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 REPLY BRIEF

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

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REPLY

In its response, the State contends that this Court need only address Johnson's third claim: the Circuit Court's errors in instructing the jury. State's Br. at 2. On this point, Johnson agrees. Each error in the jury instructions individually requires reversal. Johnson's reply brief will focus on those errors.

But Johnson disagrees with the State's contention that the Circuit Court's erroneous evidentiary rulings are harmless as long as there was no error in the instructions submitted to the jury. Even when the jury was instructed on only imperfect self-defense and first-degree reckless homicide, the Circuit Court's evidentiary rulings effectively barred Johnson from confronting the State's witnesses about the sole issue during the State's case, hobbling his ability to present a defense. These evidentiary rulings were neither reasonable nor done for a proper purpose, as would be allowed under WIS. STAT. § 906.11, but rather were based on an erroneous understanding of the law concerning self-defense. The evidentiary rulings improperly limited Johnson's ability to cross-examine witnesses in a manner that denied him due process and rendered the trial fundamentally unfair. If Johnson had been allowed to cross-examine the State's witnesses when they first testified, the jury might well have questioned those witnesses' credibility and found that the State failed to prove beyond a reasonable doubt the elements of first-degree reckless homicide.

With that said, Johnson turns to the jury instruction errors, each of which require reversal.

A. LESSER-INCLUDED OFFENSES

As the State acknowledges, this Court reviews de novo the decision to instruct on lesser-included offenses. State's Br. at 17; *State v. Jones*, 228 Wis. 2d 593, 598, 598 N.W.2d 259 (Ct. App. 1999) (reversing the Circuit Court's

refusal to instruct the jury on a lesser-included offense). A lesser-included offense must be submitted to the jury when, viewing the evidence in the light most favorable to the defendant, there are "reasonable grounds in the evidence to acquit on the greater charge and convict on the lesser." *Jones*, 228 Wis. 2d at 598; *see also id.* at 599–600 (explaining that credibility is an issue for the jury to decide).

The Circuit Court instructed the jury on first-degree reckless homicide because it determined that the jury could find that Johnson's conduct was not intentional but was reckless. *See* App. 56–57. Nevertheless, it refused to instruct on second-degree reckless homicide because it determined that "no reasonable jury would find" that Johnson "did not show utter disregard for human life." App. 58. The Circuit Court believed that the fact that Johnson "took the loaded gun into the home and . . . had it in his dominant hand" indisputably showed utter disregard for human life. *Id.* The Circuit Court's reasoning belies a legally inaccurate understanding of the "utter disregard" standard.

In *State v. Miller*, 2009 WI App 111, 320 Wis. 2d 724, 772 N.W.2d 188, this Court explained that one does not act in utter disregard for human life when he actually believes that his use of force is necessary to prevent imminent death or great bodily harm. *Id.* ¶ 40. In other words, imperfect self-defense "is inconsistent with conduct evincing utter disregard." *Id.* (directing a judgment of acquittal on a first-degree reckless injury charge when it was "undisputed that a reason, if not the reason, for [the defendant's] conduct was to protect himself . . . .").

Here, just as in *Miller*, the State conceded that the jury could find that Johnson actually believed that his use of force was necessary to prevent imminent death or great bodily harm, and therefore instructions on imperfect self-defense and second-degree intentional homicide were required. *See* App. 40; *see also State v. Head*, 2002 WI

99, ¶ 88, 255 Wis. 2d 194, 648 N.W.2d 413 ("First-degree intentional homicide is mitigated to second-degree intentional homicide if a person intentionally causes a death because of an *actual* belief that the person is in imminent danger of death or great bodily harm, and an *actual* belief that the use of deadly force is necessary to defend herself, even if both of these beliefs are not reasonable."). The Circuit Court agreed, noting that the necessity of those instructions was "obvious." App. 54. Therefore, *Miller* required the Circuit Court to instruct the jury on second-degree reckless homicide as well, because if the jury could find that Johnson acted in imperfect self-defense, it could also find that he acted without utter disregard for human life.

And even if *Miller* did not require instruction on second-degree reckless homicide, the facts of Johnson's case would require it. The evidence viewed in the light most favorable to Johnson shows that he went to KM's house to collect evidence that could be used to prevent KM from further victimizing young girls and that he brought a gun with him to protect himself from someone who had assaulted him and others in the past. The jury could reasonably infer from these facts that Johnson was acting to protect human life, not in utter disregard for it. The Circuit Court erred by refusing to instruct the jury on second-degree reckless homicide.

The Circuit Court offered the same reason for its refusal to instruct on homicide by negligent handling of a dangerous weapon, finding that no reasonable juror could believe that Johnson did not know that his conduct created an unreasonable and substantial risk of death or great bodily harm, given that Johnson "testified he brought the loaded gun and that he brought it there to use to defend himself if necessary." App. 59. The Circuit Court erred for the same reasons discussed above: The Circuit Court determined that the jury could find that Johnson actually believed that he brought the gun with him solely to defend himself if necessary, and that he

actually used the gun for that purpose. If the jury so found, it could also find that Johnson did not actually know that his handling of the gun created an unreasonable and substantial risk of death or great bodily harm, especially given Johnson's lack of experience with firearms. *See* WIS JI-CRIM 1017 ("You should consider the evidence relating to self-defense in deciding whether the defendant's conduct created an unreasonable risk to another."). Thus, the jury could find Johnson not guilty of second-degree reckless homicide but guilty of homicide by negligent handling of a dangerous weapon, and the Circuit Court erred by refusing to instruct the jury on the lesser offense.

Finally, the errors in refusing to submit each lesser-included offense to the jury affected Johnson's substantial rights. The State cites *State v. Truax*, 151 Wis. 2d 354, 363–64, 444 N.W.2d 432 (Ct. App. 1989), for the proposition that "any error would be harmless because the jury convicted [Johnson] of the higher offense, first-degree reckless homicide." State's Br. at 39. But *Truax* presented a "unique situation" in which the jury was instructed on an intermediate lesser-included offense, yet still convicted the defendant of the greater offense. 151 Wis. 2d at 363–64. This Court concluded that the erroneous failure to submit a lesser-included offense even further down the progression was harmless. *See id.*

Where, as here, the jury convicted the defendant of the least-culpable offense submitted, the usual rule applies: "If the court improperly fails to submit the requested lesser included offense to the jury, it is prejudicial error and a new trial must be ordered." *State v. Foster*, 191 Wis. 2d 14, 23, 528 N.W.2d 22 (Ct. App. 1995) (quoting *Hawthorne v. State*, 99 Wis. 2d 673, 684, 299 N.W.2d 866 (1981)); *cf. Jones*, 228 Wis. 2d at 600 (reversing and remanding for a new trial because the Circuit Court erred by refusing to instruct on the requested lesser-included offense).

B. PERFECT SELF-DEFENSE

As the State acknowledges, this Court also reviews de novo the decision to instruct on self-defense. State's Br. at 17; *see State v. Peters*, 2002 WI App 243, ¶ 12, 258 Wis. 2d 148, 653 N.W.2d 300 (reversing the Circuit Court's refusal to instruct the jury on perfect self-defense); *accord State v. Stietz*, 2017 WI 58, ¶ 17, 375 Wis. 2d 572, 895 N.W.2d 796 (reversing the Circuit Court's refusal to instruct the jury on perfect self-defense). A Circuit Court must instruct the jury on perfect self-defense when the defendant presents "some evidence" "showing that they [1] reasonably believed that they were preventing or terminating an unlawful interference with their person and [2] reasonably believed that the force they used was necessary to prevent imminent death or great bodily harm." *Peters*, 2002 WI App 243, ¶¶ 17, 21. The "some evidence" standard is met when the "evidence viewed most favorably to the defendant would allow a jury to conclude that the State did not disprove the self-defense theory beyond a reasonable doubt." *Id.* ¶ 22.

Here, the Circuit Court explained that, although it believed that the evidence established a prima facie case that allowed Johnson to present evidence of self-defense, it was refusing to instruct the jury on perfect self-defense for two reasons. First, it concluded that "an objective reasonable person would find that the victim [KM] had a lawful right to interfere with the defendant [Johnson]," and therefore an objective person would not reasonably believe that Johnson was "preventing or terminating an unlawful interference with his person." App. 73–74. Second, it concluded that "there's nothing in the record" to show that Johnson "reasonably believed that the force used was necessary to prevent imminent death or great bodily harm" because "there is no evidence that the victim [KM] ever threatened to kill him [Johnson] or ever used weapons against [him]." App. 75. The error in each reason is discussed in turn below.

1. Unlawful interference

The Circuit Court's reasoning on the first prong follows the argument advanced by the State before the Circuit Court, which the State summarizes in its brief as "stress[ing] that Johnson broke into KM's home, and KM therefore would have had every right to kill Johnson pursuant to the castle doctrine; [and] argu[ing] that no reasonable person would think Johnson has a 'right to kill the person who has the lawful right to kill' him." State's Br. at 15. On appeal, the State shifts course, disavowing any reliance on the castle doctrine. But regardless of whether the Circuit Court relied on the castle doctrine, its reasoning is faulty.

Let's begin with the Circuit Court's proposition that, because KM could have acted under the privilege of self-defense, his attack would necessarily be lawful. To the extent that a jury could find that Johnson engaged in unlawful conduct that would likely provoke KM to attack, as the Circuit Court believed, the correct response would be to instruct the jury on provocation, not to forego instructing the jury on perfect self-defense entirely. *See* WIS JI-CRIM 815.

But more important, the question before the court was not whether KM's attack was lawful as a matter of law. Rather, the question was whether the jury might conclude, based on the evidence viewed in Johnson's favor, that the State had not proven beyond a reasonable doubt that a person of "ordinary intelligence," *Peters*, 2002 WI App 243, ¶ 23 (quoting WIS JI-CRIM 1014), unschooled in the complexities of criminal law, would not have believed that KM's attack was unlawful. *See Stietz*, 2017 WI 58, ¶ 11 & n.9 ("A belief may be reasonable even though mistaken." (quoting WIS JI-CRIM 800)). A jury could conclude that a person of ordinary intelligence would think that a man with KM's violent history—including violence against the accused and their sisters—who shoves open a door and lunges at them,

immediately after finding them searching for evidence of his illegal child pornography collection, was about to do something unlawful. Deciding whether to credit Johnson's account was a task reserved for the jury. The Circuit Court erred when it concluded otherwise.

2. *Necessary force*

The Circuit Court's second reason for denying the perfect self-defense instruction was that "there's nothing in the record" to show that Johnson "reasonably believed that the force used was necessary to prevent imminent death or great bodily harm" because "there is no evidence that the victim [KM] ever threatened to kill him [Johnson] or ever used weapons against [him]." App. 75. Once again, the Circuit Court got the standard wrong. In *Peters*, this Court concluded that the Circuit Court erred in refusing to instruct the jury on perfect self-defense despite the lack of evidence that the victim "had made any direct verbal threats against [the defendant] or that he had engaged in any overtly violent acts or gestures at the time she shot him." 2002 WI App 243, ¶ 27. This Court explained that the lack of evidence of threats or violent acts "involve the weight and credibility of the evidence" and therefore "are more properly addressed to a jury." *Id.* ¶ 27 & n.4. So too here.

The State argues that Johnson's testimony that he did not remember shooting KM forecloses an instruction on perfect self-defense. *See, e.g.*, State's Br. at 33. This argument is made for the first time on appeal and therefore waived. *See, e.g., State v. Sykes*, 2005 WI 48, ¶ 21 n.6, 279 Wis. 2d 742, 695 N.W.2d 277. It is also unsupported. Johnson testified about the moments leading up to the shooting: He heard a noise, prompting him to close the open windows on the computer, gather his things, and stand up. R236:268. KM opened the door, then closed it. *Id.* at 268–29. Johnson understood that KM knew why he was there. *Id.* at 270. He wanted to get out, but the door was the only escape. *Id.* at 269. Then

"the door flew open" and KM "lunged" at Johnson and "attacked" him. *Id.* at 271, 281. This testimony, paired with the evidence of KM's violent past and the reasons for Johnson's visit, satisfies the "some evidence" standard. *Cf. Peters*, 2002 WI App 243, ¶¶ 25–28 (concluding that the "some evidence" standard was satisfied by evidence that the victim had psychologically and verbally, but never physically, abused the defendant, had made comments that could be interpreted as veiled threats, had pointed a rifle at the defendant while installing a scope, had refused to let the defendant leave the house, and immediately prior to the shooting appeared to have "dropped his hand and was reaching for a gun"). Because a jury could conclude that the State had not disproved Johnson's perfect self-defense privilege beyond a reasonable doubt, the court erred by refusing to instruct the jury on the privilege. *See id.* ¶ 28.

3. *Substantial rights*

If this Court agrees with Johnson that the Circuit Court should have instructed the jury on perfect self-defense, then the failure to do so necessarily affected Johnson's substantial rights. The State cites *Peters* in support of its argument to the contrary. But in *Peters*, this Court concluded that the Circuit Court erred by failing to instruct on perfect self-defense and that the error was not harmless, explaining, "If the jury had been properly instructed, it could have concluded that Peters did have a reasonable belief that she needed to act in self-defense and, therefore, may not have returned a guilty verdict. Thus, the error the trial court committed is not harmless and we reverse and remand the case to the trial court for a new trial." 2002 WI App 243, ¶ 29. So too here. Just as the jury acquitted Johnson of burglary when properly instructed, it might have acquitted Johnson of homicide if it had been properly instructed. As a result, reversal is required.

CONCLUSION

For these reasons and the reasons stated in his opening brief, 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, September 17, 2019.

Respectfully submitted,

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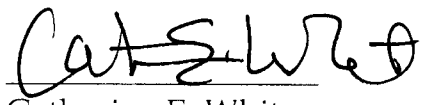
CERTIFICATION

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 2,623 words. *See* WIS. STAT. § 809.19(8)(c)2.



Catherine E. White

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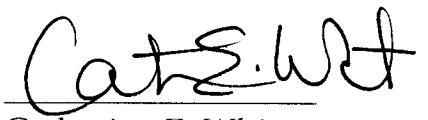

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