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

PLAINTIFF-RESPONDENT-PETITIONER'S REPLY BRIEF

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INTRODUCTION

Johnson's entire strategy on appeal is to put the deceased victim on trial and argue that a jury should be allowed to find that he was entitled to shoot KM five times in his own home because KM was a bad person. A jury heard Johnson's theory of defense, acquitted him of first-degree intentional homicide,[1] and instead found him guilty of first-degree reckless homicide. The court of appeals' decision overturning that verdict must be reversed.

First, Johnson was not entitled to an instruction on perfect self-defense. Regardless of the scope of the castle doctrine, or how it might have applied had KM survived, there was no evidence from which a jury could conclude that Johnson's repeated shooting of KM was objectively reasonable. Second, based on the trial record, no reasonable jury could conclude that Johnson acted *with* regard for the safety of KM when he admittedly "lost control" and "fired wildly" at KM. Third, Johnson's constitutional right to present a defense was not violated when the circuit court excluded evidence of the pictures found on KM's computer. The jury already heard Johnson explain why he went to KM's house and that he "got what they needed." Johnson did not have a constitutional right to inflame the jury's passions.

FACTUAL CLARIFICATIONS

Johnson sets forth several "facts" that simply were not before the trial court or jury.

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[1] Johnson asserts that "the jury found that Johnson *never* intended to kill KM." (Johnson's Br.15.) But there was not a specific jury question as to intent and we do not know why it acquitted on the greater offense.

No proffer was made of actual child pornography.

Johnson claims that he would have submitted evidence that KM's computer contained "a trove of child pornography" the night Johnson shot him to death, including Exhibits 105–09. (Johnson's Br.1–9, 34–36.) Johnson also says a detective would have confirmed this. (Johnson's Br.37.)

But at trial, Johnson conceded that Detective Craig would have testified only that the images he saw were "ambiguous" and that "in his professional opinion, he *did not* consider those girls to be underage." (R.220:213) (emphasis added). Likewise, Johnson's computer expert was prepared to opine only that "some of the images contained *what he suspected* were of child pornography." (R.220:212) (emphasis added). There was a proffer of numerous "inappropriate pictures of young girls" (Johnson's Br.9), but these were of "girls walking past" the street that were "focused on their backsides." (R.220:4.) No witness was prepared to identify a "trove of child pornography." (Johnson's Br. 9.)

There is no evidence that KM recognized Johnson or knew he accessed his computer.

Johnson claims that when KM found him in his computer room, KM "knew" why Johnson was there and that Johnson had uncovered child pornography on his computer. (Johnson's Br.10.) This is pure speculation. Johnson admitted that it was dark in KM's computer room with the only light coming from the computer monitor and ambient streetlight. (R.218:264.) Johnson did not present any evidence that KM said anything to demonstrate he knew who was in his dark computer room or why he was there. (R.218:268,270.)

There was no evidence that KM threatened Johnson's niece.

Johnson claims he went into KM's home to protect his niece from being assaulted by KM at some unknown point in

the future. (Johnson's Br.6–7.) But Johnson glosses over the fact KM was estranged from Johnson's family, did not have access to any children, and had not interacted with them in a year. (R.214:146,151; 217:151.) And there was no evidence that KM made any threatening comments to Johnson's niece.

There was no evidence that Johnson had KM's consent to enter his house at 2:00 a.m.

Johnson claims he had consent to enter KM's home the night he shot him. (Johnson's Br.26.) But Johnson did not present any evidence of the sort. And he did not present evidence that he had a standing invitation to come and go as he pleased. To the contrary, Johnson felt the need to arm himself specifically because he knew he was not welcome: "I felt like if I went over there without it I wouldn't be able to go in there." (R.218:254.)

ARGUMENT

I. Johnson was not entitled to an instruction on perfect self-defense.

A. The circuit court's ruling on *McMorris* evidence did not entitle Johnson to an instruction on perfect self-defense.

Citing *State v. Head*, 2002 WI 99, ¶ 115, 255 Wis. 2d 194, 648 N.W.2d 413, Johnson argues that because the circuit court ruled that he could present *McMorris*[2] evidence of the victim's past violent tendencies, it necessarily concluded that Johnson presented "some evidence" of perfect self-defense, such that the court was required to submit an

[2] *McMorris v. State,* 58 Wis. 2d 144, 147, 205 N.W.2d 559 (1973).

instruction on perfect self-defense. (Johnson's Br.19.) This is not a correct statement of the law and mischaracterizes both this Court's decision in *Head* and the circuit court's determination below.

McMorris evidence—that is, evidence of a victim's violent past conduct—may be admitted as part of a defendant's attempt to establish a prima facie case of self-defense. *Head*, 255 Wis. 2d 194, ¶ 124. However, this Court in *Head*, expressly stated that "the *McMorris* decision does not mandate that a defendant establish her sufficient factual basis for self-defense wholly separate from the preferred *McMorris* evidence." *Id.* ¶ 122. Rather, in determining if the defendant has presented "some evidence" of self-defense, the court is to consider "all the evidence at hand, including evidence presented by the state and any *McMorris* evidence that is proffered." *Id.* ¶ 124. In other words, the fact that a circuit court admits *McMorris* evidence does *not* mean that the court has *already* concluded that the defendant has established a prima facie case of self-defense (much less perfect self-defense). *Id.* ¶ 115.

Moreover, *Head*'s discussion of *McMorris* evidence involved a claim of *imperfect* self-defense. *Id.* ¶¶ 124, 138. *Head* held that *McMorris* evidence is probative of the defendant's "state of mind and whether she actually believed that an unlawful interference was occurring." *Id.* ¶ 123. The court in *Head* held that it was error for the circuit court to refuse an instruction on imperfect self-defense based on its conclusion that the defendant's beliefs were not objectively reasonable. *Id.* ¶¶ 139–40. However, *Head* "ma[d]e no judgment whether the court should have given an instruction on *perfect* self-defense." *Id.* ¶ 141 (emphasis added).

This Court made clear that its holding meant only that a defendant need not make a "threshold" showing of

"objective reasonableness" to be entitled to an instruction on *imperfect* self-defense. *Id.* ¶ 90. In contrast, in order to establish a prima facie case of *perfect* self-defense, a defendant "must meet a reasonable objective threshold." *Id.* ¶ 84. Thus, *Head* does not support Johnson's argument.

And, as a factual matter, the circuit court did not find that Johnson had presented "some evidence" of perfect self-defense; that is, its decision to admit *McMorris* evidence said nothing about whether Johnson had met a "reasonable objective threshold" to be entitled to an instruction on perfect self-defense. Instead, it stated, consistent with *Head*, that the evidence was "only to be introduced as evidence of the defendant's state of mind at the time of the incident." (R.211:6.) The circuit court's *McMorris* ruling said nothing of whether Johnson established a threshold of objective reasonableness, and the court explained that these are separate determinations. (R.220:219–20.)

Accordingly, Johnson's *McMorris*-evidence argument is wrong both as a matter of law and a matter of fact.

B. There was no evidence that Johnson's beliefs were objectively reasonable or that the amount of force used was reasonable and necessary.

As argued in the State's initial brief, Johnson was not entitled to an instruction on perfect self-defense because there was no evidence presented from which a jury could conclude that either: a) Johnson's belief that KM was unlawfully interfering with him was objectively reasonable; or b) that the amount of force Johnson used was both reasonable and necessary. And this is true regardless of how the castle doctrine interacts with a theory of self-defense made by an armed home intruder.

1. It is objectively unreasonable for Johnson to believe that KM was unlawfully interfering with him.

Johnson misrepresents the State's argument concerning the castle doctrine and his asserted self-defense claim. The State is *not* advocating for "a new policy of absolute privilege for criminals who kill anyone who intrudes into their home." (Johnson's Br.14.) And the State is *not* arguing that "KM was unquestionably privileged as a matter of law to attack and kill Johnson." (Johnson's Br.25.)

The court of appeals concluded that whether Johnson had a reasonable belief that KM was unlawfully interfering with his person was dependent upon a counter-factual analysis of whether KM would have been entitled to claim the castle doctrine privilege had he lived.[3] As the State explained in its initial brief, this Court need not decide the scope of the castle doctrine privilege to resolve this case. The State's position simply is that a homeowner's ability to defend his home from an intruder is not dependent upon whether the intruder believes he is committing a crime or whether the technical elements of the castle doctrine are met, as the statute merely creates a presumption, not a condition precedent. (States' Br.26.)

Johnson has not cited any authority that a homeowner's right to remove an intruder vanishes because the intruder suspects that the homeowner committed a crime. Accordingly, it was objectively unreasonable for

[3] Johnson's assertion that the castle doctrine is irrelevant because KM "has not claimed the privilege" (Johnson's Br.24) is both cynical and leads to the absurd conclusion that a homeowner retains the right to repel an invader only if he is lucky enough to survive the encounter.

Johnson to think that KM lacked the ability to use force against him. And Johnson never even testified that he subjectively believed that KM lacked the ability to interfere with him.

2. Because Johnson couldn't remember the shooting, there was no evidence his actions were objectively reasonable.

But regardless of how the castle doctrine applies in this case, Johnson was not entitled to an instruction on perfect self-defense because he failed to present any evidence of what occurred during the shooting from which a reasonable jury could find that Johnson satisfied both elements of perfect self-defense.

Johnson was required to present "some evidence" from which a reasonable jury could find (1) he had an objectively 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, 90. And Johnson could not do so because of his convenient memory loss about what occurred.

Indeed, Johnson's self-defense argument rests entirely on his motivation for intruding in KM's home and KM's alleged bullying and assaulting of Johnson and various family members in the past. (Johnson's Br.21–24.) While that evidence certainly establishes that Johnson was subjectively afraid of KM, it says nothing about the objective reasonableness of what occurred in KM's computer room at 2:00 in the morning.

Again, the *only* thing that Johnson could remember was that KM "lunged" at him. (R.218:281.) When asked: "Do you have a memory of what occurred in that room?", Johnson responded: "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 admitted that he didn't remember KM making physical contact with him and that he didn't do anything to get away without killing KM. (R.218:281, 310.) There is no testimony that KM threatened Johnson, armed himself, or even made physical contact with him. *Cf. Head*, 255 Wis. 2d 194, ¶ 15 (defendant made out prima facie case for *imperfect* self-defense when husband threatened to "take care of" defendant and reached for his handgun). Johnson was not even asked if he thought KM had a right to remove him from his home.

Johnson says he shot KM five times because he was "terrified that KM would kill him." (Johnson's Br.21.) But this is not what he said at trial; Johnson testified only that when he saw KM appear in the computer room, he thought KM would "do something to [him]." (R.218:271.) At best, Johnson said he was "scared" and "afraid." (R.218:269–270.)

Johnson further testified that he could not recall how he got past KM and that he didn't "remember feeling [them] touching." (R.218:281.) When Johnson was asked "what did you do short of killing him to try to get away without killing [KM]", Johnson responded: "I just stood there and when I saw him I didn't do anything." (R.218:310.)

Accordingly, there is not "some evidence" that Johnson had an objectively reasonable belief that KM was unlawfully interfering with him or that the amount of force he used was necessary to terminate that interference.

II. Johnson was not entitled to an instruction on second-degree reckless homicide.

Johnson does not identify any case that stands for the proposition that a defendant is entitled to an instruction on second-degree reckless homicide based on his purported concern for the safety of third parties who are not present

and not in any immediate danger. (Johnson's Br.29–32.) *Balistreri v. State*, 83 Wis. 2d 440, 265 N.W.2d 290 (1978), is inapposite. That case involved a driver who swerved to avoid a crash, braked, and honked his horn before crashing into another vehicle. *Id.* at 457–58. This conduct exhibited concern for the safety of others—the victim and other drivers in the immediate vicinity. Likewise, *State v. Burris*, 2011 WI 32, 333 Wis. 2d 87, 797 N.W.2d 30, says nothing about a defendant's purported concern for the safety of non-present parties as a justification to avoid liability for shooting an unarmed man in his home five times. *Burris* simply applied a "totality of the circumstances" test, including the victim's after-the-fact remorse and "mitigating conduct." *Id.* ¶¶ 37, 39.

Notably, Johnson has essentially conceded that he did not act with concern for the life and safety *of KM*. Johnson stated that he "felt completely out of control" and "didn't know what was going on." (Johnson's Br.10–11 (quoting R.218:82–84.) And he admits he "closed his eyes and shot wildly" in an enclosed space. (Johnson's Br.21.) At trial Johnson did not dispute that he shot KM in the back twice (in addition to the head and body shots). (R.219:313.)

Thus, Johnson's "trolley problem" (Johnson's Br.31 n.7) is a false analogy because the only person on the trolly was Johnson and the only one in immediate danger was KM. No reasonable jury could find that Johnson acted with regard for the safety of KM.

III. The circuit court was not required to admit evidence of alleged child pornography on Johnson's computer.

Johnson does little to justify the court of appeals' interference with the circuit court's discretionary ruling under Wis. Stat. § 904.03, excluding the evidence of the

contents of KM's computer. Instead, he argues that the circuit court's ruling violated his constitutional right to present evidence. (Johnson's Br.33–37.) But Johnson's argument is little more than saying he was entitled to shoot KM five times because KM possessed disturbing images on his computer.

Johnson's constitutional right to present evidence is not absolute and must "bow to accommodate other legitimate interests in the criminal trial process." *State v. DeSantis*, 155 Wis. 2d 774, 793, 456 N.W.2d 600 (1990). It does not include the right to present irrelevant evidence. *State v. Morgan*, 195 Wis. 2d 388, 432, 536 N.W.2d 425 (Ct. App. 1995). Nor does it include the right to present evidence of a "highly inflammatory nature" with minimal probative value. *DeSantis*, 155 Wis. 2d at 793.

The State fundamentally disagrees with Johnson over the relative relevance and probative value of showing the jury evidence of what was on KM's computer in light of the evidence that already was admitted at trial. Johnson testified that he previously discovered what he thought was child pornography on KM's computer and reported it to police. (R.218:227.) The jury heard him explain that he entered KM's house that night for the purported purpose of discovering additional evidence of child pornography. (R.218:296–97.) Johnson also testified that he was "going to turn it over to the police" after viewing the photos on the computer because he "found what they needed what they had talked about." (R.218:267.)

In short, the jury heard that Johnson had discovered alleged child pornography in the past, went to KM's house to get more evidence, and after viewing the contents of KM's computer, he "found what they needed." (R.218:267.) Having established his motive for being in KM's house and that he

"found what they needed," Johnson presented his theory to the jury.

With this testimony admitted, there was little, if any probative value of "ambiguous" images of naked females or photographs taken of young female posteriors. In contrast, these photos were of a highly inflammatory nature and there was a significant danger that in showing them, the jury would simply conclude that KM was a "bad" person who "deserved" to be shot. Whether KM's computer contained images of underaged naked girls, females of legal age, or other "inappropriate" pictures has zero bearing on whether Johnson's decision to shoot KM five times was objectively reasonable.

Johnson's constitutional right to present a defense was not violated, and the circuit court properly excluded the challenged evidence.[4]

[4] Johnson claims the State made improper reference to the absence of the photos during closing argument. (Johnson's Br.34.) But the comment in question concerned a conversation between Johnson and his father about what he found on KM's computer the first time—not the night in question—and that Johnson "couldn't find it again when he went back." (R.222:186) The court struck part of the comment and instructed the jury to disregard it. (R.222:186–87.)

CONCLUSION

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

Dated this 11th day of December 2020.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,000 words.

Dated this 11th day of December 2020.

_____
TIMOTHY M. BARBER
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

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

I further certify that:

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

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

Dated this 11th day of December 2020.

_____
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