STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2019AP001046 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

THEOPHILOUS RUFFIN,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and from an Order Denying Postconviction Motion, Entered in Milwaukee County Circuit Court, the Honorable M. Joseph Donald Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

OTHER AUTHORITIES CITED

ISSUES PRESENTED

1. Was it harmless error when the circuit court mistakenly instructed the jury on the incorrect substantive jury instruction outlining a form of second-degree sexual assault that was different than what Mr. Ruffin had been charged with and defended against at trial?

The circuit court concluded the instructional error was harmless, and denied Mr. Ruffin's request to vacate his conviction.

2. Was trial counsel deficient for failing to make a contemporaneous objection to the incorrect jury instruction, and if so, did the error prejudice Mr. Ruffin?

The circuit court concluded even if trial counsel was deficient, Mr. Ruffin was not prejudiced because the jury would have found him guilty of second-degree sexual assault, causing injury, had the court provided the correct jury instruction.

3. Does the error in the substantive jury instruction warrant a new trial in the interest of justice?

The circuit court concluded that the real controversy was tried regardless of the instructional error, and declined to order a new trial in the interest of justice.

4. Did the circuit court erroneously exercise its discretion when it declined to provide the

affirmative defense of "accident," set forth in WI-Criminal JI 772, to the instruction second-degree sexual assault, intercourse without consent causing injury, contrary to Wis. Stat. §940.225(2)(b)?

Prior to the conclusion of trial, the court considered this argument and declined to provide the "accident" instruction because the sexual assault charge, in its opinion, carried no mental state to modify with the instruction.

5. Was trial counsel ineffective for failing to present to the circuit court relevant legal precedent in support of his request for the "accident" instruction to the charge of second-degree sexual assault, intercourse without consent causing injury, contrary to Wis. Stat. §940.225(2)(b)?

The circuit court concluded that trial counsel was not ineffective for failing to provide any legal support for the request for the "accident" instruction because the court would not have provided the instruction had counsel effectively argued its position, and therefore, there is no prejudice.

6. Was trial counsel ineffective for failing to pursue its request to provide the "self-defense" instruction, WI-Criminal JI 800, for the charge of second-degree sexual assault, intercourse without consent causing injury, contrary to Wis. Stat. §940.225(2)(b)?

The circuit court concluded that trial counsel was not ineffective because, in its opinion, there was

"not a reasonable probability" that the jury would have found the exercise of self-defense reasonable due to the amount of force used, and therefore, there was no prejudice.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Mr. Ruffin welcomes oral argument on this issue if the court would find it helpful to deciding the questions posed by this appeal. This matter involves the application of legal principles, specifically applicability of the affirmative defenses of "accident" and "self-defense" in sexual assault cases. This issue has not been fully considered by appellate courts, and therefore, Mr. Ruffin requests publication.

STATEMENT OF FACTS

On the morning of Sunday, November 29, 2015, there was a physical altercation between Mr. Ruffin and V.P. (1). During that incident, V.P. sustained an injury to her labia. (1). Mr. Ruffin and V.P. had very different versions of what had occurred in their home that morning and how V.P. was injured, and ultimately testified before a jury about those allegations. (69, 70, 73). V.P asserted that she and Mr. Ruffin had been in a verbal argument that morning over who would feed their young baby, who had awoken in their bedroom and was crying. (69:117-120). She asserted that during the incident, Mr. Ruffin threw her on the bed, held her down and physically moved his hand forcefully in her vaginal area over her clothes. (69:128-129; 70:7-8). This, she

testified, was what caused her labia injury. (70:8). Once she yelled in pain, she testified that the altercation stopped. (70:8-9).

Mr. Ruffin testified in his own defense. He agreed that the incident began as a verbal dispute, but that they also argued over V.P.'s cocaine and alcohol use the prior evening, as she was pregnant at the time. (73:7-8). He told the jury that during the argument, he told V.P. that he wanted her out of the house and was going to call her social worker and report that she was using drugs while pregnant. (73:8). This, he testified, set V.P. off and she attacked him, jumping on him and knocking them onto the bed. (73:8-9). Once on the bed, Mr. Ruffin testified that V.P. had wrapped her legs around him and was physically assaulting him. (73:9-10).

In an effort to get V.P. off of him and not put pressure on her stomach to protect the baby, Mr. Ruffin testified that he grabbed her by the shoulder and the vaginal area to lift her up and push her off of him. (73:9-10, 45-46). When he did this, he testified that V.P. yelled in pain and the altercation ceased. (73:11). V.P. went to the bathroom and discovered the injury to her labia. (73:11).

Mr. Ruffin was ultimately charged in Milwaukee County Case Number 2015CF5306 with two counts: second-degree sexual assault causing injury, domestic abuse, contrary to Wis. Stat. §§940.225(2)(b), 939.50(3)(c), and 968.075(1)(a); and mayhem, domestic abuse, contrary to Wis. Stat. §§940.21, 939.50(3)(c), and 968.075(1)(a). (1). The

matter proceeded to trial in October 2016. (68, 69, 70, 71, 72, 73, 74).

Following the close of evidence, the parties discussed the submission of jury instructions. (73:62-79). Defense counsel requested the self-defense instruction, WI-Criminal JI 800, for both counts. Counsel argued that Mr. Ruffin's testimony that his actions were "defensive actions" and that "[h]e was trying to protect himself and the unborn child and Miss P[]" supported this instruction. (73:62-63). After a brief recess to allow the parties to review the instruction, defense counsel withdrew the request for the self-defense modification to the instructions, stating that "[a]fter reading through it I don't think it can be worded the way I think needs to be worded. Therefore, I'm going to withdraw the request. I'm not sure it really fits the situation." (73:63-64). The court did not conduct any colloquy with Mr. Ruffin regarding his attorney's withdrawal of the request for the self-defense instruction. (73:63-64).

Defense counsel then requested that the court add the language of WI-Criminal JI 772, Accident, to the instructions for both counts. The court granted the defense request on the mayhem count, but declined to modify the instruction for sexual assault. (73:70).

The court ultimately agreed with the State's position, concluding that second-degree sexual assault was a strict-liability offense, and that because intent was required by the instruction, the accident defense did not apply. (73:69). Defense counsel alternatively asked the court to modify the sexual

assault instruction with the language found in WI-Criminal JI 770, Mistake. (73:70). The court again denied the defense request. The court opined that defense counsel was free to make these arguments during closing, but that there were no legal grounds to provide the "mistake" instruction. (73:71).

In closing argument, the State asserted that Mr. Ruffin had essentially admitted guilt regarding count one, stating:

> There's no dispute that the defendant caused the injury. He admitted it. The defendant claims this was all an accident. So really the only dispute here is whether or not the defendant committed the mayhem charge, because by his own admissions on the witness stand in using the diagram of a woman's genitalia, by grabbing that labia he had to have made an intrusion into her vagina just based on where it is.

(73:93). Regarding the mayhem charge, the State argued that the case was "all about credibility. It's who you believe. There were two people in that room that day, V.P. and the defendant. Those are the people who knew what happened." (73:93). The credibility theme carried throughout the State's closing. (73:93-97).

Defense counsel argued that the evidence supported Mr. Ruffin's version of what had occurred – that V.P. was intoxicated, verbally and physically aggressive and that while he grabbed her between the legs, he did not intend to injure her, but rather to push her off of him as she attacked him on the bed. (73:99-119). Counsel argued that the injury to V.P. was accidental and occurred while Mr. Ruffin was

defending himself. (73:99). Defense counsel argued that V.P. had a motive to lie and falsify what occurred. (73:106-109).

Following closing arguments, the jury began deliberations, which continued to the next day, resulting in a split verdict – the jury found Mr. Ruffin guilty of count one, second-degree sexual assault, but not guilty of count two, mayhem. (21). The court ordered a judgment of conviction prepared on count one and a judgment of acquittal on count two. (74:7).

After the trial had concluded, it was discovered by defense counsel that there had been a substantial error in the jury instructions. (75). Specifically, the court had read the wrong substantive instruction to the jury charging count one, second-degree sexual assault. (74:1-3; 15:3-6).

Mr. Ruffin had been charged with second-degree sexual assault, causing injury. (1; 4). Neither the complaint, nor information had been amended to change the charge, and all parties proceeded to trial on the understanding that Mr. Ruffin was charged in count one with second-degree sexual assault, contrary to Wis. Stat. §940.225(2)(b).

WI JI-Criminal 1209 sets forth elements for second-degree sexual assault, sexual intercourse causing injury. Before Mr. Ruffin could have been found guilty of this offense, the State was required to prove beyond a reasonable doubt the following elements:

> 1. Mr. Ruffin had sexual intercourse with V.P.

2. V.P. did not consent to the sexual intercourse.

3. Mr. Ruffin caused injury to V.P.

WI JI-Criminal 1209 (2017).

"Cause" is defined in WI JI-Criminal 901. Thus, WI JI-Criminal 1209 should have received the following addition:

> The third element requires that the defendant causing injury to V.P. "Cause" means that the defendant's conduct was a substantial factor in producing the injury.

WI JI-Criminal 901.

This is not the instruction the court provided to the jury. Instead, the court read WI JI-Criminal 1208 by mistake. (15:3-6). WI JI-Criminal 1208 details offenses charged under Wis. Stat. §940.225(2)(a), second-degree sexual assault, use of threat or force, and requires that the State prove the following:

1. Mr. Ruffin had sexual intercourse with V.P.

2. V.P. did not consent to the sexual intercourse.

3. Mr. Ruffin had sexual intercourse with V.P. by use or threat of force or violence.

WI JI-Criminal 1208.

Defense counsel identified the issue in court on December 16, 2016. Accordingly, the court scheduled

the matter for a formal hearing for motions after verdict. (75).

At the next hearing, the court started off the hearing by acknowledging the parties were in agreement that the incorrect substantive instruction had been presented to the jury. (76:1-3). Citing *State v. Williams*, 2015 WI 75, 364 Wis. 2d 126, 867 N.W.2d 736, the court opined that the question that remained was whether the error was harmless to Mr. Ruffin. (76:7).

The State contended that the defense had notice of the instruction number to be submitted to the jury, as it listed the erroneous instruction number in its instruction request it filed with the court prior to the start of trial. (76:8). The State further argued that it was relying on "second-degree sexual assault, use of force, as the theory of [its] case." (76:8). The State asserted that the defense was not "tricked" or "unable" to have "com[e] up with an actual defense to the charges that we litigated which were not the ones in the Information," and the State asked the court to uphold the verdict. (76:9).

Defense disagreed and argued that the error caused Mr. Ruffin substantial prejudice. Counsel declared that he had been handling the case and developing strategy under the belief that the crime he was defending against was the one charged, second-degree sexual assault, causing injury, contrary to Wis. Stat. §940.225(2)(b). He argued that his entire presentation to the jury was grounded on the theory that the injury to V.P. was accidental and that he did not intentionally harm his girlfriend. (76:9-10).

Further, defense counsel asserted that there was evidence that this argument was effective on the jury because Mr. Ruffin was found not guilty of the mayhem[1] charge, which also requires that Mr. Ruffin caused an injury to V.P. (76:10-11).

Counsel also argued that had Mr. Ruffin been formally charged with second-degree sexual assault, use of force, contrary to §940.225(2)(a), his defense would have been very different. (76:11-12). Notably, defense counsel pointed out that his calculus in deciding whether to request the lesser-included offense of third-degree sexual assault[2], would have

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[1] In order for a defendant to be found guilty of mayhem, contrary to Wis. Stat. §940.21, the State must prove beyond a reasonable doubt:

> 1. The defendant cut or mutilated any body part of the victim.
> 2. The cutting or mutilation caused great bodily harm to the victim. ("Cause" means that the defendant's conduct was a substantial factor in producing great bodily harm. "Great bodily harm" means injury which creates a substantial risk of death, which causes serious permanent disfigurement, which causes protracted loss or impairment of the function of the body part, or any other serious bodily injury.)
> 3. The defendant intended to disable or disfigure the victim.

WI JI-Criminal 1246.

[2] WI JI-Criminal 1218A outlines the offense of third-degree sexual assault, sexual intercourse. In order for a (continued)

been very different had Mr. Ruffin been charged with second-degree sexual assault, use or threat of force. (76:12).

The court ultimately concluded that the error was harmless and directed verdict on the charge of second-degree sexual assault, causing injury. (76:12-19). The court held that there was clear evidence an injury had occurred, and as a result, it was "satisfied that this jury, even if [the court] had given the correct instruction, given the evidence that was introduced, would have come to the same conclusion, that this was a sexual – that this was sexual intercourse, that the victim did not consent to the sexual intercourse and that the Defendant caused the injury." (76:16-17). The court acknowledged that even though it did not know why the jury found Mr. Ruffin not guilty of the mayhem charge, as there were many possibilities as to why that occurred, it did not believe the acquittal was because "the State did not prove that there was an injury." (76:17).

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defendant to be found guilty of third-degree sexual assault, the State must prove:

4. Mr. Ruffin had sexual intercourse with V.P.

5. V.P. did not consent to sexual intercourse.

Thus, under both Wis. Stat. §939.66(1) and the elements-only test, third-degree sexual assault is a lesser-included offense of both second-degree sexual assault, use or threat of force, and second-degree sexual assault, causing injury. *See Blockburger v. U.S.*, 284 U.S. 299 (1932).

The matter was scheduled for sentencing and on February 24, 2017, the court ordered that Mr. Ruffin serve eight years initial confinement and four years initial confinement. (30).

Undersigned counsel was appointed and on October 17, 2018, a postconviction motion alleging the following was filed with the court:

1. The circuit court erred when it submitted the incorrect substantive instruction to the jury, and Mr. Ruffin was harmed as a result.

2. Trial counsel was ineffective when he failed to object to the submission of the incorrect substantive instruction to the jury, and Mr. Ruffin was prejudiced as a result.

3. Due to the error in the substantive instructions, a new trial is warranted in the interest of justice.

4. The circuit erred when it declined to provide the "accident" instruction (WI JI-Criminal 772) as an affirmative defense to count one, second-degree sexual assault, causing injury.

5. Trial counsel was ineffective in his request for the "accident" instruction (WI JI-Criminal 772) as he did not present the applicable legal support for his request, which resulted in the court refusing to provide the instruction and prejudiced Mr. Ruffin accordingly.

6. Trial counsel was ineffective for prematurely abandoning his request that the "self-defense" instruction in count one, second-degree sexual assault, and Mr. Ruffin was prejudiced as a result.

(49).

On November 2, 2018, the circuit court denied Mr. Ruffin's postconviction motion in its entirety. (50).

Regarding the error in the jury instruction, the circuit court concluded that the error was harmless and that Mr. Ruffin was not prejudiced by the mistake because "the jury would have found the defendant guilty of second degree sexual assault *beyond a reasonable doubt*." (50:3). The court likewise concluded that a new trial was not warranted in the interest of justice because it was "not persuaded that the real controversy has not been tried." (50:4).

The circuit court also concluded that even had trial counsel erred by not effectively pursuing the "accident" or in the alternative, the "self-defense" instructions, Mr. Ruffin was not prejudiced because in the court's view, there was no "reasonable probability the jury would have bought" either defense due to the severity of the injury to V.P. (50:4). The court, in a footnote, acknowledges the acquittal in the second count charging mayhem, but notes that it is irrelevant to the questions on count one, as "[t]he jury could simply have decided that he did *not intend* to disfigure or disable the victim and acquitted him on that basis," that that the jury did not necessarily

accept his assertions that the injury was accidental. (50:4, fn. 1).

Mr. Ruffin now appeals.

ARGUMENT

I. Mr. Ruffin was denied his constitutional right to the effective assistance of counsel and his due process right to a fair trial when the court instructed the jury with the incorrect substantive jury instruction charging the wrong mode of sexual assault.

A. The submission of the incorrect substantive instruction, which presented an alternative theory of second-degree sexual assault, was not harmless.

1. Legal principles and standard of review.

"A proper jury instruction is a crucial component of the fact-finding process." *State v. Perkins*, 2001 WI 46, ¶40, 243 Wis. 2d 141, 626 N.W.2d 762, citing *State v. Howard*, 211 Wis. 2d 269, 290, 564 N.W.2d 753 (1997). When it is alleged that there is an error in the instructions presented to the jury, the claim is subject to the harmless error analysis. *State v. Williams*, 2015 WI 75, ¶51, 364 Wis. 2d 126, 867 N.W.2d 736 (citations omitted). The harmless error analysis in the context of a dispute regarding jury instructions is two-fold.

First, the court must consider whether the instruction submitted to the jury contained an error, and second, if there was an error, whether it is clear beyond a reasonable doubt that the jury still would have convicted the defendant had the correct instruction been provided. *Williams*, 2015 WI 75, ¶53. If the dispute regarding the instruction involves a situation in which the instruction "omits an element or instructs on a different theory, it will often be difficult to surmise what the jury would have done if confronted with a proper instruction, even if the jury convicted under the erroneous instruction." *Id.* at ¶62. In these situations, it will be more difficult to demonstrate that the error in the jury instruction was harmless. *Id*; *See, i.e., State v. Wulff*, 207 Wis. 2d 143, 557 N.W.2d 813 (1997). Conversely, when the erroneous jury instruction adds an additional element, "the jury verdict will often sufficiently show that the jury would have convicted" had the proper instruction and elements have been submitted before the jury. *See, i.e., State v. Beamon*, 2013 WI 47, 347 Wis. 2d 559, 830 N.W.2d 681.

If the State cannot prove beyond a reasonable doubt that the jury would have found the defendant guilty of the crime had the proper instruction been submitted to the jury, the conviction shall be vacated and retrial barred under the doctrine of double jeopardy. *Williams*, 2015 WI 75, ¶52, citing *Wulff*, 207 Wis. 2d 143, 153.

While a reviewing court typically gives deference to a jury verdict in a criminal case, "[w]here jury instructions do not accurately state the controlling law, we will examine the erroneous

instructions under the standard for harmless error, which presents a question of law for our independent review." *Id.* at ¶34, citing *Beamon,* 2013 WI 47, ¶19, citing *State v. Harvey*, 2002 WI 93, ¶18, 254 Wis. 2d 442, 647 N.W.2d 189.

2. The court's instruction of the jury with the wrong sexual assault offense was not harmless.

A jury instruction may be considered erroneous when it describes a theory of criminal culpability that was not presented to the jury or omits a valid theory of criminal culpability that was presented to the jury. *Williams*, 2015 WI 75, ¶51 (citations omitted). When a defendant alleges that a substantive instruction presented the jury was improper, a reviewing court considers the totality of circumstances to determine whether the error caused him harm. The Wisconsin Supreme Court recently detailed how to analyze these issues in *State v. Williams*. *Id.*

In *Williams*, the defendant and two others committed a home invasion robbery in the home of M.P. During the robbery attempt, M.P. and his house guest, A.R., were shot and killed. *Williams*, 2015 WI 75, ¶2. Williams was found guilty[3] of two counts of

[3] Notably, the jury was instructed to not return verdicts on the attempted armed robbery charges if they arrived at guilty verdicts for the felony murder charges, as those were lesser-included offenses. They jury, however, still returned the verdict forms on all counts, finding Williams guilty of the attempted robbery of M.P., but not guilty of the attempted robbery of A.R. *Id.* at ¶32.

felony murder, one for M.P. and one for A.R. *Id.* at ¶32. At issue in *Williams* was the jury instruction related to the death of A.R.

At the conclusion of the trial, the jury was instructed that "they could convict Williams of the felony murder of [A.R.] if the defendants had attempted to rob [A.R.] and the attempted robbery caused [A.R.]'s death." *Id.* at ¶2. The State, however, failed to present sufficient evidence at trial that Williams or his accomplices attempted to rob A.R., and instead, argued that the men had attempted to rob M.P. *Id.* Williams was convicted of felony murder in A.R.'s death, but found not guilty in the attempted robbery of A.R. *Id.* Neither the State, nor the defense disputed that a valid theory of prosecution on the count charging Williams with the felony murder of A.R. was that A.R. could have been killed as a result of the attempted armed robbery of M.P.

When presented how to resolve this error, the court of appeals certified the case to the Supreme Court, asserting that there appeared to be a conflict in the law between two cases: *State v. Wulff*, 207 Wis. 2d 143, 557 N.W.2d 813 (1997) [4] and *State v. Beamon*, 2013 WI 47, 347 Wis. 2d 559, 830 N.W.2d 681[5]. *Id.* at ¶¶4-5. The Wisconsin Supreme Court accepted

[4] In *Wulff*, the court vacated the conviction and barred a retrial, holding that a defendant cannot be convicted on a theory of a crime not presented to a jury.

[5] In *Beamon*, the court upheld the conviction when the jury was given an additional and unnecessary element in the instruction.

review to clarify the reasons underlying the conflicting holdings in *Wulff* and *Beamon*. *Id.*

Ultimately, the *Williams* court concluded that "a jury instruction may be considered erroneous when it describes a theory of criminal culpability that was not presented to the jury or it omits a valid theory of criminal culpability that was presented to the jury." *Id.* at ¶6. Thus, the court set forth a two-prong test to determine whether an error in the instructions has affected a criminal proceeding in such a way warranting remedy. The Wisconsin Supreme Court held that when looking at a potential error in jury instructions, a reviewing court must determine (1) whether the instruction submitted to the jury contained an error, and (2) whether it is clear beyond a reasonable doubt that the jury still would have convicted the defendant had the correct instruction been provided. *Id.* at ¶53.

To illustrate how this test works in practice, the Supreme Court broke down *Wulff* and *Beamon* in the simplest of terms. The Court wrote:

> In *Wulff*, the defendant was charged with a crime that had as its elements A or B or C. The State presented evidence that Wulff had done B. The jury was instructed that they could convict Wulff if he had done C, and the jury convicted him. The conviction was reversed because the jury's verdict that Wulff had done C was not sufficient to demonstrate, beyond a reasonable doubt, that they jury would have concluded that Wulff had done B.
>
> In *Beamon*, the defendant also was charged with a crime that had as its elements A or B or C. The

> jury was presented only with evidence that Beamon had done A. However, unlike in *Wulff*, the jury in *Beamon* was instructed that they could convict Beamon if he had done both A *and* B. The jury convicted Beamon, and the conviction was affirmed because the jury's verdict that Beamon had done both A and B was sufficient for this court to be certain that the jury would have concluded that Beamon had done A.

Id. at ¶¶60-61.

In *Williams*, applying the two-prong test, the court concluded that the jury would have found the defendant guilty beyond a reasonable doubt had the proper instruction been given. *Id.* at ¶7. In its application, the court pointed out and the parties agreed that the felony murder statute did not require the State to prove that A.R. was killed during an attempt to steal A.R.'s property specifically. *Id*. at ¶67. Additionally, in *Williams*, the State had instructed the jury on this point during its closing argument. *Id.* In response to the defense pointing out that the State must prove that Williams intended to rob A.R. to be found guilty of felony murder, the State asserted during rebuttal:

> …That is not true. That is simply a blatant misstatement of the law.
>
> …
>
> [The State] doesn't have to show that [A.R.] was a victim [of attempted robbery]. Because if in the court of this armed robbery anyone is killed, whether it be the bank clerk, the security guard, an accomplice, a kid walking down the street, if anybody, whether it's [A.R.], or anyone else was

> killed while an armed robbery of [M.P.] was taking place, that is felony murder.

Id. at ¶67.

Moreover, even though the erroneous instruction required four elements to prove the two felony murder counts ((1) the attempted robbery of M.P., (2) the death of M.P, (3) the attempted robbery of A.R., and (4) the death of A.R.), the State only needed to prove facts (1), (2) and (4). *Id.* at ¶71. The guilty verdicts in both counts convicting Williams on the attempted robbery of M.P., and the felony murder of both M.P. and A.R. conclusively show that had the jury been properly instructed, it was clear beyond a reasonable doubt that the verdict returned on the felony murder charge related to A.R. would have been guilty. *Id.*

In this case, there is no dispute that the wrong substantive jury instruction was sent to the jury and the error was not caught until after a verdict was reached and the jury dismissed at the conclusion of trial. (76:14-17). Mr. Ruffin was charged with violating Wis. Stat. §940.225(2)(b), second-degree sexual assault, sexual intercourse causing injury (WI-JI Criminal 1209). In error, the court read the instruction related to Wis. Stat. §940.225(2)(a), second-degree sexual assault, sexual intercourse by use or threat of force or violence (WI-JI Criminal 1208). Therefore, the first prong has been satisfied. *Williams*, 2015 WI 75, ¶53.

Next, the court must consider whether this error was "harmless" as a matter of law. *Id.* If it is not clear beyond a reasonable doubt that the jury

would have found the defendant guilty of the crime had the proper instruction been submitted, the error was not harmless. *Id.* at ¶52, citing *Wulff*, 207 Wis. 2d 143, 153. If the error is not harmless, the conviction shall be vacated and retrial barred under the doctrine of double jeopardy. *Id*.

Here, the circuit court concluded that the error in the instructions was harmless to Mr. Ruffin. The court held it was "satisfied that this jury, even if…given the correct instruction, given the evidence that was introduced would have come to the same conclusion, that this was…sexual intercourse[,] that the victim did not consent to the sexual intercourse and that the Defendant caused the injury." (76:16-17).

At the motion hearing on the verdict, defense counsel argued that the acquittal on the mayhem charge illustrated that there was reason to believe that the jury may have found Mr. Ruffin not guilty of the sexual assault causing injury had it been properly instructed because the jury could have concluded V.P. was injured accidentally. (76:11-12). The circuit court dismissed that argument and held that it was impossible to know why the jury found Mr. Ruffin not guilty of the mayhem, but guilty of the sexual assault. (76:17). The court, however, concluded that it did not believe that the split verdict was because "the State did not prove that there was an injury." (76:17). This finding is problematic.

The circuit court conceded that "there are many plausible arguments" as to why the jury split the verdicts, and acknowledged that "this Court cannot

invade the province of the jury" in deciding why it arrived at this verdict. (76:17). Based on this record, however, that is exactly what the court did. Even in the face of the acquittal on the associated charge, the circuit court maintained that "the jury would have found the defendant guilty of second degree sexual assault [as charged] *beyond a reasonable doubt*." (50:3 – emphasis in original). This is not a reasonable conclusion, given the record in this case.

First, the court's conclusion that the fact that evidence overwhelmingly supports a finding that an injury occurred is irrelevant to the analysis. The question was never whether an injury occurred, but rather whether it is clear *beyond a reasonable doubt* that the jury would have found that Mr. Ruffin *caused* the injury had it been properly instructed. Acquittal on the mayhem charge made it impossible to conclude *beyond a reasonable doubt* that the jury would have found him guilty of the sexual assault causing injury if properly instructed.

Notably, the instructions for mayhem and second-degree sexual assault, sexual intercourse causing injury, share two similar elements as applied to the facts in this case. WI JI-Criminal 1209 & 1246. Under both crimes, the State was required to prove beyond a reasonable doubt not only that V.P. was injured during the incident, but also that Mr. Ruffin *caused* the injury V.P. WI-Criminal JI 1209 & 1246. "Cause" is defined the same in both WI JI-Criminal 1246 and 901 as meaning that the defendant's conduct was a substantial factor in producing the injury. WI JI-Criminal 901 & 1246. There is no similar element are found in the instruction charging

second-degree sexual assault, sexual intercourse with use of force.

Here, it is wholly possible that the jury accepted Mr. Ruffin's version of events and concluded that because the injury was accidental and occurred while he was defending himself against V.P., his behavior was not a "substantial factor" in causing the tear to her labia. Alternatively and equally reasonably, the jury could have concluded that because V.P. was intoxicated and high on cocaine, started the fight with Mr. Ruffin, physically assaulted him, and wrapped her arms and legs around him, refusing to let go, that Mr. Ruffin's actions to defend himself were not a "substantial factor" in producing the injury, but rather that it was substantially V.P.'s actions that led the injury.

Simply put, these theories are plainly plausible conclusions that the jury could have reached and support the conclusion that the jury could have reasonably accepted Mr. Ruffin's testimony over V.P's. The court cannot simply discount these possibilities in light of the acquittal on the mayhem charge, and therefore, the instruction error was not harmless.

To illustrate, the jury was instructed that the State had to prove three elements for a guilty verdict on second-degree sexual assault, sexual intercourse with use of force, contrary to Wis. Stat. §940.225(2)(a):

> 1. That Mr. Ruffin had sexual intercourse with V.P., by any penetration, however slight, of her vagina,

2. V.P. did not consent to Mr. Ruffin's act, and

3. That Mr. Ruffin did so by use of force.

WI JI-Criminal 1208.

To prove that Mr. Ruffin violated Wis. Stat. §940.225(2)(b), second-degree sexual assault, causing injury, the State would have had to prove four facts, only two of which are found in the instruction provided to the jury. The appropriate instruction would have required proof of the following:

1. Mr. Ruffin had sexual intercourse with V.P., by any penetration, however slight, of her vagina,

2. V.P. did not consent to Mr. Ruffin's act,

3. Mr. Ruffin caused, meaning was a substantial factor in producing, an injury to V.P. "Cause"

WI JI-Criminal 901 & 1209.

Thus, this case is similar to *Wulff*, as the jury was instructed to decide (1) whether Mr. Ruffin had sexual intercourse with V.P, (2) if V.P. consented to the intercourse, and (3) whether he had sexual intercourse with V.P. by use or threat of force. The jury, however, did not consider or decide whether the State proved beyond a reasonable doubt that Mr. Ruffin was a substantial factor in injuring V.P. Therefore, it is not clear beyond a reasonable doubt that the jury would have returned a guilty verdict had they been properly instructed, and as a result, the error was not harmless.

The harm here is only amplified by the impact the change in charges would have had on trial strategy, had defense counsel anticipated the change. Counsel asserted during arguments prior to sentencing that had he been aware the "use of force" version of the sexual assault instruction been submitted to the jury, that he would have proceeded with a different theory of defense that didn't focus entirely on the causing of the injury. (76:11-12). Defense counsel may have followed through with his request for the self-defense instruction or counsel would have considered requesting a lesser-included offense. (76:12). This type of substantial change could also have altered counsel and Mr. Ruffin's pre-trial strategy and decision-making. Thus, the harm to Mr. Ruffin has been significant.

As a result, Mr. Ruffin asks this court to conclude that the error was not harmless, and to vacate and dismiss Mr. Ruffin's conviction for second degree sexual assault, contrary to Wis. Stat. §940.225(2)(b), in accordance with *Williams*, 364 Wis. 2d 126.

B. Trial counsel was ineffective for failing to contemporaneously object to the submission of the wrong substantive instruction to the jury, and Mr. Ruffin was prejudiced as a result.

1. Legal principles and standard of review.

An accused's right to the effective assistance of counsel derives from the Sixth and Fourteenth Amendments to the United States Constitution, and

Art. I, sec. 7 of the Wisconsin Constitution. *State v. Smith*, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997). In assessing whether counsel's performance satisfied this constitutional standard, Wisconsin applies the two-part test outlined in *Strickland v. Washington*, 466 U.S. 668 (1984); *Smith*, 207 Wis. 2d at 273.

To establish a deprivation of effective representation, a defendant must demonstrate that: (1) counsel's performance was deficient, and (2) counsel's errors or omissions prejudiced the defendant. *Id.* To prove deficient performance, the defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* (citations omitted). The prejudice prong requires a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Smith*, 207 Wis. 2d at 276 (citing *Strickland*, 466 U.S. at 694).

Questions of ineffective assistant of counsel present a mixed question of law and fact. *State v. Thiel*, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305, citing *State v. Trawitzki*, 2001 WI 77, ¶19, 244 Wis. 2d 523, 628 N.W.2d 801. The reviewing court will defer to the circuit court's findings of fact unless clearly erroneous. *Id.* Whether trial counsel's performance was deficient as a matter of law is a question the court reviews de novo. *Id.*

2. Trial counsel was deficient when he did not contemporaneously object to the erroneous substantive jury instruction, and this error caused Mr. Ruffin prejudice.

As detailed above, the court read WI –Criminal JI 1208 to the jury in error. WI-Criminal JI 1208 as it was given defined the crime of second-degree sexual assault, sexual intercourse without consent by use or threat of force or violence. Notably, Mr. Ruffin was charged under a different subsection of the crime of second-degree sexual assault involving a different mode of commission, sexual intercourse without consent causing injury. This crime is defined in WI-Criminal JI 1209. The information was never amended by the State and it was not intended that jury instruction provided be given. (76:14-17). Trial counsel, by his own admission, erred by failing to object to the submission of the incorrect instruction, and this failure plainly caused Mr. Ruffin prejudice. (76).

After the jury delivered its split verdict, the matter was set over for a sentencing hearing on the sexual assault charge. Prior to that hearing, it was discovered by defense counsel that the incorrect jury instruction had gone to the jury and that the jury was never instructed on the elements of Wis. Stat. §940.225(2)(b), the charged crime on which Mr. Ruffin presented his defense at trial. This issue was first discussed on the record during the December 16, 2016 hearing. (75). How to resolve the error was the topic of the January 24, 2017 hearing at which defense conceded that he had erred by failing to

identify the problem with the jury instructions prior to the incorrect instruction being read to the jury. (76:9-14). Moreover, trial counsel asserted several reasons in which submission of the instruction prejudiced Mr. Ruffin. (76:9-14).

First, Mr. Ruffin was ultimately found guilty and sentenced for a sexual assault offense that the jury never considered. He was acquitted by the same jury on the corresponding mayhem charge that involved the identical injury to V.P., and had the overlapping element that required the State prove Mr. Ruffin's conduct was a substantial factor in causing the injury. Therefore, there is a reasonable likelihood that had the jury been given the correct sexual assault instruction, it would have acquitted Mr. Ruffin of that charge as well.

Second, as defense counsel argued, his entire presentation of the evidence, from the questioning of witnesses to closing argument, was based on the belief that the jury was considering the elements in WI-Criminal JI 1209 – that Mr. Ruffin's hand penetrated V.P.'s vaginal area, that she did not consent and that Mr. Ruffin's actions caused an injury to V.P. (73:97-119). The defense argued both that the State could not prove that Mr. Ruffin's hand penetrated V.P.'s vaginal opening and Mr. Ruffin had not intended to harm V.P. as he was only defending himself against her attacks. (73:97-119). Moreover, counsel credibly asserted that had the charge been formally amended pretrial, the defense theory at trial would have been different. (76:11).

Third, as the defense counsel argued, had counsel been aware of the switch in jury instructions, counsel's decision making on whether to request the instruction on the lesser-included would have been different.

For these reasons, it is clear that trial counsel's failure to object to the improper instruction on sexual assault constitutes ineffective assistance of counsel, that the failure to object was not a strategic decision and that this error prejudiced Mr. Ruffin. As such, Mr. Ruffin is entitled to a new trial. *See Smith*, 207 Wis. 2d at 275-276.

C. Due to the error in the substantive jury instructions and the detrimental affect it had on Mr. Ruffin's defense, a new trial is warranted in the interest of justice.

A defendant may request a new trial in the interest of justice in his motion for postconviction relief. *State v. Henley*, 2010 WI 97, ¶63, 328 Wis. 2d 544, 787 N.W.2d 350. A court may grant the new trial if it appears from the record that the real controversy has not been fully tried or when it is probable that justice has been miscarried for any reason. *State v. Armstrong*, 2005 WI 119, 263 Wis. 2d 639, 700 N.W.2d 98; *State v. Hicks*, 202 Wis. 2d 150, 549 N.W.2d 435 (1996). In the context of an error in the jury instructions, if the court fails to provide the proper legal framework for analyzing the question before the jury and the real controversy is not fully tried as a result, a new trial is warranted. *See State v. Austin*, 2013 WI App 96, ¶23, 349 Wis. 2d 744, 836 N.W.2d 833, citing *State v. Perkins*, 2001 WI 46, ¶12,

243 Wis. 2d 141, 626 N.W.2d 762 (A reviewing court "may reverse a conviction based on a jury instruction regardless of whether an objection was made, when the instruction…arguable caused the real controversy not to be fully tried.").

Here, there are several reasons, all linked to the issue in jury instructions, in which Mr. Ruffin's trial was unfair from a constitutional, due process perspective. First, defense counsel, by his own admission, did not realize that the jury had been instructed on the incorrect and different crime of sexual assault. Per counsel's own admission, he would have presented the case very differently had it the matter been charge as second-degree sexual assault, use or threat of force, contrary to Wis. Stat. §940.225(2)(a). (76:9-14). As a result, counsel's strategic decisions, questioning of witnesses and the whole of its presentation to the jury was affected by the error in the jury instructions.

Next, had the State formally and with notice amended the charges before the start of trial, counsel's decision on whether to request instruction on the lesser-included offense of third-degree sexual assault would have been different.

Finally, had Mr. Ruffin been charged from the outset with second-degree sexual assault, use or threat of force, contrary to Wis. Stat. §940.225(2)(a), his decision on whether to proceed to trial or to seek a negotiated plea may have been different. Thus, the error in instructions denied Mr. Ruffin the right to contemporaneously seek the advice of counsel

regarding substantial decisions about his case before the trial even began.

Not only has the real controversy not been fully tried, but the error in this case makes it more than probable that there has been a miscarriage of justice. Therefore, Mr. Ruffin alternatively asks this court to order a new trial in the interests of justice. *Henley*, 2010 WI 97, ¶63.

II. If the court declines to grant Mr. Ruffin relief due to the error of submitting the incorrect substantive jury instruction on count one, he seeks a new trial on the grounds that (1) the court erred in refusing to permit the affirmative defense instruction of "accident" on count one, or alternatively, (2) that trial counsel erred by failing to adequately argue the legal precedent supporting his request for the instruction.

A. Legal principles and standard of review.

1. Jury Instructions

Generally, "[a] [trial] court has broad discretion in determining whether to give a particular jury instruction." *State v. Gonzalez*, 2011 WI 63, ¶31, 335 Wis. 2d 270, 802 N.W.2d 454. When reviewing a trial court's decision on issuance of a particular instruction, a reviewing court must consider the challenge "in light of the proceedings as a whole." *State v. Burris*, 2011 WI 32, ¶24, 333 Wis. 2d 87, 797 N.W.2d 430.

A defendant is entitled to a particular theory of defense if he is able to satisfy four requirements:

> 1. The defendant proposes a correct statement of law;
>
> 2. The defendant's theory is supported by the evidence;
>
> 3. The defendant's theory of defense is not part of the charge; and
>
> 4. The failure to include an instruction on the defendant's theory of defense would deny a defendant a fair trial.

U.S. v. Ebert, 294 F.3d 896 (7th Cir. 2002), citing *U.S. v. Toney*, 27 F.3d 1245, 1249 (7th Cir. 1994), citing *U.S. v. Douglas*, 818 F.2d 1317, 1320-21 (7th Cir. 1987).

On review of whether an instruction should have been provided, the question "is not what the 'totality of evidence' reveals but rather, whether a reasonable construction of the evidence viewed in the light most favorable to the defendant will support the defendant's theory." *State v. Peters*, 2002 WI App 243, ¶27, 258 Wis. 2d 148, 653 N.W.2d 300, citing *State v. Mendoza*, 80 Wis. 2d 122, 153, 258 N.W.2d 260 (1977).

A claim of "accident" is an affirmative defense, and whether evidence supports the submission of this jury instruction is a question of law that an appellate court reviews de novo. *Peters*, 2002 WI App 243, ¶12, citing *State v. Mayhall*, 195 Wis. 2d 53, 57, 535 N.W.2d 473 (Ct. App. 1995).

A trial court errs when it refuses to provide an instruction supported by the evidence. *Id.* When an error has occurred, the reviewing court must consider whether the substantial rights of the defendant have been affected. *Id*; Wis. Stat. §805.18(2). In other words, the substantial rights of a defendant have been violated unless "it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Id.* at ¶29, citing *State v. Harvey*, 2002 WI 93, ¶49, 254 Wis. 2d 442, 647 N.W.2d 189.

If trial counsel erred and failed to request the appropriate instruction, the error may be reviewed under the rubric of ineffective assistance of counsel. *See State v. Langlois*, 2018 WI 73, 382 Wis. 2d 414, 913 N.W.2d 812.

2. Ineffective assistance of counsel.

An accused's right to the effective assistance of counsel derives from the Sixth and Fourteenth Amendments to the United States Constitution, and Art. I, sec. 7 of the Wisconsin Constitution. *State v. Smith*, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997). In assessing whether counsel's performance satisfied this constitutional standard, Wisconsin applies the two-part test outlined in *Strickland v. Washington*, 466 U.S. 668 (1984); *Smith*, 207 Wis. 2d at 273.

To establish a deprivation of effective representation, a defendant must demonstrate that: (1) counsel's performance was deficient, and (2) counsel's errors or omissions prejudiced the defendant. *Id.* To prove deficient performance, the defendant must establish that his or her counsel

"made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* (citations omitted).

The prejudice prong requires a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Smith*, 207 Wis. 2d at 276 (citing *Strickland*, 466 U.S. at 694).

Questions of ineffective assistance of counsel present a mixed question of law and fact. *State v. Thiel*, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305, citing *State v. Trawitzki*, 2001 WI 77, ¶19, 244 Wis. 2d 523, 628 N.W.2d 801. The reviewing court will defer to the circuit court's findings of fact unless clearly erroneous. *Id.* Whether trial counsel's performance was deficient as a matter of law is a question the court reviews de novo. *Id.*

B. The trial court erroneous exercised its discretion by declining to incorporate the language found in WI-Criminal JI 772, Accident, into the substantive jury instruction for second-degree sexual assault[6].

[6] For the purposes of this argument, it is irrelevant which version of second-degree sexual assault is submitted to the jury, as both include the element that would be effected by the proposed language – Element one: "The defendant had sexual intercourse with V.P. "Sexual intercourse" means any intrusion, however, slight, by any part of a (continued)

During the instructions conference, defense counsel requested that the court include the language from WI-Criminal JI 772, Accident, into the substantive jury instruction on count one, second-degree sexual assault. (73:66-67). Defense counsel argued that sexual assault is not a strict liability offense, even if it reads that way at first glance, because the legislature could not have possibly intended for an accidental penetration of one's private area by another be punishable as a Class C felony under Wis. Stat. §940.225. (73:66-68).

In support of his argument, trial counsel provided several examples in which the conduct that is benign and non-sexual in nature could be charged under this subsection, and argued that the law was not meant to criminally prohibit these behaviors. (73:66-68, 71-72). The trial court disagreed, concluding that because there was no mental state element to the sexual assault charge, the "accident" instruction could not be provided to the jury, and that counsel could argue that the conduct was accidental during its closing, but that it would not provide a formal legal defense of "accident." (73:67, 71).

While the court was correct in concluding that intent is not specifically an element of second-degree sexual assault involving sexual intercourse (*See State v. Neumann*, 179 Wis. 2d 687, 508 N.W.2d 687 (Ct. App. 1993)), for "sexual intercourse" in the context of a sexual assault charge to occur, a defendant must have made an affirmative act to pursue that end. *See*

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person's body or of any object, into the genital or anal opening of another. Emission of seamen is not required."

State v. Lackershire, 2007 WI 74, 301 Wis. 2d 418, 734 N.W.2d; *State v. Olson*, 2000 WI App 158, 238 Wis. 2d 74, 616 N.W.2d 144. As such, the "accident" jury instruction should have been provided as an affirmative defense to the charge, and inserted into the language defining "sexual intercourse" as requested by trial counsel.

In *Lackershire*, the court considered a question related to plea withdrawal, but central to the issue was whether Wis. Stat. §948.02(2), sexual intercourse with a child under 16, was a strict liability offense, as "sexual intercourse" as defined Wis. Stat. §948.01(6) includes no mental element or intent requirement. *Lackershire*, 2007 WI 74, ¶¶29-30. The Wisconsin Supreme Court concluded that Wis. Stat. §948.02(2) was not a strict liability offense, as in order to be found guilty of that offense, a defendant must *affirmatively* perform one of the actions on the victim or instruct the victim to perform one of the acts delineated in Wis. Stat. §948.01(6) on the defendant. *Id*. at ¶107, citing *State v. Olson*, 2000 WI App 158, ¶10. Therefore, Ms. Lackershire, who asserted that she did not consent to the sexual encounter, had a defense to the charge – a claim that she did not *affirmatively* perform the sexual act on the underage victim. *Id*. at ¶108.

The *Olson* court, on which *Lackershire* relies, also considered the definition of "sexual intercourse." *Olson*, 2000 WI App 158. The *Olson* court provided a detailed analysis of the statutory definition of "sexual intercourse," and outlined why the statute clearly requires an affirmative act pursuing the sexual assault on the part of the defendant in order to

sustain a finding of guilt. *Id.* at ¶¶9-11. The court concluded that the phrase "by the defendant or upon the defendant's instruction" was intended by the legislature to modify all modes of commission of sexual assault and requires that "the defendant has to either affirmatively perform one of the actions on the victim, or instruct or direct the victim to person one of them on him-or herself." *Id.* at ¶10.

The definitions of the term "sexual intercourse" as applicable to §948.02(2) and §940.225 are identical. Both define the act of "sexual intercourse" as "vulvar penetration" and "cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by a person or upon the person's instruction. The emission of semen is not required." *See* Wis. Stat. §§948.02(2), 940.225 and 939.22(36). Therefore, the analyses provided in *Lackershire* and *Olson* apply to crimes involving "sexual intercourse" as charged in Wis. Stat. §940.225.

Moreover, WI JI-Criminal 772 contemplates that the "accident" instruction may be relevant and applicable to elements aside from those involving a clear mental state, such as intent. The committee stated:

> …[The instruction] should be inserted at the point where the element to which evidence of accident relates is defined. Usually, this will be the mental state required for the crime, but other elements could be involved. The test should simply be one of relevance: does the evidence have "any tendency to make the existence of any

> fact that is of consequence to the determination of the action more probably or less probable than it would be without the evidence." See, §904.01.

WI JI-Criminal 772, fn.1.

As such, here the circuit court should have inserted the "accident" jury instruction as follows:

> …
>
> Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present…
>
> 1. The defendant had sexual intercourse with V.P.
>
> "Sexual intercourse" means any affirmative intrusion, however slight, by any part of a person's body or of any object, into the genital or anal opening of another. Emission of semen is not required.
>
> The defendant contends that he did not with the affirmative purpose of intruding on V.P.'s genital opening, but rather that what happened was an accident.
>
> If the defendant did not act with the affirmative purpose of intruding on V.P.'s genital opening as is required for second-degree sexual assault, the defendant is not guilty of the crime.
>
> Before you may find the defendant guilty of second-degree sexual assault, the State must prove by evidence that satisfies you beyond a reasonable doubt that the defendant acted with the affirmative purpose of intruding on V.P.'s genital opening.

...

WI JI-Criminal 1208, 1209 & 772 (Proposed instructions underlined).

Failure to provide the affirmative defense instruction as requested by defense counsel was erroneous, as "[a] court errs when it refuses to give an instruction on an issue raised by the evidence." *Peters*, 2002 WI App 243, ¶12, citing *Mayhall*, 195 Wis. 2d 53, 57. Here, it is clear by the evidence presented that Mr. Ruffin established the legal grounds required for the affirmative defense of accident. He testified that while V.P. was intoxicated and high, she physically attacked him, wrapped her legs and arms around him, refusing to release him. He admittedly attempted to push her off of his body by placing his hands in the area of her upper thighs and the injury to and touching of V.P.'s vagina occurred accidentally as he attempted to push her away. (73).

Mr. Ruffin proposed a legally permissible affirmative defense, that defense was supported by the evidence and was not plainly contemplated in the charge itself, and failure to instruct on the accident theory denied him his right to a fair trial. *See Ebert*, 294 F.3d 896 (other citations omitted). Therefore, it was erroneous to deny Mr. Ruffin the legal defense of accident. *Id.*

This error was not harmless, as a reasonable jury could have concluded that this incident was accidental, and may not have returned a guilty verdict. *See Peters*, 2002 WI App 243, ¶29, citing *Harvey*, 2002 WI 93, ¶49. This is further supported

by the fact that regarding the second charge of mayhem, the court did include the accident instruction and the jury returned a verdict of not guilty.

C. Alternatively, defense counsel was deficient when he failed to cite any case law in support of his request for the "accident" instruction, and as a result, Mr. Ruffin was prejudiced.

Defense counsel provided ineffective assistance in failing to provide relevant legal authority for his request. While trial counsel did request that the trial court permit the affirmative defense of "accident" on count one, second-degree sexual assault, he did not pinpoint any legal authority, resulting in the trial court erroneously concluding that Wis. Stat. 940.225(2)(b) was a strict liability offense and the "accident" instruction did not apply. (73:66-77).

In response to the request, the court asked trial counsel to provide him statutory or other legal authority as to why "accident" instruction and an affirmative defense comported with the crime of sexual assault, sexual intercourse. (73:74-75). Unfortunately, trial counsel did not provide the court with any specific legal grounds based in case law or the jury instructions for his request. (73:74-75).

As outlined above, there is legal authority and current precedent in support of defense counsel's request, but counsel erred in not identifying it to the court. As such, the "accident" jury instruction should have been provided as an affirmative defense to the sexual assault charge, but because trial counsel failed

to articulate the legal grounds for this request, the court declined to do so and counsel was ineffective as a matter of law.

Mr. Ruffin was prejudiced by counsel's error, as a reasonable jury could have concluded that Mr. Ruffin's touching of V.P.'s vaginal area while she was attacking him was accidental, and may not have returned a guilty verdict. This is further supported by the fact that the jury acquitted Mr. Ruffin of mayhem, to which the court did include the accident instruction. Therefore, Mr. Ruffin is entitled to a new trial due to counsel's deficient performance. *Smith*, 207 Wis. 2d at 276.

III. Trial counsel was ineffective when he failed to pursue self-defense to the sexual assault charge, declining to move forward with his initial request that the court incorporate WI-Criminal JI 800 in the instructions.

A. Legal principles and standard of review.

1. Jury Instructions

Whether an instruction should have been provided, the question "is not what the 'totality of evidence' reveals but rather, whether a reasonable construction of the evidence viewed in the light most favorable to the defendant will support the defendant's theory." *State v. Peters*, 2002 WI App 243, ¶27, 258 Wis. 2d 148, 653 N.W.2d 300, citing *State v. Mendoza*, 80 Wis. 2d 122, 153, 258 N.W.2d 260 (1977).

Like "accident," "self-defense is also an affirmative defense, and whether evidence supports the submission of this jury instruction is a question of law that an appellate court reviews de novo. *Peters*, 2002 WI App 243, ¶12, citing *State v. Mayhall*, 195 Wis. 2d 53, 57, 535 N.W.2d 473 (Ct. App. 1995).A trial court errs when it refuses to provide an instruction supported by the evidence. *Id.*

If the circuit court declined to provide an instruction in error, a reviewing court must consider whether the substantial rights of the defendant have been affected. *Id*; Wis. Stat. §805.18(2). If trial counsel failed to request the appropriate instruction, the error is reviewed under the rubric of ineffective assistance of counsel. *See Langlois*, 2018 WI 73.

2. Ineffective assistance of counsel.

To establish a deprivation of effective representation, a defendant must demonstrate that: (1) counsel's performance was deficient, and (2) counsel's errors or omissions prejudiced the defendant. *Id*. To prove deficient performance, the defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id*. (citations omitted).

Questions of ineffective assistance of counsel present a mixed question of law and fact. *State v. Thiel*, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305, citing *State v. Trawitzki*, 2001 WI 77, ¶19, 244 Wis. 2d 523, 628 N.W.2d 801. The reviewing court will defer to the circuit court's findings of fact unless clearly erroneous. *Id.* Whether trial counsel's

performance was deficient as a matter of law is a question the court reviews de novo. *Id.*

B. Trial counsel erred when he failed to pursue his request that the self-defense be applied to the second-degree sexual assault instruction, and Mr. Ruffin was prejudiced as a result.

At the close of evidence, trial counsel requested that the court provide the self-defense instruction, WI-Criminal JI 800, in the context of count one charging the second-degree sexual assault. The self-defense privilege as applied to this charge provides a defendant total legal immunity to threaten or use force against another if (1) the defendant believed that there was an actual or imminent unlawful interference on his person; (2) he believed the amount of force he used was needed to stop the interference; and (3) based on the circumstances as they existed at the time, these beliefs were reasonable. See WI-Criminal JI 800. If the State cannot prove beyond a reasonable doubt that the defendant engages in a privileged act of self-defense, the jury must return a not guilty verdict. WI JI-Criminal 800.

Defense counsel argued to the court that the record contained an abundance of evidence, including Mr. Ruffin's testimony that his actions were "defensive actions" and that "[h]e was trying to protect himself and [his] unborn child" when he pushed V.P. in between her legs while she was attacking him in an attempt to pry her off of him. (73:62-63). Before the court could rule on the request, defense counsel withdrew his motion to modify the

charges with the self-defense instruction. (73:63-64). The court did not conduct any colloquy with the defendant about defense counsel's request that the question of self-defense be withdrawn from consideration from the jury. (73:63-64). After a lunch break, counsel requested the "accident" affirmative defense instruction and that it be applied to the sexual assault charge. As outlined above, the court denied that request.

Mr. Ruffin contends that after the court refused to instruct the jury on Mr. Ruffin's alternative affirmative defense request, trial counsel erred when he declined to renew his request that the self-defense instruction be applied to the sexual assault charge. First, Mr. Ruffin contends that the court, based upon the record made during the trial, would have been required to provide the self-defense instruction and failure to do so would have constituted error. *See Peters*, 2002 WI App 243, ¶12, citing *Mayhall*, 195 Wis. 2d 53, 57. There was clearly substantial evidence that supported the assertion that Mr. Ruffin intentionally placed his hand in between V.P.'s legs in an effort to force her off of him. V.P. was at the time engaged in an assault on Mr. Ruffin, as she had jumped on him, wrapped her legs around him and refused to let go. This was an unlawful interference on Mr. Ruffin and he had the legal privilege of self-defense to terminate that interference by pushing her off. Therefore, providing the self-defense instruction was warranted and required at that time. *See Ebert*, 294 F.3d 896.

Second, the asserted defense during the trial and at closing, that Mr. Ruffin intentionally pushed

V.P. away and accidentally injured her in the process, was consistent with the privilege of self-defense. The law is clear – a claim of self-defense is not inconsistent with a concurrent claim of accident. *State v. Watkins*, 2002 WI 101, ¶44, 255 Wis. 2d 265, 647 N.W.2d 244; See also *State v. Gomaz*, 141 Wis. 2d 302, 313, 414 N.W.2d 626 (1987). One may engage in an intentional act of self-defense and accidentally injure another in the process. The record plainly demonstrates that this was Mr. Ruffin's defense, as outlined in his testimony, and argued by defense counsel through the entirety of the trial and during closing. Thus, there is no viable argument that trial counsel strategically declined to pursue self-defense as an avenue for relief.

Moreover, even if trial counsel were to assert that the abandonment of the request for a self-defense instruction was a strategic choice, the U.S. Supreme Court has held that trial counsel cannot override the client's wishes regarding his objective defense, which the record clearly reveals was self-defense in this case. *McCoy v. Louisiana*, __ U.S. __, 138 S.Ct. 1500 (2018). If a defendant wishes to pursue a defense for which there are legal grounds, "trial counsel may not override his autonomy" to make this choice. *McCoy*, 138 S.Ct. at 1508. Here, Mr. Ruffin's testimony makes clear that his intended defense was that he believed V.P. was attacking him and that he attempted to push her off of his body, accidentally injuring her in the process. Trial counsel could not abandon Mr. Ruffin's privileged defense for any reason without his client's clear consent, and the U.S. Supreme Court has held that when this occurs, the court must order a new trial without a harmless

error analysis. *Id.* at 1511. For these reasons, trial counsel was ineffective for failing to request that the court instruct the jury on Mr. Ruffin's privileged right to self-defense.

Trial counsel's error resulted in substantial prejudice. Though defense counsel argued self-defense during closing and asked that the jury find his client not guilty of the offense, "arguments by counsel cannot substitute for an instruction by the court[, as] [a]rguments by counsel are likely to be viewed as statements of advocacy, whereas a jury instruction is a definitive and binding statement of law." *State v. Perkins*, 2001 WI 46, ¶41, 243 Wis. 2d 131, 626 N.W.2d. Moreover, this court provided the jury with the instruction that specifically informed the jury that counsel's closing arguments are not evidence and that the verdict should be decided "according to the evidence, under the instructions given…by the court." WI JI-Criminal 160; See *Perkins*, 2001 WI 46, ¶41. Thus, Mr. Ruffin was prejudiced as a result counsel's error.

CONCLUSION

For these reasons, Mr. Ruffin asks this court first for an order vacating the judgment of conviction in this matter and issuance of a judgment of acquittal on the grounds that the incorrect substantive jury instruction was presented to the jury. Alternatively, Mr. Ruffin requests that this court vacate the judgment of conviction either on the grounds that trial counsel was ineffective by failing to object to the erroneous jury instruction or alternatively that the interest of justice require a new proceedings.

Finally, Mr. Ruffin requests that the judgment of conviction be vacated and a new trial ordered on the grounds that the court erred in not submitting the "accident" instruction to the jury, or that trial counsel erred by failing to adequately present its argument in support of its request that the court instruct the jury on either "accident" or self-defense.

If this court declines concludes that a *Machner* hearing is necessary to address any of the claims of ineffective assistance of counsel, Mr. Ruffin requests that the matter be remanded for the trial court for such a hearing.

Dated this 16th day of August, 2019.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,609 words.

CERTIFICATE OF COMPLIANCE WITH RULE 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 § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after 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 16th day of August, 2019.

Signed:

NICOLE M. MASNICA
Assistant State Public Defender

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 16th day of August, 2019.

Signed:

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APPENDIX

INDE X
TO
APPENDIX

Page