STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2020AP1981-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SERGIO MOISES OCHOA,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE SHEBOYGAN COUNTY CIRCUIT COURT, THE HONORABLE REBECCA L. PERSICK, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

Around 2:00 a.m. on July 30, 2017, Defendant-Appellant Sergio Moises Ochoa got out of bed, got dressed, and drove to his cousin's home. Ninety minutes later, Sheboygan Police received a call from 911 dispatch: Ochoa's cousin, Luis Garcia, and Garcia's best friend, Fernando Lara Lopez, were dead—shot to death by Ochoa. Shortly thereafter, Ochoa arrived at the police station and turned himself in, admitting that he killed the two men.

Lengthy court proceedings followed, which included dozens upon dozens of motions on the admissibility of evidence, objections to witness testimony, and disputes over jury instructions. The saga culminated in a 17-day jury trial at which a jury found Ochoa guilty of two counts of first-degree reckless homicide.

Ochoa has now selected a handful of putative errors which, he claims, entitle him to a new trial. They do not. The circuit court properly decided the issues presented in this case, but even if it did not, any errors were not so egregious as to undermine confidence in the outcome of the trial. Justice was served, and the jury's verdict should stand. This Court should affirm.

ISSUES PRESENTED

1. Did the circuit court violate Ochoa's constitutional right to present a defense when it excluded *McMorris*[1] evidence and three expert witnesses proffered by the defense?

The circuit court excluded the evidence and disallowed the proffered expert witness testimony.

This Court should affirm.

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

2. Did the circuit court erroneously exercise its discretion when it excluded certain hearsay statements made by one of the victims?

The circuit court excluded the statements.

This Court should affirm.

3. Did the circuit court violate Ochoa's right to a fair trial when it followed the pattern jury instruction on self-defense without a modification requested by Ochoa?

The circuit court concluded that Ochoa's requested modification to the instruction was not necessary or appropriate.

This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. This Court can resolve this appeal by applying settled legal precedents to the facts and issues presented.

STATEMENT OF THE CASE

Slayings

At about 3:30 a.m. on July 30, 2017, law enforcement officers responded to a call about a shooting in Oostburg in Sheboygan County. (R. 4:1.) When they arrived on the scene, they found two men—Luis Garcia and Fernando Lara Lopez—shot dead in the living room. (R. 4:1–2.) The officers observed seven 9mm shell casings on the living room floor. (R. 4:2.)

Police interviewed Garcia's son, J.G. (R. 4:2.) J.G. told police that he was upstairs in his room with a couple of friends and could hear his father arguing with someone in the living room. (R. 4:2.) Suddenly, J.G. heard several gun shots, and the sound of the argument stopped. (R. 4:3.) J.G. was scared

that a shooter might still be in the house, so he did not go downstairs to check on the men. (R. 4:3.) Instead, he called his uncle, José Garcia, who was asleep downstairs, to try to find out what happened. (R. 4:3.) Meanwhile, one of J.G.'s friends went out through a second story window and saw that Garcia and Lara Lopez had been shot. (R. 4:3.) J.G. and his uncle then went to check on the men and called 911. (R. 4:3.)

Police interviewed José. (R. 4:3.) José reported that earlier in the evening on July 29th, Ochoa and another man had come over to Garcia's residence. (R. 4:3.) According to José, Ochoa and Garcia had not been speaking because Garcia owed Ochoa approximately $200. (R. 4:3.) At that time, the men were drunk, but were not fighting or arguing. (R. 4:3.)

Police also interviewed Ochoa's wife, who said that at approximately 1:30 or 2:00 a.m. on July 30th, she woke up and noticed that Ochoa was awake and putting on his shoes. (R. 4:3.) Ochoa told her that he was going outside for a minute, but that he did not say where or why. (R. 4:3.) She went back to sleep and was later awakened by police knocking on the door looking for Ochoa. (R. 4:3–4.)

Finally, at around 4:15 a.m. on July 30th, Ochoa showed up at the Sheboygan Police Department and said that he wanted to make a statement. (R. 4:4.) He told police that he was scared and that he had done something bad but did not mean to. (R. 4:4.) He advised police that he had a gun in his car. (R. 4:4.) The officers knew that an investigation into the shooting in Oostburg was ongoing and took Ochoa into custody. (R. 485:131–33.)

Police secured search warrants for Ochoa's car and his residence. (R. 4:4.) Searches conducted pursuant to those warrants revealed a Sig Sauer 9mm pistol with nine rounds of ammunition remaining in a 17 round magazine and ammunition consistent with the shell casings identified at Garcia's residence. (R. 4:4.) Based on the interviews and the

physical evidence, the State charged Ochoa with two counts of first degree intentional homicide. (R. 4:1; 15:1.)

Pretrial Proceedings

A lengthy period preceded trial, during which both Ochoa and the State filed many motions related to the admissibility of various evidence and witness testimony. Relevant to this appeal, Ochoa filed a motion on May 1, 2019, seeking to introduce ten different expert witnesses to testify on a variety of topics. The listed experts included Marty Hayes, whom Ochoa described as "a former law enforcement officer who is certified in ballistics and the use of deadly force." (R. 84:3.) Ochoa claimed that Hayes would testify as an expert witness about "the dynamics of violent encounters, including the risk of an armed defender having his weapon disarmed when he is outflanked; . . . the use of spent cartridge casings and other physical evidence to infer shooter location; and . . . the analysis of the trajectory of bullets, and other ballistic evidence, to infer the manner in which" the victims were shot and killed. (R. 84:3.)

Ochoa also offered Conrad Zvara and Alfonso Villaseñor as expert witnesses. (R. 84:2–3.) Zvara would offer expert testimony on the use of deadly force, while Villaseñor would translate and explain the meaning of three separate slang phrases Ochoa claimed Lara Lopez used shortly before the homicides. (R. 84:2–3.)

On May 8, 2019, Ochoa moved to introduce evidence of specific acts of violence that Garcia and Lara Lopez allegedly took part in pursuant to *McMorris v. State*, 58 Wis. 2d 144, 205 N.W.2d 559 (1973). (R. 108.) According to the motion, Ochoa personally observed "three-to-four instances" of Garcia and Lara Lopez attacking random strangers during rodeo events in Mexico during the 1990s. (R. 108:2.) Additionally, Ochoa claimed that since the 1990s, he had heard Garcia and Lara Lopez "reminisce . . . about their violent exploits in

Mexico" as well as about attacks that allegedly took place more recently in the United States. (R. 108:2.)

Ruling on *McMorris* Evidence

At a hearing on August 30, 2019, the court addressed many of the pretrial motions. (R. 477:2.) Among these, the court addressed Ochoa's motion to introduce *McMorris* evidence related to prior acts by the victims. (R. 477:24–30.) The court commented that Ochoa seemed to have a proper motive for introducing the proffered evidence in that it supported his self-defense argument. (R. 477:26–27.) However, the court noted that "admission of *McMorris* evidence is not automatic" and that the evidence could be excluded if it was not relevant because it was too remote in "time, place, and circumstance." (R. 477:26–27.)

In reviewing the time, place, and circumstance of Ochoa's proffered evidence, the court noted that some of the attacks Ochoa described happened some 18 years prior in public places in Mexico, and that those alleged attacks were against strangers, not family members or friends. (R. 477:27.) Ochoa's description of other attacks, which allegedly happened in the United States, included no information as to where they supposedly happened, when they supposedly happened, or under what circumstances they supposedly happened. (R. 477:28.)

The court compared Ochoa's evidence to the evidence proffered in *Head*[2] and *Mink*,[3] and it concluded that the evidence in *Head* was admissible because it showed a pattern leading up to the incident while the evidence in *Mink* was admissible because it involved delayed reporting by a child

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[2] *State v. Head*, 2002 WI 99, 255 Wis. 2d 194, 648 N.W.2d 413.

[3] *State v. Mink*, 146 Wis. 2d 1, 429 N.W.2d 99 (Ct. App. 1988).

victim of sexual assault. (R. 477:28–29.) Here, however, the court reasoned that even if the alleged incidents involving the victims were relevant, "admitting them would be more prejudicial than probative." (R. 477:30.) The court therefore ruled that "although the victims' reputations for violence may have reasonably impacted the defendant's apprehension of danger and those are admissible, the specific acts he seeks to admit are not." (R. 477:30.)

Ruling on Expert Marty Hayes

The circuit court also addressed Ochoa's proffered expert witnesses at the August 30, 2019, hearing, beginning with Marty Hayes. (R. 477:33–34.) The court noted that the two main concerns for admissibility under the *Daubert*[4] standard are reliability and relevance. (R. 477:33–34.) Commenting that Hayes was being offered to testify "about the location of people within the crime scene at the time of the shooting, about bullet hole entry and exit wounds and trajectory in the bodies of the decedents," the court said that it had "some real concerns about the basis of his opinions." (R. 477:34.) The court continued:

> He does have some experience as a former member of law enforcement, but that's very dated. It didn't involve analysis of crime scenes to the degree he's being called—would be called to testify in this case.
>
> He doesn't have a formal education about crime scene reconstruction, forensic pathology, or the movement of bullets in the human body, except he did attend a few seminars, and he's read books and articles. He bases a lot of his conclusions on his own experiments firing weapons and using mannequins and rods to trace the trajectory of the bullets.
>
> And that latter basis is particularly troubling to me because mannequins don't have bone that can

[4] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

> change the trajectory of bullets. Also people's bodies may be moving as they're being shot, unlike a mannequin's, which is stationary. There's little value, in my opinion, in comparing how a bullet travels through a mannequin versus a human body because the makeup of the two are vastly different. It's comparing apples to oranges.
>
> And although Mr. Hayes acknowledged that, it wasn't clear to me from his testimony how he accounted for that difference in forming his opinions. And I just don't believe that his methodology of using a mannequin and rods as opposed to a human body and rods is reliable.

(R. 477:34–35.) The court therefore excluded Hayes as an expert witness. (R. 477:35.)

Ruling on Expert Conrad Zvara

The court similarly excluded Conrad Zvara as an expert, noting that much of his testimony relied on Hayes's now-excluded testimony. (R. 477:38.) Even Zvara's testimony that did not rely on Hayes's testimony, however, was not relevant because it concerned generic "dynamics of deadly force decisions, threat assessment, danger zones, and disparity of force" which did not bear on Ochoa's actual, subjective beliefs about the situation he was in. (R. 477:38.) "The jury needs to consider the defendant's thoughts and actions," the court reasoned, "[s]o testimony about typical use of force situations just isn't relevant." (R. 477:38.)

Ruling on Expert Alfonso Villaseñor

Finally, the court addressed Ochoa's proffer of Alfonso Villaseñor as an expert on "Mexican Spanish slang." (R. 477:38.) The court noted that although the State did not challenge Villaseñor's knowledge or expertise, it did challenge the relevance of his proffered testimony. (R. 477:38.) The court agreed, saying that there was "no need for an expert to testify about meanings of words or phrases because the only person the meaning mattered to was Mr. Ochoa was the hearer of

those statements." (R. 477:38.) In response to Ochoa's argument that Villaseñor's testimony would bolster his own, the court reasoned that the jury would "need to believe Mr. Ochoa one way or the other anyway. And if they believe him, then they'll believe his take on those words." (R. 477:39.) The court therefore excluded Villaseñor as an expert, finding that his testimony would be "cumulative" and "not necessary." (R. 477:39.)

Trial

Ochoa's jury trial began on October 7, 2019 and lasted for 17 days. (R. 481–501.) Portions of trial relevant to this appeal are discussed below.

Ruling on Hearsay Evidence

At trial, Ochoa testified in his own defense. (R. 494:3.) Defense counsel asked Ochoa about waking up in the middle of the night:

> Q Did you ever wake up during the night?
>
> A Yes.
>
> Q Did you have an alarm?
>
> A No.
>
> Q Why did you wake up?
>
> A I woke up because I remembered that my cousin [Garcia] had been very insistent—

(R. 494:92.) At that point, the State objected on hearsay grounds. (R. 494:93.) The court sustained the objection, and defense counsel requested a sidebar. (R. 494:93.)

Outside the presence of the jury, the court explained for the record that the defense was seeking to "introduce testimony of what the decedent, Luis Garcia, had said that led Mr. Ochoa to return to the house that evening in the middle of the night or middle of the . . . early morning." (R. 494:93.) The court further explained that the defense offered two

theories of admissibility—foundation and state of mind. (R. 494:93.) However, the court said, foundation was only admissible when not offered for the truth, "but here the statement would clearly be being offered for the truth." (R. 494:93.) Moreover, the court added, "the exception related to state of mind refers to the declarant, so that wouldn't apply either." (R. 494:93–94.) After more discussion by the parties, the court indicated it wished to research the issue further. (R. 494:100.) The court therefore dismissed the jury for the day. (R. 494:105.)

After additional discussions, the court stated that it would allow Ochoa to testify that when he left Garcia's house earlier in the evening, he was under the impression that Garcia wanted him to return later that evening. (R. 494:109.) The court said it would also allow Ochoa to testify that he told Garcia he would return if he could, and that Ochoa could testify about any statements the victims made that impacted an element of the offense charged. (R. 494:109.) The court indicated it would instruct the jury that it should use those statements only to consider their impact on Ochoa, not for the truth of the matter asserted. (R. 494:111.)

The next day, Ochoa filed a motion—styled as a motion for reconsideration—offering additional authority on the hearsay point. (R. 368.) In particular, Ochoa argued that under *State v. Kutz*, 2003 WI App 205, 267 Wis. 2d 531, 671 N.W.2d 660, an out-of-court instruction is not hearsay. (R. 368:4.) In discussing Ochoa's motion, the court clarified:

> What I'm trying to do is comply with the law as I understand it on hearsay. I don't know that the specific statement . . . that the defendant wants to offer that Luis Garcia made was ever specifically imparted to me. **What it says in the motion is that the statement is come back, cousin. If that's the statement, I think that he can testify to that as to effect on listener, come back, cousin.** But to get into all the extra stuff, the discussion about plans, et cetera, I think that would be a violation of the

> hearsay rule for the reasons I already went into yesterday.

(R. 496:26 (emphasis added).) With that qualification, the court denied Ochoa's motion for reconsideration. (R. 496:26–27.)

When Ochoa returned to the stand and questioning continued, defense counsel asked Ochoa what he was worried about that caused him to get up in the middle of the night. (R. 497:31.) Ochoa responded that Garcia had told him to return to Garcia's house later because Garcia wanted to discuss something important. (R. 497:31–32.) Ochoa claimed that he had never seen Garcia act so seriously before. (R. 497:33–34.) So, Garcia testified, he got out of bed, got dressed, got into his car—which had his pistol in it—and drove to Garcia's home. (R. 497:34–36.)

Ruling on Jury Instruction

After the close of evidence, the parties discussed whether lesser included offenses would be submitted to the jury and which jury instructions would apply. Over Ochoa's objection, the court agreed with the State that the jury should receive instructions on first degree intentional homicide as well as the lesser included offenses of second degree intentional homicide and first degree reckless homicide. (R. 499:87–89.) The State then urged the court to issue Wis. JI–Criminal 1016 (2015), which is the pattern instruction for first degree intentional homicide with lesser included offenses and includes a discussion of how self-defense plays into each offense. (R. 499:85.) Ochoa requested that the circuit court modify the pattern instruction to include a portion of Wis. JI–Criminal 805 (2001)—the pattern instruction for perfect self-defense in any crime—which includes language stating that a defendant's belief related to his self-defense claim can be reasonable even if mistaken. (R. 499:85.) The State opposed this request, reasoning that Wis. JI–Criminal 1016 was fully vetted and accounted for how different views of Ochoa's self-

defense claim might affect the jury's ultimate decision of whether to acquit or convict. (R. 499:85.)

The court indicated that its inclination was not to change the pattern jury instruction, but it said that it would review any case law Ochoa could provide on the appropriateness of using Wis. JI–Criminal 805 in a situation similar to his. (R. 499:86–87.) The defense did not provide the circuit court with any case law on the point, nor did it indicate what "mistaken belief" Ochoa might have had that would nevertheless have been reasonable. (R. 499:85–87.) Ultimately, the circuit court issued Wis. JI–Criminal 1016 without the modification Ochoa requested. (R. 393:4–15.)

Verdict and Sentencing

At the end of trial, the jury found Ochoa guilty of first degree reckless homicide, a lesser-included offense of first degree intentional homicide. (R. 501:32.) A pre-sentence investigation was prepared and delivered. (R. 409.) And on March 13, 2020, the court sentenced Ochoa to a total of 25 years of initial confinement and 10 years of extended supervision. (R. 503:95.) Ochoa now appeals.

STANDARDS OF REVIEW

The admission or exclusion of evidence, including *McMorris* evidence, is left to the circuit court's discretion. *State v. Sarfraz*, 2014 WI 78, ¶ 35, 356 Wis. 2d 460, 851 N.W.2d 235; *McAllister v. State*, 74 Wis. 2d 246, 251, 246 N.W.2d 511 (1976). The question is not whether a reviewing court "would have admitted" the evidence, "but whether the trial court exercised its discretion in accordance with accepted legal standards and in accordance with the facts of the record." *State v. Payano*, 2009 WI 86, ¶ 51, 320 Wis. 2d 348, 768 N.W.2d 832. "The circuit court's decision will be upheld 'unless it can be said that no reasonable judge, acting on the

same facts and underlying law, could reach the same conclusion.'" *Id.* (citation omitted).

A circuit court's decision to admit expert testimony under Wis. Stat. § 907.02(1) using the standards set forth by *Daubert* and its progeny is likewise reviewed for an erroneous exercise of discretion. *Seifert v. Balink*, 2017 WI 2, ¶¶ 89–96, 372 Wis. 2d 525, 888 N.W.2d 816. "[A] circuit court has discretion in determining the reliability of the expert's principles, methods, and the application of the principles and methods to the facts of the case." *Id.* ¶ 92. This Court will sustain the circuit court's evidentiary ruling admitting expert testimony unless it "rests upon a clearly erroneous finding of fact, an erroneous conclusion of law, or an improper application of law to fact." *Id.* ¶ 93.

"A [trial] court has broad discretion when instructing a jury." *Nommensen v. American Cont'l Ins. Co.*, 2001 WI 112, ¶ 50, 246 Wis. 2d 132, 629 N.W.2d 301. If this Court determines that the trial court has committed an error in failing to give a jury instruction, it must then "assess whether the substantial rights of the defendant have been affected." *State v. Head*, 2002 WI 99, ¶ 44, 255 Wis. 2d 194, 648 N.W.2d 413 (citing Wis. Stat. § 805.18(2)). "An error does not affect the substantial rights of a defendant if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Id.* "The harmless error inquiry raises a question of law that this court decides" de novo. *State v. Stietz*, 2017 WI 58, ¶ 62, 375 Wis. 2d 572, 895 N.W.2d 796.

ARGUMENT

I. The circuit court's evidentiary rulings did not violate Ochoa's constitutional right to present a defense.

A. The court's exclusion of Ochoa's proffered *McMorris* evidence was proper.

1. A circuit court may exclude evidence related to a victim's prior acts without violating a defendant's constitutional rights.

Defendants have a constitutional right to present a defense and confront witnesses. *Sarfraz*, 356 Wis. 2d 460, ¶ 37. These rights only protect "present[ing] relevant evidence that is 'not substantially outweighed by its prejudicial effects.'" *Id.* (citation omitted). Relevant evidence has "any tendency to make the existence of any fact that is of consequence" more or less probable. Wis. Stat. § 904.01. Even if relevant, however, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay." Wis. Stat. § 904.03.

One type of other acts evidence involving other acts of a victim is known as *McMorris* evidence. In *McMorris*, the Wisconsin Supreme Court held that "[w]hen the issue of self-defense is raised in a prosecution for assault or homicide and there is a factual basis to support such defense, the defendant may, in support of the defense, establish what the defendant believed to be the turbulent and violent character of the victim by proving prior specific instances of violence within his knowledge at the time of the incident." *McMorris*, 58 Wis. 2d at 152. "Admissibility [of *McMorris* evidence] is not automatic," however. *Head*, 255 Wis. 2d 194, ¶ 128. "*McMorris* evidence may not be used to support an inference about the victim's actual conduct during the incident." *Id.*

Rather, "[t]he evidence should be probative of the defendant's beliefs in relation to her defense." *Id*. ¶ 129. If the court deems the evidence relevant, it should apply the Wis. Stat. § 904.03 balancing test, as it would to "any other relevant evidence." *Id.* This determination lies within the circuit court's discretion. *Id.*

Excluding other-acts evidence, including *McMorris* evidence, does not abridge a defendant's right to present a defense if the court properly deemed it inadmissible under the rules of evidence. *See State v. Muckerheide*, 2007 WI 5, ¶¶ 40–41, 298 Wis. 2d 553, 725 N.W.2d 930; *see also Taylor v. Illinois*, 484 U.S. 400, 410 (1988) ("The accused does not have an unfettered right to offer testimony . . . inadmissible under standard rules of evidence.").

2. The circuit court properly exercised its discretion when it determined that Ochoa's proffered *McMorris* evidence was inadmissible.

Ochoa frames his argument as a constitutional claim, and in one sense, that is correct: whether the circuit court denied Ochoa his constitutional right to present a defense is a constitutional question. However, the law is clear that where a circuit court properly exercises its discretion to determine that the probative value of proffered *McMorris* evidence is outweighed by the risk of "unfair prejudice, confusion of the issues, or misleading the jury," there is no constitutional violation. *See Head*, 255 Wis. 2d 194, ¶ 129. Thus, the question confronting this court is one of judicial discretion, not—as Ochoa claims—one that this Court reviews independently. (Ochoa's Br. 14.)

Here, the circuit court reviewed the proffered evidence using the proper test under Wis. Stat. § 904.03. (R. 477:26–30.) The court considered appropriate factors such as the "similarity in time, place, and circumstance" between the

proffered evidence and the charged homicides. (R. 477:27.) It noted significant differences based on those three factors. With respect to Ochoa's stories about Garcia and Lara Lopez that took place in Mexico, the court observed that those incidents occurred more than 20 years prior to the slayings, occurred in public places in Mexico, and involved random strangers, not individuals known to them. (R. 477:27.) Regarding Ochoa's allegations about more recent attacks by the decedents that supposedly occurred in the United States, the court noted that "there [were] no details provided about time, place, or circumstance." (R. 477:28.) Without that information, the court reasoned, it could not conclude that the allegations were relevant and therefore admissible. (R. 477:28.)

The court was correct. The victims' alleged attacks on strangers at Mexican rodeos in the late 1990s bore little resemblance to the circumstances in a private home in Sheboygan County where everyone present was a friend or family member. Allowing allegations about crimes that the victims allegedly committed almost two decades prior would have added little to the jury's analysis of the relevant issues while potentially prejudicing the jury against the victims. Ochoa offered the evidence, but nothing to support its admissibility, and "[a]dmissibility [of *McMorris* evidence] is not automatic." *Head*, 255 Wis. 2d 194, ¶ 128. Moreover, to the extent Ochoa argues that the circuit court erroneously excluded testimony about attacks that allegedly occurred more recently in the United States, this Court should consider that issue waived because Ochoa did not make an offer of proof concerning the "substance of the evidence." *See* Wis. Stat. § 901.03(1)(b).

Ochoa argues that this Court should apply the *Pulizzano*[5] test for determining whether the circuit court's ruling violated his constitutional rights. (Ochoa's Br. 14–16.) The State is aware of no case where an appellate court has used the *Pulizzano* framework to review the admission or exclusion of *McMorris* evidence. Rather, cases such as *Head* are far more on point and a better fit for reviewing the proffered evidence in cases like this one. Nevertheless, as Ochoa points out, the *Pulizzano* framework would require him to make five distinct showings, including showing that the probative value of the proffered evidence outweighs its prejudicial effect. (Ochoa's Br. 15.) As discussed, the circuit court properly determined that the probative value of the proffered testimony was outweighed by its potential for prejudice. (R. 477:27–30.) Thus, even under Ochoa's formulation, there was no constitutional violation.[6]

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[5] *State v. Pulizzano*, 155 Wis. 2d 633, 456 N.W.2d 325 (1990). *Pulizzano* involved the interplay of Wisconsin's rape shield law and the defendant's constitutional right to present a defense in reviewing the admissibility of allegations that a victim of a child sexual assault had previously been abused, thus offering a putative alternative source of the victim's sexual knowledge. *Id.* at 638–39.

[6] Ochoa argues that "strict scrutiny" should apply in this case. (Ochoa's Br. 15.) Strict scrutiny is a framework for reviewing the constitutionality of statutes; it was at issue in *Pulizzano* because the court was considering the constitutionality of Wisconsin's rape shield statute as applied in that case. *Pulizzano*, 155 Wis. 2d at 654. Here, Ochoa has identified no statute to which this Court should apply strict scrutiny. To the extent strict scrutiny might apply to the statutes governing circuit courts' evidentiary decisions at trial, the State suggests that the constitutionality of such decisions is already accounted for in the substantial body of caselaw reviewing those types of decisions. In short, nothing about this case warrants a novel approach to the circuit court's decisions regarding the admissibility of evidence.

Ochoa also argues, in effect, that the circuit court incorrectly concluded that the testimony about the victims' past would be more prejudicial than probative. (Ochoa's Br. 17–20.) As discussed, however, this is not correct. Ochoa alleged only distant examples of generic violence directed towards random strangers by the victims. Those examples bore little resemblance to the circumstances present at Garcia's home in the early morning hours of July 30, 2017. And their admission would have been highly inflammatory and invited the jury to speculate about issues tangential to the case. The circuit court was in the best position to weigh these considerations, and it did so properly.

The court's decision was a proper exercise of discretion using the appropriate legal standard. Ultimately, the court determined that the evidence was either not relevant under the statute or that, even if Ochoa established the relevance of the *McMorris* evidence by making a showing as to his claim of self-defense, the probative value of the evidence was outweighed by its prejudicial nature. (R. 477:29–30.) Because the court properly exercised its discretion in making this determination, there was no constitutional violation. *See Muckerheide*, 298 Wis. 2d 553, ¶¶ 40–41; *Head*, 255 Wis. 2d 194, ¶ 129.

If this Court does approach this issue using the *Pulizzano* framework, however, the State would argue that Ochoa cannot show that the alleged acts "clearly occurred." Ochoa offered nothing more than anecdotes to support his claim, and that is not enough. *See, e.g.*, *State v. Carter*, 2010 WI 40, ¶¶ 45–48, 324 Wis. 2d 640, 782 N.W.2d 695 (holding that defendant failed to show a prior sexual assault "clearly occurred" where the allegation was unsupported by testimony from other witnesses or documentary evidence).

B. The exclusion of certain expert testimony was proper.

1. Expert testimony must assist the factfinder by reliably applying reliable principles and methods.

Wisconsin Stat. § 907.02 governs the admission of expert testimony. *See State v. Giese*, 2014 WI App 92, ¶ 17, 356 Wis. 2d 796, 854 N.W.2d 687. Prior to 2011, that statute made expert testimony admissible "if the witness [was] qualified to testify and the testimony would help the trier of fact understand the evidence or determine a fact at issue." *Id.* (quoting *State v. Kandutsch*, 2011 WI 78, ¶ 26, 336 Wis. 2d 478, 799 N.W.2d 865).

In January 2011, the Legislature amended section 907.02 to make Wisconsin law on the admission of expert testimony consistent with "the *Daubert* reliability standard embodied in Federal Rule of Evidence 702." *Id.* (quoting *Kandutsch*, 336 Wis. 2d 478, ¶ 26 n.7). Federal Rule of Evidence 702 codified the trilogy of United States Supreme Court cases *Daubert*, *General Elec. Co. v. Joiner*, 522 U.S. 136 (1997), and K*umho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999).

The amended rule provides as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.

Wis. Stat. § 907.02(1).

Under section 907.02, the circuit court performs a "gate-keeper function . . . to ensure that the expert's opinion is based on a reliable foundation and is relevant to the material issues." *Giese*, 356 Wis. 2d 796, ¶ 18. The court must focus on the principles and methodology the expert relies upon, not on the conclusion generated. *Id.*; *see also Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 595 (1993). The standard envisions a "flexible" inquiry "to prevent the jury from hearing conjecture dressed up in the guise of expert opinion." *Giese*, 356 Wis. 2d 796, ¶ 19. The expert's testimony must be grounded in an accepted body of learning or experience in the expert's field, and the expert must explain how the conclusion is so grounded. Fed. R. Evid. 702 advisory committee note (2000 amendment) (Rule 702 committee note).

2. The circuit court properly concluded that the testimony of Hayes, Villaseñor, and Zvara should be excluded under Wis. Stat. § 907.02.

Ochoa complains about the circuit court's decision to exclude three witnesses who would have offered expert testimony for the defense. For each witness, the circuit court provided a reasoned analysis of why the testimony would be excluded. Rather than engaging with the circuit court's reasoning regarding any of these experts, Ochoa merely rehashes statements about the individuals' credentials and what their testimony would have included. This Court should affirm.

a. Marty Hayes

The circuit court excluded Hayes' testimony "about the location of people within the crime scene at the time of the shooting, about bullet hole entry and exit wounds and trajectory in the bodies of the decedents" because it had "some real concerns about the basis of his opinions." (R. 477:34.) This

reasoning fits squarely within the court's "gatekeeper" function under the *Daubert* standard.

The *Daubert* standard requires expert testimony to be "based on a reliable foundation." *Giese*, 356 Wis. 2d 796, ¶ 18. It does not allow for "conjecture dressed up in the guise of expert opinion." *Id.* ¶ 19. Yet that is what Hayes offered. Hayes lacked formal education in crime scene reconstruction, forensic pathology, and the movement of bullets through human bodies. (R. 477:34.) Instead, his testimony would have been based on "his own experiments firing weapons and using mannequins and rods to trace the trajectory of the bullets." (R. 477:34.) The circuit court properly concluded that this was not a reliable foundation for expert testimony because, among other things, "mannequins don't have bone that can change the trajectory of bullets" and cannot replicate the movement of the human body in a real-life situation. (R. 477:34.)

Ochoa does not seem to argue that Hayes's testimony met the standard for him to testify about the forensic reconstruction of the scene. Instead, Ochoa focuses on his argument that Hayes's experience qualified him as an expert in "the principles and dynamics of violent encounters." (Ochoa's Br. 23.) Although the circuit court did not directly address this line of argument with respect to Hayes, it did address the admissibility of expert testimony on "the principles and dynamics of violent encounters" when it excluded the testimony of Conrad Zvara. (Ochoa's Br. 23.) There, the court concluded that general testimony about "typical use of force situations" was not relevant because the question presented here was what Ochoa's subjective beliefs were and whether those beliefs were reasonable. (R. 477:38.)

That analysis was correct and is as applicable to Hayes as it was to Zvara. Hayes would not have been able to tell the jury what Ochoa was thinking while he was in Garcia's living room, and generic testimony about use-of-force situations would not have aided the jury in understanding what a

reasonable person would believe under the specific circumstances present. Hayes's testimony likely would have confused the issues for the jury by discussing factual scenarios other than the one at issue in this case.

Ultimately, the reasonableness of Ochoa's beliefs and actions was a fact question for the jury to decide, not an expert. Thus, the court properly fulfilled its gatekeeping function in excluding Hayes's testimony. This Court should affirm that decision.

b. Conrad Zvara

The circuit court also properly excluded Conrad Zvara as an expert witness because it concluded that Zvara's testimony was both based on Hayes's excluded testimony and not relevant to the ultimate issue in the case. (R. 477:38.) As with Hayes's testimony, Zvara would have offered general testimony on use of force when the question posed to the jury was not about general use of force but whether Ochoa's use of force was reasonable. (R. 477:38.)

As with the circuit court's decision regarding the testimony of Marty Hayes, the circuit court's decision regarding Zvara was a proper exercise of discretion. The court concluded that to the extent Zvara's testimony would be based on Hayes's testimony, it was not based on a reliable foundation, and that to the extent Zvara would have testified to matters not involving Hayes's testimony, it would not be relevant. The court had wide latitude to make those determinations, and it was not error to do so. This Court should leave the circuit court's ruling undisturbed and affirm.

c. Alfonso Villaseñor

Finally, the circuit court excluded Alfonso Villaseñor as an expert witness because Villaseñor's proffered testimony was irrelevant. (R. 477:38.) This again was a proper exercise of the court's function under *Daubert*. Villaseñor would have

testified about the meaning of a phrase Ochoa claimed he heard during the confrontation with the victims. However, an actual translation of the phrase would not have assisted the jury. What mattered was whether Lara Lopez actually said what Ochoa claimed he said, and what Ochoa understood the phrase to mean. These were matters of Ochoa's credibility for the jury to decide, and the jury would not have benefitted from expert opinion.

Ochoa argues that there is a difference in how the phrase was translated by the interpreter in court and what he actually took it to mean. (Ochoa's Br. 25.) But Ochoa's trial testimony explored what he thought it meant:

> Q This phrase that [Lara Lopez] was using, what does it mean to you?
>
> A With the tone of voice and the manner of which he was saying it, it was like a threat to me. He said—he was telling me I'm going to kill you. You're going to die.
>
> Q Because the jury doesn't or may not speak Spanish, what verb tense was he using—present, future, past?
>
> A It's a future, but it's an immediate future.

(R. 498:18–19.)

The jury could have elected to believe Ochoa's interpretation of the phrase or not, but there would be no reason for the jury to believe that Ochoa was telling the truth about what Lara Lopez said but lying about what he believed it to mean. This directly illustrates the circuit court's point that Villaseñor's testimony would not have aided the jury, it would have served only to waste time and possibly create confusion. The circuit court thus properly excluded the testimony, and this Court should affirm.

II. The circuit court properly exercised its discretion regarding the admissibility of certain hearsay evidence.

A. Circuit courts have wide discretion to exclude evidence.

A circuit court exercises broad discretion regarding the admissibility of evidence. *State v. Warbelton*, 2009 WI 6, ¶ 17, 315 Wis. 2d 253, 759 N.W.2d 557. However, unless provided by a statutory exception or supreme court rule, hearsay is inadmissible at trial. Wis. Stat. § 908.02. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Wis. Stat. § 908.01(3).

B. The circuit court did not exclude the evidence Ochoa claims it excluded, and to the extent Ochoa argues otherwise, that argument is undeveloped.

Ochoa accuses the circuit court of erroneously exercising[7] its discretion by "grossly misinterpret[ing] the law governing the admissibility of L.G.'s instructions to 'come back cousin.'" (Ochoa's Br. 29.) However, Ochoa misinterprets the record; the circuit court did not exclude this statement.

The circuit court stated that it would allow Ochoa to testify that Garcia told him to come back, which is what prompted him to return to Garcia's home in the middle of the night. (R. 496:26.) Indeed, when Ochoa returned to the stand

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[7] Ochoa claims the circuit court "abused" its discretion, but for almost 30 years, Wisconsin courts have said that "the term 'erroneous exercise of discretion' should be used instead of the term 'abuse of discretion' to refer to an error by the circuit court in making a discretionary decision." *See King v. King*, 224 Wis. 2d 235, 248 n.9, 590 N.W.2d 480 (1999) (citing *City of Brookfield v. Milwaukee Metro. Sewerage Dist.*, 171 Wis. 2d 400, 491 N.W.2d 484 (1992)). The legal standard is the same. *Id.*

and questioning continued, defense counsel asked Ochoa what he was worried about that caused him to get up in the middle of the night. (R. 497:31.) Ochoa replied, "Well, because of my cousin [Garcia]. Hours prior he had insisted that I go to his house because he wanted to talk about something with me." (R. 497:31.) Defense counsel asked, "did [Garcia] tell you, cousin, come over to my house?" (R. 497:31.) Ochoa replied, "Yes. He insisted that I go back to him. And I was under the impression that he had something really important to tell me." (R. 497:31–32.) Ochoa completely ignores these facts in his brief. The circuit court thus did not erroneously exercise its discretion as Ochoa claims; the court properly exercised its discretion to allow Ochoa to testify about why he returned to Garcia's home that evening.

It is true that the circuit court sustained certain objections to defense counsel's questioning during Ochoa's testimony. For example, the State objected to defense counsel asking Ochoa what time Garcia insisted he come back, and the circuit court sustained the objection. (R. 497:32.) Similarly, the court sustained an objection to defense counsel asking Ochoa why Garcia said he wanted Ochoa to return.[8] (R. 497:32.) Meanwhile, the court overruled objections to a question about Garcia's demeanor when he told Ochoa to return and why Ochoa did not tell his wife about where he was going in the middle of the night and why. (R. 497:33–34.) But Ochoa does not develop an argument as to why any of these decisions were erroneous.[9] This Court should decline to

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[8] Ochoa later testified that when he returned to Garcia's that night, Garcia asked why Ochoa had not visited him and why Ochoa did not want Garcia to be godfather to his children. (R. 497:41–42.)

[9] Moreover, there appears to be nothing in the record indicating what the actually excluded statements were, *i.e.*, what time Garcia told Ochoa to return or what Garcia told Ochoa he wanted to discuss. On the latter point, Ochoa claimed that Garcia

develop an argument for him. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

In short, the statements that Ochoa claims were excluded were not, in fact, excluded. And Ochoa fails to develop any argument related to any of the statements that actually were excluded. He does not, for example, explain how he was supposedly prejudiced by not being allowed to testify what time Garcia told him to come back or what specifically Garcia wanted to discuss. Instead, he claims that he was forbidden from explaining himself. (Ochoa's Br. 30.) He was not. The court allowed Ochoa to explain that Garcia told him

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was upset because Ochoa did not want Garcia to act as godfather to his children. (R. 497:42.) Both parties discussed this at length in their closing arguments. (R. 499:141–45, 186–88.) Thus, to the extent Ochoa might claim that he was forbidden from explaining to the jury what Garcia wanted to discuss when Ochoa came back, the record shows otherwise.

Ochoa also references "an offer of proof which was not captured by the court record." (Ochoa's Br. 28.) It is the appellant's duty to ensure a complete record. *See State v. McAttee*, 2001 WI App 262, ¶ 5 n.1, 248 Wis. 2d 865, 637 N.W.2d 774. This Court should therefore decline to speculate as to what the offer of proof might have contained. Even so, however, Ochoa cites a portion of the transcript that includes the following statement by defense counsel:

> [C]learly we've articulated in one of the most comprehensive offers of proof I think one can give, is the entire content of the conversation between [Garcia] and [Ochoa] that occurred at the house and its subsequent effect on the listener, [Ochoa], why he went back is because [Garcia] insisted that he come back and it was something that [Garcia] had never been so insistent about before.

(R. 494:98–99.)

As discussed, the court concluded that both Garcia's request that Ochoa return later in the evening and the abnormality of that request were admissible. Nothing indicates that the offer of proof might have contained anything relevant beyond those two points.

to come back that night and that Garcia seemed to have something important to discuss with him. (R. 497:32–34.)

Indeed, while Ochoa points to the State's closing argument as evidence that he was denied the right to explain himself, the State's closing argument discussed Ochoa's testimony about Garcia wanting him to return:

> The defendant claims that when he went to the Garcia residence July 29, [Garcia] was saying, I need you to return because there's something so important. And the defendant said he'd never seen [Garcia] talking in this manner of having something so important, so it caused the defendant a feeling he needed to return. It was important to return. In fact, it was an issue that was so significant that it woke him from his sleep.

(R. 499:142.) Ochoa's problem was not that the court did not allow him to explain himself to the jury. Ochoa's problem was that his story strained credibility. The State rightly pointed this out: why would Ochoa get up in the middle of the night, put his phone in airplane mode, and drive to Garcia's house while armed simply to have a conversation with Garcia about Garcia acting as Ochoa's son's godfather? (R. 499:143.) Contrary to Ochoa's argument, the State was not taking advantage of improperly excluded evidence in its closing. Rather, the State gave a full and fair summary of the evidence and properly pointed out the flaws in Ochoa's story.

With no argument developed that the circuit court improperly excluded any non-hearsay statements as hearsay, this Court should conclude that the circuit court's hearsay determinations were proper and affirm Ochoa's conviction.

C. Any error the circuit court may have made by excluding hearsay evidence was harmless.

The exclusion of evidence on hearsay grounds is subject to harmless error analysis. *See State v. Anderson*, 141 Wis. 2d 653, 669, 416 N.W.2d 276 (1987). "To determine whether an

error is harmless, this court inquires whether the State can prove 'beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error[ ].'" *State v. Jorgensen*, 2008 WI 60, ¶ 23, 310 Wis. 2d 138, 754 N.W.2d 77 (citation omitted).

Here, even if this Court concludes that the circuit court improperly excluded evidence as hearsay during Ochoa's testimony, it should still affirm because any error was harmless beyond a reasonable doubt. This is so because the facts Ochoa apparently wished to testify to—that Garcia wanted to discuss his status as godfather to Ochoa's children—came in through Ochoa's testimony anyways. (R. 497:41–43.) The jury thus had access to all of the information Ochoa believed they should have had access to during deliberations. The outcome clearly would have been the same even if the circuit court had overruled the State's hearsay objections, and this Court should affirm.

III. The circuit court properly instructed the jury on the privilege of self-defense, so the jury instructions did not violate Ochoa's constitutional rights.

A. Circuit courts have broad discretion in instructing juries.

"[A] circuit court has broad discretion in deciding whether to give a particular jury instruction." *State v. Fonte,* 2005 WI 77, ¶ 9, 281 Wis. 2d 654, 698 N.W.2d 594. "A circuit court properly exercises its discretion when it fully and fairly informs the jury of the law that applies to the charges for which a defendant is tried." *State v. Ferguson*, 2009 WI 50, ¶ 9, 317 Wis. 2d 586, 767 N.W.2d 187. "The purpose of a jury instruction is to fully and fairly inform the jury of a rule or principle of law applicable to a particular case." *State v. Hubbard*, 2008 WI 92, ¶ 26, 313 Wis. 2d 1, 752 N.W.2d 839 (quoting *Nommensen*, 246 Wis. 2d 132, ¶ 36).

In determining whether a jury instruction accurately stated the law, this Court must "review the jury instructions as a whole to determine whether the overall meaning communicated by the instructions was a correct statement of the law." *State v. Langlois*, 2018 WI 73, ¶ 38, 382 Wis. 2d 414, 913 N.W.2d 812 (quoting *Dakter v. Cavallino*, 2015 WI 67, ¶ 32, 363 Wis. 2d 738, 866 N.W.2d 656); *see also State v. Neumann*, 2013 WI 58, ¶ 139, 348 Wis. 2d 455, 832 N.W.2d 560 (appellate courts view "jury instructions in light of the proceedings as a whole and do not review a single instruction in isolation"). "If the jury instructions did not accurately state the law, then the circuit court erroneously exercised its discretion." *State v. McKellips*, 2016 WI 51, ¶ 30, 369 Wis. 2d 437, 881 N.W.2d 258.

"Although they are not infallible, [this Court] generally consider[s] the pattern instructions 'persuasive' on the points of law they state." *In Interest of D.P.*, 170 Wis. 2d 313, 332 n.7, 488 N.W.2d 133 (Ct. App. 1992).

This case involves a claim of self-defense, which is an affirmative defense. Importantly, although ultimately the burden of proof and persuasion falls to the State, the defendant has the burden of *production* regarding his or her affirmative defenses. *See Pettit*, 171 Wis. 2d at 640. In other words, "it is necessary for a defendant to come forward with some evidence of the . . . defense to warrant the jury's consideration of the issue." *Id*.

Two types of self-defense justifications exist in Wisconsin law: (1) the use of necessary force, called "perfect self-defense," and (2) the use of unnecessary force, called "imperfect self-defense." *Head*, 255 Wis. 2d 194, ¶ 45.

To obtain an instruction on perfect self-defense, the defendant must point to "some evidence" to show he held an objectively reasonable belief that the amount of force was necessary to prevent or terminate what he believed to be an

unlawful interference with his person. Wis. Stat. § 939.48(1); *Head*, 255 Wis. 2d 194, ¶ 67. "In these circumstances," a defendant "has to meet the same 'some'-evidence standard, but [his] evidence would be measured against an objective reasonable threshold." *Head*, 255 Wis. 2d 194, ¶ 125. If proven, perfect self-defense is a privilege to a homicide charge. Wis. Stat. § 939.45(2). "Once the defendant successfully raises an affirmative defense, the state is required to disprove the defense beyond a reasonable doubt." *Head*, 255 Wis. 2d 194, ¶ 106.

A defendant is entitled to an imperfect self-defense instruction if there is "some evidence" to show he held a subjective belief that he was in danger of great bodily harm, regardless of whether his belief was reasonable. *Head*, 255 Wis. 2d 194, ¶ 124; Wis. Stat. § 940.01(2)(b). If proven, imperfect self-defense mitigates first-degree intentional homicide to second-degree intentional homicide. Wis. Stat. § 940.01(2)(b).

B. The circuit court properly declined to instruct the jury with Wis. JI–Criminal 805.

Wisconsin JI–Criminal 1016 and Wis. JI–Criminal 805 serve different purposes. Wisconsin JI–Criminal 1016 provides instructions for first-degree intentional homicide with the lesser included offenses of second-degree intentional homicide and first-degree reckless homicide and explains the interplay of the self-defense privilege with those crimes. Wisconsin JI–Criminal 805, on the other hand, provides instructions for self-defense more generally, as a privilege to both homicide and non-homicide crimes.

The text of Wis. JI–Criminal 1016 instructs the jury on the elements of first degree intentional homicide and its relationship to the lesser included offenses of second degree intentional homicide and first degree reckless homicide. Wis. JI–Criminal 1016. The instruction then summarizes the self-

defense privilege[10] and explains how the concept of self-defense fits in to each of the homicide offenses. It explains that an "unreasonable belief" that force was necessary—sometimes called "imperfect self-defense"—can reduce an offense from first degree intentional homicide to second degree intentional homicide. Then it explains the interplay between self-defense evidence and first-degree reckless homicide. Wis. JI–Criminal 1016. A defendant is guilty of first-degree reckless homicide if he caused the death of another "by criminally reckless conduct and the circumstances of the conduct showed utter disregard for human life." *Id.* The instruction directs the jury to consider the self-defense evidence presented when weighing whether the "utter disregard" element is met, *i.e.*, "what the defendant was doing; why the defendant was engaged in that conduct; how dangerous the conduct was; how obvious the danger was; [and] whether the conduct showed any regard for life." *Id.*

Wisconsin JI–Criminal 1016 thus correctly sets forth the law of self-defense as it relates to first degree intentional homicide, second degree intentional homicide, first degree reckless homicide, and self-defense in Wisconsin. *See* Wis. Stat. §§ 939.48, 940.01(2)(b), 940.02(1) 940.05; *see also State v. Burris*, 2011 WI 32, ¶ 64, 333 Wis. 2d 87, 797 N.W.2d 430

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[10] The Criminal Code of Wisconsin provides that a person is privileged to intentionally use force against another for the purpose of preventing or terminating what (he) (she) reasonably believes to be an unlawful interference with (his) (her) person by the other person. However, (he) (she) may intentionally use only such force as (he) (she) reasonably believes is necessary to prevent or terminate the interference. (He) (She) may not intentionally use force which is intended or likely to cause death unless (he) (she) reasonably believes that such force is necessary to prevent imminent death or great bodily harm to (himself) (herself).

Wis. JI–Criminal 1016.

(recommending that Wis. JI–Criminal 1016 be revised to include language regarding "utter disregard for human life" and warning against supplementing the instruction with other language "taken out of context").

Wisconsin JI–Criminal 805, on the other hand, instructs a jury only on the absolute privilege of self-defense, sometimes called "perfect self-defense," as a defense to *any crime* where the defendant has used force intended or likely to cause death or great bodily harm. *See* Wis. JI–Criminal 805. The instruction explains that "[a] belief may be reasonable even though mistaken" while Wis. JI–Criminal 1016 does not. It is true that a reasonable belief will not always be a correct belief: a person may reasonably believe what is not actually the case.[11] However, the ultimate issue under Wisconsin's law of self-defense is not whether a person's beliefs are "correct" or "mistaken," but rather whether those beliefs are *reasonable* and thereby excused or justified. *See Head*, 255 Wis. 2d 194, ¶ 79; Wis. Stat. § 939.48(1). That is exactly what Wis. JI–Criminal 1016 provides.

Here, the circuit court determined that the jury would be instructed on first degree intentional homicide as well as on the lesser included offenses of second degree intentional homicide and first degree reckless homicide, and how it should consider any claim of self-defense within those homicide charges.[12] (R. 499:87–89.) Thus, Wis. JI–Criminal 1016 properly described the legal issues confronting the jury as it weighed the evidence against Ochoa. The circuit court properly issued Wis. JI–Criminal 1016 to the jury, and it

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[11] For example, one may reasonably, but mistakenly, believe that a firearm held by an assailant is loaded.

[12] Although Ochoa objected to the jury receiving instructions on lesser included offenses at trial, he has not renewed the issue on appeal.

properly declined to instruct the jury beyond that. *See Ferguson*, 317 Wis. 2d 586, ¶ 9 (a circuit court properly exercises its discretion when it issues a jury instruction that accurately describes the law); *Burris*, 333 Wis. 2d 87, ¶ 64.

Ochoa argues that it was error for the court to instruct the jury only with Wis. JI–Criminal 1016 because Wis. JI–Criminal 805 states the law set out in Wis. Stat. § 939.22(32).[13] (Ochoa's Br. 32–33.) However, Ochoa does not argue now, nor did he argue to the circuit court when requesting Wis. JI–Criminal 805, that there was some "mistaken belief" that would make Wis. JI–Criminal 805 relevant. (Ochoa's Br. 32–34; R. 499:85–87.) As the party requesting it, Ochoa had the burden of production to show that the language in Wis. JI–Criminal 805 was appropriate in the context of the facts of the case. *See Pettit*, 171 Wis. 2d at 640. He failed to meet that burden, so the circuit court properly denied his request.

Moreover, as discussed, Wis. JI–Criminal 1016 accurately states the law with respect to self-defense in Wisconsin. Simply because it does not elaborate to the same extent as another jury instruction does not make it incorrect. And where a circuit court issues a jury instruction that accurately states the law, the court has properly exercised its discretion. *See Ferguson*, 317 Wis. 2d 586, ¶ 9.

C. Any error in the jury instruction was harmless beyond a reasonable doubt.

Even if this Court concludes that the circuit court erroneously declined to issue the Wis. JI–Criminal 805 language to the jury, this Court should still affirm because the

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[13] Wisconsin Stat. § 939.22(32) defines "reasonably believes": "'Reasonably believes' means that the actor believes that a certain fact situation exists and such belief under the circumstances is reasonable even though erroneous."

error was harmless beyond a reasonable doubt for two reasons. First, the record demonstrates that there is no "mistaken belief" Ochoa may have had that still would have been reasonable, so the instruction would have had no effect on the jury's deliberations. This is not a situation where Ochoa might argue that he mistakenly believed a gun was loaded and thus posed a threat to him, for example. At no point did Ochoa point to a mistaken belief that the jury might have considered in determining whether his belief was reasonable. Thus, it is clear that an additional jury instruction advising the jury that a belief can be reasonable even if mistaken would not have changed the outcome.

Second, it is clear that the jury did not base its verdict on whether Ochoa's belief was reasonable because it convicted Ochoa of first degree reckless homicide rather than first or second degree intentional homicide. If the jury thought that Ochoa acted in imperfect self-defense—that is, if the jury thought that Ochoa believed his life was in danger but thought this belief was unreasonable or thought that the force used was unreasonable—because they did not know that a mistaken belief can be "reasonable" under Wis. Stat. § 939.22(32), it would have convicted Ochoa of second degree intentional homicide, not first degree reckless homicide. The jury's decision to convict Ochoa of first degree reckless homicide indicates that it took an entirely different view of the evidence than Ochoa argued. It is thus clear that even if the jury had received the instruction Ochoa asked for, the verdict would have been the same. This Court should therefore affirm Ochoa's conviction.

CONCLUSION

For the reasons discussed, this Court should affirm Ochoa's judgment of conviction.

Dated this 13th day of July 2021.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 9,668 words.

Dated this 13th day of July 2021.

Electronically signed by:

s/ John A. Blimling
JOHN A. BLIMLING
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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 13th day of July 2021.

Electronically signed by:

s/ John A. Blimling
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