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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2018AP2318-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

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-PETITIONER

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INTRODUCTION

This case is about whether a jury should be allowed to condone vigilantism under the guise of self-defense and to what extent we allow a murderer to justify his vigilantism to a jury.

On October 25, 2016, at approximately 2:20 a.m., KM's wife woke after hearing a "thud" and discovered her husband's bullet-riddled body lifeless on the floor of the computer room. KM was partially clothed and unarmed. Police arrested KM's brother-in-law, Alan P. Johnson, after he admitted to killing KM. Johnson claimed he entered KM's house with gloves and a loaded weapon in the middle of the night to discover evidence of suspected child pornography on KM's computer. Johnson shot KM five times, including in the back and the head. Johnson said he could not remember anything about the shooting other than that KM "lunged" at him.

Johnson was charged with first-degree intentional homicide and burglary. Following an eight-day trial, a jury found Johnson guilty of the lesser-included offense of first-degree reckless homicide and acquitted him on the burglary charge. Johnson appealed, and the court of appeals reversed, ordering a new trial. *State v. Johnson*, 2020 WI App 50, ___ Wis. 2d ___, 948 N.W.2d 377.[1] The court of appeals held that the circuit court should have: (1) instructed the jury on perfect self-defense; and (2) submitted a lesser-included offense instruction for second-degree reckless homicide. Additionally, it ruled that the circuit court erroneously exercised its discretion in excluding evidence of alleged child pornography on KM's computer.

[1] P-App. 101–128.

This Court should reverse because the court of appeals' first two rulings are inconsistent with existing law and would allow the jury on remand to condone vigilantism under the guise of self-defense. The court of appeals' third ruling must be reversed because it invaded the province of the circuit court.

ISSUES PRESENTED

1. Was Johnson entitled to a jury instruction on 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 alleging 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, P-App. 203–07.)

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. *Johnson*, 2020 WI App 50, ¶¶ 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. *Johnson*, 2020 WI App 50, ¶¶ 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 because Johnson came into KM's home uninvited with a loaded gun and shot KM five times, no reasonable jury could find that Johnson acted recklessly but *without* utter disregard for KM's life. (R.221:34–36, P-App. 187–191.)

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. *Johnson*, 2020 WI App 50, ¶¶ 35, 40 (emphasis added).

3. Did the circuit court erroneously exercise its discretion in excluding evidence of alleged child pornography[2] 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.[3] (R.211:14–16, P-App. 145–47.)

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 and that the circuit court did not give the evidence enough probative value. *Johnson*, 2020 WI App 50, ¶¶ 46–51.

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

[3] All statutory references are to the current edition of the Wisconsin Statutes, unless otherwise noted.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Having accepted the petition for review, both oral argument and publication are warranted.

STATEMENT OF THE CASE

Overview. The State charged Johnson with first-degree intentional homicide and burglary for breaking into the home of his brother-in-law[4] (KM) and shooting him five times and killing him on October 25, 2016 at approximately 2:20 a.m. (R.2:1–3, P-App. 265–67; R.9, P-App. 131.) KM's body was discovered by his wife who awoke in the middle of the night to a "thud." (R.2:2.) Johnson initially denied any knowledge of what happened, but when the police returned later in the day, Johnson said, "Arrest me, I killed him." (R.2:2, P-App. 266.)

Following an eight-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; 179.) The court entered judgment accordingly and sentenced Johnson to 35 years' imprisonment. (R.203, P-App. 129.)

Pretrial rulings on other-acts/McMorris[5] *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 years before KM's death, Johnson discovered child pornography on a computer in KM's home. (R.15:1–2.) Johnson argued the information was

[4] KM's wife is Johnson's sister.

[5] *McMorris v. State*, 58 Wis. 2d 144, 205 N.W.2d 559 (1973) (addressing when evidence of prior acts of violence by victim is probative to self-defense).

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 vigilantism. (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 KM was "domineering" and belittled him and was verbally abusive to KM's son. (R.46:3–10.) As to the shooting, Johnson asserted 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 said anything; KM closed the door, reopened it, and "charged at" Johnson; Johnson shot him. (R.46:10–11.)

The State said that none of the other-acts evidence could be referenced until Johnson testified because such evidence would be unduly prejudicial unless Johnson established a factual basis for its relevance. (R.210:232–35, 240.) Further, the State disputed that the images Johnson accessed on KM's computer actually constituted child pornography. (R.65:1–2.) But it argued that this was irrelevant and that such evidence should not be admitted

because it would create "two trials within a third trial," about the legal definition of child pornography and would confuse and mislead the jury. (R.59:7.) However, the State agreed that Johnson could testify that his motivation for entering KM's house was to "ferret out" what he thought was criminal activity. (R.210:232.)

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, P-App. 136–37.) The court explained that Johnson's testimony was necessary because "the defendant and the victim are the only ones present during this incident." (R.211:6, P–App 137.)

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, P-App. 138–141.)

The court also ruled that Johnson could introduce evidence about child pornography he allegedly discovered years earlier, 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 unduly prejudicial. (R.211:13–17, P-App. 144–48.) As to relevancy, the court explained that "[w]hether or not there was child pornography, regular pornography, pictures of girls or other people walking, anything that was found on his computer does not make the existence of any fact that is of consequence to this action more or less probable." (R.211:15, P-App. 146.) The court further explained that the evidence was not probative as to the existence of any element of the charged crimes or defense. (R.211:15, P-App. 146.) As to unfair prejudice, the court reasoned that such evidence "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, P-App. 147.) And presentation of such evidence "would cause undue delay in the trial and it would be very misleading to the jury." (R.211:16, P-App. 147.)

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.)[6] 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.)[7]

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.) Johnson said that years before he killed KM, he discovered child pornography on KM's family computer. (R.218:211–13.) 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.) 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.)

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.) He said he went to find "fresh pictures" so police "could take care of it." (R.218:247.) Before he left, Johnson

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[6] Johnson did not dispute any of the ballistics or DNA evidence. (R.219:13.)

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

grabbed gloves and obtained a gun and ammunition from his father's safe because he wanted to feel "safe." (R.218:249,254.) He denied wanting to kill KM but speculated: "[I]f he saw me he would know why I was there and he'd go after me." (R.218:254.)

Johnson drove to KM's house, entered through a sliding door, and brought the loaded gun inside with him. (R.218:255–56.) 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.)

Johnson heard a noise, closed down the computer, grabbed his gun, and went towards the door. (R.218:268.) KM opened the door, half naked and unarmed. (R.218:268–69, 316.) KM closed the door, then opened it and "attacked" Johnson. (R.218:271.) Johnson said that KM came at him and "lunged." (R.218:281.)

Johnson admitted that he was an intruder in KM's home. (R.219:11.) He 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.) Johnson said he was "afraid" and didn't think he could get out or defend himself. (R.218:266, 269.)

But Johnson could not offer any further details about the shooting, explaining: "I think I closed my eyes. I didn't see what happened." (R.218:271.) Johnson said he did not remember shooting the gun, hearing it fire, or how he got beyond KM. (R.218:271.) Counsel asked Johnson: "Do you have a memory of what occurred in that room?" (R.218:272.) He answered: "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.) Johnson also 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.) Johnson also could not recall how far KM was away from him when he entered the room. (R.219:11.)

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.)

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.) 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.) Johnson admitted 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.) As to the allegations concerning KM's conduct toward his family members, Johnson admitted that to his knowledge, no one ever called the police. (R.219:14.)

Johnson's family members described KM as a violent bully and relayed childhood instances where KM allegedly choked or touched them. (R.220:107, 152–553.) On rebuttal, KM's wife testified that she never saw KM physically abuse either Johnson or her son. (R.220:158–60, 177–80.)

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.) Another officer testified that when Johnson was asked about prior problems with KM during the investigation, Johnson said only that KM hit him a few times when he was 11 or 12 years old, but they had no other arguments. (R.220:64.)

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.) 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.) The defense also proffered that Johnson found images of allegedly 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.)[8]

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, P-App. 159–61.)

The parties agreed that a second-degree intentional homicide instruction was appropriate. (R.221:32, P-App. 185.) 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, P-App. 187–191.) 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, P-App. 187–89.) The court also ruled 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, P-App. 189–90.)

[8] The photos in question (R.185–191), have been sealed (R.183:1; 220:11).

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, P-App. 202–05.) 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; and there was no evidence that KM used any weapon against Johnson or threatened to kill him. (R.221:50–52, P-App. 203–05.) 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, P-App. 205.) 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, P-App. 206.)

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.) The jury found Johnson guilty of first-degree reckless homicide while armed and not guilty of armed burglary. (R.178; 179.)

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. *Johnson*, 2020 WI App 50.

Johnson's main argument to the court of appeals was that the circuit court erroneously made him testify and establish a factual basis for his self-defense theory before it

allowed him to present *McMorris* evidence, thus violating his constitutional right to present a defense. (Johnson's COA Br. 23–28.) The court of appeals rejected this argument. *Johnson*, 2020 WI App 50, ¶ 30 & n.11.[9] However, the court ruled in Johnson's favor on three other points, which are the subject of this appeal.

First, the court addressed whether Johnson was entitled to an instruction on perfect self-defense under the "some evidence" standard, considering both the prerequisites 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).[10] *Johnson*, 2020 WI App 50, ¶¶ 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. *Id.* ¶¶ 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. *Id.* ¶¶ 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),

[9] Johnson did not petition for cross-review of this portion of the court of appeals' decision. Accordingly, this issue is not before the Court.

[10] *See* 2011 Wis. Act 94.

reasoning that these "are all facts to be weighed by the jury." *Id.* ¶ 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. *Id.* ¶¶ 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. *Johnson*, 2020 WI App 50, ¶¶ 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." *Id.* ¶ 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. *Id.* ¶ 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. *Id.* ¶¶ 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. *Id.* ¶¶ 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 evidence. The admission of 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

I. Johnson was not entitled to an instruction on perfect self-defense because he shot an unarmed homeowner five times with no recollection of the shooting.

Johnson was not entitled to an instruction on perfect self-defense for two reasons. First, regardless of the scope of the castle-doctrine and how it applies here, there was no evidence from which a reasonable jury could find that he acted to prevent an unlawful interference with his person. Second, there was no evidence from which a reasonable jury could find that Johnson reasonably believed that the amount of force used was necessary to prevent an interference with his person. In ruling to the contrary, the court of appeals

misapplied the law and created a dangerous precedent whereby a homeowner's ability to use force to expel an intruder is dependent upon the intruder's motivation for entering the home.

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

Under Wis. Stat. § 939.48(1),[11] 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).[12] 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). 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.

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[11] P-App. 269.

[12] "Unlawful" means "either tortious or expressly prohibited by criminal law or both." Wis. Stat. § 939.48(6).

But this still requires that "a defendant must meet a reasonable objective threshold." *Id.* ¶ 84.

Perfect self-defense differs from imperfect self-defense, as the latter involves "[u]nnecessary defensive force"—that is, an unreasonable belief that the actor was in imminent danger of death or bodily harm or an unreasonable belief that the amount of force used was necessary to defend the actor. Wis. Stat. § 940.01(2)(b).[13] Accordingly, imperfect self-defense only mitigates a first-degree intentional homicide charge to second-second intentional homicide, whereas perfect self-defense is a complete defense. Wis. Stat. §§ 939.48(1), 940.01(2).

The court of appeals concluded that the statutory castle-doctrine set forth in Wis. Stat. § 939.48(1m)(ar)2. was relevant to the issue of perfect self-defense insofar as it provided KM with a privilege to *lawfully* interfere with Johnson, so as to negate that element of perfect self-defense. *Johnson*, 2020 WI App 50, ¶ 19.

Under Wis. Stat. § 939.48(1m)(ar)2.,[14] 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." Additionally, a court may not consider "whether the actor had an opportunity to flee or retreat before he or she used force." Wis. Stat. § 939.48(1m)(ar).

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[13] P-App. 268.

[14] P-App. 269.

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." *Johnson*, 2020 WI App 50, ¶ 17.[15] But this presumption 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. Johnson did not present evidence from which a reasonable jury could find he acted with an objectively reasonable belief that KM was unlawfully interfering with him or the amount of force he used was necessary.

As noted above, in order to be entitled to a jury instruction on perfect self-defense, Johnson was required to present "some evidence" from which a reasonable jury could find (1) he had a reasonable belief that KM was unlawfully interfering with his person and (2) the amount of force he used on KM was "necessary" to prevent or terminate the interference. *Head*, 255 Wis. 2d 194, ¶ 84. Importantly, perfect self-defense "requires objective reasonableness" on both elements. *Id.* ¶ 90.

Because there is absolutely no evidence from which a jury could find in Johnson's favor on either element, this

[15] As a reminder, the person to whom the castle-doctrine presumption would apply is the victim, KM—not Johnson. No decision has squarely addressed whether the statutory presumption affects a defendant's burden of production or persuasion. The Law Committee Note to Wis. JI–Criminal 805A (2019) (P-App. 272), suggests that it is the former. However, the Court need not rule on this issue to resolve the present appeal, and the State takes no position on it.

Court must reverse. But because Johnson did not even attempt to justify the *amount* of force used, the State addresses the second element of self-defense first.

1. Johnson presented no evidence that the amount of force used was necessary.

There is absolutely no evidence from which a reasonable jury could find that Johnson reasonably believed that the amount of force used—five shots at close range including shots to KM's chest, back, and head—was necessary to prevent an unlawful interference with his person. Johnson claimed he could not remember anything about the shooting other than that KM "lunged" at him. KM was unarmed and half naked. There was no evidence that Johnson was injured. Without any testimony as to what occurred when Johnson shot KM, Johnson could not prove the second element of perfect self-defense.

Under section 939.48(1), a defendant "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." And, a defendant may use "only such force or threat thereof as [he] reasonably believes is necessary to prevent or terminate the interference." The jury instruction on self-defense states, in pertinent part, that "[t]he reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of the defendant's acts and not from the viewpoint of the jury now." Wis. JI–Criminal 805 (2001).

The court of appeals concluded that the facts that KM was unarmed and partially disrobed, that Johnson fired five times, and that Johnson could not remember details of the shooting were simply facts for the jury to "weigh with all the

other evidence" in determining if the amount of force used by Johnson was reasonable. *Johnson*, 2020 WI App 50, ¶ 23. The court of appeals was wrong because there simply was not any "other evidence" that it was necessary for Johnson to shoot KM five times, including in the back and in the head, to prevent any alleged unlawful interference with his person.

The fundamental problem for Johnson is that by claiming to have no recollection of the shooting, and by killing the only other person present, Johnson, by definition, could not present "some evidence" that deadly force was necessary to prevent an alleged unlawful interference with his person. The only details of the attack before the jury were that Johnson heard a noise, closed down the computer, grabbed his gun, and went towards the door. (R.218:268.) All that Johnson could remember after that is that KM came at him and "lunged." (R.218:281.)

Johnson was asked, point blank: "Do you have a memory of what occurred in that room?" (R.218:272.) He answered: "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.) Specifically, Johnson could not recall how far KM was from him when he "lunged" at him (R.219:11), he didn't remember shooting the gun, hearing the weapon discharge, or how he got past KM (R.218:271). In fact, the next thing Johnson remembers was driving home with blood-soaked clothing. (R.218:282–83.)

The jury also heard the following facts:

- 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.)
- KM was half-naked when he opened the door to the computer room and unarmed. (R.218:268–69, 316.)

- KM's wife (Johnson's sister) and son were present in the home at the time he was killed, and Johnson admitted he could have called out for help. (R.218:316.)

There was no testimony that KM threatened or said anything to Johnson before Johnson shot him five times. There was no testimony that KM armed himself, struck Johnson, or did anything other than "lunge" at him. Certainly, there was no testimony from which a jury could find that KM was in "a fit of rage" at the time, as the court of appeals suggested. *Johnson*, 2020 WI App 50, ¶ 21. And there was no testimony as to whether KM fell to the ground when he was first shot or whether Johnson moved past him before discharging the additional four rounds, including the rounds to his head and back. Allowing the jury to find that Johnson reasonably believed that the amount of force he used was necessary on this record would require them to engage in speculation, contrary to the standard jury instruction not to speculate. Wis. JI–Criminal 140 (2014). (R.100:19.)

And KM's alleged childhood abuse of Johnson was not sufficient, standing alone, to justify the amount of force Johnson used. While the context of the parties' relationship may be relevant to the inquiry, *State v. Jones*, 147 Wis. 2d 806, 816, 434 N.W.2d 380 (1989), 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 generally was 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.) There was no evidence of recent violence that could inform the jury's determination of whether Johnson had an objectively reasonable belief that it was necessary to shoot KM five times. Johnson's evidence amounted to little more than showing KM was allegedly a "bad" person and that Johnson was afraid of him.

Simply put, only two people were in the computer room when KM was shot—one of them is dead and the other has no memory of anything other than that the unarmed deceased "lunged" at him. 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 (R.218:281), no reasonable jury could conclude that Johnson reasonably believed that the amount of force used was "necessary to prevent or terminate [KM's] interference." *Head*, 255 Wis. 2d 194, ¶ 84. The court of appeals plainly erred in holding otherwise.

Because no reasonable jury could find in Johnson's favor as to the second element of self-defense, the circuit court properly refused to instruct the jury, and this Court can reverse on the self-defense issue on this basis alone.

2. Johnson did not act with an objectively reasonable belief that KM was unlawfully interfering with him.

As noted above, in order to be entitled to an instruction on perfect self-defense, Johnson needed to produce some

evidence that (1) he had a reasonable belief that KM was unlawfully interfering with his person and (2) that the amount of force he used on KM was "necessary" to prevent or terminate the interference. *Head*, 255 Wis. 2d 194, ¶ 84. The circuit court correctly concluded that there was no evidence from which a reasonable jury could conclude Johnson had an objectively reasonable belief that KM was unlawfully interfering with his person, as is necessary to submit an instruction on perfect self-defense.

In reversing, the court of appeals stated that the availability of perfect self-defense hinged on whether Johnson believed that KM had a legal privilege to interfere with him, based on Johnson's purported motivation for intruding in KM's home. *Johnson*, 2020 WI App 50, ¶¶ 17–21. According to the court of appeals, the jury could find that Johnson reasonably believed that KM lunged at him in order to prevent Johnson from reporting alleged child pornography on Johnson's computer; if so, then Johnson would not have a privilege to interfere with KM under the castle doctrine. Hence, the logic goes, the jury could find that Johnson believed that KM was *unlawfully* interfering with him, such that Johnson had the privilege of self-defense under section 939.48(1). *Id.*

The court of appeals' analysis is wrong both legally and factually.

a. Johnson's motivation for invading KM's home does not provide a basis for perfect self-defense.

Legally, the court of appeals was wrong because it erroneously posited that a homeowner's privilege to use force against an intruder entirely vanishes if an intruder believes the homeowner is engaged in illegal activity somehow

connected to the reason he is invading the person's home. *Johnson*, 2020 WI App 50, ¶ 21 & n.21. This rationale is fundamentally flawed because a homeowner's privilege to use force against an intruder is not dependent upon whether the intruder believes the homeowner has committed a crime.

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.[16] But, there is absolutely no basis for the court of appeals' conclusion that an intruder's subjective belief that a homeowner has committed a crime is enough to justify an objectively reasonable belief that the homeowner has no legal right to defend his property under section 939.48(1m). That is, an intruder's beliefs as to the homeowner's alleged criminal activity cannot negate the homeowner's ability to resist an armed intruder at 2:00 in the morning.

It is true that self-defense under section 939.48(1) requires an analysis of the actor's state of mind—i.e. in acting to "terminate[ ] what the person reasonably believes to be an unlawful interference with his or her person." But, there is absolutely no authority to support the notion that an invader's subjective beliefs about the homeowner's alleged criminal activity has any bearing on the objective reasonableness of thinking that a homeowner has no right to act to expel an armed intruder.

Johnson admitted that he was an intruder in KM's home. (R.219:11.) He admitted that his presence was likely to

[16] 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 the presumption apply. *Johnson*, 2020 WI App 50, ¶ 21 & n.21.

provoke a response from the homeowner if discovered. (R.219:11.) Johnson's beliefs as to KM's alleged past misdeeds did not affect whether KM could lawfully remove an armed intruder from his home at 2:00 in the morning.

The court of appeals' conclusion to the contrary is, in essence, a declaration that a homeowner is at the mercy of an armed invader, so long as the invader alleges he reasonably believes he is acting to uncover evidence of a crime. This is completely contrary to the legislative policy determination that "homeowners ordinarily do not have a duty to retreat from trespassers and, when lethal force is used, 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." *Johnson*, 2020 WI App 50, ¶ 17.

Consider the consequences of the court of appeals' holding. Under its rationale, a person who thinks his neighbor stole his bike or tools could forcibly enter the suspected thief's home while armed in the middle of the night and then kill the homeowner and escape responsibility simply by alleging he thought the homeowner "attacked" him to prevent him from reporting the theft. While a jury may not be as likely to acquit as it may be if the alleged crime is possession of child pornography, in either case, the intruder cannot have an objectively reasonable belief that the homeowner has forfeited his right to defend his home.

In short, for purposes of perfect self-defense under section 939.48(1), it is not objectively reasonable to think that a homeowner loses the privilege of lawfully defending his home under section 939.48(1m), simply because the intruder believes that he is acting to uncover evidence of a crime. The court of appeals' decision makes the castle-doctrine presumption dependent upon an intruder's belief as to

whether the homeowner was guilty of a crime. That holding cannot stand.

Additionally, the court of appeals erred in assuming that the issue of self-defense hinged *entirely* upon whether the exception to the castle-doctrine presumption under Wis. Stat. § 939.48(1m)(b)1. applied to KM. That is, the court of appeals erred by its assumption that the castle-doctrine presumption under section 939.48(1m) is the only means by which a homeowner can *legally* use force to expel in intruder. *Johnson*, 2020 WI App 50, ¶ 18.

For purposes of self-defense under section 939.48(1) "unlawfully" means "either tortious or expressly prohibited by the criminal law." Wis. Stat. § 939.48(6). Thus, in order for the court of appeals' logic to hold, one would need to conclude that a homeowner has no legal right to use force against an intruder *unless* the castle doctrine applies.

But as the Law Committee Note to Wis. JI–Criminal 805A (2019)[17] states, section 949.48(1m) "does not change the substance of the existing privilege of self-defense defined in § 939.48 or create an alternative to the existing privilege." Rather, the statutory castle-doctrine simply provides "another way for the defendant to meet the burden of production" when asserting self-defense. *Id.* According to the Law Committee, the presumption in section 939.48 simply creates one means by which a homeowner asserting a self-defense theory can satisfy the "some evidence" standard. *Id.*[18]

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[17] P-App. 272.

[18] Again, the State does not take a position in this case as to whether the Law Committee Note to Wis. JI–Criminal 805A (2019) accurately describes the full breadth of the castle-doctrine privilege (that is whether it affects the burden of production or persuasion). However, even under the narrow interpretation provided by the

In other words, a homeowner's ability to use force against an intruder is not commensurate with the scope of the castle-doctrine presumption, even under a narrow interpretation of section 939.48(1m). Accordingly, KM would still retain the legal right to expel an intruder from his home even assuming, *arguendo*, that the castle doctrine presumption did not apply.

In short, whether KM was acting under the castle-doctrine presumption or not, it was objectively unreasonable for Johnson to believe that KM lacked the right to defend his home from an armed intruder at 2:00 in the morning. Accordingly, Johnson could not have maintained an objectively reasonable belief that KM was "unlawfully" interfering with Johnson's person when he lunged at him.

b. There is no evidence from which a jury could find that KM was *unlawfully* interfering with Johnson.

Even if the court of appeals' interpretation of how the castle doctrine operates under section 939.48(1) is correct, this Court must still reverse based on the factual record. According to the court of appeals, a reasonable jury could conclude that KM was not trying to defend himself from an armed intruder, but instead was trying "to prevent Johnson from reporting his ongoing criminal activity of possession of child pornography" or "perhaps" Johnson was acting in "a fit of rage over the fact that such activity had been discovered." *Johnson*, 2020 WI App 50, ¶ 21. But there is absolutely no evidence to support such speculation.

Law Committee, the castle-doctrine merely is one way of establishing self-defense.

To start, there is no evidence that KM did anything to "attack" Johnson, *id.*, other than that Johnson testified KM "lunged at [him]." (R.218:281.) Johnson had no recollection of what happened after the alleged lunge; he had no recollection of shooting KM; and he had no recollection of how he got past KM and out to his vehicle. (R.218:271–72, 283.) It is undisputed that KM was unarmed when he entered the computer room in the early hours of the morning and encountered an armed intruder. (R.218:268–69, 316.)

There is no evidence that KM said anything to Johnson before Johnson shot him. There is no evidence that KM armed himself. Johnson did not report any injuries. And there is no evidence that KM knew what Johnson was doing. To the contrary, Johnson testified that when he heard KM approaching, he closed down the computer, grabbed his gun, and went towards the door. (R.218:268.) All the evidence showed was that an unarmed and half-naked homeowner "lunged" at an intruder who was armed with a loaded weapon.

And there was no testimony from which a jury could find that KM was in "a fit of rage" at the time, as the court of appeals suggested or that he was trying to prevent Johnson from reporting him to police. *Johnson*, 2020 WI App 50, ¶ 21. The only testimony was Johnson's objected-to speculation that he (Johnson) *believed* that KM knew who he was and that Johnson believed that KM thought Johnson had uncovered pornography on his computer. (R.219:19–20.)

But Johnson's subjective belief as to what he thought KM was thinking has absolutely zero evidentiary value. It is undisputed that Johnson had not interacted with KM for over a year. (R.214:151, 217:151.) Additionally, as discussed above, there is no evidence KM said anything to Johnson when encountering him in the computer room.

And even assuming that KM's right to defend his home was dependent upon the castle-doctrine exception, the exception applies only if the homeowner is "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."[19] While Johnson testified that he believed he had "found what they needed" on KM's computer (R.218:263, 267)—presumably some evidence of the alleged child pornography—there is no evidence from which a jury could find that KM was engaged in any criminal activity when he appeared half-naked and unarmed in his computer room to discover an armed intruder in his home at 2:00 in the morning. Wis. Stat. § 939.48(1m)(b)1.

Finally, the court of appeals erroneously concluded that there was "some evidence" of perfect self-defense because the jury failed to convict on first-degree intentional homicide. *Johnson*, 2020 WI App 50, ¶ 27. This is a non-sequitur that has no basis in law. The difference between first-degree intentional homicide and first-degree reckless homicide is that reckless homicide requires proof that "show[s] utter disregard for human life," whereas intentional homicide requires proof of the "intent to kill that person or another." Wis. Stat. §§ 940.02(1), 940.01(1)(a). The fact that the jury concluded that Johnson did not act with intent to kill, but instead acted with an utter disregard for human life says nothing about whether Johnson's intent was *justified* by his asserted self-defense theory.

Therefore, even if the court of appeals' interpretation of the castle doctrine was correct, there was no evidence from

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

which a reasonable jury could conclude that KM was *unlawfully* interfering with Johnson. Wis. Stat. § 939.48(1).

II. Johnson was not entitled to an instruction on the lesser-included offense of second-degree reckless homicide because no reasonable jury could find that he acted recklessly but without utter disregard for Johnson's life.

Next, the court of appeals erred in holding that the circuit court was required to instruct the jury on second-degree reckless homicide. *Johnson*, 2020 WI App 50, ¶¶ 35, 40. According to the court of appeals, 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. *Id.* (emphasis added). This holding is in error for two separate reasons.

First, the court of appeals' holding—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 *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.* 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. *Johnson*, 2020 WI App 50, ¶¶ 35, 40. This reasoning is inconsistent with established law. As set forth in *State v. Edmunds*, 229 Wis. 2d 67, 77–78, 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, 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 *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, P-App. 205.)

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.)

Again, the consequences of the court of appeals' decision are profound. If a person's subjective desire to protect non-present third-parties from *future* harm is sufficient for a second-degree reckless homicide instruction, then someone who intentionally kills another would be able to escape full criminal responsibility simply by alleging that the victim was "bad" and that he killed the victim because he was worried the victim *may* harm others in the future.

To be clear, the State does not dispute that *Miller* would apply in some circumstances where an individual's actions are motivated by a desire to protect third parties who are both *present* and in *imminent danger* of death or great bodily harm. But *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." *Johnson*, 2020 WI App 50, ¶ 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. *Johnson*, 2020 WI App 50, ¶ 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.[20]

[20] Even so, it is not clear why there would be any "inconsistency" in giving these instructions. As noted above, imperfect self-defense mitigates a charge of first-degree intentional homicide to second-degree intentional homicide, based on an unreasonable belief that the amount of force used was necessary. Wis. Stat. § 940.01(2). The logical implication of *Miller* is that a jury could never find a defendant was guilty of first-degree reckless homicide when it is instructed on imperfect self-defense. Such a conclusion would, in turn, greatly expand the scope of mitigation offered by section 940.01(2).

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 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, P-App. 187–88.) The court of appeals' holding to the contrary is inconsistent with existing law and must be reversed.

III. The circuit court did not erroneously exercise its discretion in excluding evidence of alleged child pornography under section 904.03.

Finally, the court of appeals erred in holding that the circuit court erroneously exercised its discretion by excluding evidence of the images of alleged child pornography found on KM's computer. 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.211:14–16, P-App. 145–47.) The circuit court's decision was a reasonable discretionary determination and should not have been overturned.

When reviewing a circuit court's discretionary evidentiary rulings, an appellate court is limited to determining if the trial court applied the correct legal standard and set forth a reasonable basis for its decision based on the facts of record—even if those facts are not articulated with precision. *State v. Pharr*, 115 Wis. 2d 334, 342, 340 N.W.2d 498, 501 (1983). A reviewing court thus has a 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.

Here, the transcript reveals that the circuit court applied the proper standard under Wis. Stat. § 904.04(2) and *State v. Sullivan*, 216 Wis. 2d 768, 772–73, 576 N.W.2d 30 (1998), and provided a reasonable explanation for its decision. (R.211:15–16, P-App. 146–47.)

"Other acts" evidence may be admitted if "(1) offered for an acceptable purpose under Wis. Stat. § 904.04(2); (2) relevant under Wis. Stat. § 904.01; and (3) its probative value is not substantially outweighed by the danger of unfair prejudice, confusion, or delay under Wis. Stat. § 904.03." Wis. Stat. § 904.04(2); *Sullivan*, 216 Wis. 2d at 772–73.

The circuit court concluded that evidence of the alleged child pornography was not relevant to any pertinent character trait of the victim and was not pertinent to establishing any element of the charged crimes or defenses. (R.211:14–16, P-App. 145–47.) That is, the contents of KM's computer do not make it any more or less likely that Johnson acted in self-defense when he shot an unarmed man five times.

The circuit court also determined that even if the computer evidence was relevant, "[i]t would be completely and unfairly prejudicial" as it had "little to no probative value other than to try and paint the victim in a bad light."

(R.211:16, P-App. 147.) Based on the parties' dispute over whether the images actually constituted child pornography, the circuit court also concluded that the computer evidence would "cause undue delay in the trial and it would be very misleading to the jury." (R.211:16, P-App. 147.)

This was not an unreasonable explanation. There was a high degree of danger that if the jury were told that KM possessed alleged child pornography that the jury would draw an impermissible inference that he was a "bad person" and "deserved" to be murdered. Furthermore, the court's concerns over delay and confusion were not without basis. The vast majority of the images in question were "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; 220:3–5.) Johnson's analyst was prepared to testify only that "to a lay person . . . [it] would be reasonable for them to interpret [the images] . . . to be child pornography." (R.220:212–13.)[21] Undoubtedly, the presence of such images is highly disturbing, and that is exactly why the circuit court excluded this evidence, but it is far from clear that KM actually possessed pornographic images of underage children.

In short, the circuit court applied the correct legal standard and reached a reasoned decision to exclude the computer evidence of alleged child pornography. The court of appeals erred in finding otherwise and usurped the discretion of the circuit court by conducting its own balancing of the probative value and prejudicial effect, despite this Court's recent admonishment that the court of appeals should not "substitute its discretion for that of the circuit court." *Gutierrez*, 391 Wis. 2d 799, ¶ 27. Accordingly, this Court should reverse.

[21] Johnson never explained how his analyst was qualified to offer such an opinion.

CONCLUSION

This Court should reverse the court of appeals' decision and affirm the judgment of conviction.

Dated this 16th day of October 2020.

Respectfully submitted,

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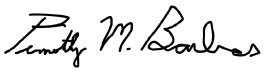

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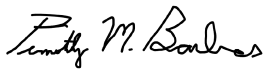
CERTIFICATION

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 10,215 words.

Dated this 16th day of October 2020.



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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.

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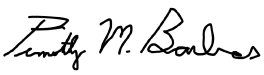

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