STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2018AP2318-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ALAN M. JOHNSON,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN WALWORTH COUNTY CIRCUIT COURT, THE HONORABLE KRISTINE E. DRETTWAN, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Did the circuit court err by holding that Defendant-Appellant Alan M. Johnson could not present evidence of (a) homicide victim KM's past sexual assault of him, physical assault of him and others, and reputation for violence, or (b) KM's years-earlier possession of child pornography, until Johnson established a factual basis through his own testimony?

The circuit court so held.

This Court should hold, "No."

2. Did the circuit court err by holding that Johnson could not present evidence of whether KM's computer had child pornography on it the night Johnson shot KM?

The circuit court so held.

This Court should hold, "No."

3. Did the circuit court err when it declined to instruct the jury on (a) perfect self-defense and (b) lesser-included offenses of second-degree reckless homicide and homicide by negligent use of a dangerous weapon?

The court declined to give those instructions.

This Court should hold, "No."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not seek oral argument or publication.

INTRODUCTION

Johnson mistakenly equates his right to present a defense with a right to present any evidence, in any manner, and to receive any requested instruction. He ignores the deference this Court gives to a circuit court's evidentiary rulings and overlooks the significance of the *affirmative*

nature of his self-defense claims to the court's rulings. Many of Johnson's arguments are undeveloped, and all fail.

To avoid confusion, the State follows the order in which Johnson presents his main claims, but this Court should not: If it agrees with the State that the circuit court did not err in declining to instruct on perfect self-defense, *see* Section III.B., *infra*, then Johnson's first and second claims are non-starters. Those claims involve challenges to when and how Johnson could present evidence to support self-defense. Imperfect self-defense (about which the jury was instructed), however, only mitigates first-degree intentional homicide to second-degree intentional homicide. The jury did not find him guilty of any intentional homicide offense but instead convicted him of first-degree *reckless* homicide.

No matter how this Court chooses to analyze Johnson's claims, it should reject them all and affirm.

STATEMENT OF THE CASE

Procedural overview. KM's wife awoke in the night to a "thud." (R.2:2.) KM had been shot multiple times. (R.2:2.) Police questioned KM's wife's brother—Johnson, then 31 years old. (R.2:2.) Johnson at first denied any knowledge of what happened. (R.2:2.) When police returned later that day, Johnson said, "Arrest me, I killed him." (R.2:2.)

The State charged one count of first-degree intentional homicide with the use of a dangerous weapon and one count of armed burglary. (R.9.) A nine-day jury trial ensued, with the Honorable Kristine E. Drettwan, presiding. (R.213; 214; 215; 216; 217; 218; 219; 220; 221; 222; 223.)[1]

The jury found Johnson guilty of the lesser-included offense of first-degree reckless homicide while armed and not

[1] The transcripts from the fourth trial day are in reverse order in the appellate record.

guilty of armed burglary. (R.178; 179.) The court sentenced him to 35 years' imprisonment. (R.224:57.)

Pre-trial litigation concerning the admission of other-acts and McMorris evidence. Johnson, by Attorney Scott McCarthy, filed a motion to "introduce other acts evidence." (R.15; 21; 23.) He sought to admit evidence that: (1) KM sexually assaulted him when he was about 11 years old, and he did not report it; (2) KM physically assaulted him multiple times, including "choking him out" once; (3) KM "inappropriately" touched Johnson's younger sister (not KM's wife) years earlier and "chok[ed] her out"; (4) five to six years before KM's death, Johnson discovered child pornography on a computer in KM's home. (R.15:1–2.)

Johnson's motion further explained that he did not report the child pornography at the time. (R.15:2.) But, after becoming concerned about what KM might do to other young family members, he—two years before KM's death—reported the child pornography to a cyber tip-line. (R.15:3, 11–17.) Police said there was nothing they could do given the staleness of the information but said to call them if he found "anything more." (R.15:3, 18–21.)

Johnson's motion further asserted that he told his father, Eric, a retired police officer, about the child pornography. (R.15:3–4.)[2] Eric confronted KM about the child pornography; KM said he moved it and would get counseling, but that did not happen. (R.15:4.)

Johnson claimed he entered KM's home that evening to "find the child pornography so he could report it." (R.15:4.) He asserted he was on the computer for over two hours when he found "over 5,500 pictures of school age children walking past

[2] The State refers to his father as "Eric," and the Defendant-Appellant as "Johnson."

the home of [KM], taken by [KM] out of his front window," in "categories such as 'Blondes.'" (R.15:4.)

Johnson noted that he disclosed this information before receiving discovery. (R.15:5.) He noted police advised that the pictures were viewed on KM's computer at 2:17 a.m., with the 911 call at 2:21 a.m.; he argued this was "consistent with" KM catching him on the computer and "attacking" him "to prevent the disclosure" of the photographs. (R.15:5.)

Johnson argued the information was relevant to self-defense and imperfect self-defense. (R.15:6–10.) He asserted he would introduce this information through his testimony and the testimony of family members, law enforcement, and experts. (R.21.)

The State opposed Johnson's motion. (R.24.) It argued that the evidence was not relevant, but if it were, the probative value would be outweighed by the danger of unfair prejudice. (R.24:2–6.) The State argued that Johnson wished to introduce evidence of "[v]igilantism." (R.24:6–10.) The State filed motions in limine arguing that Johnson be precluded from arguing jury nullification and from introducing evidence that KM assaulted him "20 years prior to the shooting," and "collected and/or took photographs of females." (R.27:2.) Johnson objected. (R.25:4–5.)

Johnson, by new trial counsel—Attorneys Stephen Hurley and Jonas Bednarek—filed an "omnibus brief" addressing, among other things, his motion to admit evidence about KM. (R.46.) Johnson argued: "Whether the evidence is classified as other-acts evidence, *McMorris* evidence, or evidence of intent (or lack of intent)," the evidence was "fundamental to his constitutional right to present a complete defense." (R.46:2.)

Johnson presented another written offer of proof, similar to that in his first motion. (R.46:3–12.) He added a few

details: KM was "domineering" and belittled him and was verbally abusive to KM's son. (R.46:3–10.)

He added more allegations about the shooting: that while on the computer in KM's home, he heard a noise, got up and turned towards the door and saw KM standing, naked; he had the pistol he brought with him by his side; neither man said anything, KM closed the door, reopened it, and "charged at" Johnson; Johnson shot him. (R.46:10–11.)

At a hearing, the State made additional arguments about Johnson's other-acts evidence motion. (R.210:227–42.) It noted it could choose to offer evidence that Johnson claimed KM sexually assaulted him as a child as proof of motive, but would not do so. (R.210:232–33.) It acknowledged Johnson had the right to testify that he went to the house to "ferret out" KM's criminal activities to report them to police. (R.210:232.) It argued, though, that if Johnson ultimately did not testify—a decision he did not have to make until it was time for his testimony—the defense should not be able to introduce the evidence because it would be unfairly prejudicial under Wis. Stat. § 904.03. (R.210:232–35.)

The State asked the court to rule that "none of the other-acts evidence" could be referenced, including in opening statement, until Johnson testified. (R.210:240.) The State noted that then, the court could decide what evidence could be admitted. (R.210:240.)

The parties submitted additional briefing. (R.57; 58; 59.) Johnson argued that he had a constitutional right to develop his defense through voir dire, opening statement, and cross-examination of State's witnesses. (R.58:3–5.)

The State stressed that no other witness could testify as to Johnson's motivations for being in KM's home that night and what happened in the room between the two of them. (R.59:9–10.)

The State also argued that whether KM actually possessed child pornography was irrelevant; the only relevant component was whether Johnson believed it. (R.59:5.) The State asserted it would create "two trials within a third trial," confusing and misleading the jury. (R.59:7.)

The circuit court's ruling on the admission of McMorris evidence and other-acts evidence. The court first addressed evidence concerning KM's alleged prior acts of sexual and physical violence and reputation for physical violence. (R.211:4.) Given the State's acknowledgment that Johnson could testify about his fears based on KM's history towards him, the questions were whether Johnson could testify to his knowledge of KM's actions towards others and whether others could testify about KM's actions and reputation. (R.211:4.)

The court explained that in order for *McMorris* evidence to be admissible, there must be a "sufficient factual basis that self-defense is at issue." (R.211:5.) It concluded that the only way a sufficient factual basis for self-defense could be shown here would be through Johnson's testimony: "It is undisputed that the defendant and the victim are the only ones present during this incident." (R.211:6.)

The court therefore held that if Johnson chose to testify and if his attorneys believed he established a sufficient factual basis for self-defense, then counsel could ask for a ruling. (R.211:6–7.) If the court found a sufficient factual basis, it would allow other-acts and reputation evidence about KM's physical aggressiveness. (R.211:7.) Then, this evidence would be relevant to Johnson's state of mind, and its probative value would not be substantially outweighed by the danger of unfair prejudice. (R.211:10–11.)

It would also then permit evidence of specific acts of physical violence, including sexual assault, by KM against Johnson. (R.211:8.) It would allow acts of physical violence against Johnson's younger sister but would not allow

testimony that he "made her feel creepy." (R.211:8.) It would allow evidence of any physical abuse, but not verbal abuse, of KM's son. (R.211:8–9.) It would not permit evidence that he was "self-absorbed or domineering or unkind or selfish or a bad father." (R.211:7.) Other witnesses would be allowed to testify to KM's reputation and to any of the permitted other-acts evidence. (R.211:10.)

This meant that the defense could not question the State's witnesses about these matters during the State's case-in-chief but would be permitted to re-call any relevant witness. (R.211:10.) The court recognized this order "might not be the most streamlined way" for the defense but deemed it necessary and not violative of Johnson's rights. (R.211:9–10.)

As to the child pornography allegations, the questions were whether, (1) before Johnson testified, the defense could introduce evidence that he contacted police about child pornography years earlier; and (2) the defense could introduce evidence of whether KM's computer had child pornography on it that night. (R.211:13–14.) The court noted, "Clearly, this is not evidence of physical violence by the victim so this is not a self-defense or *McMorris* type of analysis." (R.211:14 (emphasis added).)

As to the first question, the court answered no; "for the same reasons" as in the "self-defense analysis," the defense would not be able to introduce evidence about child pornography prior to Johnson's testimony. (R.211:14.) If Johnson testified and established that he found child pornography on KM's computer years earlier, he could recall any relevant witnesses and present evidence to support his testimony. (R.211:14–15.)

As to the second question, the court answered that any evidence of what was or was not on KM's computer was not relevant under Wis. Stat. § 904.01. (R.211:15.) Even if it were

relevant, 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." (R.211:16.) It would also cause undue delay and mislead the jury. (R.211:16.)

Defense counsel argued that if he could not establish whether Johnson found child pornography that night, it would "make it appear to the jury that there was none." (R.211:18.) The court disagreed. (R.211:18.)

The court ruled that the defense *could* discuss the self-defense and child pornography issues in voir dire and opening statement. (R.211:11–17.)

Johnson's motion for reconsideration. Johnson moved for reconsideration. (R.64.) The State in response noted it disputed Johnson's claim that there was child pornography on KM's computer that night but would not "challenge the defendant's testimony about the contents of the computer so as not to open the door." (R.65:2.) The court rested on its prior rulings. (R.69.)

The defense's opening statement. The defense set forth its theory in opening statement: KM's molestation of Johnson and history of violence towards Johnson and others; Johnson's discovery of child pornography years earlier and his being told by police that it was too stale; and his desire to obtain new evidence of child pornography that night. (R.214:50–63.) Counsel said Johnson would testify that he had no memory of actually shooting KM. (R.214:61.)

The State's case-in-chief. Detective Banasyznski spoke with Johnson two times the morning of KM's death; Johnson denied knowing anything about it. (R.216:70–106.)[3] Johnson

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[3] Detective Banasyznski's initial testimony spanned two days. The transcript of the second day incorrectly refers to him as Detective Kolb—another State's witness who testified before

(continued on next page)

lived with his parents. (R.216:79.) Later that day, the detective returned to Eric's house, and Johnson said, "Arrest me, I killed him." (R.218:78.)

A medical examiner testified that KM was shot five times, including once in the back and once in the head; a third shot hit his left arm; the others hit his chest area. (R.215:220–98.)

Eric testified that he owned several firearms, including a .40 caliber semi-automatic pistol. (R.217:110.) He kept his guns and ammunition in a locked safe in his house. (R.216:86–89, 111–12.) A firearms examiner confirmed that Eric's .40 caliber pistol was used to kill KM. (R.215:27–135.) KM's blood was found on clothing located in a bin in Johnson's home. (R.215:163–178; 214:166–83.)

The State called KM's wife (Johnson's sister), who testified to looking in the computer room and finding her husband on his stomach. (R.214:109–12.) Her son testified to his mom calling him to come downstairs and finding his father lying face down. (R.214:200–01.) Police explained that the computer room was a small, roughly ten-foot by ten-foot "severely cluttered" room. (R.214:241–42.)

KM's wife also testified that Johnson had lived with them for a summer; they also had vacationed together. (R.214:98, 102–03.) She acknowledged not speaking with Johnson for roughly one-and-a-half years before he killed KM; she believed Johnson was upset with them. (R.214:151.) Eric also acknowledged that his relationship with KM became strained, and he asked KM not to come around his family anymore. (R.217:151.)

In between testimony of many of the State's witnesses, the defense—outside the presence of the jury—presented

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Detective Banasyznski. (*Compare* R.216:70–106; 218:14–87) *with* R.217:159–192; 216:35–68).)

offers of proof of evidence they believed they could have elicited, or questions they would have asked, but for the court's pretrial rulings. The defense wished to explore with KM's wife that Johnson was upset with KM because he would not go to therapy. (R.214:141–45.) The defense wished to elicit from KM's son that Johnson talked with him about finding child pornography on KM's computer. (R.215:15–17.) The defense wished to question Eric about his discussion with KM about child pornography and about Eric telling police that KM molested Johnson years ago. (R.217:14–17.)

The defense asserted they would have cross-examined police about the "knowledge of [KM] having child pornography" on his computer, about Eric telling police about KM molesting Johnson, about other family members reporting a family rift, about Johnson telling police that KM molested him and was abusive towards others, and about discovering child pornography. (R.216:109; 218:115–31.)

Johnson's testimony and the court's ruling. After the defense called a police officer, (R.218:152–73), Johnson testified. (R.218:174–318; 219:10–20.)

Johnson said that when he was 10 or 11 years old, KM reached his hands down his pants and held them there for a few seconds as they were play-wrestling. (R.218:198–99.) He testified that KM bullied him and other family members. (R.218:198.) He gave examples where KM hit him in the chest and squeezed his head. (R.218:202–03.) One time, he said, KM put his arm around his neck and "pulled [his] wind pipe shut" as KM's wife watched. (R.218:203–04.)

Johnson testified that years before KM's death, he discovered child pornography on KM's family's computer, including a picture of an adult man having sex with an elementary-school-aged girl. (R.218:211–13.) He did not tell anyone. (R.218:212–13.)

He said he became concerned years later because of a family member who was the same age as the girl in the picture. (R.218:213.) He filed an online report; law enforcement contacted him and said that they could not do anything but to tell them if he saw anything else. (R.218:227–29.) Johnson said he discussed this with his father, who talked with KM about it. (R.218:230–33.) His father said KM said he "moved" the child pornography and he would get counseling, but he did not get counseling. (R.218:236–37.) Johnson testified he told KM's son that child pornography was found on the computer. (R.218:238–39.)

Johnson testified he was not thinking about killing himself or anyone else the day and evening of KM's death. (R.218:241–46.) He made the decision to break into KM's house "[r]ight like about the time that [he] went." (R.218:247.) He said he went to find "fresh pictures" so police "could take care of it." (R.218:247.) He said he took gloves because he did not want to "fry" the computer equipment. (R.218:249.)

Johnson said he found the keys to his father's safe, got a gun, found a magazine with ten bullets in it, and made sure the magazine fit. (R.218:251–54.) As to why he brought a gun: "if he saw me he would know why I was there and he'd go after me." (R.218:254.) He denied taking it to kill KM but said he wanted to feel "safe." (R.218:254.)

He drove over and parked on the street to not wake the family. (R.218:255–56.) He entered through a sliding door; he brought a bag with him that he left outside but took the gun and a glove out. (R.218:258.) He did not bring a phone. (R.218:267.)

He said he looked for drives in the computer room and looked on the computer for about two-and-one-half hours. (R.218:260–64.) He testified he "found what they needed" and intended to turn it over to police. (R.218:267–68.)

Johnson testified that he heard a noise, closed the computer windows, grabbed the gun, and got up towards the door. (R.218:268.) KM opened the door; Johnson noticed he was not wearing a shirt. (R.218:268–69.) Johnson said KM quickly pulled the door shut; Johnson "just stood there." (R.218:269.)

Johnson said he was afraid. (R.218:269.) "I wanted to get out." (R.218:269.) He did not think he could get out through a window. (R.218:269.) He said he did not believe he could defend himself against KM. (R.218:266–67.)

He explained: "I was standing in the room and then the door flew open and he attacked me. He just came right at me. . . . I think I closed my eyes. I didn't see what happened." (R.218:271.)

Johnson said he did not remember shooting the gun or hearing it fire, or how he got beyond KM. (R.218:271.)"Q. Do you have a memory of what occurred in that room? A. No. I mean, I remember being in there and being on the computer but I don't remember exactly how I got out." (R.218:272.)

After this answer, defense counsel asked to speak outside the jury's presence. (R.218:272.) The court concluded Johnson had established a sufficient factual basis to allow admission of the evidence it previously deemed conditionally admissible. (R.218:273–74; 220:213–20.) The court noted they would discuss the distinction between perfect and imperfect self-defense in the context of jury instructions, "[b]ut there is a different standard between what the Court gives as a jury instruction and what the standard is for the Court allowing the introduction of *McMorris* evidence." (R.220:219–20 (emphasis added).)

Johnson then testified that he previously saw KM put his hands on his younger sister and verbally berate KM's son. (R.218:277–80.)

Johnson also testified that he noticed blood on his feet at an intersection driving home. (R.218:283.) He put his clothes in a bag and in a bin in the basement. (R.218:285–87.) He saw five bullets were missing from the gun and returned it. (R.218:287.) He acknowledged at first not telling his older sister, or police, what he did. (R.218:288.) He said he contemplated killing himself but could not. (R.218:293–94.)

On cross, Johnson acknowledged that Eric had told him he could still report KM's molestation because the statute of limitations had not run; further, that Eric said KM could face life imprisonment for it. (R.218:301.) Johnson said he did not believe "anything would happen." (R.218:301–02.)

He acknowledged that his younger sister—whose daughter's age raised his concerns—knew to keep her children away from KM. (R.218:315–16.)

Johnson also acknowledged being taller than KM and that he could have called out for his sister or her son for help, but "didn't think of it." (R.218:316.)

Following his testimony, the defense presented an additional offer of proof that, if permitted, Johnson would have testified to, that night, finding images of naked underage girls on the computer and over 5000 images of neighborhood girls, many focused on their "back sides" and "crotches." (R.220:3–5.)

Additional defense evidence. The defense called a computer analyst who testified that, between 12:30 a.m. and 2:29 a.m., thousands of files were accessed on the computer. (R.220:20–35.) Outside of the jury's ear, the defense made an offer of proof that the analyst would have also testified that some images contained what he suspected was child pornography. (R.220:212–13.)

They also called the detective who spoke with Johnson in 2015 after he reported finding child pornography; he confirmed telling Johnson they could not do anything with the

information he provided but that he should let them know if he found anything "current." (R.220:53–54.) At the time, he asked Johnson if Johnson had any altercations with KM; Johnson said KM hit him a few times when he was 11 or 12 years old, but they had no other arguments. (R.220:64.)

Johnson's eldest sister (not KM's wife), testified that Johnson is a passive person who avoids confrontation. (R.220:104.) She said Johnson was afraid of KM and avoided him where possible. (R.220:105–07.) She believed KM was a violent bully and said other family members feared him. (R.220:107.) She also said that two years earlier, Johnson told her that KM had child pornography. (R.220:110.)

Johnson's younger sister (also not KM's wife), testified KM choked her until she blacked out when she was 14 years old. (R.220:150.) She said he touched her a lot, and she was concerned about her children being around him. (R.220:151–52.) She described him as a violent bully, and Johnson as a passive, non-confrontational man. (R.220:152–53.)

On rebuttal, KM's wife testified that she never saw KM physically abuse either Johnson or her son. (R.220:158–60, 177–80.) Though Eric (who acknowledged memory problems) denied it in rebuttal testimony, a detective testified that Eric reported Johnson saying he went over to the house to kill KM. (R.220:164, 186.)

Jury instructions and the verdicts. The defense asked the court to instruct on first- and second-degree intentional and reckless homicides, and self-defense, as well as homicide by negligent handling of a dangerous weapon. (R.221:6–8.)

The parties agreed to the second-degree intentional homicide instruction. (R.221:32.) The court also agreed to instruct on first-degree reckless homicide. (R.221:34–35.)

It denied the requests to instruct on second-degree reckless homicide and homicide by negligent use of a firearm. (R.221:35–38.) It explained that with "utter disregard" as the

only distinction between the reckless homicides, there was no way a jury could acquit on first-degree reckless and convict on second-degree. (R.221:34–36.) The court also held that there was no way a jury could acquit on intentional and reckless homicide offenses but convict on negligent homicide, given that Johnson got the gun, loaded it, and took it with him as he broke into the house. (R.221:36–37.)

As to the self-defense instructions, the State agreed Johnson was entitled to an imperfect self-defense instruction but objected to one for perfect self-defense. (R.221:39–41.) The State stressed that Johnson broke into KM's home, and KM therefore would have had every right to kill Johnson pursuant to the castle doctrine; it argued that no reasonable person would think Johnson has a "right to kill the person who has the lawful right to kill" him. (R.221:19–22, 39–40.)

The defense argued that the castle doctrine was inapplicable because, according to Johnson, KM attacked him to prevent him from reporting a crime. (R.221:27.)

The court noted that the castle doctrine was not directly applicable because the roles were reversed but was relevant for consideration of "self-defense" and "provocation." (R.221:31–32.)

It concluded that Johnson was entitled to instruction on imperfect self-defense but not perfect self-defense. (R.221:49–52.) It held that a reasonable jury could not conclude that the State failed to meet its burden to disprove one of the elements of self-defense beyond a reasonable doubt. (R.221:50.)

The court noted that Johnson had to satisfy an objective-person standard that he reasonably believed he was preventing or terminating an unlawful interference with his person. (R.220:50.) "Whether or not a castle doctrine applies," it explained, Johnson "came uninvited" in the middle of the night with a loaded weapon and saw the victim "nude from the waist up" without any weapons. (R.221:50–51.)

The court concluded that an "objective reasonable person would find that the victim had a *lawful* right to interfere," and therefore it could not be that the defendant was preventing an *unlawful* interference. (R.221:51–52 (emphasis added).) The Court stated, "I'm not convinced at all that what the victim was doing was unlawfully interfering with the defendant trying to gather evidence of child pornography. I don't think an objective reasonable person would buy that." (R.221:52.)

The court noted that Johnson testified he had no memory of shooting KM, and there was no evidence that KM ever threated to kill Johnson or that he used weapons against him. (R.221:52.) "[E]ven looking at all of the evidence that is in the record of what things the victim did to the defendant over his lifetime," that would not be enough to justify the force of the multiple gunshots. (R.221:53.)

The court instructed the jury accordingly. (R.222:42–71.) The jury found Johnson guilty of first-degree reckless homicide while armed and not guilty of armed burglary. (R.178; 179.)

Johnson appeals.

STANDARDS OF REVIEW

The admission or exclusion of evidence, including *McMorris* evidence, is left to the circuit court's discretion. *State v. Sarfraz*, 2014 WI 78, ¶ 35, 356 Wis. 2d 460, 851 N.W.2d 235; *McAllister v. State*, 74 Wis. 2d 246, 251, 246 N.W.2d 511 (1976). The question is not whether a reviewing court "would have admitted" the evidence, "but whether the trial court exercised its discretion in accordance with accepted legal standards and in accordance with the facts of the record." *State v. Payano*, 2009 WI 86, ¶ 51, 320 Wis. 2d 348, 768 N.W.2d 832 (citation omitted). "The circuit court's decision will be upheld 'unless it can be said that no

reasonable judge, acting on the same facts and underlying law, could reach the same conclusion.'" *Id.*

Whether the evidence supported an instruction on self-defense and lesser-included offenses are questions of law reviewed de novo. *State v. Peters*, 2002 WI App 243, ¶ 12, 258 Wis. 2d 148, 653 N.W.2d 300; *State v. Fitzgerald*, 2000 WI App 55, ¶ 7, 233 Wis. 2d 584, 608 N.W.2d 391.

ARGUMENT

I. The circuit court did not err by requiring Johnson to establish a factual basis for self-defense through his testimony before allowing admission of supporting evidence.

A. Legal principles

The admission of character evidence, generally. Defendants have constitutional rights to present a defense and confront witnesses. *Sarfraz*, 356 Wis. 2d 460, ¶ 37. These rights only protect "present[ing] relevant evidence that is 'not substantially outweighed by its prejudicial effects.'" *Id.* (citation omitted).

Relevant evidence has "any tendency to make the existence of any fact that is of consequence" more or less probable. Wis. Stat. § 904.01 Even if relevant, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay." Wis. Stat. § 904.03.

Though generally inadmissible, evidence of a victim's "pertinent" character trait may be admissible in a homicide case. Wis. Stat. § 904.04(1)(b). When this exception is present, character evidence may be presented through reputation testimony. Wis. Stat. § 904.05(1). Where the defendant seeks to admit specific instances of prior conduct, the character or

character trait must be "an essential element of a charge, claim, or defense." Wis. Stat. § 904.05(2).

The admission of other-acts evidence, generally. Evidence of other acts is inadmissible to show action in conformity therewith.[4] Wis. Stat. § 904.04(2)(a). Other-acts evidence is admissible if: (1) it is offered for a permissible purpose under Wis. Stat. § 904.04(2)(a), (2) it is relevant under Wis. Stat. § 904.01, and (3) if its probative value is not substantially outweighed by the risk or danger of unfair prejudice under Wis. Stat. § 904.03. *State v. Sullivan*, 216 Wis. 2d 768, 772–73, 576 N.W.2d 30 (1998).

Excluding other-acts evidence does not abridge a defendant's right to present a defense if the court properly deemed it inadmissible under the rules of evidence. *State v. Muckerheide*, 2007 WI 5, ¶¶ 40–41, 298 Wis. 2d 553, 725 N.W.2d 930; *see also Taylor v. Illinois*, 484 U.S. 400, 410 (1988) ("The accused does not have an unfettered right to offer testimony . . . inadmissible under the standard rules of evidence.")

Admission of McMorris evidence. When (1) "the issue of self-defense is raised" in a homicide prosecution *and* (2) "there is a factual basis to support such defense," a defendant may establish what he believed were the "turbulent and violent character of the victim by proving prior specific instances of violence within his knowledge at the time." *McMorris v. State*, 58 Wis. 2d 144, 152, 205 N.W.2d 559 (1973). If the defendant fails to establish a factual basis for self-defense, the victim's prior acts "have no probative value." *Id.*

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[4] The greater latitude exception permitting admission of propensity evidence in certain sexual assault trials is not applicable here, so evidence to show conformity is inadmissible. Wis. Stat. § 904.04(2).

This evidence is not admissible to show the victim's action in conformity; rather, it "relates to the defendant's state of mind, showing what his beliefs were concerning the victim's character" at the time. *Werner v. State*, 66 Wis. 2d 736, 743, 226 N.W.2d 402 (1975). A defendant may "produce supporting evidence to prove the reality of the particular acts of which he claims knowledge, thereby proving reasonableness of his knowledge and apprehension and the credibility of his assertion." *McAllister*, 74 Wis. 2d at 250–51. He may not present evidence from other witnesses to show that the victim acted in conformity. *Id.*

"Admissibility is not automatic." *State v. Head*, 2002 WI 99, ¶ 128, 255 Wis. 2d 194, 648 N.W.2d 413. "*McMorris* evidence may not be used to support an inference about the victim's actual conduct during the incident." *Id.* If the court deems the evidence relevant, it should apply the Wis. Stat. § 904.03 balancing test, as it would to "any other relevant evidence." *Id.* ¶ 129. This determination lies within the circuit court's discretion. *Id.*

Wisconsin Statute § 906.11(1) also gives the circuit court discretion over the "mode and order of interrogating witnesses and presenting evidence."

Self-defense standards. Two types of self-defense justifications exist in Wisconsin law: (1) the use of necessary force, called "perfect self-defense," and (2) the use of unnecessary force, called "imperfect self-defense." *Head*, 255 Wis. 2d 194, ¶ 45.

A defendant is entitled to an imperfect self-defense instruction if there is "some evidence" to show he held a subjective belief that he was in danger of great bodily harm, regardless of whether his belief was reasonable. *Head*, 255 Wis. 2d 194, ¶ 124; Wis. Stat. § 940.01(2)(b). If proven, imperfect self-defense mitigates first-degree intentional

homicide to second-degree intentional homicide. Wis. Stat. § 940.01(2)(b).

To obtain an instruction on perfect self-defense, the defendant must point to "some evidence" to show he held an objectively reasonable belief that the amount of force was necessary to prevent or terminate what he believed to be an unlawful interference with his person. Wis. Stat. § 939.48(1); *Head*, 255 Wis. 2d 194, ¶ 67. "In these circumstances," a defendant "has to meet the same 'some'-evidence standard, but [his] evidence would be measured against an objective reasonable threshold." *Head*, 255 Wis. 2d 194, ¶ 125.

If proven, perfect self-defense is a privilege to a homicide charge. Wis. Stat. § 939.45(2). "Once the defendant successfully raises an affirmative defense, the state is required to disprove the defense beyond a reasonable doubt." *Head*, 255 Wis. 2d 194, ¶ 106.

When applying the "'some' evidence standard, the trial court must determine 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.'" *Peters*, 258 Wis. 2d 148, ¶ 22. It is a "relatively low threshold." *Id.* ¶ 27 n.4. Evidence satisfies the standard even if "weak, insufficient, inconsistent, or of doubtful credibility." *State v. Stietz*, 2017 WI 58, ¶ 17, 375 Wis. 2d 572, 895 N.W.2d 796.

The "general rule" is that "a circuit court must *hear* an offer of proof to determine whether evidence would support a proffered defense before ruling on the relevancy of the evidence." *State v. Dundon*, 226 Wis. 2d 654, 674, 594 N.W.2d 780 (1999) (emphasis added).

B. The circuit court properly exercised its discretion.

Johnson does not argue that the court here erred in excluding evidence but instead in requiring his testimony first. (Johnson's Br. 23–27.) The circuit court did not err, but ultimately, any error would be harmless; this Court may wish to start with harmless error, addressed in Section I.C., *infra*.

As an initial matter, Johnson does not make clear whether he is challenging the circuit court's rulings concerning admission of evidence of KM's past assaultive history *and* its ruling concerning KM's possession of child pornography years-earlier, or just the former. He simply asserts that the court's "pretrial orders" limited evidence that he "acted in self-defense when he shot KM." (Johnson's Br. 23–28.) Because the circuit court analyzed the two types of evidence (past violent history and past possession of child pornography) separately, the State does the same here.[5]

1. The circuit court properly exercised its discretion concerning evidence of the victim's past acts of, or reputation for, assault, bullying, or other violence.

Here, the question is: did the circuit court err by holding that Johnson should have to establish a factual basis for self-defense through his own testimony before allowing other

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[5] Johnson also makes no argument that the court erred in excluding all evidence of KM making Johnson's younger sister feel "creepy," of verbal abuse towards KM's son, and of reputation evidence that KM was "self-absorbed or domineering or unkind or selfish or a bad father." (R.211:7–9.) He has therefore abandoned any claim of error in these holdings. *A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) ("an issue raised in the trial court, but not raised on appeal, is deemed abandoned").

evidence about KM's alleged character and history of assault and bullying behavior?

The court did not erroneously exercise its discretion. In short: (1) the *only* way any evidence concerning KM's history of or reputation for violence would become relevant would be if Johnson advanced a self-defense theory; and (2) the *only* way Johnson could support such a self-defense theory would be through his own testimony.

First, absent a claim of self-defense, KM's character of past violence would not be a "pertinent" character trait, Wis. Stat. § 904.04(1)(b), and specific instances of his conduct would not be "essential" to a "charge, claim, or defense." Wis. Stat. § 904.05(2). The evidence would not be *McMorris* evidence absent the "issue of self-defense." *McMorris*, 58 Wis. 2d at 152. Johnson makes no argument that any of it would have been relevant or admissible absent the question of self-defense. (*See* Johnson's Br. 23–27.)

Second, the court properly recognized that the evidentiary support for Johnson's self-defense claims had to come through Johnson's testimony. It was "undisputed" that he and KM were alone downstairs in KM's home when he shot KM. (R.211:6.) The "some evidence" standard may be a low threshold, but it still required *some* evidence. *Head*, 255 Wis. 2d 194, ¶ 125. Johnson was the only witness who could attest to KM purportedly attacking him that night.

Thus, the court did not erroneously exercise its broad discretion to decide whether and how evidence may be presented by concluding that it *would* allow character evidence about KM's reputation of and history for violence, but only after Johnson established a basis for self-defense through his testimony.

Johnson's arguments to the contrary fail. First, though not entirely clear, Johnson appears to argue that his non-testimonial written offer-of-proof assertions through counsel

were sufficient to satisfy the "some evidence" standard. (Johnson's Br. 23–24.) This, however, would go against the "general rule" that a circuit court must *hear* an offer of proof to support a proffered defense. *Dundon*, 226 Wis. 2d at 674.

The cases he relies on do not support the idea that his written pretrial assertions through counsel were sufficient to constitute "some evidence." (*See* Johnson's Br. 24–25.) *Stietz* concerned whether the court erred in not *instructing* the jury on self-defense following the defendant's testimony at trial. *Stietz*, 375 Wis. 2d 572, ¶¶ 12–60. So did *Coleman*. *State v. Coleman*, 206 Wis. 2d 199, 205–16, 556 N.W.2d 701 (1996) (review of circuit court's decision denying self-defense instruction following defendant's trial testimony).

Johnson argues that "[n]o Wisconsin case has ever required the defendant to testify before offering evidence in support of his defense." (Johnson's Br. 24.) He, however, overlooks that *he* must show that the circuit court erroneously exercised its discretion by requiring him to do so here. *McAllister*, 74 Wis. 2d at 251. The court did not err where—here—there would have been no way for Johnson to establish some evidence of self-defense without his own testimony.

Johnson has not and still does not explain how he could have produced sufficient evidence of self-defense without his testimony. He broadly asserts that self-defense "can be established, at least preliminarily, through questioning of witnesses." (Johnson's Br. 26.) He also broadly asserts that other witnesses "may have [had] information pertaining" to self-defense. (Johnson's Br. 26.)

But he offers nothing specific to show how he could have possibly mounted a viable self-defense claim without his testimony. And though a defendant advancing *McMorris* evidence may "produce supporting evidence to prove the reality of the particular acts of which he claims knowledge," *McAllister*, 74 Wis. 2d at 250–51, that evidence cannot be

admitted to show conformity—it only becomes relevant to support the *defendant*'s mind-state. *Id.*

Thus, as the circuit court recognized, without Johnson's testimony as to his mind-state, the questioning of other witnesses about KM's violent nature and history would have been irrelevant and unfairly prejudicial. (R.211:11.) *See also Lee v. Murphy*, 41 F.3d 311, 313 (7th Cir. 1994) (noting a Wisconsin defendant cannot assert either perfect or imperfect self-defense "unless he takes the stand and testifies").

Johnson argues, without support, that a review of "many Wisconsin cases" shows that "our courts regularly permit questioning of witnesses and the admission of evidence without first requiring the defendant to testify" in self-defense cases. (Johnson's Br. 27.) He cites examples of other self-defense cases where "events" occur "out-of-view" from other witnesses, but those cases do not support his proposition.

In *Head*, for example, the court permitted the defendant to discuss her self-defense theory in opening, but delayed ruling on the admission of *McMorris* evidence; "[a]fter the State presented its case," the court allowed the defendant to testify to outside of the jury's presence, to make her offer of proof. *Head*, 255 Wis. 2d 194, ¶¶ 24–25. The Court concluded that the circuit court erred because the defendant's testimonial offer of proof was sufficient; notably, it did not hold that the court erred in delaying its ruling on the admission of *McMorris* evidence until after the defendant's testimony. *Id.* ¶¶ 130–42.

Johnson asserts that preventing him from cross-examining the State's witnesses about supporting evidence "unconstitutionally restricted" his right to cross-examination by "invit[ing] the jury to form opinions before all evidence was heard." (Johnson's Br. 24.) Johnson provides no support for this constitutional claim. *State v. Pettit*, 171 Wis. 2d 627, 646–

47, 492 N.W.2d 633 (Ct. App. 1992) (this Court need not address undeveloped arguments).

If Johnson were correct, the same could seemingly be said for a court not allowing defense witnesses to testify until the State completes its case-in-chief. Moreover, his argument overlooks that a court has broad discretion over the mode and order of witness-questioning and evidence presentation. Wis. Stat. § 906.11(1).

Johnson's claim that the court's order violated his rights against self-incrimination and to due process also fall short. Johnson rests his argument on *Brooks v. Tennessee*, 406 U.S. 605 (1972). (Johnson's Br. 25–27.) There, the Supreme Court considered a state statute requiring that a defendant testify as the first defense witness, or not at all. *Brooks*, 406 U.S. at 606. The statute was enacted to prevent other witnesses influencing the defendant's testimony. *Id.* at 607. The Court rightly deemed this an impermissibly heavy restriction on the defendant's right to remain silent. *Id.* at 610.

Neither *Brooks*, nor any of the other unrelated right-to-present-a-defense Supreme Court cases Johnson cites, (Johnson's Br. 27), stand for the proposition that where a defendant wishes to advance an *affirmative* defense dependent on his testimony, a court impermissibly violates his right to remain silent by holding that he cannot first present otherwise inadmissible evidence until he presents evidence supporting his defense. On the contrary, in *Chambers*, the Supreme Court held that, "[i]n the exercise" of a defendant's right to present witnesses in his own defense, "the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). Johnson fails to show that the court erroneously exercised its discretion.

2. The circuit court properly exercised its discretion concerning evidence of Johnson's alleged discovery of child pornography on the victim's computer years earlier.

Johnson does not advance any argument concerning the circuit court's ruling not allowing evidence to support Johnson's claimed discovered child pornography on KM's computer five to six years before he shot KM, until Johnson testified to that information. He asserts that the court limited evidence that he acted "in self-defense," (Johnson's Br. 23), and his alleged years-earlier discovery of child pornography on KM's computer was part of his written pretrial proffers, (R.15:1–2; 46:4–5.)

But, as the circuit court recognized, whether KM possessed child pornography years earlier "is not evidence of physical violence by the victim so this is not a self-defense or *McMorris* type of analysis." (R.211:14 (emphasis added).) By not advancing a specific argument, he has abandoned this challenge. *A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998). Insofar as he raised it by simply asserting that the court erred in limiting his "self-defense" evidence, then he failed to develop it. *Pettit*, 171 Wis. 2d at 646–47.

Should this Court nevertheless conclude that Johnson has satisfactorily advanced this argument, he fails to show that the court erred in only allowing admission of this evidence following his testimony, for the same reasons set forth in Section I.B.1, *supra*.

Johnson does not and cannot explain how evidence that he reported discovering child pornography on KM's computer years earlier could have had *any* relevance but-for his testimony connecting the child pornography to his actions and beliefs when he shot KM.

C. Even if the court erred, any error is harmless.

"An erroneous evidentiary ruling is reversible only if 'a substantial right of the party is affected.'" *State v. Monahan*, 2018 WI 80, ¶ 33, 383 Wis. 2d 100, 913 N.W.2d 894 (citation omitted). The State must prove beyond a reasonable doubt that a rational jury would have convicted absent the error. *Id.*

First, as argued further below, the court properly concluded that Johnson was not entitled to an instruction on perfect self-defense. *See* Section III.B., *infra*.

Second, Johnson suffered no harm from the court's rulings concerning his imperfect self-defense claim. Imperfect self-defense only mitigates first-degree intentional homicide to second-degree intentional homicide, Wis. Stat. § 940.01(2)(b), and the jury *acquitted* him of both of those charges and convicted him of first-degree reckless homicide. (R.178; 223:3–4.)

But even further, we know any error was harmless because the jury *heard* the other evidence supporting his self-defense claim, and it still convicted him. The court ultimately allowed Johnson to admit evidence of KM's history of and reputation for assaultive, violent behavior, and of Johnson's prior discovery of child pornography.

Moreover, there would have been no way for Johnson to prove self-defense absent his own testimony. Thus, any error in the court deeming his testimony a prerequisite to other evidence is harmless. Absent his testimony, the jury would have heard no explanation of what happened between him and KM that night, other than that KM was shot repeatedly, Johnson confessed to shooting him, and the gun used to kill KM and clothes with KM's blood on it were found where Johnson lived.

Lastly, any error in the court requiring the defense to recall any of the State's witnesses it wished to question about

Johnson's self-defense claim, instead of questioning them on cross-examination, is also harmless. (*See* Johnson's Br. 24.) Again, the court permitted admission of the evidence. Moreover, the court instructed the jury to reach its decisions based on "the evidence offered and received at trial." (*See, e.g.*, R.222:43.) We presume jurors follow instructions. *State v. Truax*, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989).

II. The circuit court did not erroneously exercise its discretion by prohibiting evidence of whether the victim's computer contained child pornography the night Johnson killed him.

A. Legal principles

The legal principles concerning the admission of character, other-acts, and *McMorris* evidence, set forth in Section I.A., *supra*, also apply here.

B. The circuit court properly prohibited the evidence.

The circuit court did not erroneously exercise its discretion by concluding any evidence concerning whether KM had child pornography on the computer the night Johnson killed him was (a) not relevant to the issues at trial, and (b) even if it were, the probative value would be outweighed by the dangers of unfair prejudice and misleading the jury, in addition to causing undue delay. (R.211:15); Wis. Stat. §§ 904.01 and 904.03.

Johnson characterizes this evidence as *McMorris* evidence. (Johnson's Br. 28–30.) *McMorris*, however, concerns admission of the victim's "turbulent and violent character" based on "prior specific instances of violence." *McMorris*, 58 Wis. 2d at 152. Whether KM had child pornography on his computer that night would not have been evidence of his "turbulent and violent character." *See id.*

Ultimately, whether viewed as *McMorris* evidence or other-acts evidence, the evidence could not be admitted without the court concluding it was (1) relevant and (2) admissible under Wis. Stat. § 904.03's probative-versus-prejudicial balancing test. *Sullivan*, 216 Wis. 2d at 772–73; *Head*, 255 Wis. 2d 194, ¶¶ 128–29. The Court rightly concluded it was not.

First, the court recognized that whether Johnson "was correct or incorrect" that he would find child pornography that night was not relevant. (R.211:15.) The relevant inquiry was Johnson's *belief* when he killed KM; whether that belief was accurate was inapposite. *See* Wis. Stat. § 904.01.

Second, as the court also recognized, even if relevant, any marginal probative value was substantially outweighed by the danger of unfair prejudice and misleading the jury; further, it would cause delay. (R.211:16); Wis. Stat. § 904.03. Few crimes are more stigmatized than possession of child pornography, and discussing it would have unfairly steered the jury towards nullification.

Even beyond that, corroboration would have in essence created a trial-within-a-trial as to whether there was indeed child pornography on the computer. (*See* R.65:1–2.) The court did not erroneously exercise its broad discretion in refusing to admit this evidence.

Johnson's arguments to the contrary again overlook (1) the deference this Court affords a circuit court's evidentiary rulings and (2) that his constitutional rights do not include the admission of otherwise inadmissible evidence.

He argues this evidence would have corroborated his "state of mind," by making his belief that KM's reaction required self-defense more reasonable. (Johnson's Br. 30.) But, again, whether viewed as *McMorris* or other-acts evidence, "[a]dmissibility is not automatic." *Head*, 255 Wis. 2d 194, ¶ 128; *Sullivan*, 216 Wis. 2d at 772–73. The court

engaged in a proper balancing analysis under Wis. Stat. § 904.03. He speculates that the court's ruling "likely" suggested that he was being untruthful about his reason for being in KM's home. (Johnson's Br. 29.) The circuit court considered this very concern, and concluded the evidence was inadmissible under Wis. Stat. § 904.03. (R.211:16–18.) Johnson may disagree with the circuit court's exercise of its discretion, but that does not make it erroneous.

Johnson also argues that the ruling violated his due process right to present a defense, (Johnson's Br. 28–30), but that right only protected his ability to "present relevant evidence that is 'not substantially outweighed by its prejudicial effects.'" *Sarfraz*, 356 Wis. 2d 460, ¶ 37 (citation omitted). Because the court did not err in holding that the evidence was inadmissible under Wis. Stat. §§ 904.01 and 904.03, he cannot show any improper infringement on his right to present a defense.

Johnson also makes undeveloped assertions that it impeded his constitutional right to testify. (Johnson's Br. 28.) He did not have a limitless right to testify to otherwise inadmissible matters. *See Taylor*, 484 U.S. at 410. The State will not further develop his constitutional argument for him. *Cemetery Servs., Inc. v. Dep't of Regulation & Licensing*, 221 Wis. 2d 817, 831, 586 N.W.2d 191 (Ct. App. 1998). ("A one or two paragraph statement that raises the specter of such [constitutional] claims is insufficient to constitute a valid appeal.").

State v. Anderson, 141 Wis. 2d 653, 416 N.W.2d 276 (1987), does not help Johnson either. (*See* Johnson's Br. 29–30.) *Anderson* concerned the corroboration requirement of Wis. Stat. § 908.045(4)'s hearsay exception for unavailable declarants. *Anderson* neither addresses the admission of other-acts or *McMorris* evidence nor holds that a defendant's right to present a defense permits him to admit evidence deemed inadmissible under the rules of evidence. Indeed, case

law tells us that excluding such evidence does *not* violate a defendant's right to present a defense. *Muckerheide*, 298 Wis. 2d 553, ¶¶ 40–41.

C. If the court erred, any error is harmless.

The legal standard for harmless-error analysis, set forth in Section I.C., *supra*, also applies here.

Even if the court erred, any error was harmless. The court properly declined to instruct on perfect self-defense, and the court did not convict him of first-degree intentional homicide. *See* Section III.B., *infra*; (R.178; 223:3–4.) Thus, no harm occurred in preventing Johnson from admitting evidence to support his claim of self-defense. He also cannot show any harm related to the burglary charge, as he was acquitted of that offense. (R.179; 223:3–4.)

On top of that, the jury heard evidence from Johnson and police that Johnson reported discovering child pornography on KM's computer years earlier. (R.220:53–54). It also heard Johnson testify that after searching KM's computer that night, he "found what [police] needed" and planned to turn it over to police. (R.218:267–68.) The clear implication was that Johnson believed he discovered child pornography. The defense analyst also corroborated that thousands of files were accessed on KM's computer that night. (R.220:20–36.)

It is therefore clear beyond a reasonable doubt that the jury would have convicted Johnson of first-degree reckless homicide even if it heard evidence about whether Johnson in fact discovered child pornography on KM's computer prior to killing him. *Monahan*, 383 Wis. 2d 100, ¶ 33.

III. The court did not err in declining to give instructions on perfect self-defense and certain lesser-included offenses.

A. Legal principles

The legal principles concerning self-defense instructions, set forth in Section I.A., *supra*, also apply here.

In addition, when assessing whether to provide a self-defense instruction, a court should not weigh the testimony; credibility should be resolved by a jury. *Stietz*, 375 Wis. 2d 572, ¶ 58. But a court may decline to instruct when no reasonable basis exists "for the defendant's belief" that the other person "was unlawfully interfering with his person and that" he used "such force as he reasonably believed necessary to prevent or terminate the interference." *Id.* ¶ 15.

As to whether to instruct on a lesser-included offense, a circuit court engages in a two-step analysis. *State v. Morgan*, 195 Wis. 2d 388, 433–34, 536 N.W.2d 425 (Ct. App. 1995). First, the court determines whether the crime is indeed a lesser-included offense. *Id.* at 434. Second, the court "weigh[s] whether there is a reasonable basis in the evidence for a jury to acquit on the greater offense and to convict on the lesser offense." *Id.*

If both steps are satisfied, the court should give the requested instruction. *Morgan*, 195 Wis. 2d at 434. In reviewing a challenge to the court's decision, this Court views the evidence in the light most favorable to the defendant. *Id.*

The erroneous failure to instruct on self-defense and lesser-included offenses is subject to harmless-error analysis. *Peters*, 258 Wis. 2d 148, ¶ 29 (self-defense instruction); *Truax*, 151 Wis. 2d at 363–64 (lesser-included offenses).

B. The circuit court properly declined to instruct on perfect self-defense.

To be entitled to an instruction on perfect self-defense, Johnson had to point to "some evidence" that he held an objectively reasonable belief that the amount of force he used was necessary to prevent what he reasonably believed to be an unlawful interference with his person. Wis. Stat. § 939.48(1); *Head*, 255 Wis. 2d 194, ¶¶ 67, 125; Wis. JI–Criminal 1016.

The evidence presented did not even come close. The easiest way to see it: Johnson himself testified that he did not remember shooting KM—at all. (R.218:271.) He remembered the door swinging open, KM coming at him and "attack[ing]" him, but he said he "closed [his] eyes. . . . didn't see what happened," and could not remember firing the weapon. (R.218:271.) No other evidence could attest to exactly what happened between Johnson and KM in the moments where any self-defense and the respective amount of force would have been necessary.

Thus, even viewing the evidence in the light most favorable to Johnson, *see Peters*, 258 Wis. 2d 148, ¶ 22, the jury could not have concluded that Johnson reasonably believed that the amount of force he used was necessary. That alone defeats his claim on appeal.

Further, even in the light most favorable to Johnson, the jury could not have concluded that Johnson had an objectively reasonable belief that he was preventing an *unlawful* interference. (R.221:51–52.) Johnson testified that he broke into KM's home in the middle of the night with a glove and a gun, used a flashlight as he rummaged through items in the computer room, and remained in KM's home for hours until KM came downstairs and discovered him. (R.218:251–69.) Johnson was unquestionably an unlawful intruder.

Consider, for example the dramatic difference between the evidence here, and the evidence in *Stietz*—where the Wisconsin Supreme Court held that the court erred by not instructing on perfect self-defense (there, a threat by the defendant to use defensive force). 375 Wis. 2d 572, ¶ 60. A 64-year old farmer who had trouble with trespassers, faced trial for resisting law enforcement and intentionally pointing a firearm at an officer. *Id.* ¶¶ 2, 24–29. He was patrolling his property during deer season; he carried a rifle, and kept a handgun in his pocket. *Id.* ¶¶ 24–31.

Two Department of Natural Resources wardens, wearing blaze-orange with DNR insignias, were looking around; each carried a handgun. *Stietz*, 375 Wis. 2d 572, ¶¶ 32–35. They entered his fenced-in land, and it was "nearly completely dark" when the defendant saw them. *Id.* ¶¶ 35–38. The wardens shined their flashlights at the defendant, who testified that he did not see the DNR insignia. *Id.* ¶ 39.

The wardens then asked for his rifle; when he said no, they grappled it away from him. *Stietz*, 375 Wis. 2d 572, ¶¶ 44–46. All three testified that a warden then pointed his handgun at the defendant. *Id.* ¶ 47. The second pulled a handgun on the defendant, and the defendant drew his handgun simultaneously. *Id.*

The defendant testified he feared for his life. *Stietz*, 375 Wis. 2d 572, ¶ 48. All testified that the defendant said he would lower his gun when they lowered theirs. *Id.* ¶ 49. The defendant then realized the men were wardens, but did not lower his gun because the men still pointed their handguns at his face. *Stietz*, 375 Wis. 2d 572, ¶ 53.

The Court concluded that a reasonable jury could find that a person in the defendant's position could reasonably believe the wardens were "unlawfully interfering with his person and that he was threatening reasonable force in the

exercise of his privilege of self-defense." *Stietz*, 375 Wis. 2d 572, ¶ 60.

Here, on the other hand, the jury was presented with *no* evidence as to what actually happened in those critical moments. A jury could not assess the objective reasonableness of Johnson's actions when Johnson could not even explain what his actions—or frankly, what KM's actions—were, or why he believed he had to shoot KM again, and again, and again, and again.

Johnson in essence argues that *any* evidence hinting at perfect self-defense is "some" evidence; he stresses that self-defense does not require a person to first suffer injury and notes that a belief may be reasonable even if mistaken. (Johnson's Br. 31–36.) But there had to be some evidence from which a jury could conclude that a reasonable person in Johnson's position could believe he was exercising the privilege of self-defense. *Stietz*, 375 Wis. 2d 572, ¶ 15. Try as he might, he cannot get around the glaring gaps in the evidence.

Johnson's other arguments fall short. First, he argues that the court's denial of the perfect self-defense instruction is "inconsistent" with its prior finding that he provided a sufficient factual basis to admit supporting evidence. (Johnson's Br. 34.) The Wisconsin Supreme Court rejected this very type of argument in *Head*. The Court explained that it would be very difficult for a court to exclude *evidence* of perfect self-defense while allowing presentation of evidence for imperfect self-defense, because the two defenses "so overlap." *Head*, 255 Wis. 2d 194, ¶ 116. Ultimately, though, "[t]hese issues should be clearer at the close of trial after all the evidence has come in"; then, the defendant is "not entitled to a perfect self-defense instruction unless perfect self-defense has a reasonable basis in the evidence." *Id.* The circuit court here properly recognized this distinction. (R.220:219–20.)

Second, though unclear, Johnson appears to argue that the court erroneously believed that the castle doctrine under Wis. Stat. § 939.48(1m) applied. (*See* Johnson's Br. 34.) This Court should reject this argument as undeveloped. *Pettit*, 171 Wis. 2d at 646–47.

It also fails on its merits, as the circuit court specifically explained that the castle doctrine was not directly applicable. (R.221:31–32, 51.) It reasonably recognized that the castle-doctrine principle was relevant to assessing whether a jury could conclude that Johnson reasonably believed he needed to use force to prevent an *unlawful* interference with his person, as Johnson illegally broke into KM's home in the middle of the night. (R.221:51–52.)

Johnson faults the court for saying an objectively reasonable person would not "buy" that KM was "unlawfully interfering with [Johnson] trying to gather evidence of child pornography." (Johnson's Br. 36–39 (citing R.221:50–52).) Johnson appears to suggest that the court's use of the word "buy" meant it improperly weighed the evidence. (*See* Johnson's Br. 36–39.)

Johnson misunderstands the court's point. His argument is premised on the idea that if KM was attempting to prevent Johnson from reporting his child pornography on his computer, then a reasonable person could have believed that KM *was* unlawfully interfering with Johnson. Assuming, without conceding, that this premise is correct, there still was not "some evidence" to support this theory. By Johnson's own account, at the time KM encountered him, he (Johnson) was standing up, facing KM with a *gun*, and KM had no weapons, and was "naked from the waist up." (*See* R.221:51–52.)

Given their respective positions, no objectively reasonable person in Johnson's position would believe that, if KM interfered with Johnson's person, KM did so to prevent Johnson from disclosing information, as opposed to defending

himself from the man with a gun inside his home. That Johnson subjectively may have believed this was not the question. The court properly recognized that Johnson's evidence had to be measured "against an objective reasonable threshold." *Head*, 255 Wis. 2d 194, ¶ 125.

But even if this Court should disagree, again, the circuit court's ruling was still proper because there was *no* evidence to establish whether the amount of force was reasonably necessary. The circuit court therefore properly declined to instruct on perfect self-defense.

C. The circuit court properly declined to instruct on second-degree reckless homicide and homicide by negligent use of a firearm.

Johnson's lesser-included instructions arguments fail for two reasons: (1) they are undeveloped; (2) they fail on their merits.

First, this Court should reject Johnson's lesser-included offense argument as undeveloped. *Pettit*, 171 Wis. 2d at 646–47. After presenting the legal principles, and explaining the circuit court's holding, he provides only one sentence of argument: "The Court's denial of Johnson's request to instruct the jury on the lesser offenses should have been granted." (Johnson's Br. 42.)

His arguments fail on their merits, too. The second part of the analysis is dispositive—whether a reasonable basis in the evidence existed from which a jury could acquit of the greater offense but convict of the lesser. *Morgan*, 195 Wis. 2d at 433–34. As the circuit court properly recognized, no such reasonable basis existed for second-degree reckless homicide and homicide by negligent handling of a dangerous weapon.

The only element separating reckless homicides is whether the defendant acted under circumstances that showed utter disregard for human life. *Compare* Wis. Stat.

§ 940.02(1) *with* Wis. Stat. § 940.06(1). As Johnson could not attest to why he shot KM five times, including a shot to the head and back, the court properly concluded that there was no reasonable basis from which a jury could conclude that Johnson recklessly killed KM, but not under circumstances that demonstrated utter disregard for human life. (R.221:35–36.)

The court also properly recognized that there was no reasonable basis from which a jury could acquit Johnson of intentional and reckless homicides but convict him of homicide by negligent operation of a firearm. (R.221:36–37.) That offense would have required the jury to conclude that Johnson's negligent handling of the gun caused KM's death. Wis. Stat. § 940.08. Given that Johnson (1) admitted getting the gun, loading it, and bringing it with him, and (2) testified he had it when KM opened the door but could not recall shooting KM at all, (R.218:251–71), there was no way a jury could have acquitted on the greater offenses but concluded his negligent gun-handling caused KM's death.

D. If the court erred, any error is harmless.

Even if the court erred in declining to give instructions on perfect self-defense or the lesser-included offenses, that error would be harmless. *Peters*, 258 Wis. 2d 148, ¶ 29; *Truax*, 151 Wis. 2d at 363–64.

First, had the jury instructed on perfect self-defense, the evidence still would have established, beyond a reasonable doubt, that the necessary facts to constitute perfect self-defense did not exist. Wis. Stat. § 940.01(3). Why? Because there were no facts explaining why Johnson used the amount of force he used—the nature of any struggle, whether Johnson paused between firing any of the shots, whether KM stopped his "attack" after the first shot or continued, etc. *See Head*, 255 Wis. 2d 194, ¶¶ 67, 125. Without that, a jury could not have concluded that Johnson's actions were objectively

reasonable, particularly given that he shot and killed a man after he broke into that man's home in the middle of the night.

Johnson emphasizes the jury's acquittal on the burglary charge, suggesting it shows the jury must have believed he did not break into KM's home with the *intent* to commit a felony (i.e. kill him). (Johnson's Br. 40.) But the jury did not convict him of intentional homicide.

The jury convicted him of killing KM through criminally reckless conduct showing utter disregard for human life; Johnson loaded a gun, brought it with him as he broke into the victim's home, and could not say what happened when he shot KM five times. *See* Wis. JI–Criminal 1016. Even if the court had instructed on perfect self-defense, it is clear the jury would have still convicted Johnson of first-degree reckless homicide.

The same is true had the court instructed on second-degree reckless homicide and homicide by negligent use of the firearm. Most simply, we know any error would be harmless because the jury convicted him of the higher offense, first-degree reckless homicide. *See Truax*, 151 Wis. 2d at 363–64. We also know that Johnson would not have been able to tailor any different argument towards those lesser offenses, because he testified that he could not recall shooting KM. Any error was harmless.

CONCLUSION

This Court should affirm the judgment of conviction.

Dated this 3rd day of September 2019.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,983 words.

Dated this 3rd day of September 2019.

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HANNAH S. JURSS
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 3rd day of September 2019.

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