STATE OF WISCONSIN

IN SUPREME COURT

No. 2018AP2318-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

ALAN M. JOHNSON,

Defendant-Appellant.

PETITION FOR REVIEW

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INTRODUCTION

This case presents a matter of first impression—the interaction between the "castle doctrine" and perfect self-defense to a charge of first-degree intentional homicide, where a trespasser enters a private dwelling in the middle of the night with a loaded firearm for the claimed purpose of uncovering evidence of a crime and then shoots an unarmed homeowner five times (including in the back and head), but has no recollection of the shooting.

The court of appeals, District II, in an opinion recommended for publication, ruled that the trespasser is entitled to an instruction on perfect self-defense and second-degree reckless homicide under these circumstances and that the jury should have heard evidence of purported child pornography found on the victim's computer. *State v. Johnson*, 2020 WL 3815997 (Wis. Ct. App. July 8, 2018), (Pet-App. 101–28.)

In so ruling, the court of appeals established new legal principles, acted contrary to existing law, invaded the province of the circuit court, and allows the jury on remand to condone vigilantism. Review is needed to clarify the law on a novel issue of statewide importance, resolve inconsistencies between the court of appeals' opinion and existing law, and correct the court of appeals' inference with the circuit court's discretionary evidentiary ruling.

ISSUES PRESENTED FOR REVIEW

1. Was Johnson entitled to a jury instruction for perfect self-defense based on his testimony concerning his motivation for trespassing with a loaded firearm in KM's house, despite the fact that KM was unarmed, shot five

times, and Johnson could not recall anything about the shooting other than that KM "lunged" at him?

Answered by the circuit court: No. The circuit court concluded that no reasonable jury could find that Johnson acted in perfect self-defense because it was undisputed that KM was unarmed, Johnson had no memory of the shooting, and there was not sufficient evidence to "justify the force of the multiple gunshots." (R.221:50–53, Pet-App. 404–07.)

Answered by the court of appeals: Yes. According to the court of appeals, a reasonable jury could conclude that KM was motivated by "rage" or the desire to prevent Johnson from reporting him to the police, such that Johnson was permitted to use force to defend against KM's "unlawful" interference with Johnson. (Pet-App. 112–14, ¶¶ 22–28.) The court of appeals also concluded that a reasonable jury could find that the amount of force used was reasonable based on Johnson's motivation for being in KM's house and their childhood history, despite the fact Johnson had no recollection of the shooting and KM was unarmed. (Pet-App. 13–14, ¶¶ 25–27.)

2. Was Johnson entitled to submission of the lesser-included offense of second-degree reckless homicide under the above circumstances?

Answered by the circuit court: No. The circuit court concluded that in light of the fact that Johnson came into KM's home uninvited with a loaded gun and shot KM five times (including in the back and in the head), no reasonable jury could find that Johnson acted recklessly but *without* utter disregard for KM's life. (R.221:34–36, Pet-App. 388–90.)

Answered by the court of appeals: Yes. The court of appeals held that the circuit court "invaded the province of the jury" by refusing to give the requested instruction and that a reasonable jury could find that Johnson "demonstrate[d] a regard for the life, safety, and well-being of others" because he was trying to get KM arrested for possession of child pornography. (Pet-App. 117, 20, ¶¶ 35, 40.)

3. Did the circuit court erroneously exercise its discretion in excluding evidence of alleged child pornography[1] Johnson found on KM's computer before he killed KM?

Answered by the circuit court: No. The circuit court concluded the evidence was not relevant under Wis. Stat. § 904.01 and, alternatively, should be excluded under Wis. Stat. § 904.03. (R.211:15–16, Pet-App. 149–50.)

Answered by the court of appeals: Yes. The court of appeals held that the evidence was relevant to KM's motive in attacking Johnson and Johnson's state of mind, that its probative value was not substantially outweighed by the danger of unfair prejudice, and its exclusion was not harmless. (Pet-App. 124–27, ¶¶ 46–51.)

STATEMENT OF CRITERIA THAT SUPPORT REVIEW

Review of all three issues is justified under Wis. Stat. § 809.62(1r)(b),(c) and (d).

[1] The State disputed that there actual pornography on KM's computer. (R.65:2.)

First, whether a trespasser's stated intention of uncovering evidence of a crime is sufficient to revoke a homeowner's privilege to use force under the castle doctrine, such that the trespasser may claim perfect self-defense for killing him, is a novel issue of state law, resolution of which will have a statewide impact on criminal prosecutions. It will also impact the rights of homeowners and businessowners across the State of Wisconsin vis-à-vis trespassers. This Court should grant review to clarify that an armed trespasser is not entitled to an instruction on perfect self-defense under these circumstances, particularly when the homeowner is unarmed, shot five times, and the trespasser claims to have no recollection of the event.

Second, the court of appeals' conclusion that Johnson was entitled to an instruction on second-degree reckless homicide based on his purported concern to protect others in the community from KM (thereby showing that he did not act with utter disregard *for others'* lives) is a novel interpretation of the required elements for first-degree reckless homicide and inconsistent with established law. This Court should take review to clarify that the relevant question is whether the defendant exhibited an utter disregard for the life of *the victim* when shooting him five times—not whether the defendant's motivation for trespassing was laudatory.

Third, while a ruling concerning the admission of evidence under Wis. Stat. §§ 904.01 and 904.03 normally would not warrant review on its own, in this case, the evidentiary issue is intertwined with the first two issues. That is, according to the court of appeals, whether Johnson found child pornography on KM's computer was relevant as to whether KM had a privilege to use force against Johnson under the castle doctrine and whether Johnson acted in

perfect self-defense. The court of appeals improperly substituted its own preferences for the circuit court's reasoned evidentiary decision.

Finally, considered together, all three issues involve a significant state policy of whether under Wisconsin's criminal statutes, as interpreted by this Court, citizens should be relieved of the consequences of taking the law into their own hands. While Johnson's allegations as to KM's past behavior are abhorrent, the combined effect of the court of appeals' rulings is to permit a jury to condone vigilante justice and allow an armed trespasser to murder an unarmed homeowner because the trespasser was motivated to uncover evidence of a crime. This result is contrary to the state's public policy as expressed in the statutory castle-doctrine, the law of self-defense, and the elements of first-degree reckless homicide.

STATEMENT OF THE CASE

Overview. The State charged Alan M. Johnson with first-degree intentional homicide and burglary for breaking into the home of his brother-in-law (K.M.) and shooting him five times, including in the head and back, and killing him on October 25, 2016 at approximately 2:20 a.m. (R.2:1–3, Pet-App. 481–82; R.9, Pet-App. 134.) Following a nine-day trial, a jury found Johnson guilty of the lesser-included offense of first-degree reckless homicide and acquitted him on the burglary charge. (R.178, Pet-App. 132; 179, Pet-App. 133.) The court sentenced Johnson to 35 years' imprisonment. (R.203, Pet-App. 130.)

Pretrial rulings on other-acts/McMorris[2] *evidence.* Johnson moved for admission of other-acts evidence to show: (1) KM sexually assaulted him when he was about 11 years old; (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 before KM's death, Johnson discovered child pornography on a computer in KM's home. (R.15:1–2.) Johnson argued the information was relevant to self-defense and imperfect self-defense. (R.15:6–10.) Specifically, he claimed that he entered KM's home the night of the shooting to "find the child pornography so he could report it" and that while there, he found "over 5,500 pictures of school age children walking past the home of [KM], taken by [KM] out of his front window," in "categories such as 'Blondes.'" (R.15:4.)

The State opposed the motion and argued that the evidence was not relevant, its probative value was outweighed by the danger of unfair prejudice, and that its intended purpose was to allow the jury to condone "[v]igilantism." (R.24:6–10.) The State also filed motions in limine to prevent Johnson from arguing jury nullification or introducing evidence that KM assaulted him 20 years ago and "collected and/or took pictures of females." (R.27:2.)

In response, Johnson filed another offer of proof in which he provided additional details of KM's past conduct and what occurred the night of the shooting. (R.46:3–12.) Specifically, Johnson claimed that that while on the computer in KM's home, he heard a noise, got up and turned towards the door and saw KM standing, half-naked; Johnson had the pistol he brought with him by his side; neither man

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

said anything; KM closed the door, reopened it, and "charged at" Johnson; Johnson shot him. (R.46:10–11.)

After extensive briefing, the circuit court ruled that some of the other-acts/*McMorris* evidence could be admitted, but only after Johnson established a "sufficient factual basis that self-defense is at issue" through his own testimony. (R.211:5–6, Pet-App. 139–40.) Assuming Johnson made such a showing through his testimony, the court would allow evidence of specific acts of KM's past physical violence and alleged sexual assault of Johnson, but would not allow evidence of verbal abuse, general bad character, or that KM made Johnson's younger sister "feel creepy." (R. 211:7–10, Pet-App. 141–44.) The court also ruled that Johnson could introduce evidence about child pornography he allegedly discovered years earlier after he testified, but could not testify as to what he found on KM's computer the night he killed KM because such evidence was not relevant and, alternatively, unduly prejudicial. (R.211:13–17, Pet-App. 147–151.)

Trial. 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.) The murder weapon was a .40 caliber pistol owned by Johnson's father, Eric. (R.215:79–80; 217:110–12.) Detective Banaszynski spoke with Johnson two times the morning of KM's death: Johnson initially denied knowing anything about it, but later said, "Arrest me, I killed him." (R.218:77–78.)[3]

[3] Detective Banaszynski is erroneously identified as "Detective Kolb" on this transcript. (R. 218:1–14.)

Johnson testified that when he was a child, KM bullied him, physically abused him, and put his hands down Johnson's pants on one occasion. (R.218:198–204, Pet-App. 195–201.) Johnson said that years before he killed KM, he discovered child pornography on KM's family computer. (R.218:211–13, Pet-App. 208–10.) More recently, he became concerned because a family member was the same age as the girl in the photo and filed on online report. (R.218:213, 227, Pet-App. 210, 224.) Police contacted Johnson and told him there was nothing they could do because the evidence was "too stale," but he should contact them if he saw anything else. (R.218:227–29, 247, Pet-App. 224–26, 244.)

Johnson testified he made the decision to break into KM's house "[r]ight like about the time that [he] went" there. (R.218:247, Pet-App. 244.) He said he went to find "fresh pictures" so police "could take care of it." (R. 218:247, Pet-App. 244.) Before he left, Johnson obtained a gun and ammunition from his father's safe because he wanted to feel "safe." (R.218:254, Pet-App. 251.) He denied wanting to kill KM but said: "[I]f he saw me he would know why I was there and he'd go after me." (R.218:254, Pet-App. 251.)

Johnson drove to KM's house, entered through a sliding door, and brought the loaded gun inside with him. (R.218:255–56, Pet-App. 252–53.) Johnson spent approximately two and a half hours going through KM's computer files and said he "found what they needed" and intended to turn it over to police. (R.218:263, 267, Pet-App. 260, 264.)

Johnson heard a noise, closed down the computer, grabbed his gun, and went towards the door. (R.218:268, Pet-App. 265.) KM opened the door, half naked and unarmed. (R.218:268–69, 316, Pet-App. 265–66, 313.) KM

closed the door, then opened it and "attacked" Johnson. (R.218:271, Pet-App. 268.) Johnson said that KM "lunged at [him]" and "c[a]me at [him]." (R.218:281, Pet-App. 278.)

After that, Johnson "closed [his] eyes" and "didn't see what happened." (R.218:271, Pet-App. 268.) Johnson said he was "afraid" and didn't think he could get out or defend himself. (R.218:266, 269, Pet-App. 263, 266.) Johnson said he didn't remember shooting KM or leaving the residence and panicked when he was driving home and noticed blood on his clothes. (R.218:271–72, 283, Pet-App. 268–69, 280.)

Based on Johnson's testimony up until this point, the court concluded that it would allow admission of the other-acts and *McMorris* evidence it conditionally admitted in its pretrial ruling. (R.218:272–74, Pet-App. 269–71.)

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, Pet-App. 274–77.) He said that his younger sister—whose daughter's age raised his concerns—knew to keep her children away from KM. (R.218:315–16, Pet-App. 312–13.)[4]

On cross-examination, Johnson testified that he was aware that he could still report KM's alleged molestation of him, but he did not believe "anything would happen." (R.218:301–02, Pet-App. 298–99.) Johnson also acknowledged being taller than KM and that he could have called out for his sister or her son (who were in the home) for help, but "didn't think of it." (R.218:316, Pet-App. 313.)

[4] Johnson's sisters corroborated this. (R.220:107, 151–53.)

A police officer testified that Johnson's father, Eric, initially reported that Johnson told him he went to KM's home to kill him; Eric denied saying this on the stand but acknowledged he had memory problems. (R.220:164.)

Computer evidence. The defense called a computer analyst who testified that thousands of KM's computer files were accessed around the time of the murder. (R.220:20–36, Pet-App. 336–52.) The defense made an offer of proof that the analyst would have also testified that some images contained what "to a lay person . . . would be reasonable for them to interpret . . . to be child pornography." (R.220:212–13, Pet-App. 353–54.) The defense also proffered that Johnson found 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, Pet-App. 319–21.)

Jury instructions. The defense asked the court to instruct on first and second-degree intentional and reckless homicide and perfect self-defense, as well as homicide by negligent handling of a dangerous weapon. (R.221:6–8, Pet-App. 360–62.)

The parties agreed that a second-degree intentional homicide instruction was appropriate. (R.221:32, Pet-App. 386.) The court also agreed to instruct on first-degree reckless homicide but denied Johnson's requests to instruct on second-degree reckless homicide and homicide by negligent use of a firearm. (R.221:34–38, Pet-App. 388–392.) It explained that with "utter disregard" as the only distinction between first and second-degree reckless homicide, there was no way a jury could acquit on first-degree reckless and convict on second-degree. (R.221:34–36, Pet-App. 388–90.) The court also held that there was no way

a jury could acquit on the 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, Pet-App. 390–91.)

As to the self-defense instructions, the court concluded that Johnson was entitled to an instruction on imperfect self-defense but not perfect self-defense. (R.221:49–52, Pet-App. 403–06.) According to the court, no reasonable person could conclude that KM did not have a lawful right to interfere with Johnson because Johnson "came uninvited" in the middle of the night with a loaded weapon and saw the victim partially disrobed, without any weapons, and that there was no evidence that KM used any weapon against Johnson or threatened to kill him. (R.221:50–52, Pet-App. 404–06.) 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, Pet-App. 406.) The court noted that Johnson had no recollection of the shooting and that based on what he did remember, "even 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, Pet-App. 407.)

Therefore, the court instructed the jury as to burglary, first-degree intentional homicide, second-degree intentional homicide, first-degree reckless homicide, and imperfect self-defense. (R.100:1–14, Pet-App. 467–480.) The jury found Johnson guilty of first-degree reckless homicide while armed and not guilty of armed burglary. (R.178, Pet-App. 132; 179, Pet-App. 133.)

Court of appeals' decision. Johnson appealed and the court of appeals reversed and remanded for a new trial on the first-degree reckless homicide conviction with instructions for submission of second-degree reckless homicide and perfect self-defense. (Pet-App. 111–128.)

The court of appeals first addressed whether Johnson was entitled to an instruction on perfect self-defense under the "some evidence" standard, considering both the perquisites for perfect self-defense under Wis. Stat. § 939.48(1) and a homeowner's privilege to use force against a trespasser under the "castle-doctrine" set forth in Wis. Stat. § 939.48(1m). (Pet-App. 107–10, ¶¶ 13–19). According to the court of appeals, a reasonable jury could conclude that KM was motivated by "rage" or the desire to prevent Johnson from reporting him to the police for child pornography. If so, then KM was not "lawfully" permitted to use force against Johnson under the castle doctrine and therefore Johnson was permitted to use force against KM to defend himself from KM's "unlawful" interference. (Pet-App. 112–14, ¶¶ 22–28.) The court of appeals reasoned that a jury could find a "connection/nexus" existed between KM's alleged illegal behavior and KM's use of force, such that there was no presumption that KM's attack on Johnson was a lawful use of force. (Pet-App. 108–11, ¶¶ 17–19 & n.9.) And, the court rejected the State's argument that Johnson could not prove perfect self-defense because he shot KM five times and could not remember what happened (i.e. Johnson could not prove the amount of force he used was necessary), reasoning that these "are all facts to be weighed by the jury." (Pet-App. 113, ¶ 25.)

Next, the court of appeals held that the circuit court "invaded the province of the jury" by refusing to give the requested instruction on second-degree reckless homicide; the court reasoned that a reasonable jury could find that

Johnson "demonstrate[d] a regard for the life, safety, and well-being of others" because he was trying to get KM arrested for possession of child pornography. (Pet-App. 117, 120, ¶¶ 35, 40.) The court of appeals further reasoned that under *State v. Miller*, 2009 WI App 111, ¶ 40, 320 Wis. 2d 724, 772 N.W.2d 188, it is inconsistent to instruct a jury on imperfect self-defense but refuse to submit a lesser-included offense instruction. (Pet-App. 118–19, ¶¶ 37–39.) According to the court of appeals, the fact that Johnson shot KM five times, including in the back and in the head, does not establish, "beyond a reasonable doubt, an utter disregard for human life." (Pet-App. 120, ¶ 39.) The court ruled that a jury could find that Johnson did not act with utter disregard for human life because he was trying to protect others from KM. (Pet-App. 120, ¶ 40.)

Finally, the court of appeals held that the circuit court erred in not permitting Johnson to present other-acts evidence that he allegedly discovered child pornography on KM's computer the night he killed KM. (Pet-App. 122–27, ¶¶ 43–51.) The court of appeals held that the evidence was relevant to KM's motive in attacking Johnson and Johnson's state of mind, that its probative value was not substantially outweighed by the danger of unfair prejudice, and that its exclusion was not harmless. (Pet-App. 124–27, ¶¶ 46–51.)

STANDARDS OF REVIEW

Self-defense and lesser-included offenses. The interpretation of statutes and their application to a set of facts presents a question of law reviewed de novo on appeal. *State v. Leitner*, 2002 WI 77, ¶ 16, 253 Wis. 2d 449, 646 N.W.2d 341. Whether the evidence supported an instruction on perfect 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.

Admissibility of McMorris evidence. The admission 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. 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.* (citation omitted).

ARGUMENT

Review is warranted for the following reasons:

I. The Court of appeals' holding that a defendant's motivation for trespassing can negate the castle-doctrine privilege and support a claim of perfect self-defense for shooting an unarmed homeowner creates new law that needs clarification.

A. Someone asserting perfect self-defense must show force was used to prevent an unlawful interference with his person and that the amount of force used was necessary.

The court of appeals' decision in this case is the first published appellate decision to address the interaction between the castle-doctrine privilege set forth in section

939.48(1m) and the availability of perfect self-defense under section 939.48(1) when a trespasser shoots a homeowner.

Under section 939.48(1), a person is privileged to "intentionally use force against another for the purpose of preventing or terminating what the person reasonably believes to be an *unlawful interference* with his or her person by such other person." (emphasis added.) But the person "may intentionally use only such force or threat thereof as the actor reasonably believes is necessary to prevent or terminate the interference." *Id.* And, the person "may not intentionally use force which is intended or likely to cause death or great bodily harm unless the actor reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself." *Id.*

Perfect self-defense thus has two elements: "(1) a reasonable belief in the existence of an *unlawful interference*; and (2) a reasonable belief that the amount of force the person intentionally used was *necessary* to prevent or terminate the interference." *State v. Head*, 2002 WI 99, ¶ 84, 255 Wis. 2d 194, 648 N.W.2d 413 (emphasis added).[5] However, in order to be entitled to a jury instruction, a defendant is required only to present "some evidence" to support the defense. *State v. Stietz*, 2017 WI 58, ¶ 16, 375 Wis. 2d 572, 895 N.W. 2d 796.

The castle-doctrine comes into play because it is relevant to whether Johnson reasonably believed that K.M. was *unlawfully* interfering with him at the time KM "lunged" at Johnson. Stated differently, Johnson would not

[5] In contrast, imperfect self-defense involves "[u]nnecessary defensive force." Wis. Stat. § 940.01(2)(b).

be entitled to an instruction on perfect self-defense unless he reasonably believed that KM, as a homeowner, did not have a lawful right to interfere with Johnson, as an intruder, under the castle doctrine.

Under Wis. Stat. § 939.48(1m)(ar)2.,[6] a homeowner is entitled to a "presum[ption] that [he] reasonably believed that the force was necessary to prevent imminent death or great bodily harm to himself" if "the person against whom force was used was in the [homeowner]'s dwelling . . . after unlawfully and forcibly entering it" and the homeowner "knew or reasonably believed that the person had unlawfully and forcibly entered the dwelling."

As the court of appeals correctly noted, "the castle doctrine represents a public policy determination by the legislature that homeowners . . . are entitled to a presumption that the homeowner reasonably believed that such force was necessary to prevent imminent death or great bodily harm to himself or herself." (Pet-App. 109, ¶ 17.) But this presumption[7] does not apply if, *inter alia*, the homeowner "was engaged in a criminal activity or was using his or her dwelling . . . to further a criminal activity at the time." Wis. Stat. § 939.48(1m)(b)1.

B. The court of appeals created new law and erroneously applied Wis. Stat. §§ 939.48(1) and 939.48(1m) in a manner that justifies vigilantism.

The circuit court concluded that Johnson was not entitled to a jury instruction on perfect self-defense for two

[6] This statute was created by 2011 Wis. Act 94.

reasons. First, no "objective person . . . is going to find that was a reasonable belief [by Johnson] of preventing or terminating an unlawful interference with his person [by KM]." (R.221:51–52, Pet-App. 405–06.) According to the circuit court, because Johnson and KM had not had contact in over a year, "an objective reasonable person would find that the victim had a lawful right to interfere with the defendant at that point finding him in his home in the middle of the night." (R.221:52, Pet-App. 406.) The court did not believe there was evidence from which the jury could "buy" that KM was unlawfully interfering with Johnson's efforts to find child pornography. (R.221:52, Pet-App. 406.) Second, the circuit court said that "there's nothing in the record that supports" the notion that Johnson "reasonably believed that the force used was necessary to prevent imminent death or great bodily harm" because Johnson "testified he does not remember it." (R.221:52–53, Pet-App. 406–07.)

The court of appeals reversed, holding that a reasonable jury could conclude that KM was motivated by "rage" or the desire to prevent Johnson from reporting him to the police, such that KM was not "lawfully" permitted to use force against Johnson under the castle doctrine and Johnson was permitted to use force against KM to defend himself from KM's "unlawful" interference. (Pet-App. 111–14, ¶¶ 21–28.) The court of appeals also concluded that a reasonable jury could find that the amount of force used was reasonable based on Johnson's motivation for being in KM's house and their history, despite the fact Johnson had no recollection of the shooting. (Pet-App. 113–14, ¶¶ 25–27.) Both holdings are in error.

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[7] The absence of the presumption does not negate the caste-doctrine privilege.

1. A trespasser is not entitled to a perfect self-defense instruction because he invades a home for the purpose of uncovering evidence of an alleged crime.

In assessing whether Johnson had a reasonable belief that KM was *unlawfully* interfering with his person when KM "lunged" at him, the key facts are that: (1) Johnson and KM had been estranged for a year; (2) Johnson entered KM's house without permission in the early hours of the morning while armed with a loaded firearm; (3) KM appeared unarmed and half-naked; (4) Johnson closed the computer before KM entered the room; (5) there is no evidence of KM saying anything to Johnson or otherwise communicating his intent; and (6) Johnson testified that he did not recall anything about the shooting. (R.218:251–71, Pet-App. 248–68.) Yet, according to the court of appeals, a jury could find that under these circumstances, KM did not have a "lawful" right to interfere with Johnson because Johnson was allegedly abused by KM when he was younger and Johnson was trying to find evidence that KM possessed child pornography. (Pet-App. 111–14, ¶¶ 21–28.) No authority supports this rationale.

The court of appeals' decision invites the jury to speculate that Johnson attacked KM in a "fit of rage" or because he "wanted to prevent Johnson from reporting his [alleged] ongoing criminal activity of possession of child pornography." (Pet-App. 111, ¶ 21.) According to the court of appeals, if the jury were to so conclude, then KM's privilege under the castle doctrine to use force against a home invader would be forfeited due to a "nexus" between KM's illegal activity and the shooting. (Pet-App. 111, ¶ 21 & n.10.)

The State recognizes that the castle-doctrine presumption does not apply if the homeowner "was engaged in a criminal activity or was using his or her dwelling, motor vehicle, or place of business to further a criminal activity at the time." Wis. Stat. § 939.48(1m)(b)1. And, the State agrees with the court of appeals that there must be some form of "nexus" between the alleged criminal activity and the use of force for this exception to apply. (Pet-App. 111, ¶ 21 & n.10.)

But the record is wholly devoid of any *evidence* of KM's intent; Johnson has no recollection of what occurred after KM, unarmed and half-naked, "lunged" at him. Johnson closed the computer before KM entered the room. There is no evidence that KM knew what Johnson was doing. Because only two people were present—KM and Johnson—and one of them is dead and the other alleges he doesn't remember anything, it is pure speculation to suggest that KM acted out of a desire to avoid disclosure of alleged criminal activity. Thus, there is absolutely no basis for the jury to conclude that Johnson had a reasonable belief that KM was *unlawfully* interfering with him.

And while Johnson testified that he believed he had "found what they needed" on KM's computer (R.218:263, 267, Pet-App. 260, 264), there is no evidence from which a jury could find that KM was "engaged in a criminal activity . . . *at the time*." Wis. Stat. § 939.48(1m)(b)1. (emphasis added). The phrase "at the time" means "at the time [the homeowner] used force."[8]

[8] Wis. Legis. Council Act Memo, *2011 Wisconsin Act 94: Self-Defense* (Dec. 13, 2011), https://docs.legis.wisconsin.gov/2011/related/lcactmemo/act094.pdf.

Here, there is no evidence that KM was engaged in any criminal activity during the moment when he appeared half-naked and unarmed in his computer room to discover an armed intruder in his home. Therefore, there is no evidence from which a reasonable jury could conclude that Johnson had a reasonable belief that deadly force was needed to prevent an "unlawful interference with his . . . person." Wis. Stat. § 939.48(1).

The court of appeals' decision effectively allows a jury to excuse a trespasser from shooting an unarmed homeowner five times purely because the trespasser is motivated to uncover evidence of an alleged crime. This is completely contrary to the legislative intent behind the castle-doctrine and effectively condones vigilantism. Consider the consequences of this: Under the court of appeals' decision, a person is justified in invading another's home with a loaded weapon and dispensing "street justice" because he believed that the homeowner was engaged in illegal activity. Practically, the jury is left to decide whether the homeowner "had it coming" based on the underlying alleged illegal activity. This cannot be the law. The court of appeals' decision creates a dangerous precedent and must be reversed.

2. A trespasser's motivation for invading a home and the homeowner's distant alleged abuse cannot establish that deadly force was necessary.

The court of appeals also erred and created a dangerous precedent by holding that a jury could find that Johnson used an amount of force that was necessary to prevent an unlawful interference with his person based solely on Johnson's motivation for being in KM's house and KM's alleged childhood abuse of Johnson. (Pet-App. 113–14, ¶¶ 25–27.)

The undisputed facts are that Johnson shot an unarmed, half-naked homeowner five times, including in the back and in the head, with no recollection of doing so, after the homeowner "lunged" at him. As the circuit court concluded (R.221:51–52, Pet-App. 405–06), there is absolutely no way a reasonable jury could find that Johnson had a "reasonable belief that the amount of force [he] intentionally used was necessary to prevent or terminate the interference." *Head*, 255 Wis. 2d 194, ¶ 84. The fact that KM allegedly abused Johnson as a child and that Johnson thought KM possessed child pornography does not provide "some evidence" that five shots were "necessary" to prevent KM from lunging at Johnson.

It is true that "the personal characteristics and histories of the parties" are *relevant* to determining if a defendant's belief was reasonable under section 939.48(1), *State v. Jones*, 147 Wis. 2d 806, 816, 434 N.W.2d 380 (1989). But the State is not aware of any case in which contextual evidence alone was held to be sufficient under the "some evidence" standard to submit a perfect self-defense instruction to a jury when there was no evidence of what occurred at the time of the shooting—much less when the assailant shoots the victim five times, including in the head and back. Even in *Jones*, 147 Wis. 2d at 816–18, there was extensive testimony about what occurred during the assault and immediately beforehand. The court evaluated the *recent* history of the parties and looked to whether past occurrences of violence were "continuous." *Id.* at 816.

Here, while there was testimony that KM was generally a bully and physically abused Johnson and others and allegedly molested Johnson on one occasion as a child, there was absolutely no evidence of any recent history of violence between them. Indeed, the testimony was that KM

was estranged from Johnson's family and had not interacted with them in a year. (R.214:151, 217:151.)

Without any testimony of recent violence between KM and Johnson and with no testimony about what occurred prior to the shooting other than that an unarmed and partially disrobed KM "lunged at [Johnson]" and "c[a]me at [him]," (R.218:281, Pet-App. 278), no reasonable jury could conclude that the amount of force used by Johnson was "necessary to prevent or terminate [KM's] interference." *Head*, 255 Wis. 2d 194, ¶ 84.

The court of appeals' decision to the contrary again allows the jury to excuse vigilantism and sets a dangerous precedent that must be reversed.

II. A defendant's purported concern for non-present third parties does not entitle him to an instruction on second-degree reckless homicide when he invaded the unarmed victim's home with a loaded weapon and shot him five times.

The court of appeals held that the circuit court was *required* to instruct the jury on second-degree reckless homicide because a reasonable jury could find that Johnson "demonstrate[d] a regard for the life, safety, and well-being of others" because he was trying to get KM arrested for possession of child pornography to protect his relatives. (Pet-App. 117–20, ¶¶ 35, 40.) This holding requires review for two separate and independent reasons.

First, the court of appeals' conclusion that Johnson's purported abstract concern for non-present third parties meant that the jury could find that he acted *without* utter disregard of human life is inconsistent with existing law. The "utter disregard" element for first-degree reckless

homicide focuses on the defendant's intent vis-à-vis *the victim's* life—not the life of others who are not present. Second, the court of appeals erred by reading *State v. Miller*, 320 Wis. 2d 724, ¶ 40, as requiring a circuit court to submit an instruction on second-degree reckless homicide anytime it instructs on imperfect self-defense.

A. A court must instruct on a lesser-included offense if there is evidence from which a reasonable jury could acquit on the greater offense and also convict of the lesser.

Whether to instruct on a lesser-included offense is a two-step inquiry. The first step is to determine if the second offense is a lesser-included offense of the offense charged. *State v. Muentner*, 138 Wis. 2d 374, 387, 406 N.W.2d 415 (1987). The second step is to determine "whether there is a reasonable basis in the evidence for an acquittal on the greater charge and for a conviction on the lesser charge." *Id.*

Importantly, and contrary to what the court of appeals' implication, (Pet-App. 117–18, ¶ 35), this second step "involves a *weighing of the evidence* which would be presented to the jury. Thus, the court is assessing the likelihood that the jury would find all the elements of the particular crime." *Muentner*, 138 Wis. 2d at 387 (emphasis added).

There is no dispute that second-degree reckless homicide, Wis. Stat. § 940.06, is a lesser-included offense of first-degree intentional homicide and first-degree reckless homicide. Wis. Stat. §§ 940.01, 940.02(1). The question here is whether there was a reasonable basis for the jury to acquit on first-degree reckless homicide but find Johnson guilty of second-degree reckless homicide.

First-degree reckless homicide requires proof that the defendant "caused the death [of the victim] by criminally reckless conduct" under circumstances showing "utter disregard for human life." Wis. JI–Criminal 1022 (2015); Wis. Stat. § 940.02(1). Second-degree reckless homicide does not contain the "utter disregard for human life" requirement. Wis. JI–Criminal 1022; Wis. Stat. § 940.06(1).

The circuit court correctly concluded that no reasonable jury could find that Johnson acted *without* utter disregard *for Johnson*'s life when he shot him five times. The court of appeals' holding to the contrary is inconsistent with existing law and must be reversed.

B. The court of appeals' decision is inconsistent with established law governing the utter disregard element of first-degree reckless homicide and permits vigilantism.

According to the court of appeals, Johnson was entitled to an instruction on second-degree reckless homicide because a jury could conclude that Johnson "demonstrate[d] a regard for the life, safety, and well-being of others" because he was trying to get KM arrested for possession of child pornography

and protect his relatives from KM. (Pet-App. 117–20, ¶¶ 35, 40.) This reasoning is inconsistent with established law. As set forth in *State v. Edmunds*, 229 Wis. 2d 67, 598 N.W.2d 290 (Ct. App. 1999), the "utter disregard" element of first-degree reckless homicide focuses on the defendant's concern for *the victim's* life—not the lives of others who are not present.

"Utter disregard is proved through an examination of the act, or acts, that caused death and the totality of the circumstances that surrounded that conduct." *Edmunds*, 229 Wis. 2d at 77. This totality of the circumstances inquiry is focused on the relationship between the defendant *and the victim*; the court considers "the type of act, its nature, why the perpetrator acted as he/she did, the extent of the victim's injuries and the degree of force that was required to cause those injuries." *Id.* The court also "consider[s] the type of victim, the victim's age, vulnerability, fragility, and relationship to the perpetrator." *Id.* Finally, the court must consider whether the defendant's conduct "*showed any regard for the victim's life*." *Id.* (emphasis added).

The court of appeals' conclusion that the jury could find that Johnson acted without utter disregard for the life of KM based on his concern for non-present third parties is inconsistent with *Edmunds* and must be reversed. Although the court of appeals attempted to justify its holding by relying on *Miller*, 320 Wis. 2d 724,[9] that case is distinguishable for several reasons and does not stand for the proposition that a defendant's purported concern for others who are not present, rather than his concern for the life of the victim, determines whether he is entitled to an instruction on second-degree reckless homicide.

Miller—a pre castle-doctrine case—involved both a claim of self-defense and defense-of-others to a charge of first-degree reckless injury after the defendant shot a drunk and belligerent houseguest a single time in the leg in his trailer after the victim assaulted him and other guests, after he had already called 911. *Id.* ¶¶ 1–14, 37. The issue in

[9] Johnson did not cite the *Miller* decision to the court of appeals.

Miller was whether the defendant's conduct was "otherwise defensible" in light of his defense-of-others defense, such that a jury could conclude that Miller was entitled to submission of second-degree reckless injury. *Id.* ¶ 37. *Miller* is distinguishable for several reasons.

In *Miller*, the homeowner called 911 *before* he shot the victim in the leg and only fired once. *Id.* ¶¶ 9–14. Here, Johnson invaded someone else's home with a loaded firearm and shot the unarmed homeowner five times. Also, the prosecutor in *Miller* "acknowledged in his closing argument that Miller 'was acting in self-defense, but he wasn't acting in lawful self-defense." *Id.* ¶ 40. No such concession was made by the State in the present case. Also, in *Miller* it was undisputed that "a reason, if not *the* reason for Miller's conduct was to protect himself and his friends." *Id.* Not so here. The circuit court here concluded: "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, Pet-App. 406.)

But the most important distinction is that Miller's friends were present with him in his home when the victim became violent towards them, and Miller asserted a defense-of-others defense. *Miller*, 320 Wis. 2d 724. ¶ 40. Here, the only people present in the room were KM and Johnson. And Johnson was allowed to present *McMorris* evidence based on his prima facie case of *self-defense*, not defense of others. (R.218:272–74, Pet-App. 269–71.)

Miller does not establish a per se rule that a defendant is entitled to a second-degree reckless homicide instruction based on his abstract concern for the safety of non-present third parties and stated desire to prevent a future crime. Its

holding does not apply where, as here, an instruction on self-defense is given based on the defendant's fear for his own safety at the time of the shooting and no third parties are present or in any imminent danger.

The court of appeals' contrary holding is inconsistent with *Edmunds* and again encourages vigilante justice. It must be reversed.

C. A court is not *required* to instruct on second-degree reckless homicide anytime it instructs on imperfect self-defense.

In addition, the court of appeals misstated the law by relying on *Miller*, 320 Wis. 2d 724, ¶ 40, for the proposition that it is "generally inconsistent to instruct on imperfect self-defense, while at the same time declining a lesser-included instruction on the grounds that there are no circumstances where a jury could fail to infer utter disregard to human life." (Pet-App. 119, ¶ 39.) Contrary to what the court of appeals suggested, *Miller* does not stand for the proposition that anytime a court instructs a jury on imperfect self-defense, it must always instruct on second-degree reckless homicide. (Pet-App. 119, ¶ 39.)

As discussed above, *Miller* involved a unique factual scenario. The defendant in *Miller* was charged with first-degree reckless injury after he shot a belligerent house guest *a single time* in the leg while defending other houseguests that the victim assaulted. *Miller*, 320 Wis. 2d 724, ¶¶ 14–15. Under those facts, the court of appeals determined that it would be inconsistent to instruct on self-defense/defense-of-others and not also instruct on second-degree reckless injury. *Id.* ¶ 40.

In contrast, here, Johnson shot an unarmed KM five times, including in the head and in the back. Under the facts of this case, there is nothing at all inconsistent with a jury finding that Johnson shot KM based on an actual, but objectively unreasonable fear for his life, making his use of force "unnecessary" (i.e. imperfect self-defense), but that he also acted recklessly and *with* utter disregard for KM's life by shooting him five times at close range (first-degree reckless homicide). Wis. Stat. §§ 940.01(2)(b), 940.02(1). In fact, under these facts, imperfect self-defense based on an unreasonable use of force is *perfectly* consistent with a finding that Johnson acted with utter disregard of KM's life. The propriety of the circuit court's instructions is evident by the fact that the jury *did not find* that Johnson acted with imperfect self-defense.

The circuit court correctly ruled that in light of the facts of record—that Johnson came armed with a loaded gun to KM's house, entered without permission, pointed the gun at him, and then shot him five times—that no reasonable jury could find that he acted *without* utter disregard for KM's life. (R.221:34–35, Pet-App. 388–89.) The court of appeals' holding to the contrary is inconsistent with existing law and must be reversed.

III. The Circuit Court Properly Excluded Evidence of Alleged Child Pornography on KM's Computer.

Finally, if this Court grants the petition for review on either of the two bases discussed above, then it should also review the court of appeals' reversal of the circuit court's decision excluding evidence of the alleged child pornography found on KM's computer. While this issue, standing alone, would not ordinarily warrant review, the court of appeals' interference with the circuit court's discretionary evidentiary ruling, in conjunction with its rulings on self-defense and second-degree reckless homicide, is of sufficient importance to this case that review of this issue is needed.

The circuit court excluded this evidence because it was not relevant and because any limited probative value it had was outweighed by the danger of unfair prejudice, confusion of the issues and waste of time under Wis. Stat. § 904.03. (R.211:15–16, Pet-App. 149–50.) Specifically, there was a high degree of danger that if the jury were told that KM possessed child pornography that the jury would draw an impermissible inference that he was a "bad person" and "deserved" to be murdered. As the circuit court recognized, evidence of child pornography was not relevant to any pertinent character trait of the victim and had nothing to do with whether Johnson acted in self-defense when he shot KM five times. (R.211:15–16, Pet-App. 149–50.) Further, given that the State disputed that the images on KM's computer actually constituted child pornography, there was a significant danger that such evidence would result in a trial within a trial about the legal definition of child pornography.

The circuit court considered all of these factors and, acting within its discretion, excluded the computer evidence. The court of appeals disagreed, believing that the probative value of this evidence was high with little danger of unfair prejudice. (Pet-App. 124–27, ¶¶ 46–51.)

However, this Court recently reminded the court of appeals that its duty when reviewing a discretionary evidentiary ruling is to "look for reasons to sustain [it]." *State v. Gutierrez*, 2020 WI 52, ¶ 27, 391 Wis. 2d 799, 943 N.W.2d 870 (citation omitted).[10] As in *Gutierrez*, "[w]hile the court of appeals may have preferred that the circuit court give more weight to the evidence's probative value, it 'may not substitute its discretion for that of the circuit court.'" *Id.* (citation omitted).

The circuit court's decision was a proper exercise of discretion. The court of appeals should not have re-weighed the value of the evidence and substituted its own preferences for the circuit court's reasoned decision.

[10] *Gutierrez* was also a District II opinion authored by the same judge as the present case.

CONCLUSION

For these reasons, this Court should grant the petition for review, reverse the court of appeals' mandate, and affirm Johnson's judgment of conviction for first-degree reckless homicide.

Dated this 6th day of August 2020.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this petition conforms to the rules contained in Wis. Stat. § 809.62(4) for a petition for review produced with a proportional serif font. The length of this petition is 7,983 words.

Dated this 6th day of August 2020.

TIMOTHY M. BARBER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.62(4)(b)

I hereby certify that:

I have submitted an electronic copy of this petition for review, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rules) 809.62(4)(b)and 809.19(12).

I further certify that:

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

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

Dated this 6th day of August 2020.

TIMOTHY M. BARBER
Assistant Attorney General