STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2019AP001046 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

THEOPHILOUS RUFFIN,

Defendant-Appellant.

On Review of a Decision of the Court of Appeals, District I, Affirming in Part and Reversing in Part 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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RESPONSE BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Did the court of appeals misapply the framework used to determine when a criminal appellant has satisfied the burden necessary to trigger a *Machner* hearing?

The decision of the court of appeals plainly illustrates it well understood the state of law surrounding ineffective assistance of counsel claims and when a *Machner* hearing is necessary, and the appellate court appropriately ordered this matter remanded to the circuit court for such a proceeding.

STATEMENT OF THE CASE & 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 was ultimately charged in Milwaukee County Case Number 2015CF5306 with two counts: second-degree sexual assault causing injury, domestic abuse, contrary to sections 940.225(2)(b), 939.50(3)(c) and 968.075(1)(a), *Stats.*; and mayhem, domestic abuse, contrary to sections 940.21, 939.50(3)(c), and 968.075(1)(a), *Stats.* (1). The case proceeded to trial in October 2016. (68, 69, 70, 71, 72, 73, 74).

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 both 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 claimed 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, and she was allowed to get up. (70:8-9).

Mr. Ruffin testified in his own defense and explained to the jury that he had a learning disorder, of which he was diagnosed when he was a child. (73:4). He provided background on his relationship with V.P. and then testified about the night in question. During his testimony, Mr. Ruffin agreed that the incident began as a verbal dispute. He testified that they argued over V.P.'s cocaine and alcohol use the prior evening, as she was pregnant at the time and also the mother to their young infant who was in her care. (73:7-8). He stated that during the argument, he told V.P. that he wanted her to leave the home because of her aggressive behavior. (73:7). As she was yelling at him, Mr. Ruffin got dressed and told V.P. that he 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 while in the hallway near the stairs. He stated that V.P. hit and punched him, then tried to push him down the stairs. (73:8).

Mr. Ruffin testified that in response, he had to push V.P. away and back into the bedroom. (73:9). As he did this, V.P. "was still throwing blows" at him.

(73:9). Once in the bedroom, he pushed her toward the bed away from him. She tripped and grabbed Mr. Ruffin by the collar. (73:9). This caused the pair to fall over onto the bed. Mr. Ruffin used his hands to stop his body from falling on V.P. as he was concerned about hurting the unborn baby. (73:9).

It was at that time that V.P. grabbed and pulled at Mr. Ruffin, wrapping her legs around his waist and preventing him from getting away. (73:9-10). While her legs were wrapped around him, V.P. continued to hit Mr. Ruffin and had him by his shirt collar. He fear that she was trying to bite him or even worse, get him to fall on her body to cause harm to the unborn child. (73:10). Mr. Ruffin denied that he ever slapped or hit V.P. (73:9-10). He testified that he just wanted to get away from V.P. and to that he was planning to go outside and take a walk until things would calm down. (73:10).

To stop the assault and to get away from V.P.'s assault, Mr. Ruffin testified that he grabbed V.P. by the shoulder and the inner thigh area to repel her attack and push her off his body. (73:9-10, 42, 44-46). He testified that after he did this, 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). Both parties testified that V.P. was clothed during the incident.

Following the close of evidence, the parties discussed 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 spontaneously withdrew the request for the self-defense modification to the instructions. 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 asked the court to 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). In denying the request, the trial court reasons that second-degree sexual assault, intercourse, was a strict-liability offense, and that because intent was not required, 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).

The jury deliberated over the course of two days and issued a split verdict. The jury found Mr. Ruffin guilty of count one, second-degree sexual assault, but not guilty of count two, mayhem. (21). After the trial had concluded, it was discovered by

defense counsel that there had been a substantial error in the substantive jury instruction for count one. (75; 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 a second-degree sexual assault, sexual intercourse causing injury, contrary to Wis. Stat. §940.225(2)(b).

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 acknowledged that the parties agreed 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 only question that remained was whether the error was harmless. (76:7).

The State argued 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 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 and trial strategy 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, would have 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, rather than finding Mr. Ruffin guilty of the charge the jury considered. (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).

Mr. Ruffin went to sentencing on February 24, 2017, and the court ordered that he serve eight years initial confinement and four years extended supervision. (30).

On October 17, 2018, a postconviction motion was filed with the court. On November 2, 2018, the circuit court denied Mr. Ruffin's postconviction motion in its entirety in writing, without a hearing. (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 appealed the adverse decision of the trial court and on March 9, 2021, the court of appeals issued a decision on the matter, denying the majority of Mr. Ruffin's arguments in support of a new trial, but remanding the matter for a *Machner* hearing on Mr. Ruffin's claim that his attorney improperly abandoned his claim of self-defense.

Regarding the question of whether his attorney was ineffective for failing to object to the substantive jury instruction, the court of appeals, following the State's concession, agreed that trial counsel had plainly erred in not objecting to the incorrect substantive jury instruction being provided to the jury. Thus, pursuant to the holding in *State v. Williams*, 2015 WI 75, ¶53, 364 Wis. 2d 126, 867 N.W.2d 736, the remaining question was whether counsel's error was harmless. (*State v. Ruffin*, COA Case Number 2019AP1046-CR, March 9, 2021

Decision, 11-14). In other words, "is it clear beyond a reasonable doubt that the jury still would have convicted the defendant had the correct instruction been provided?" (*State v. Ruffin*, March 9, 2021 Decision, 12, citing *Williams*, 364 Wis. 2d 126, ¶53).

Here, the court of appeals concluded, "it was clear beyond a reasonable doubt that the jury would have still convicted Ruffin of sexual assault if the trial court gave the proper jury instruction." (*State v. Ruffin*, COA Case Number 2019AP1046-CR, March 9, 2021 Decision, 13). The court found that because Mr. Ruffin acknowledged while testifying that V.P. was injured while he was trying to repel the assault he was enduring from her, a jury would have plainly found him guilty beyond a reasonable doubt of the crime charged in the information. (*State v. Ruffin*, March 9, 2021 Decision, 13).

Regarding the question of the accident instruction, the court of appeals concluded that second-degree sexual assault, intercourse, causing injury, contains no mental element whatsoever and as a result, accident as an affirmative defense is not appropriate. (*State v. Ruffin*, March 9, 2021 Decision, 15-18). To dispel Mr. Ruffin's legal arguments that the holding so *State v. Lackershire* and *State v. Olson* were inconsistent with such a broad interpretation of the statute, the court reasoned that those cases were different because they "hinged on whether the activities defended as sexual intercourse were caused 'by the defendant or upon the defendant's instruction.'" (*State v. Ruffin*, March 9, 2021 Decision, 17, citing Wis. Stat. §948.01(6)). Mr. Ruffin's situation, the court reasoned, was therefore

inapposite because he "was the actor in this case." (*State v. Ruffin*, March 9, 2021 Decision, 17).

Finally, regarding the issue of whether counsel appropriately withdrew Mr. Ruffin's self-defense claim without his consent, the court of appeals remanded the matter to the circuit court for a *Machner* hearing. The court of appeals concluded that Mr. Ruffin's postconviction motion entitled "him to an evidentiary hearing on whether trial counsel was ineffective in withdrawing this request for a self-defense instruction." (*State v. Ruffin*, March 9, 2021 Decision, 21). Throughout the decision, the court recited the appropriate legal framework controlling claims of ineffective assistance of counsel and *Machner* hearings, demonstrating a thoughtful understanding of the relevant standards. (*State v. Ruffin*, March 9, 2021 Decision, 8-9).

Both parties filed petitions for review regarding their respective adverse decisions of the court of appeals and on September 17, 2021, this court issued an order denying Mr. Ruffin's petition for review and granting the State's companion request. (101).

Mr. Ruffin submits this brief in opposition to the State's request for review and reversal.

ARGUMENT

I. The court of appeals applied the proper legal framework for determining whether Mr. Ruffin was entitled to an evidentiary claim on his motion alleging ineffective

assistance of counsel for waiving his legally privileged self-defense claim.

A. Legal principles and standard of review.

1. 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.*

If a jury is not properly advised regarding the affirmative defense and the State's obligation to prove that the defendant's actions were not privileged self-defense, they lack "the proper framework for analyzing" the conduct of the defendant. *Austin,* 2013 WI App 96, ¶12, citing *State v. Perkins 2001 WI 46,* ¶12, 243 Wis. 2d 141, 626 N.W.2d 762 (An appellate court "may reverse a conviction based on a jury instruction regardless of whether an objection was

made, when the instruction…arguably caused the real controversy not to be fully tried.")

2. Errors in the Jury Instructions

When considering whether a jury 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).

"[S]elf-defense 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). When self-defense is raised by the defendant and a jury instructed on the question, "the burden is on the State to disprove the defense beyond a reasonable doubt." *State v. Austin,* 2013 WI App 96, ¶12, 349 Wis. 2d 744, 836 N.W.2d 833, citing *State v. Head*, 2002 WI 99, ¶106, 255 Wis. 2d 194, 648 N.W.2d 413. A trial court errs when it refuses to provide an instruction supported by the evidence. *Peters*, 2002 WI App 243, ¶12.

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, however, trial counsel failed to request the appropriate instruction in the first place, the error is reviewed

under the rubric of ineffective assistance of counsel. *See Langlois*, 2018 WI 73.

B. Contrary to the State's disagreement with the holding below, the court of appeals in no way misapplied the legal framework guiding IAC claims and its holding plainly demonstrates the opposite.

The State takes the position that the court of appeals is somehow confused about the law surrounding ineffective assistance of counsel and when to order an evidentiary hearing, opining that its decision relies on an "erroneous interpretation of *Allen*." (State's Brief-in-Chief, 28, presumably referencing this court's holding in *State v. Allen*, 2004 WI 106, 274 Wis. 2d 568, 682 N.W.2d 433). The State assumes without evidence to the contrary that the court of appeals disregarded the totality of the court record in this matter, on which it conclusively claims no prejudice exists even if counsel erred when he declined to request the jury be instructed on self-defense. (State's Brief-in-Chief, 28-29). When reading between the lines of the State's argument, however, it is clear that the State's issue with the holding is the ultimate conclusion – that Mr. Ruffin is entitled to a *Machner* hearing – and is using this review with the hope that this court likewise disagrees with the appellate court's assessment of the case and reverses the decision, denying Mr. Ruffin any relief without further hearing.

It is plain from a review of the pleadings that this appeal was a complicated one, with several

complex legal questions at issue. As a result, the court of appeals considered the following six questions in this order:

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

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

3. Whether a new trial is warranted in the interest of justice.

4. If 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. Whether trial counsel was ineffective in his request for the "accident" instruction.

6. And finally, whether trial counsel was ineffective for prematurely abandoning his request that the "self-defense" instruction be provided to the jury.

(*State v. Ruffin*, March 9, 2021 Decision).

Thus, by the time the court of appeals reached when trial counsel was ineffective as a matter of law for failing to request the self-defense instruction, the

appellate court had already twice discussed IAC claims and applied the appropriate legal framework in each of those decisions.

Looking to its analysis of those issues, particularly regarding the question of IAC regarding the failure to object to the incorrect substantive jury instruction, there can be no doubt that the court of appeals understood and properly applied the law in its review of the question regarding the self-defense instruction. For example, the appellate court concluded (and the State stipulated) that trial counsel was constitutionally deficient when he failed to object to the wrong substantive jury instruction being read to the jury. The court of appeals then turned to the second prong of the IAC test – whether this erred caused Mr. Ruffin prejudice.

At that point in the inquiry, the court of appeals did not halt its review and conclude that any further questions are those that remain for the trial court, nor did it hold as a general matter that because the pleadings, if true, stated a viable IAC claim that it was required to order a *Machner* hearing on the deficiency prong. Instead, the court of appeals did as the law instructs and moved on to the question of whether Mr. Ruffin was prejudiced as a result of his counsel's error. That the appellate court engaged in this detailed analysis is conveniently given no attention by the State.

Next, looking to the court of appeals second discussion of IAC, this time in reference to Mr. Ruffin's claim that counsel erred in not effectively pleading its request for the "accident" instruction, the

court held that contrary to Mr. Ruffin's pleadings, he was not entitled to the "accident" instruction. Now, had the court of appeals held the misguided belief that simply because a defendant makes certain claims in his pleadings, that it must assume that all of the allegations are true and grant a *Machner* hearing to test those allegations, it would have done so regarding Mr. Ruffin's "accident" arguments. But the court of appeals did not do that – a fact which is again completely ignored by the State. Instead, the court of appeals concludes that because "accident" is not a legally appropriate defense under the facts and circumstances of this case, that trial counsel was not deficient in failing to properly plead its request for the necessary instruction. (*State v. Ruffin*, March 9, 2021 Decision, 18).

When the court of appeals reached the sixth and final question in this appeal – whether trial counsel was ineffective as a matter of law for failing to request the self-defense instruction contrary to his client's wishes – the reviewing court had several times discussed the rubric guiding IAC claims. Additionally, the appellate court specifically cited back to its earlier recitation of the appropriate legal framework in footnote 11, which states: "We set forth the standard for when a defendant is entitled to an evidentiary hearing on his or her postconviction hearing in *supra,* ¶16 of this decision." (*State v. Ruffin*, March 9, 2021 Decision, 19, fn. 11). Paragraph 16 reads:

> "A hearing on a postconviction motion is required only when the movant states sufficient material facts that, if true, would entitle the defendant to relief." *State v. Allen,* 2004 WI 106, ¶14, 274 Wis.

> 2d 568, 682 N.W.2d 433. "[I]f the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegation, ***or if the record conclusively demonstrates that the defendant is not entitled to relief***," the circuit court may deny a postconviction motion without a hearing. *Id.*, ¶9. We review the trial courts decision to deny an evidentiary hearing under the erroneous exercise of discretion standard. *See id.* Whether a motion alleges sufficient facts that, if true, would entitle the defendant to an evidentiary hearing presents a question of law that we review *de novo*. *See State v. Bentley*, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). "[A] defendant should provide facts that allow the reviewing court to meaningfully assess his or her claim." *Id.* at 314. As stated in *Allen*,
>
> > Postconviction motions [should]…allege the five "w's" and one "h"; that is, who, what, where, when, why, and how. A motion that alleges, within the four corners of the document itself, the kind of material factual objectivity…will necessarily include sufficient material facts for reviewing court to meaningfully assess a defendant's claim.
>
> *Id.*, 274 Wis. 2d 568, ¶23 (footnote omitted).

(*State v. Ruffin*, March 9, 2021 Decision, 8-9; emphasis added).

Additionally, in its discussion of the pleadings, the court of appeals states that it was relying upon six key facts alleged by Mr. Ruffin when concluding that a *Machner* hearing on his claim that a self-

defense instruction should have been requested was appropriate:

> (1) V.P. was attacking him and she refused to let go;
>
> (2) V.P.'s attack was an unlawful interference with his person;
>
> (3) He pushed V.P. between her legs to disengage her legs from around his body and stop her from attacking him;
>
> (4) He was only trying to remove V.P. from his body during a fast-moving altercation;
>
> (5) He was trying to protect her pregnant belly from his hands or weight by pushing on her legs instead of anywhere else; and
>
> (6) He did not intend to harm V.P.

(*State v. Ruffin*, March 9, 2021 Decision, 19).

Not one of these facts can be demonstrated to be conclusively untrue by the record, nor does the State provide any real argument to the contrary. The appellate court appropriately concluded that *if* these facts are true, trial counsel erred in not requesting the self-defense instruction (assuming of course that Mr. Ruffin was not in agreement in the waiver of this specific defense). Therefore, a review of the decision of the court of appeals clearly demonstrates that it had a full and proper understanding of the law, a thoughtful appreciation of when a *Machner* hearing is necessary and applied the relevant rubrics to the

case at hand. The State simply objects to the court's view of the evidence.

Next, regarding the question of prejudice, the State seems to fault the court of appeal's position that it was not concluding "that Ruffin suffered any prejudice" as a result of trial counsel's alleged error, asserting that this was some sort of abdication of a duty to do so. (*State v. Ruffin*, March 9, 2021 Decision, 21). However, it is clear that the court was well aware that it could forgo a *Machner* hearing if it concluded that the record conclusively demonstrated that no prejudice had occurred, as this is the exact conclusion of the court regarding the first discussed claim of IAC. Instead, the court was not taking a position on whether there was prejudice, which is in no way an error on the part of the court of appeals. After all, the reviewing court noted that there were other factual questions that remained and were relevant to the question of prejudice such as the level of force needed to cause the injury in this case and whether trial counsel improperly conceded Mr. Ruffin's privileged claim of self-defense, contrary to the holding in *McCoy v. Louisiana*, 584 U.S. __, 138 S.Ct. 1500 (2018).

Now, the State again invites this court to conclude that trial counsel's error regarding the self-defense instruction was not prejudicial, pointing to facts in the record that it asserts negates as a matter of law the privilege of self-defense. Those alleged facts/omissions are as follows:

- "There is no evidence from which a reasonable person could find that in nearly detaching

> Delia's labia, Ruffin's (sic) acted with force that regarding reasonably believed was necessary to stop her aggression."
>
> - The State's allegation that Mr. Ruffin "was a foot taller and at least 100 pounds heavier than Delia."
>
> - The State's allegation that Mr. Ruffin "did not testify that he felt threatened by Delia, nor did he testify that he attempted to de-escalate the situation without using force."
>
> - Mr. Ruffin claimed the harm to her was an accident.
>
> - Mr. Ruffin "provided no explanation for how his hand made contact with her vagina and why or how he tore tissue in that area other than saying he was 'pushing in that area' to 'push her legs off of me so I [could] go.'"
>
> - Trial counsel stated, regarding the self-defense instruction, he was "not sure it really fits this situation."

(State's Brief-in-Chief, 25-26; internal citations omitted). Not one of these points negates a self-defense claim.

First, what level of force was appropriate under the circumstances is a question of fact, not of law, and therefore is one for the jury. Moreover, the State assumes that the level of force necessary to injury V.P.'s labia minora was substantial, but as pointed out by Mr. Ruffin in his pleadings and the court of appeals in its decision, there was no testimony or

evidence presented at trial regarding the level of force necessary. (*State v. Ruffin*, March 9, 2021 Decision, 21, fn. 13). The State cannot now guess the level of force used was substantial after failing to make such a showing at trial. Had self-defense been properly instructed to the jury, the State would have had to prove *beyond a reasonable doubt* that the level of force was not reasonably necessary to terminate V.P.'s attack.

Second, Mr. Ruffin cannot be denied the privilege of self-defense simply because he is a man or because he is taller and larger than V.P. Whether the facts and circumstances are consistent with self-defense is a question for the jury.

Third, the State incorrectly asserts Mr. Ruffin made no mention of the need to protect himself or that he felt he was in danger by V.P.'s actions. He testified that she hit him, kicked him, attempted to push him down the stairs, grabbed onto his waist by wrapping her legs around him and that he believed she was trying to bite him when he was pushing her off. Each one of V.P.'s acts were illegal interferences with Mr. Ruffin, and he had the right to defend himself from such an attack.

Fourth, contrary to the State's repeated hinting that the privilege of self-defense is mutually exclusive with accidentally injuring someone, well-settled case law makes it clear that this is not true. One may intentionally engage in an act with the purpose of defending themself while unintentionally causing the harm to the other party. Here, Mr. Ruffin was attempting to push V.P. off of his body and while

pushing her, she was accidentally injured. Notably, V.P. was fully clothed during this incident, with her vaginal area covered.

Fifth, Mr. Ruffin plainly stated that he was attempting to push V.P. in between her legs to get her off of him at the time of the injury.

Sixth, we have no idea why trial counsel made the statement in question, but it very well could have been that the attorney had the same mistaken belief as the State that a self-defense claim and accidental injury claim are mutually exclusive. We do not know the basis of this claim (though we likely will if there is a *Machner* hearing), but as a general matter, trial counsel's personal opinion on the matter is irrelevant.

These six points, either on their own or taken all together, in no way undermine Mr. Ruffin's claim of self-defense and most are simply argument the State would provide to the jury in a closing statement if it saw fit to do so.

The State hangs its hat on the court of appeals finding that it neither concludes that trial counsel acted deficiently or that prejudice ensued as a result. (State's Brief-in-Chief, 31). Had the court of appeals done so, however, it would have been out of bounds. By finding that a *Machner* hearing is appropriate, the court of appeals made a statement – that if all of the allegations set forth by Mr. Ruffin are true, that he would be entitled to the relief sought. That finding, of course, is posited on the assumptions without the benefit of the testimony of trial counsel and Mr. Ruffin. Therefore, the court of appeals was not in a position to properly answer whether some unknown

facts exist that undermine his claim. Simply because the court did not spell it out to the State why a *Machner* hearing is necessary in a case such as Mr. Ruffin's does not mean that its conclusion was improper as the State opines.

Ultimately, the State's argument plainly illustrates that its objection with the court of appeals' ruling is that it ordered a *Machner* hearing, not its disingenuous belief that the appellate court misunderstood the applicable legal framework guiding this type of review. For these reasons, this court should rebuke the State's invitation to conduct a secondary review of an already decided issue, as it amounts to simple error correction and not the type of review that is appropriate for this court under the criteria section forth in section 809.62, *Stats.*

C. 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, and Mr. Ruffin was prejudiced as a result.[1]

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

[1] While this court did not grant review specifically on whether trial counsel was ineffective, as this issue overlaps Mr. Ruffin's IAC claim on the issue of self-defense, he sets forth his position below to preserve it for the possibility of further review.

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*, 584 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. The record clearly demonstrates that Mr. Ruffin satisfied the burden necessary of obtaining a perfect self-defense instruction. *See State v. Head,* 2002 WI 99, ¶¶111-12, 255 Wis. 2d 194, 648 N.W.2d 413; *See also State v. Stietz,* 2017 WI 58, ¶17, 375

Wis. 2d 572, 895 N.W.2d 796 (citations omitted) (A defendant need only present some evidence consistent with a self-defense claim to earn its instruction).

Additionally, that trial counsel argued[2] self-defense during closing and asked that the jury find his client not guilty of the offense was not a sufficient substitute to a proper instruction. Of course, "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," but in this case, the error was even greater because it alleviated the State of the substantial burden of disproving Mr. Ruffin's self-defense claim *beyond a reasonable doubt*. *State v. Perkins*, 2001 WI 46, ¶41, 243 Wis. 2d 131, 626 N.W.2d. Here, based on the record before the jury, there is more than reason to believe that the State would not have prevailed in this task. Thus, Mr. Ruffin was prejudiced as a result of counsel's error.

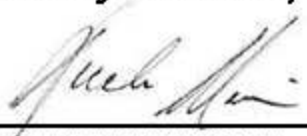
[2] Moreover, the trial court provided the jury with the instruction that specifically informed the jury that counsel's closing arguments are not evidence and that the verdict should be decided "according to the evidence, under the instructions given…by the court." WI JI-Criminal 160; See *Perkins*, 2001 WI 46, ¶41.

CONCLUSION

For these reasons, Mr. Ruffin asks this court to conclude that the court of appeals properly considered the necessary legal framework involving claims of ineffective assistance of counsel and when it is necessary to grant a *Machner* hearing, remanding the matter back to the circuit court for an evidentiary hearing on this claim.

Dated this 29th day of November, 2021.

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 6,769 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 29th day of November, 2021.

Signed:

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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 29th day of November, 2021.

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