why we weren't—nobody was saying anything, there was no argument, no nothing. And [KM] was in the front passenger seat, and he just he turned around and he slammed me right-square in the chest with his fist and I didn't know why, and he just laughed. And then he just turned around like nothing happened.

Id. at 202.

Johnson also described that KM came up behind him and pressed his temples between his hands. *Id.* at 203. KM would squeeze Johnson's head "like a vice and he'd just hold me there until he let me go." It was painful. *Id.* Johnson felt that he could not say anything. *Id.* at 203-04. Another event occurred in the kitchen.

> I was standing in the kitchen at the counter and he came up behind me and he put his arm around my throat and he pulled my wind pipe shut and he turned me around and shoved me right to Kimberly who was in the kitchen too and he started laughing. And he'd just hold me there. And Kim was just staring at me wide eyed.

Id. at 204. "And he just kept holding me there and I felt like I was getting close to passing out and then he let me go." *Id.* KM also verbally abused Alan Johnson. *Id.* at 204.

> He was really condescending. You know, some of it seemed innocuous at first. You know, he'd call you a slacker or he'd say that you're dumb or what you're doing is dumb or he'd—you know, you'd be working on something and he'd dismiss it as like, oh, I can't believe, you know, that that's your level of understanding, that's all you know. You know, oh, I learned that when I was so young and it's no problem for me.

Alan's sister, Christina, corroborated Alan's perception about KM. R238:107. "[H]e was a violent person." "I think he caused other people to fear him." "I think [KM] was a bully." *Id.* She knew that other members of her family feared KM. *Id.* at 109. This included Nicole and their mother. *Id.*

Nicole, Alan's younger sister, confirmed that KM choked her. *Id.* at 150. "He choked me until I blacked out." *Id.* She was about fourteen years old at the time. *Id.* at 151. "Every time I walked past him he would either poke at

me or grab at me or pull me into his lap. He would sit next to me on the couch and then rest his head on my chest. He would wrestle with me to the ground and not let me up. He would pull me onto the couch and basically be on top of me and not let me up." *Id.* Nicole offered opinion testimony that KM was a violent man, that he was a bully, and that he had a quality for making people fear him. *Id.* at 153. Nicole was afraid of KM. *Id.* Nicole also offered testimony that Alan was not a violent person, and that Alan was a passive person who avoids confrontation and conflict. *Id.*

Kim (Alan's sister and KM's wife), asked for Alan's assistance, because of his skill with computers. Kim told Alan that she had downloaded a file, but she couldn't figure out to where it had been saved. Alan tried to find the lost document. In searching through her computer Alan discovered a cache of child pornography. *Id.* at 211. He did not expect to find images of "Young girls. There's one—it was nude young girls—but there was one in particular that—that I noticed." *Id.* at 212. "It was—it was an adult man, he was naked, and he was having sex with a girl who looked like she was in elementary school. They were both naked." *Id.* This wasn't the only image he found. *Id.* Alan "saw a screen full of thumbnails. It was probably around a dozen," but he quit looking at the computer at that point. *Id.* He told Kim what he observed. *Id.* at 209. Knowledge of what he observed on KM's computer weighed heavily on Alan.

After graduating from college, Alan left for a job in New York City. R236:184. While the work was interesting and challenging, he did not enjoy the work environment or the location. *Id.* He returned home, and began to care

for his parents who were now elderly. *Id.* at 218. His dad had been injured in a tree cutting accident that affected his memory, and his mother was hospitalized for hip replacement surgery. *Id.* at 219. He became their caretaker. *Id.* He shopped, cooked, cleaned and maintained their home. Alan also took on a similar role for his sister, Christine, following the death of her husband. *Id.* at 220. Over time, Alan testified, the work took an emotional toll. *Id.* at 226. "I was completely overwhelmed and I knew I couldn't keep going. I couldn't keep it up." *Id.*

Alan was also concerned about Nicole's daughter, who had reached the age that Nicole was when he'd seen her abused by KM, and which was also the same age as girls he had seen in the pornography on KM's computer.

Alan sent an email to the National Center for Missing and Exploited Children about the images he'd found on KM's computer. *Id.* at 227. But Alan was concerned that if he "handed it off to local law enforcement, [and] that KM would potentially get tipped off because I knew he had at least one friend on the Whitewater police department." *Id.* Alan was contacted by police. *Id.* at 229. But Alan was told that nothing could be done, the information was too old. The investigator told Alan that, if he had any further information, he should let him know. *Id.*; R238:54

Alan shared the information with his father. Eric Johnson was upset when he learned that KM possessed child pornography. Eric spoke to KM about this, and Eric reported to Alan that KM claimed to have moved the files. R236:236. Eric continued to have discussions with KM over the course of several months.

> The police said they couldn't do anything about it and my dad confronted him about it directly. He met him in person and talked to him about it and, you know, told him you can't come around the family anymore because of it. And my dad tried to work with him to get help and nothing was happening. And I was still the only one who had seen it and knew about it. I told my dad about it but I'm the only one who knew firsthand about it.

Id. at 237.

Because KM was not getting therapy or addressing his problem, Alan decided he needed to obtain fresh evidence so that the police would investigate and, then, prosecute KM. *Id.* at 247. If he found such evidence "they would have what they need and I wouldn't be involved anymore. They would just—they could take care of it." *Id.*

Alan decided to go to KM's house to search his computer. Before leaving home, he took one of his father's handguns. *Id.* at 254. "I felt like if I went over there without it I wouldn't be able to go in there. I wouldn't be able to, you know, go looking for his equipment because if he saw me he would know why I was there and he'd go after me." *Id.* He did not take the handgun to kill Ken. "I felt—not safe with it but like I—I could at least go in there." *Id.* Alan drove his father's truck to KM's house in Whitewater. *Id.* at 255. He brought along some gloves, but not because he was "worried about fingerprints." *Id.* at 259. He didn't want

static electricity to damage any computer files. *Id.* Alan examined the computer. *Id.* at 260.

> I sat down and I touched the computer mouse just to see what was on the screen and it was already logged in. I didn't have to type in a password or anything.

Id. at 260.

Alan then searched for "typical file format for photographic images." *Id.* at 261. He sat at the computer for about two and one half hours. *Id.* at 263.

On direct examination, Alan was not allowed to testify about the specifics about what he observed on KM's computer. The following offer of proof was made about what Johnson observed on the computer.

> [...] Alan Johnson would have testified that when he viewed the computer he viewed images of naked underage girls, that there were many, many such images. That, additionally, he saw that there were over 5,000 files of images of neighborhood children, all girls, most of which were girls walking past 911 Peck Street. Most of the images focused on their back sides, many of the images focused on their crotches. Some of the images were taken from what appeared to be [KM]'s automobile and occurred in other parts of town. I have submitted to the Court Exhibits 106, 107, 108, 109 and 105. Alan Johnson would have testified that he saw that the photographs of

> neighborhood children were cataloged to include titles such as others, riders, neighbors, blondie, walkers. He would testify that he recognizes Exhibits 105 through 109 as images that he viewed on the computer that evening or early morning, that is the late evening of October 24th, the early morning of October 25th; that of those exhibits he recognizes many of those images as the ones that he viewed and the others as of the type that he viewed that evening.

R238:3-5.

Suddenly, Alan heard what "sounded like maybe a scuff, like on the carpeting, not from in the room which I was in, it came from somewhere else in the house." R236:268. "I closed the Windows that I had opened on the computer ... and I got up, I grabbed the gun. I got everything that I had with me." *Id.* The door to the small room opened. *Id.* KM was at the threshold. *Id.*

KM closed the door. *Id.* at 269. Alan stood there. "I wasn't thinking. I don't know. I wasn't thinking about anything." *Id.* "I was afraid. I wanted to get out." *Id.* But the door was the only way in and out. *Id.* Johnson was afraid he believed that KM saw Johnson in the room. *Id.* at 270. "He looked right at me, and he knew why I was there. I knew that he knew." *Id.* Alan believed that KM knew he had seen the contraband images on the computer and that, as a result, KM would be going to prison. R237:19. Then "the door flew open and he attacked me. He just came right at me. And I didn't see—I didn't—I think I closed my eyes. I didn't see what happened." R236:271. "He lunged at me. I saw him

come at me." *Id.* at 281. Alan Johnson did not recall using his father's handgun. "I don't remember hearing it or it going off. I don't. I don't, no." *Id.*

Alan fled in a panic. *Id.* at 283. Stopped at an intersection, he saw that there was blood on his feet. *Id.* After arriving at his parents' home in Lima Center, Alan "went to the back of the house and then I started stripping my clothes off because when I looked down I saw more blood." *Id.* He was in a fog about what happened. *Id.* at 284. "I knew I had blood on me. I knew something bad happened. I didn't—I just felt completely out of control. I didn't know what was going on." *Id.*

Asked whether he could defend himself against KM, Alan told the jury that he "couldn't. I never had." *Id.* at 266. Alan perceived KM to be very strong. *Id.* Alan testified that he didn't plan to kill KM. *Id.* at 292. Indeed, he had never intended to kill KM. *Id.* He had no experience in defending himself. *Id.* at 267.

The Circuit Court determined that Johnson had made a *prima facie* showing of self-defense. "I think that the defense has met their burden of proof as outlined here." *Id.* at 274. The finding permitted Alan to testify about his observations about his younger sister's fear of KM. *Id.* at 277. And, for similar reasons, he feared for the safety of Nicole's daughter, Ally. "He would do a lot of the same things he would do to me—press her head in between his hands. He would put his hands on his shoulder and he would squeeze really hard and I could see her wince." *Id.* at 278. Alan also learned from his mother that Nicole told her that KM had choked her in the past too.

R236:279. Alan's two sisters, Christina and Nicole were permitted to testify after the court's ruling.

Early in the morning on October 25, 2016, KM's wife awoke. She heard a thud, and found KM at the bottom of a staircase. R232:104. She called 911. *Id.* at 109.

KM was dead. R2. Police found evidence that KM had been shot: he had wounds to his arm, chest, and back. R232:112. Evidence consistent with a shooting, such as a bullet casing was found in the home, which was located near his body. *Id.* at 258.

The house in which KM lived with his wife and son was small. R232:67. The house had two bedrooms upstairs, and two additional bedrooms on the lower level. *Id.* The lower level contained a small room with a computer. *Id.* at 85. That room, which was right where KM was found, was described as a ten foot by ten foot in size, and it was "severely cluttered" *Id.* at 241-42. "The room was full of items in a way that it was difficult to even enter the room." *Id.* at 262.

Investigators learned that members of KM's wife's family—the Johnsons—had made allegations of physical and sexual abuse against KM, including that KM had possessed child pornography. R235:111. Indeed, investigators soon learned that a number of Johnson family members had not spoken to KM or his wife in more than a year. R232:151.

Investigators interviewed Alan Johnson. During an initial interview, he deflected responsibility. Interviewed a second time later that same day, Johnson told investigators about his relationship with KM. R236:289. Johnson said that KM had physically and

sexually abused him, and that KM had child pornography. *Id.* Johnson told investigators that KM mistreated his sister Nicole, and that he believed KM had mistreated his son Tyler. Recounting these events caused Johnson to suffer a panic attack. *Id.* at 290.

As he became emotional, Alan's father interrupted the interview. Investigators then turned their attention to speaking with Eric Johnson. Among the things that Eric told investigators was that he owned two handguns, one of which matched the caliber of the cartridge found at the crime scene. R234:87. Investigators examined the handgun and determined that it had been fired, but not cleaned; it was taken as evidence. *Id.* at 89.

After his first two contacts with investigators, Alan was overwhelmed by his act. He took a knife, and began to sharpen it, intending to kill himself. R236:293-294. But he could not bring himself to commit suicide. *Id.* at 294. Alan Johnson then told his father that he had killed KM. *Id.* at 295-96.

Eric Johnson then contacted investigators. He asked them to return to his residence. When they arrived, Eric told investigators about Alan's confession. As the investigators approached Alan, he stood up and stated "Arrest me, I killed him." R236:78.

Ballistic testing confirmed that Eric Johnson's handgun was used to shoot KM. R126, R127, R128. And Alan Johnson, who lived with his parents, had access to that handgun. R235:112-113. While investigators searched the residence where Alan Johnson lived with his parents, they did not find the clothes he wore on the night of KM's death. R20:4. Alan Johnson's attorney found those in the basement of the residence weeks later, and turned them

over. *Id.* His attorney also disclosed to the District Attorney that, prior to his obtaining discovery in the matter, the computer in KM's residence contained child pornography. *Id.*

Testimony during the State's case in chief and before Alan Johnson testified provided few details about the relationship between Alan Johnson, KM, and his family and gave the jury no information about why Johnson had entered the residence or why, when confronted by KM, Alan Johnson shot him. The District Attorney objected whenever Johnson sought to ask questions that would reveal information about the Johnson's family discord.

Questioning of witnesses during the case-in-chief was limited by two key pretrial rulings. R229. Both related to the defense that he raised. First, the Circuit Court ruled that Johnson was barred from raising any aspect of his claim of self-defense until after he testified. Then, such evidence could be offered provided that Johnson had met the evidentiary standard for the admission of such evidence. The pretrial order required Johnson to testify before evidence of self-defense could be presented.

> [I]f the defendant shows a sufficient factual basis for self-defense and the only way this can be done—the only way a sufficient factual basis for self-defense can be shown given these circumstances here is through the defendant's testimony. ... There is no other evidence to show a sufficient factual basis for self-defense but the defendant testifying. It's the only possible logical and legal conclusion that this Court can reach.

R229:6-7 (emphasis added). Johnson moved the Circuit Court for reconsideration, noting that the decision was not in accord with case law and affected his constitutional rights. R65. The pretrial ruling remained unchanged. R69.

At trial, the Circuit Court continued to embrace its pretrial restrictions on Johnson's presentation of evidence:

> Because my pretrial order was very clear, all of the *McMorris* evidence and anything about the child pornography, which by extension would mean whether or not [KM] was getting therapy for the child pornography, does not come in until the Court has determined that the defendant has met the threshold for showing a sufficient factual basis for self-defense, and the only way that could be done was with him testifying.

R234:17.

At trial, Johnson sought to offer evidence that Johnson found evidence that KM possessed child pornography on October 25, 2017, when he searched KM's computer prior to their confrontation. Johnson argued that this evidence corroborated his testimony about his state of mind; that is, about why he entered the home. The Circuit Court ruled that whether child pornography was located on KM's computer was not relevant.

> It's not of relevant or admissible character trait of the victim and it's not relevant to establishing any fact that's of issue here. And even if it were, it would fail under

> 904.03. It would be completely and unfairly prejudicial with little to no probative value other than to try and paint the victim in a bad light, and it certainly would not substantially over—substantially outweigh that unfair prejudice. I also think it would cause undue delay in the trial and it would be very misleading to the jury. So there will be no evidence allowed about what, if anything, the defendant saw on the victim's computer that night and/or what the police found or did not find on the computer.

Id. at 13-15.

In response to Johnson's argument that the ruling would deprive the accused of the ability to corroborate his testimony, the State promised the court that it would not argue that there was no proof that Johnson searched the computer for child pornography.[2] *See* R238:87.

The Circuit Court did allow that Alan Johnson could be asked about the time he spent on the computer (more than two hours) prior to the confrontation with KM.

> You can ask him why did you spend two whole hours on the computer because I'm assuming he will have already testified he went there to look for child pornography. His answer can be I went there to look for child pornography. There will be no evidence, however, about what if anything he found.

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[2] Having induced the court's ruling, and having reaped the benefit of its promise, in its rebuttal closing argument, the State did precisely what it promised the court it would not do. R240:186-187.

Id. at 18. The Circuit Court recognized that Johnson's discovery of child pornography on KM's computer was relevant, as it explained Johnson's state of mind as to the armed burglary.

> I note that the state concedes as it did in the first motion that the defendant may testify as to why he went to the victim's home. As to what he says he saw on the victim's computer around six years ago, his actions to report it, his concern about nothing being done, et cetera. And this is relevant under 904.01 as to the defendant's intent on the charge of armed burglary. Was there an intent to steal or to commit a felony therein. Explains why he was in the home. All of this goes towards his state of mind.

R229:13.

Because self-defense was his theory of defense, and based on the Circuit Court's pretrial ruling, Alan Johnson had no choice but to testify at trial. When the Circuit Court asked to engage in a colloquy with Johnson, defense counsel interjected and put the issue to the Circuit Court, again:

> I believe that the Court's rulings have forced Mr. Johnson to testify. So in having the colloquy with Mr. Johnson about whether it is his choice to testify, the Court should bear in mind that I believe and he believes he's being improperly forced to do so because of the restrictions on both cross-examination of the state's witnesses and on what witnesses we can call to ask what questions in what

> order. Other than that, it's up to the Court whether it wishes to address him.

R236:140-141. The Circuit Court found Johnson's decision to testify was made knowingly, intelligently, and voluntarily. *Id.* at 143.

David Russell, a privately retained computer forensic examiner testified at trial. R238:19. His report was offered as Exhibit 104. But testimony concerning the content of his report was limited by the pretrial order. He could offer no testimony other than to refer to "files of interest," when referring to what he found on KM's computer. At a break in testimony, Alan Johnson made an offer of proof regarding Russell's examination of KM's computer.

> Had he been permitted rather than use the vague term "files of interest" as he did in his testimony, he would have identified the files which he found on the computer with the specificity – that was with the specificity expressed in his report which is I believe Exhibit 104. Yes, 104. Those files – I'm not going to list them out loud – they're contained under the heading significant findings on page six. It was table three under significant findings commencing on page six. On table four on page seven, table five on page seven and eight, table six on pages eight, nine and ten. Additionally, either I or Mr. Bednarek would have shown him Exhibits 105 through 109, and he would have stated that these were photographs which were derived from the hard drive,

> more specifically the larger of the two hard drives that were on the [KM] computer, and many of which correspond to those files which I just mentioned in his report or identified in his report. He also would have opined or would have opined in conformity with his report that he had viewed a number of files on the 16-1697-59 manually. That some of the images contained what he suspected were of child pornography and are referenced in table three. That he drew this conclusion as some of the images appear to involve girls unambiguously less than eighteen years of age. That based on law enforcement reports that were on the same evidence drive in the reports folder, law enforcement officials had submitted thousands of images on the drive to NCMEC for analysis which led him to believe that the reviewing officer may have suspected some of the images may have contained child pornography. Water marks on some of the files were consistent with certain websites that have a history of child pornography. That the images in the My Pics folder were primarily taken with a DMC-ZS19 camera and that two of the folders within the My Pics neighbors folder contained references to two females by name ... though no EXIF tag data was available to indicate their source.

Id. at 211.

Detective Craig, an employee of the Walworth County Sheriff's Department, testified for the District Attorney

as a computer forensics expert. Johnson could not ask Craig questions related to his examination of KM's computer. An offer of proof laid out the evidence his testimony would have elicited.

> [H]e found those files identified by David Russell in his report which is Exhibit 104. That, additionally, he found images of nude girls. That while in his professional opinion he did not consider those girls to be underage, that there were such a number of them that were ambiguous that he sent them to the National Center for Missing and Exploited Children for their examination. And that additionally he would agree that to a lay person, an ordinary person, it would be reasonable for them to interpret those pictures of nude females to be child pornography.

Id. at 213.

Johnson argued that when KM attached him, KM was not protecting his home; he was attempting to prevent the reporting of a crime: KM used his computer to further a criminal activity. R239:26-28. Thus WIS. STAT. § 939.48(1)(m) did not apply: Alan testified that when KM first opened the door he looked at Johnson and Johnson was sure KM knew exactly why he was there—the child pornography.

ARGUMENT

The principle question for the jury at the end of the trial was not whether KM had been killed or who had done it. Rather, the question came down to intent: what was Johnson's intent when he entered KM's residence, and what was his intent when he shot KM? If Johnson killed KM in self-defense, then no crime was proven. This question, in turn, was wholly one of credibility. More specifically, Johnson's credibility.

Central to Johnson's defense was his ability to demonstrate why he entered KM's home, and why he feared KM. But the pretrial rulings limited Johnson's ability to present his defense at trial. Johnson had to give up his right to remain silent, if he wished to present evidence of self-defense. The Circuit Court's ruling is not supported by law or practice. Indeed, its approach is contrary to clear precedent. The pretrial rulings also unfairly restricted Johnson's presentation of *McMorris* evidence, which would have informed the jury as to his state of mind.

Lastly, the Circuit Court, despite an ample factual basis, did not instruct the jury on other offenses that Alan Johnson requested, and one instruction referred to self-defense but gave no definition of it, thus limiting the jury's ability to reasonably analyze the evidence. The jury's acquittal on the burglary count clearly shows that the Circuit Court erred.

While it is true that, by the end of the trial, Johnson was able to present evidence in support of his defense theory, the manner in which the Circuit Court controlled the presentation of the evidence placed him at a significant, and unfair disadvantage; the court affected how the jury

comprehended the evidence. The Circuit Court's approach was akin to hobbling someone at the outset of a foot race. One should not claim no harm as long as the runner finishes the race. The hobbling prevented the racer from having an equal chance of winning (or due process in an adversary system), which is the whole point.

A. THE CIRCUIT COURT'S ORDER BARRING ADMISSION OF EVIDENCE RELATED TO JOHNSON'S CLAIMS OF SELF-DEFENSE UNTIL AFTER JOHNSON TESTIFIED VIOLATED HIS CONSTITUTIONAL RIGHTS.

The pretrial orders limited the admission of evidence, specifically evidence that Alan Johnson acted in self-defense when he shot KM. Usually, the admission of evidence is left to the trial court's discretion. *State v. Richard G.B.*, 2003 WI App 13, ¶ 7, 259 Wis. 2d 730, 656 N.W.2d 469. But not all evidentiary rulings are discretionary; if a defendant was denied the constitutional right to present a defense through the exclusion of evidence, the question is one of constitutional fact, which is reviewed de novo. *State v. St. George*, 2002 WI 50, ¶ 16, 252 Wis. 2d 499, 643 N.W.2d 777.

The Circuit Court decided that, if he was to pursue self-defense, Johnson had to testify first. R229:6. Having conditioned Johnson's right to present a defense on his waiver of his right to silence was unconstitutional and violated his rights under the Fifth, Sixth, and Fourteenth Amendments (and their Wisconsin corollaries).

Johnson made a preliminary showing to support his claim of self-defense prior to trial. *See* R47:3-12. But the

Court did not accept the offer of proof. The effect of the Court's decision needlessly complicated the presentation of evidence and had the effect of misleading the jury. Functionally, the decision unconstitutionally restricted his right to remain silent, to confront and to cross-examination witnesses and left Johnson unable to fully question many of the witnesses who were called by the State in its case-in-chief, after having given an opening statement that raised self-defense as an issue at trial. The construct invited the jury to form opinions before all evidence was heard because the jury was deprived of the critical filter of cross-examination.

No Wisconsin case has ever required the defendant to testify before offering evidence in support of his defense, including self-defense. In fact, the opposite is routine—and mandated. Requiring the defendant to testify before he presents evidence violates established Supreme Court precedent. *Brooks v. Tennessee*, 406 U.S. 605 (1972). A rule that requires the defendant to testify first is an infringement on his state and federal constitutional right of due process. *See Ferguson v. Georgia*, 365 U.S. 570 (1961). The Circuit Court persisted in its ruling despite *Brooks* having been brought to its attention. R69.

Moreover, the Court's decision is contrary to well-established Wisconsin law, which requires only a minimal quantum of "some evidence" necessary to establish the defendant's right to present evidence of self-defense. *State v. Stietz*, 2017 WI 58, 375 Wis. 2d 572, 895 N.W.2d 796. And, to the extent that Johnson's claim of self-defense hinges on his credibility, that question is to be resolved by the jury—not the circuit court. *State v. Coleman*, 206 Wis. 2d 199, 213-14, 556 N.W.2d 701 (1996). A court's preliminary focus is on whether there is "some evidence" supporting the defendant's self-defense

theory. *Stietz*, 2017 WI 58, ¶ 134. Johnson's offer of proof met this test.

In *Brooks v. Tennessee*, 406 U.S. 605 (1972), the Supreme Court ruled that a statute was unconstitutional because it required a defendant to testify before any other testimony for the defense was heard. This requirement violated the defendant's privilege against self-incrimination and also denied due process as it deprived him of the guiding hand of counsel in deciding not only whether he would testify but, if so, at what stage of the trial. Here, the Circuit Court decided for him.

The Supreme Court explained that a defendant may not know at the close of the State's case whether his own testimony will be necessary or even helpful to his cause.

> Rather than risk the dangers of taking the stand, he might prefer to remain silent at that point, putting off his testimony until its value can be realistically assessed. Yet, under the Tennessee rule, he cannot make that choice "in the unfettered exercise of his own will." [The Tennessee rule] exacts a price for his silence by keeping him off the stand entirely unless he chooses to testify first. This, we think, casts a heavy burden on a defendant's otherwise unconditional right not to take the stand. The rule, in other words, "cuts down on the privilege (to remain silent) by making its assertion costly." *Griffin v. California*, 380 U.S. 609, 614 (1965).

Id., 406 U.S. at 610-11 (internal footnotes omitted). The court further explained that no court rule should force a defendant to relinquish his right to testify.

> Whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right. By requiring the accused and his lawyer to make that choice without an opportunity to evaluate the actual worth of their evidence, the statute restricts the defense—particularly counsel—in the planning of its case. Furthermore, the penalty for not testifying first is to keep the defendant off the stand entirely, even though as a matter of professional judgment his lawyer might want to call him later in the trial. The accused is thereby deprived of the 'guiding hand of counsel' in the timing of this critical element of his defense.

Id. at 612–13.

In some cases it may be necessary for a defendant to testify in order to present facts sufficient to permit the trial court to instruct the jury on self-defense. But self-defense can be established, at least preliminarily, through questioning of witnesses. Witnesses, including investigators who examined the crime scene and KM's computer, the medical examiner, or detectives who took a defendant's statement, for example, may have information pertaining to the claim of self-defense. The questioning (cross-examination) of witnesses should not be preconditioned on the defendant testifying. Such a rule is arbitrary and disproportionate to the interest served. *Sussman v. Jenkins*, 636 F.3d 329 (7th Cir. 2011), citing *Michigan v. Lucas*, 500 U.S. 145 (1991).

No Wisconsin case imposes such a requirement, even where the only witness to the confrontation is the

accused. A review of the many Wisconsin cases involving the assertion of self-defense demonstrates that our courts regularly permit questioning of witnesses and the admission of evidence without first requiring the defendant to testify. Many of the cases discussing self-defense, like this case, involve events that occur out-of-view from other witnesses, and involve a claim raised by the individual who survived the encounter. *See, e.g., State v. Head*, 255 Wis. 2d 194, 648 N.W.2d 413 (2002); *State v. Watkins*, 2002 WI 101, 255 Wis. 2d 265, 647 N.W.2d 244; and *State v. Peters*, 2002 WI App 243, 258 Wis. 2d 148, 653 N.W.2d 300.

The Supreme Court has regularly found unconstitutional rules that limit a defendant's presentation of evidence, particularly, as it relates to his own testimony. *See, e.g., Holmes v. South Carolina*, 547 U.S. 319 (2006); *Montana v. Egglehoff*, 518 U.S. 37 (1996) (jury must be able to consider evidence of defendant's intoxication in determining whether requisite mental state existed); *Rock v. Arkansas*, 483 U.S. 44 (1987) (bar against hypnotically refreshed testimony is arbitrary and incompatible with constitutional right to testify); *Crane v. Kentucky*, 476 U.S. 683 (1986) (court may not bar defendant from testifying about voluntariness of admissions); *Chambers v. Mississippi*, 410 U.S. 284 (1973); and *Washington v. Texas*, 388 U.S. 14 (1967) (statute that did not permit defendant to call as a witness at trial any principal, accomplices or accessories, even though the state could call them as witnesses at trial, violated defendant's Sixth Amendment rights). Nothing in the pretrial ruling—requiring Alan Johnson to testify before he offers any evidence related to self-defense—supports the important balancing of constitutional rights necessary before a rule deprives a defendant of a constitutional right.

Brooks v. Tennessee, 406 U.S. 605 (1972), controls and requires the reversal of the conviction.

B. LIMITING JOHNSON'S PRESENTATION OF MCMORRIS EVIDENCE VIOLATED JOHNSON'S RIGHT TO A FAIR TRIAL.

In exercising its discretion to admit (or exclude) proffered evidence, a court must apply two principles: first, it must adhere to evidentiary rules; second, if the defendant asserts that exclusion of the evidence implicates his or her right to present a defense, the court must consider constitutional law principles. *St. George*, 252 Wis. 2d 499, ¶ 38, 643 N.W.2d 777.

"One of the essential ingredients of due process in a criminal trial is the right to a fair opportunity to defend against the State's accusations. A corollary to this principle is the right to present relevant and competent evidence." *State v. Johnson*, 118 Wis. 2d 472, 479, 348 N.W.2d 196 (1984) (citations omitted). The right to present a defense "includes the right to offer the testimony of witnesses." *Brown County v. Shannon R.*, 2005 WI 160, ¶ 65, 286 Wis. 2d 278, 706 N.W.2d 269. Additionally, the fundamental right to testify on one's behalf cannot be doubted. *Rock v. Arkansas*, 483 U.S. 44, 49 (1987). The right to testify is secured by the Due Process Clause of the Fourteenth Amendment, the Compulsory Process Clause of the Sixth Amendment, and the Fifth Amendment's guarantee against compelled testimony. *Id.* at 51-53.

The Circuit Court ruled that testimony about child pornography observed on KM's computer by Johnson on

October 25, 2016, was not relevant or admissible at trial.[3] R229:15. The evidence was integral to KM's conduct, after he found that Johnson was, again, examining his computer. Moreover, the evidence corroborated Johnson's testimony. While the Court did permit Johnson to say whether he was looking for contraband images on the computer (*id.*, at 18), not allowing the jury to know whether such contraband images were, in fact, located on the computer left the jury having to guess about this information, and allowed the District Attorney to argue that there was no corroboration. *See* R240:187. The Court erred in denying Johnson the ability to present evidence about what was found on the computer.

The presence of child pornography on KM's computer corroborated what witnesses were prepared to testify to. But, not allowing the jury to hear what Johnson found likely caused the jury to think that Johnson was lying in wait for KM. Too, the jury was likely to conclude that Johnson was not truthful about what he observed on KM's computer in the past. And, as Johnson testified that his purpose in going to KM's residence was to gather evidence, foreclosing Johnson's ability to talk about what he saw, may likely have caused the jury to conclude that Johnson was untruthful. Finally, as Johnson testified that what he saw five years earlier on KM's computer gave him concern for the safety of his niece, his inability to corroborate it with evidence of what he saw, likely affected the jury's determination about his credibility.

In *State v. Anderson*, 141 Wis. 2d 653, 416 N.W.2d 276 (1987), the court authorized the admission of evidence

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[3] The Circuit Court's ruling suggested that the balancing test required by § 904.04(2) is to protect a victim. It is protect against unfair prejudice to the accused or the State. Cases in which the victim is prejudiced usually say there is little or no prejudice.

corroborating defendant's statements sufficient to permit a reasonable person to conclude, in light of all facts and circumstances, that the statement could be true. The standard preserves a defendant's constitutional right to present evidence, where due process requires the admission of hearsay testimony that would otherwise be excluded by rote application of state hearsay statutes, provided that the testimony possessed persuasive assurances of trustworthiness and was essential to the defense. *Id.*, 141 Wis. 2d at 664-665, citing *Chambers*, 410 U.S. at 302. The standard adopted in *Anderson*, is "more consistent with the defendant's constitutional right to present evidence." *Anderson*, 141 Wis. 2d at 665.

Too, the presence of child pornography on KM's computer goes to Alan Johnson's state of mind in another way: KM, it can be inferred, reacted violently when he discovered that Johnson had (again) found child pornography on the computer in his study—there could be no other reason for Johnson's presence at the computer, and KM knew that Johnson was the one who discovered the child pornography on the computer previously. KM's reaction to finding Johnson examining files on the computer goes to the reasonableness of Johnson's claim of self-defense and explains why Alan Johnson would fear for his safety.

The exclusion of credible evidence that demonstrated why Alan Johnson had entered KM's home and, further, that explained his state of mind and that of KM was unfairly limited. The exclusion of the evidence violated Johnson's right to due process and to present a complete defense.

C. ERRORS WITH JURY INSTRUCTIONS AFFECTED JOHNSON'S SUBSTANTIAL RIGHTS.

1. *The Failure to Instruct on Self-Defense.*

Independent review of whether a jury instruction is appropriate is made applying the specific facts of a given case. *State v. Groth,* 2002 WI App 299, ¶ 8, 258 Wis. 2d 889, 655 N.W.2d 163, *overruled on other grounds by State v. Tiepelman,* 2006 WI 66, ¶ 31, 291 Wis. 2d 179, 717 N.W.2d 1. Whether there are sufficient facts to warrant instructing the jury on self-defense is a question of law that a reviewing court decides independently. *Head,* 255 Wis. 2d 194, ¶ 44 (citing *State v. Mayhall,* 195 Wis. 2d 53, 57, 535 N.W.2d 473 (1995). The Circuit Court exercises its discretion to "fully and fairly inform the jury of the rules of law applicable to the case and to assist the jury in making a reasonable analysis of the evidence." *State v. Coleman,* 206 Wis. 2d 199, 212, 556 N.W.2d 701 (1996).

The Circuit Court, which earlier explained in detail how Mr. Johnson had established a *prima facie* case of self defense, denied Alan Johnson's requested instruction on self-defense and, instead, instructed the jury on imperfect self-defense.

Self-defense takes three forms: the castle doctrine, self-defense, and imperfect self-defense (unnecessary defensive force). Each imposes a different test. The raising of one form of self-defense does not exclude the application of another form of self-defense. A defendant who places self-defense in issue bears the burden of production, not a burden of persuasion. *State v. Head,* 255 Wis. 2d 194, 246, 648 N.W.2d 413 (2002); *State v. Felton,* 110 Wis. 2d 485, 329 N.W.2d 161 (1983) ("It is for the accused to come forward with some evidence in rebuttal

of the state's case—evidence sufficient to raise the issue of the provocation defense. The burden of persuasion, of course, always remains upon the state"). But Wisconsin law is clear: to place a mitigating factor in issue at trial, there need be only "some" evidence supporting the defense. *Id.* The same general standards hold true for the affirmative defense of imperfect self-defense; but for the affirmative defense, the defendant is not required to meet an objective reasonable threshold—as a result, imperfect self-defense has a lower threshold for admissibility than self-defense. *Head,* 255 Wis. 2d at 246.

> [I]f, before trial, the defendant proffers 'some' evidence to support her defense theory and if that evidence, viewed most favorably to her, would allow a jury to conclude that her theory was not disproved beyond a reasonable doubt, the factual basis for her defense theory has been satisfied.

Id., at 248; *State v. Stietz,* 2017 WI 58, ¶ 134, 375 Wis. 2d 572, 895 N.W.2d 796. The evidentiary threshold that the accused must surmount to be entitled to a jury instruction on the privilege of self-defense has been described as a "low bar." *Id.* at ¶ 16. Evidence satisfies the "some evidence" quantum of evidence even if it is "weak, insufficient, inconsistent, or of doubtful credibility" or "slight." *Id.,* at ¶ 17.

The castle doctrine, WIS. STAT. § 939.48(1m), makes privileged the use of force to defend an actor's dwelling when the actor was present in the dwelling, and the actor knew or reasonably believed that an unlawful and forcible entry was occurring. The castle doctrine and self-defense are not mutually exclusive. The fact that a jury could find KM's actions to be privileged under the castle doctrine does not preclude the jury's consideration

of whether Alan Johnson's actions were also privileged—whether as perfect or imperfect self-defense.

Both self-defense and imperfect self-defense look to the perspective of the person asserting the privilege. No Wisconsin case holds that, if a jury could find an actor's conduct to be privileged under § 939.48(1)(ar), the privilege of self-defense or the affirmative defense of imperfect self-defense is not available. In the case of a person who asserts the privilege or an affirmative defense, whether their beliefs and the amount of force used were reasonable are all questions for the jury to decide.

The threshold for self-defense evidence is higher than the threshold for imperfect self-defense evidence, because of the objective reasonableness required for self-defense, and because the consequences for the State of not disproving perfect self-defense are much greater than the consequences of not disproving imperfect self-defense. *Head,* 255 Wis. 2d at 249.

The pattern jury instruction for self-defense instructs that a defendant's privileged use of force is based on his belief that "there was an actual or imminent unlawful interference with the defendant's person," and he "believed that the amount of force the defendant used or threatened to use was necessary to prevent or terminate the interference." Above all else, "the defendant's beliefs were reasonable." WIS JI—CRIM 800 (footnotes omitted).

However, a belief may be reasonable, even if mistaken. *See Maichle v. Jonovic,* 69 Wis. 2d 622, 628, 230 N.W.2d 789 (1975) ("The reasonableness of the actor's beliefs, moreover, is not defeated by a subsequent determination that his beliefs were mistaken"). Whether the defendant's beliefs were reasonable, must be determined from the

standpoint of the defendant at the time of the defendant's acts and not from the viewpoint of the jury now: what would a person of ordinary intelligence and prudence have believed in the defendant's position under the circumstances that existed at the time of the alleged offense.

The Circuit Court admitted that Johnson had made a *prima facie* showing necessary for the admission of self-defense. R236:274. The Court's denial of the jury instruction is inconsistent with its own factual finding.

Evidence was offered that KM was not protecting his home; he was attempting to prevent the reporting of a crime. Thus WIS. STAT. § 939.48(1)(m) did not apply: Paraphrasing, the Court roughly summarized the evidence pertinent to the jury instructions. *See* R239:33-34. But the Court would not instruct the jury on perfect self-defense. Alan testified that when KM first opened the door he looked at Johnson and Johnson was sure KM knew exactly why he was there—the child pornography: KM had used his computer to further a criminal activity. *Id.* at 26-28.

The facts at trial showed that Alan Johnson was in a panicked state when he was discovered by KM. Only a door separated Johnson and KM—and KM had closed the door. Johnson testified he couldn't think; he was afraid of KM; he was smaller and weaker than KM; he had been physically and sexually abused by KM, as had his siblings; and Johnson did not want to be discovered; he wanted to get in and out of KM's residence. Now his only way out was blocked by KM.

Johnson testified he did not go to the residence to kill KM, and never intended to kill KM. While armed, Johnson's experience with handguns was limited: he

went with his dad to a shooting range a few times when he was still at home either in middle school or high school. He had no more current experience with handguns. Johnson did not remember anything after KM shoved open the door and lunged at him.

McMorris evidence may be used to establish a factual basis to support a self-defense claim. *Head,* 255 Wis. 2d at 250. Thus the Supreme Court concluded that evidence of a victim's violent character and of the victim's prior acts of violence of which a defendant has knowledge should be considered in determining whether a sufficient factual basis exists to raise a claim of self-defense. *Id.*, 255 Wis. 2d at 251. Such evidence may be probative of a defendant's state of mind and whether she actually believed that an unlawful interference was occurring, that danger of death or great bodily harm was imminent, or that she needed to use a given amount of defensive force to prevent or terminate the unlawful interference. *Id.* In determining any of these issues, the circuit court should consider all the evidence proffered. *See id.*

Nor does self-defense require an actual interference; it can be premised upon an apprehension of danger—a belief that action must be taken in order to prevent imminent danger—just as legitimately as it can after an actual physical blow or threat.

> It is no less true that one assaulted is entitled to act upon his apprehensions, reasonably justified by the circumstances, in deciding as to the amount of force which he may use, than that such apprehension may justify him in using force at all; and to tell the jury that he may use no more force than is 'actually necessary' is as erroneous as to tell them that, before he can use force at all, the

> peril of an assault must be actually imminent, instead of merely imminent to his reasonable apprehension.

Schmidt v. State, 124 Wis. 516, 519, 102 N.W. 1071, 1072 (1905), citations omitted.

There is no requirement in the law that one party must first suffer an injury or permit herself to come within an inch of losing her life before she can act upon the apprehension of danger that she perceived.

> [T]he law does not require a person, in order to make out the defense of justification for killing his adversary, to prove that the apprehension or the necessity to resort to that extremity existed in fact. If he has reasonable ground to apprehend that he is in imminent danger of losing his life or receiving some serious bodily injury at the hands of his assailant, he has a right to act, efficiently, upon such reasonable apprehension and employ, what, to him at the time, honestly, seems necessary to that end, even to taking the life of his assailant.

Miller v. State, 139 Wis. 57, 77, 119 N.W. 850 (1909), quoting *Frank v. State*, 94 Wis. 211, 218, 68 N.W. 657 (1896).

Based on his prior experiences with KM, including the physical and sexual assaults, Johnson believed that the amount of force used to terminate KM's interference with him (when KM was lunging at him) was reasonable.

Regarding Johnson's request for the self-defense instruction, the Circuit Court ruled that:

> Because an objective reasonable person would find that the victim had a lawful right to interfere with the defendant [...] I don't think an objective reasonable person would buy that... I don't think a jury would find that the state failed to meet its burden on that prong. The second prong is would the objective threshold of reasonably believing that the force the defendant used was necessary to prevent imminent death or great bodily harm. [...] So I don't think a jury would conclude that the state had failed to meet its burden to disprove that element either. So for those reasons I will not allow those instructions that deal with perfect self-defense. I will allow as already noted the imperfect.

R239:50-52. The court employed an unrecognized standard: what the court thought a jury would "buy;" *i.e.*, whether it would successfully persuade a jury. It premised its decision on the faulty notion that the "castle doctrine" defeats the right to defend oneself. And it never considered the evidence suggesting that KM was acting to cover-up his crime, rather than to defend a dwelling.

A circuit court has broad discretion in deciding whether to give a requested jury instruction. *State v. Coleman*, 206 Wis. 2d 199, 212, 556 N.W.2d 701 (1996). The circuit court must, however, exercise its discretion in order "to fully and fairly inform the jury of the rules of law applicable to the case and to assist the jury in making a reasonable analysis of the evidence." *State v. Vick*, 104 Wis. 2d 678, 690, 312 N.W.2d 489 (1981). "[A] criminal defendant is entitled to a jury instruction on a theory of defense if: (1)

the defense relates to a legal theory of a defense, as opposed to an interpretation of evidence; (2) the request is timely made; (3) the defense is not adequately covered by other instructions; and (4) the defense is supported by sufficient evidence." *Coleman*, 206 Wis. 2d at 212-13 (internal citations omitted); *Johnson v. State*, 85 Wis. 2d 22, 28-29, 270 N.W.2d 153 (1978).

The test isn't what a jury would "buy," it's whether a reasonable construction of the evidence will support the defendant's theory "viewed in the most favorable light it will 'reasonably admit from the standpoint of the accused.'" *Head*, 255 Wis. 2d 194, ¶113. The factual basis for Johnson's requested instruction met this test. Indeed, the Circuit Court made a lengthy and fact specific finding that there had not just been "some" evidence of self defense, but a *prima facie* case. *See* R236:274.

Evidence satisfies the "some evidence" quantum of evidence even if it is "weak, insufficient, inconsistent, or of doubtful credibility" or "slight." *State v. Schuman*, 226 Wis. 2d 398, 404, 595 N.W.2d 86 (Ct. App. 1999); *State v. Peters*, 2002 WI App 243, ¶ 27 n.4, 258 Wis. 2d 148, 653 N.W.2d 300 ("The 'some' evidence standard is a relatively low threshold, in part because of the distinct functions of judge and jury."); Walter Dickey, David Schultz & James Fullin, Jr., *The Importance of Clarity in the Law of Homicide: The Wisconsin Revision*, 1989 WIS. L. REV. 1323, 1347 (The "some" evidence standard is a relatively low threshold, in part, because of the distinct functions of judge and jury—evaluating the weight and credibility of the evidence is traditionally a task reserved to the jury.).

However, the court is not to weigh the evidence. *State v. Mendoza*, 80 Wis. 2d 122, 152, 258 N.W.2d 260 (1977). It does not "look to the totality of the evidence," as that

"would require the court to weigh the evidence—accepting one version of facts, rejecting another—and thus invade the province of the jury." *Mendoza*, 80 Wis. 2d at 153; *Ross v. State*, 61 Wis. 2d 160, 172-73, 211 N.W.2d 827 (1973). "[T]he question of reasonableness of a person's actions and beliefs, when a claim of self-defense is asserted, is a question peculiarly within the province of the jury." *Maichle v. Jonovic*, 69 Wis. 2d 622, 630, 230 N.W.2d 789 (1975).

Here, the evidence supported the jury being instructed on self-defense instruction. A reasonable fact-finder could have determined that Johnson reasonably believed that he had to use lethal force to protect himself from KM. The *McMorris* evidence provided the factual background for Johnson's beliefs; so too, the circumstances of being cornered in a small room by KM after having been discovered while attempting to collect evidence of KM's repeated possession of child pornography, showed that a jury could believe that Johnson's conduct was reasonable. And the jury's acquittal on the charge of armed burglary underscores that the jury "bought" the evidence that Johnson did not enter KM's home with either the intent to steal or to kill. In the end, the jury should have been permitted to decide the issue, not the Court.

Because sufficient evidence supported instruction on the privilege of self-defense, the Circuit Court erred in failing to instruct the jury on self-defense as requested by Johnson; that failure affected substantial rights, and was not harmless error.

2. *Denying the Self-Defense Instruction Affected Substantial Rights and Requires Reversal.*

A defendant's substantial rights are unaffected if a jury would have come to the same conclusion (beyond a reasonable doubt), absent the error or if it is clear beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.

But here, the jury acquitted on the armed burglary charge. Acquittal on that count – premised on Johnson's carrying a gun into KM's home to commit a felony – required the jury to believe Johnson's testimony, or some of it. In light of the verdict on the burglary count, if given the self-defense instruction, the jury may well have acquitted on the lesser charge upon which they convicted. Thus, the Circuit Court's error in refusing to give the jury a self-defense instruction cannot be harmless. It is clear beyond a reasonable doubt that a jury would not have come to the same conclusion absent the error, and the error contributed to the guilty verdict. Self-defense could have absolved Alan Johnson of his conviction. As a result, the Circuit Court's refusal to give the self-defense instruction affected his substantial rights – the error was not harmless.

3. *The Circuit Court Unfairly Denied Johnson's Request for Instructions on Lesser Offenses.*

A circuit court has the duty to accurately give to the jury the law of whatever degree of felonious homicide the evidence tends to prove and no other. *State v. Stortecky*, 273 Wis. 362, 369, 77 N.W.2d 721 (1956). Though in some cases it is appropriate to submit multiple verdict questions. *State v. Weeks*, 165 Wis. 2d 200, 477 N.W.2d 642 (Ct. App. 1991). However, it is error for a court to refuse to instruct the jury on an issue which is raised by

the evidence or to give an instruction on an issue which finds no support in the evidence. *Lutz v. Shelby Mutual Ins. Co.*, 70 Wis. 2d 743, 750, 235 N.W.2d 426 (1975). Said another way, if evidence warrants submission of lesser degrees of homicide, failure to do so results in prejudice to defendant. *Weston v. State*, 28 Wis. 2d 136, 135 N.W.2d 820 (1965).

Generally, an offense is a "lesser-included" one only if all of its statutory elements can be demonstrated without proof of any fact or element in addition to those which must be proved by the "greater" offense. *Hagenkord v. State*, 100 Wis. 2d 452, 302 N.W.2d 421 (1981). But where first degree intentional homicide is charged, all homicide crimes which are a less serious type of criminal homicide are considered lesser included offenses. The general principle was explained in Walter Dickey *et al.*, THE IMPORTANCE OF CLARITY IN THE LAW OF HOMICIDE: THE WISCONSIN REVISION, 1989 WIS. L. REV. 1323, 1387:

> Where first-degree intentional homicide ... is charged, all other homicide offenses are included crimes under section 939.66(2). The included crimes could be submitted on two different tracks—one involving intent to kill and one involving recklessness and negligence. If there is evidence of a mitigating circumstance, second-degree intentional homicide should be submitted. If there is a basis for reasonable doubt about intent to kill, first-degree reckless homicide should be submitted.... The evidence could support submitting included crimes on both tracks.

To justify submission of lesser included offense to jury, some reasonable ground must exist for acquittal of

greater and conviction of lesser offense. *State v. Stanton*, 106 Wis. 2d 172, 316 N.W.2d 134 (Ct. App. 1982); *Hawthorne v. State*, 99 Wis. 2d 673, 682, 299 N.W.2d 866 (1981).

Whether a reasonable construction of the evidence will support the defendant's theory is viewed in the most favorable light it will "reasonably admit ... from the standpoint of the accused." *Ross v. State*, 61 Wis. 2d 160, 211 N.W.2d 827 (1973). If this question is answered affirmatively, then it is for the jury, not the trial court, to determine whether to believe defendant's version of events supporting the submission of lesser included offense instructions. *State v. Mendoza*, 80 Wis. 2d 122, 153, 258 N.W.2d 260 (1977).

The Circuit Court roughly summarized the evidence pertinent to the jury instructions. R239:33-34. It noted that Johnson was not skilled at handling a handgun. His most recent experience with a handgun was more than 15 years prior, and then it was only because Johnson's father required him to train with a handgun. Johnson's lack of familiarity with the handgun and the inherent dangerousness of handguns could have allowed the jury to decide that a lesser charge involving recklessness or negligence was appropriate on the facts presented at trial.

The Court's denial of Johnson's request to instruct the jury on the lesser offenses should have been granted.

CONCLUSION

The Circuit Court erred when it controlled too tightly the presentation of evidence such that it required Alan

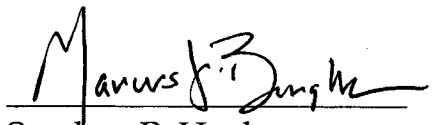
Johnson to testify at trial prior to permitting the admission of evidence related to his claim of self-defense. The pretrial order was fundamentally wrong in requiring Johnson to relinquish constitutional rights if he wished to advance a claim of self-defense. Moreover, the Circuit Court's decision to restrict the presentation of evidence going to Johnson's state of mind both when he entered KM's home and when he and KM engaged in the struggle affected substantial rights and violated Johnson's right to due process and to a complete defense. Finally, a reasonable construction of the evidence supported the defendant's theory of defense and should have required the Circuit Court to instruct the jury on perfect self-defense and lesser included offenses.

For these reasons, Alan Johnson now respectfully requests that this Court **REVERSE** the judgment of the Walworth County Circuit Court and **REMAND** for a new trial consistent with this Court's opinion.

Dated at Madison, Wisconsin, May 13, 2019.

Respectfully submitted,

ALAN M. JOHNSON,
Defendant-Appellant

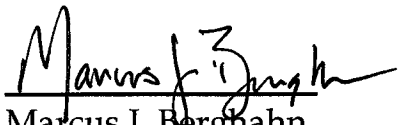


Stephen P. Hurley
Wisconsin Bar No. 1015364
Jonas B. Bednarek
Wisconsin Bar No. 1032034
Marcus J. Berghahn
Wisconsin Bar No. 1026953

HURLEY BURISH, S.C.
33 East Main Street, Suite 400
Madison, Wisconsin 53703
[608] 257-0945

CERTIFICATION

I certify that this brief conforms with the rules contained in WIS. STAT. §§ 809.19(8)(b) and (c), for a brief produced using proportional serif font. The length of the portions of this brief described in WIS. STAT. § 809.19(1)(d), (e) and (f) is 10,824 words. *See* WIS. STAT. § 809.19(8)(c)1.



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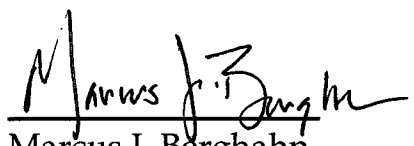

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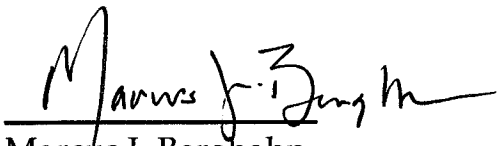

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I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decisions of the administrative agency.

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